JURISDICTIONAL FICTION? A DIALECTICAL SCRUTINY OF THE APPELLATE COMPETENCE OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

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Abstract

It is established case-law of the African Court on Human and Peoples' Rights that it does not assume appellate jurisdiction over national courts. In several decisions rendered since its inception, the Court has consistently held that, when it examines cases of alleged violations of rights, it merely acts as an international court of first and final instance in vetting the conformity of domestic law and the conduct of municipal organs with international law to which the state concerned is a party. An overview of its jurisprudence however reveals a consistent challenge to the Court's jurisdiction over cases that Respondent States argue had or should have been settled by domestic courts. The objections raised in related cases have led to a confrontational interaction between the Court and the states involved. On an increasing number of occasions, the 'interaction crisis' resulted in a political challenge to the very mandate of the Court and withdrawals or threats to retract from acceptance to its jurisdiction over sovereignty of the state and the integrity of domestic courts. Considering their submissions in respect of this issue, objections raised by Respondent States are genuine and therefore require principled reflections that the limited scope of the Court's reasoning in individual cases or responses from its Registry do not and have not so far provided. In any event, the dialogue appears to have stalled as one of misunderstanding on the part of states and dilemmas for the Court. In this paper, I attempt to take up Sextus Empiricus*' role in assessing the veracity of both answers to the question whether the African Court exercises an appellate jurisdiction over courts of the Respondent States.*

Keywords: African Court on Human and Peoples' Rights, jurisprudence, international law, appellate competence, margin of appreciation

Résumé

Il est de jurisprudence constante de la Cour africaine des droits de l'homme et des peuples qu'elle n'exerce pas une compétence d'appel à l'égard des juridictions nationales. Dans de nombreuses décisions rendues depuis sa création, la Cour a conclu de manière constante que lorsqu'elle examine des cas d'allégation de violation des droits, elle juge seulement, en tant que juridiction internationale de

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première et dernière instance, de la conformité du droit interne et des actes des autorités nationales au droit international auquel l'État concerné est partie. Un aperçu de sa jurisprudence révèle cependant une contestation constante de la compétence de la Cour dans des affaires qui, selon les États défendeurs, auraient préalablement été ou dû être tranchées par les juridictions nationales. Les objections soulevées dans les affaires en question ont conduit à une interaction conflictuelle entre la Cour et les États concernés. Dans un nombre croissant d'affaires, cette « crise d'interaction » a entraîné une contestation politique du mandat même de la Cour de même que des retraits ou menaces de retrait de l'acceptation de sa juridiction pour cause d'empiètement sur la souveraineté des États et l'intégrité des juridictions nationales. Au regard de leurs conclusions sur cette question, les objections soulevées par les États défendeurs se révèlent fondées et appellent donc une réflexion de principe que ni la portée limitée du raisonnement de la Cour dans des affaires individuelles, ni les réponses de son greffe n'ont jusqu'à présent entreprise. En tout état de cause, le dialogue semble être suspendu entre des malentendus de la part des États et des dilemmes pour la Cour. Dans cet article, je tente de prendre le rôle de Sextus Empiricus dans l'évaluation de la véracité des deux réponses à la question de savoir si la Cour africaine exerce une compétence d'appel à l'égard des juridictions des États défendeurs.

Mots-clés : Cour Africaine des Droits de l'Homme et des Peuples, jurisprudence, droit international, compétence d'appel, souveraineté, marge d'appréciation

Introduction

The Court notes that it does not have any appellate jurisdiction to receive and consider appeals in respect of cases already decided upon by domestic and/or regional and similar courts.[1]

There lies, as laid down in the case of *Ernest Francis Mtingwi v Malawi*, the foundation of what may be termed the 'jurisdictional fiction' of the appellate function of the African Court on Human and Peoples' Rights (the African Court).

Despite peculiarities, which are marginal in the context of the present discussion, the role of appellate courts is largely agreed across legal systems. For the purpose of the discussion, I elect three main features in identifying appellate competence: powers and function, outcome, and impact. I also recognise but take an ancillary approach to the different understandings of appellate jurisdiction as operational within the international and national realms. Here, I use 'appellate jurisdiction' loosely and in the meaning adopted by the African Court in its jurisprudence.

The common law on the features of appellate courts can be summed up as follows: in respect of their powers and function, hear appeals from

[1] *Ernest Francis Mtingwi v Malawi* (jurisdiction) (2013) 1 AfCLR 190 para 14.

subordinate courts; adjudicate on the correctness, in law and, in certain circumstances, in facts, of decisions made by subordinate courts both in their substantive and procedural aspects; when it finds errors, refer the matter to subordinate courts for retrial or deal with the errors under concurrent jurisdiction;[2] in respect of the outcome of their decisions, make decisions that bind subordinate courts not only on the case concerned but also on the system at large;[3] and, in respect of the impact of their decisions, make law and rules of systemic ambit with the main purpose of ensuring legal certainty.[4]

The appellate jurisdiction of international courts in relation to pronouncements made by their national counterparts is not peculiar to the African Court. In the matter of *Bekaye Traore and Others v Mali*, the ECOWAS Court of Justice dismissed the Applicants' claim of unfair treatment on the ground that it 'cannot act as an appellate or cassation court over decisions of national courts'.[5] It is worth noting that the claim had been partly adjudicated domestically with the merits yet to be decided by the Supreme Court of Mali at the time the matter reached the regional stage. Interestingly, the ECOWAS Court found that it had jurisdiction as rights were invoked and that the matter was admissible as the rule of exhaustion of local remedies does not apply to the merits that were still pending before the Supreme Court.[6] However, the *Bekaye Traore and Others v Mali* ruling is not leading on the issue. In its foundational judgment delivered in the case of *Jerry Ugokwe v Nigeria*, the Court had held that:

> [a]ppealing against the decision of the National Court of Member States does not form part of the powers of the Court; the distinctive feature of the Community legal order of ECOWAS is that it sets forth a judicial monism of first and last resort in Community law. (…) The ECOWAS Court of Justice is not a Court of Appeal or a Court of cassation.[7]

[2] See ss 4(1), 4(2) and 4(3), Appellate Jurisdiction Act, United Republic of Tanzania, Chapter 141, 1979; and Oellers-Frahm, K. 'International Courts and Tribunals, Appeals' *Max Planck Encyclopedias of International Law* (latest update 2019) para 1.

[3] Bernard, DP. 'The role of the appellate court'. Available at <https://ccj.org/papersand articles/THE%20ROLE%20OF%20 THE%20APPELLATE%20COURT.pdf> *The Caribbean Court of Justice* [Accessed 25 November 2019] 1.

[4] See Council of Chief Judges of the State Courts of Appeal 'The Role of State Intermediate Appellate Courts' *Principles for Adapting to Change* (November 2012) 2–5; and Fricero, N. *Les institutions judiciaires* (2010) 70, 97, 98.

[5] *Bekaye Traore and Others v Mali* ECW/CCJ/JUD/04/19, 6 February 2019 at 16.

[6] Ibid 12–13.

[7] *Jerry Ugokwe v Nigeria* ECW/CCJ/JUD/03/05, 7 October 2005 para 35.

The Court consequently dismissed the Applicant's claim for reinstatement as the winner of an election for lack of jurisdiction over electoral disputes.[8] Both the national electoral court and Court of Appeal had adjudicated the claim prior to litigation in the regional court. This can be termed an actual case of lack of appellate jurisdiction in the common law meaning of the same.

Appellate jurisdiction has also been a bone of contention between parties before the East African Court of Justice (EACJ) albeit in variance with the experience in the ECOWAS Court of Justice. One leading pronouncement in this respect is arguably that in the case of *Sitenda Sebalu v Uganda* where the EACJ held that appellate jurisdiction as provided for in article 27(2) of the EAC Treaty 'is internal within the EACJ itself, … not any other type of appellate jurisdiction …'.[9] Called mainly to determine whether it had appellate jurisdiction over the decision of the Supreme Court of Uganda with respect to an electoral petition, the EACJ therefore found in the negative. The consistent position developed by the EACJ in the post-*Sebalu* era embraces a more substantive reasoning on the issue as is exemplified in the matter of *Burundian Journalists Union v Burundi*.[10] There, the issue for determination was whether the Court could exercise jurisdiction on the legality, in light of the Treaty, of the Burundian Press Law, which had previously been declared constitutional by the Constitutional Court of Burundi. It was the Respondent's contention that the judgment of the national court being 'final and not subject to the intervention of any other court, including the EACJ …', means a contrary decision would amount to 'challenging the decisions of the Constitutional Court … and would contravene the powers conferred to the EACJ by the Treaty'.[11] The EACJ held that the constitutionality of the subject matter of the reference did not supersede the well-grounded primacy of its jurisdiction over the interpretation of the Treaty.[12] I consider this situation as one asserting the common meaning in international law of the international jurisdiction versus appellate jurisdiction.

One last trend worth mentioning is that in the European Court of Human Rights (ECHR), which held in the case of *Mirilachvili v Russia*, that 'it is not an appellate or fourth instance court' and 'assessment of the credibility of witnesses and relevance of evidence regarding issues in contentious is vested with domestic courts'.[13] The Court however further

[8] Ibid para 36.

[9] *Hon Sitenda Sebalu v Secretary General of EAC and Others* Reference No. 1 of 2010, 30 June 2011 paras 37–40.

[10] *Burundian Journalists Union v The Attorney-General of the Republic of Burundi* Reference 7 of 2013 EACJ Law Report 299 (2012–2015).

[11] Ibid para 36.

[12] Ibid paras 39–44.

[13] *Mikhail Mirilachvili v Russia* App. No. 6293/04, 11 December 2008 para 161.

held that it 'nonetheless has the power to examine whether the manner in which evidence was adduced exhibited fairness …'.[14] It went on to then undertake an overall assessment of the domestic proceedings.[15] In a previous judgment delivered in the case of *Edwards v UK*, the Court had held that '… in assessing fairness of proceedings it will undertake an overall examination thereof …' and '… it does not fall within its competence to substitute its own appreciation of the facts with that of domestic courts'.[16] The Court thus proceeded as held to assess the fairness of the domestic proceedings. In both instances, the approach is what I term 'jurisdictional fiction', which is a merger of the both the ECOWAS and EAC Courts' jurisprudence, and the trend adopted and expanded on by the African Court.

The hypothesis in this article is that, at the heart of its operation, and particularly in light of its case law on jurisdiction, admissibility and, to a lesser extent, the merits, the African Court has assumed jurisdiction with an outcome and impact that feature appellate functions as outlined above. In no less than 20 judgments, the Court made a pronouncement on its appellate competence in respect of decisions made by domestic courts, whether first instance, appellate or constitutional review jurisdiction.[17]

[14] Ibid para 162.

[15] Ibid paras 164 and subsequent.

[16] *Edwards v United Kingdom* App. No. 13071/87, 16 December 1992 paras 33–34.

[17] *Ernest Francis Mtingwi v Republic of Malawi* (jurisdiction) (2013) 1 AfCLR 190 para 14; *Alex Thomas v United Republic of Tanzania* (merits) (2015) 1 AfCLR 465 para 130; *Mohamed Abubakari v United Republic of Tanzania* (merits) (2015) 1 AfCLR 599 paras 22–29; *Kennedy Owino Onyachi and Others v United Republic of Tanzania* (merits, 28 September 2017) paras 27–40 (court of first instance or appellate court) para 39 (constitutionality appeal); *Ingabire Victoire Umuhoza v Republic of Rwanda* (merits, 24 November 2017) paras 52–56 (court of appeal or legislative boby) para 167 (repeal of national legislation); *Nguza Viking and Johnson Nguza v United Republic of Tanzania* (merits and reparations, 23 March 2018) paras 35–37 (court of first instance and appellate court); *Kijiji Isiaga v United Republic of Tanzania* (merits and reparations, 23 March 2018) paras 30–36 (appellate court); paras 44 (court of first instance); *George Maili Kemboge v United Republic of Tanzania* (merits, 11 May 2018) paras 17–21; *Amiri Ramadhani v United Republic of Tanzania* (merits, 11 May 2018) para 24; *Thobias Mango and Another v United Republic of Tanzania* (merits, 11 May 2018) paras 30–36 (court of first instance and appellate court); *Minani Evarist v United Republic of Tanzania* (merits and reparations, 21 September 2018) paras 18–21; *Diocles William v United Republic of Tanzania* (merits and reparations, 21 September 2018) paras 24–30 (appellate jurisdiction or court of first instance); *Anaclet Paulo v United Republic of Tanzania* (merits and reparations, 21 September 2018) paras 21–27 (court of first instance); *Armand Guehi v United Republic of Tanzania* (merits and reparations, 7 December 2018) paras 31–34 (first instance and appellate court); *Werema Wangoko Werema and Another v United Republic of Tanzania* (merits and reparations, 7 December 2018) paras 27–32; *Alfred Agbesi Woyome v Republic of Ghana* (merits, 28 July 2019) para 28 (human rights jurisdiction of domestic courts; review jurisdiction); *Oscar Josiah v United Republic of Tanzania* (merits and reparations, 28 March 2019) paras 21–28; *Kenedy Ivan v United Republic of Tanzania* (merits and reparations, 28 March 2019) paras 17–28 (court of first instance and appellate court); *Shukrani Masegenya Mango and Others v United Republic of Tanzania* (merits and reparations, 26 September 2019) paras 28–29; *Godfred Anthony and Another v United Republic of Tanzania* (jurisdiction and admissibility, 26 September 2019) paras 19–21 (court of first instance and appellate court); and *Majid Goa alias Vedastus v United Republic of Tanzania* (merits and reparations, 26 September 2019) paras 19–21 (court of first instance and appellate court).

Such an assumption does not in any manner challenge the indisputable fact that the Court is an international but not an appellate tribunal for appeals of decisions rendered by domestic courts. The issue with this jurisprudential dualism is that it entertains a 'jurisdictional fiction' whereby, while it is not granted appellate jurisdiction *de jure* or by statute, the African Court assumes such competence *de facto* albeit on a normative basis. In this article, I explore the veracity of the postulate against the observation that objections raised in this respect by Respondent States may be genuine even though possibly based on misunderstandings; that the reasoning of the Court may be contradictory; that its pronouncements have led to challenges to its jurisdiction and backlash. My propositions rely on doctrine, general principles of (international) law, applicable law before the Court, and more particularly, case law of the Court.

The African Court lacks appellate jurisdiction *de jure*

That the African Court is not an appellate tribunal for decisions rendered by domestic courts is undisputed, at least by law. In that respect, the Court is constrained by both functional and structural limitations.

Functional limitations to appellate jurisdiction

The functional limitations to the appellate jurisdiction of the African Court dwell on the one hand, in its mission and mandate, and on the other hand, in its jurisdiction as established by its statutes.

Systemic mission and continental mandate

The systemic mission of the African Court is to be found first in the preamble to its Protocol, where Member States of the African Union are:

> firmly convinced that the attainment of the objectives of the African Charter – and those of the African [Banjul] Commission in ensuring the promotion and protection of human rights in Africa – requires the establishment of an African Court … to complement and reinforce the functions of the African Commission …

In substantive corroboration of the preamble, article 2 of the Protocol provides that 'the Court shall … complement the protective mandate of the African Commission … conferred upon it by the African Charter …'.

Modelled on its European and Inter-American counterparts, the African Court was therefore established with a mandate to reinforce the protection of human rights in a regional system that had previously operated with a single body, the African Commission. Notably, the mandate of the Court is to 'judicialise' the system by complementing the Commission and giving it the 'efficiency' that it arguably lacked despite its commendable achievements in almost two decades prior to the advent

of the Court. The establishment of the Court is therefore fundamentally about what is referred to as the African human rights system that is a set of norms, institutions and processes aimed at guaranteeing the enforcement of rights in Africa. As such, the norms include the law of the African Union on human rights; the institutions being the Commission and the Court; and the processes encompassing means by which the institutions are moved by entitled entities to ensure that the norms are observed and enforced.[18]

The Court has made a few standard-setting pronouncements on its mandate and mission as systemic to the regional human rights system. One such instance is the *Order on the Request of Advisory Opinion by PALU and Another* on the suspension of the SADC Tribunal. In pursuance of articles 4(1) of the Protocol and 68(3) of its Rules, the Court declined to provide the opinion since the request related to a contentious matter pending before the Commission.[19] Although it has never materialised so far, another evidence of its systemic role is the provision in article 6(1) of the Protocol that the Court may request the opinion of the Commission when deciding on the admissibility of a case filed by individuals and NGOs under article 5(3). Finally, the most emblematic ruling of the African Court on this issue is arguably that in the case of *Femi Falana v African Commission on Human and Peoples' Rights* where the Court, in ruling on complementarity, held that the relationship between the two organs is one of 'mutually reinforcing partner institutions with the aim of protecting human rights on the whole continent.'[20]

International human rights law jurisdiction

In pursuit of its systemic mission, the African Court was assigned an international mandate. Just as other tribunals of the kind, no provision in its statute terms the African Court as 'international', yet the Court is an international court of human rights. It is made international by its institutional umbrella and jurisdiction.

First, the Court is international by virtue of its establishment through the Protocol, an international convention adopted by 54 Members States of the African Union, which itself is an international and intergovernmental organisation. Understood in both its general and legal meanings, 'international' applies to what relates to two or more states and is in principle above them. 'International law' is thus defined as 'the body of rules generally recognized by civilized nations as governing their conduct

[18] See Krasner, SD. 'Structural causes and regime consequences: Regimes as intervening variables' (1982) 36 *International Organisations* 185–205; Donnelly, J. 'International human rights: A regime analysis' (1986) 40 *International Organisations* 499–642.

[19] *PALU and Another* (jurisdiction) (2013) 1 AfCLR 723 paras 4–7.

[20] *Femi Falana v ACHPR* (jurisdiction) (2015) 1 AfCLR 499 para 16.

towards each other and towards each other's subjects'.[21] 'International' is of course also understood in comparison with and opposition to 'national' and thus to what belongs in a state, its borders, norms, organs and entities.

In debating the international nature of a court, it is unavoidable to recourse to the monism versus dualism dichotomy that involves the two major legal traditions when it comes to the relationship between international and national law. Monism is known as a system whereby national and international orders are the same, and international law becomes part and parcel of national law solely upon ratification. Conversely, dualism purports that the two orders are segregated making it necessary for international ratified law to seek special domestication – an act – of parliament before penetrating the domestic legal system. The dichotomy might have however become academic with monists adopting dualist trends and vice-versa; and more intricacies are added to the quandary about which of the Constitution or international ratified or domesticated law takes precedence.[22] Notwithstanding this background, there is a wide consensus that international is understood as inherently standing above national law, at minima above law adopted by parliament.[23] There is no need to further expand on the related issues, which is a debate excessive of the present discussion.

Second, the African Court is also international by its jurisdiction, particularly in respect of both the material and personal limbs thereof, as well as the law applicable before it. Pursuant to article 3(1) of the Protocol, 'The jurisdiction of the Court shall extend to all cases … concerning the interpretation and application of the Charter, this Protocol and any other human rights instrument ratified by the States concerned.' The subject matter of the Court's competence is, therefore, international law as defined in the above provisions. The Court has, properly so, interpreted 'any other human rights instrument' as meaning not only human rights treaties *stricto sensu*, but also emerging conventions that could be termed as 'hybrid' as they exhibit the features of both human rights treaties and interstate or community law instruments. This interpretation is illustrated in the matter of *APDH v Côte d'Ivoire* where the Court held that the African Democracy Charter[24] is a human rights instrument mainly by its purpose, and in joint reading with relevant provisions of the African Human Rights Charter.[25] The Court had previously, in the case of *Lohé*

[21] *Collins English Dictionary*.

[22] See in general, Killander, M & Adjolohoun, H. 'International Law and Domestic Human Rights Litigation in Africa: An Introduction' in Killander, M (ed), *International Law and Domestic Human Rights Litigation in Africa* (2010) 3–24.

[23] See in general, Killander as above.

[24] African Charter on Democracy, Elections and Governance (adopted 30 January 2007, entered into force 15 February 2012).

[25] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986).

Issa Konaté v Burkina Faso, interpreted and applied the ECOWAS Revised Treaty,[26] and Protocol on Democracy[27] in adjudicating the criminalisation of press offences as a violation of freedom of expression and the rights of journalists.[28]

Regarding its personal jurisdiction, States or interstate institutions form part of the entities that may initiate proceedings before the Court under both advisory and contentious procedures.[29] More importantly, defendants are exclusively States which are also the main addressees of the Court's findings and orders which they pledge to abide by within the time stipulated therein.[30]

In light of the above, it can be agreed that the African Court is an international human rights court as it was created by several States, to interpret and apply treaties that are international in nature, and make rulings that bind States in their capacity as international entities. As such, the African Court cannot be said to be an appellate court in either of the meanings of an appellate division within an international court, or a national Court of Appeal.

The limitations to the appellate competence of the African Court are also structural.

Structural limitations to appellate jurisdiction

When assessed by structural design, limitations to the African Court's appellate jurisdiction dwell first in the fact that it does not belong in the same legal order with domestic courts. Furthermore, and consequently, the continental Court is not, by statute, positioned in a functional hierarchy with its national counterparts with whom it entertains no formal judicial relationship.

Unitary jurisdiction in the international sphere

As earlier set out, the African Court is an international human rights court, which belongs in the international legal order and applies international law. As such, it does not feature in the same legal order with national courts, which are situated in the domestic sphere and regulated by national law. Alluding to the relationship between national

[26] Revised Treaty of the Economic Community of West African States (adopted 24 July 1993, entered into force 23 August 1995).

[27] ECOWAS Protocol A/SP1/12/01 on Democracy and Good Governance, Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (adopted 21 December 2001, entered into force 20 February 2008).

[28] See *Lohé Issa Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 314; *Norbert Zongo and Others v Burkina Faso* (merits) (2014) 1 AfCLR 219.

[29] See Arts 4 and 5, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004).

[30] See Art 29, African Court Protocol.

and international orders, it has been stated above that the two orders are separate and their interactions are therefore regulated by strict rules. One such rule is the requirement that, to penetrate the national sphere, international norms must first be ratified, and then domesticated to be made municipal before they can seek applicability and enforcement in the national port. Those being rules generally applicable in common law countries, most civil law countries have also additionally required that international law seeking domestic applicability are published in the national gazette, enjoy reciprocal application, subject to incorporation or translation into statutes or regulations.[31]

This segregation by legal order has found an echo in the case law of the African Court. The Court has first moved beyond the *Thomas v Tanzania* position that it does not have appellate jurisdiction over domestic courts' decisions.[32] It has gone into substantiation to hold in the *Abubakari* judgment that it would be exercising appellate competence only '… if, *inter alia*, it were to apply to the case the same law as the Tanzanian national courts, that is, Tanzanian law.'[33] The Court concluded that it is 'clearly not the case' because it applies 'exclusively' the Charter and other applicable norms.[34] The Court has also therefore, as exemplified in the case of *Owino v Tanzania*, excluded national constitutions from its jurisdictional scope holding that 'it does not have jurisdiction to examine the constitutionality of domestic legislation.'[35] The limitation was then extended to ordinary legislation in *Ingabire Victoire Umuhoza v Rwanda* where the Court held that it is not a legislative body and can thus not repeal national laws of the Respondent.[36]

Hierarchy disconnection with domestic courts

Besides its limitations *quo jure*, the African Court is also not situated in a functional hierarchy with domestic courts. It does indeed stand alone in its own legal, institutional and judicial framework. The Protocol established the Court as a single entity with a unitary institutional structure. It is a full-bench adjudicatory body, with no structure, division or chamber whether for task division or appellate purpose in the international understanding of appeal. The exception to the Court's unitary set up is not national but rather international in that its operation is complementary to that of its twin sister, the Banjul Commission. The two bodies, therefore,

[31] See in general, Killander & Adjolohoun (n 22); Tanoh, A & Adjolohoun, H. 'International law and human rights litigation in Côte d'Ivoire and Benin' in Killander op cit note 22 at 109–121.

[32] *Mohamed Abubakari v United Republic of Tanzania* (merits) (2016) 1 AfCLR 599 para 25.

[33] Ibid para 28.

[34] Idem. See also *Kennedy Owino Onyachi and Others v United Republic of Tanzania* (merits, 28 September 2017) para 39.

[35] Idem.

[36] See *Umuhoza* paras 52–56, 167.

operate in the same legal and institutional galaxy of the African human rights system.[37] This is the position that transpires from the Court's ruling in the *Falana* case where it held that the two bodies are 'independent but mutually reinforcing' in operating the continental human rights protection system.[38]

The hierarchical disconnection is equally addressed in the Court's jurisprudence especially in relation to the operation of domestic courts. It originates in the inaugurating *Mtingwi* pronouncement of the Court in that respect where the Court concluded that '… it does not have appellate jurisdiction to receive and consider appeals in respect of cases already decided upon by domestic … courts.'[39] The position is then replicated with a slight but consolidating variance in the *Thomas v Tanzania* judgment as the Court stated that it '… is not an appellate body with respect to decisions of national courts …'.[40] With respect in particular to the substance of its jurisdictional limitations, the Court subsequently held in the *Abubakari* judgment that it does not have the power to 'decide on the value' of evidence that formed the conviction of the Applicant but only whether such evaluation was arbitrary or led to a miscarriage of justice.[41] The above-referenced pronouncements confirm the understanding of the African Court that it is not positioned within the same structure let alone operate in hierarchy for purposes of appeal of decisions rendered by domestic courts.

The foregoing shows that the African Court is not an appellate tribunal for decisions made by domestic courts because it lacks the legal basis to do so from both functional and structural perspectives. The second limb of my argument is that these limitations are only *de jure*, and the Court *de facto* operates both on the basis and with the effect of an appellate international tribunal. Here unfolds what I refer to later in the article as a normative based structural appellate jurisdiction.

The African Court assumes appellate jurisdiction *de facto*

The African Court assumes appellate jurisdiction not only substantively but also institutionally.

[37] It can be argued, as I have posited elsewhere, that the African regional – human rights – regime has now developed beyond the two continental mechanisms into a 'grand system'; see Adjolohoun, SH. '*The Njemanze ECOWAS Court Ruling and 'Universal' Jurisdiction: Implications for the 'Grand' African Human Rights System'* (2017) *Blog of the International Journal of Constitutional Law*. Available at <http://www.iconnectblog.com/2017/11/the-njemanze-ecowas-court-ruling-and-universal-jurisdiction-implications-for-the-grand-african-human-rights-system> [Accessed on 25 November 2019].

[38] *Falana* para 16.

[39] *Mtingwi* para 14.

[40] Ibid para 130.

[41] *Abubakari* para 26. See also *Owino* para 37.

Substantive appellate jurisdiction

First, the African Court makes determinations in both fact and law, with respect to matters already examined, including finally, by domestic courts. Second, the outcome of its determination is injunctive and binds domestic courts through the Respondent State.

Determination in respect of fact and law

A glance at the case law of the African Court shows that it reaches a determination by examining, relying on, or using the same set of facts as domestic courts.

The variance between the facts as presented before the African Court and domestic courts is indeed marginal if non-existent. For instance, in alleging violations of fair trial rights, the Applicant unavoidably presents to the African Court the full set of facts which supported the domestic proceedings that led to the challenged trial. The marginal difference is that the narration of the same facts includes facts relating to the actions of the domestic authorities whether judicial or others. The ancillary nature of the difference referred to becomes more evident when the Court relies on and makes use of the said facts in its reasoning and to reach its determination. Illustrations can be found in case law to that effect.

Reliance on and use of facts originating in domestic proceedings is illustrated for instance in the case of *Reverend Christopher Mtikila v Tanzania* where, in a ten-paragraph background to the applications, the Court recounted the very facts that supported proceedings before national courts. They included the adoption by parliament of the Amendment Act prescribing sponsoring of candidatures, challenges of the law by Mtikila before domestic courts, and actions taken by the executive to enforce orders banning independent candidates from running for presidential, parliamentary and local elections.[42] Beyond a mere reference to the facts as had already been examined by domestic courts, the African Court directly relied on them in building its reasoning and arriving at a ruling on whether the right to participation guaranteed in article 13 of the African Charter was violated.[43]

Determinative reliance on facts is systematic and statutory in the African Court's judicial law-making. Even though it has varied in format over time, the section on the 'Facts of the case' is not only compulsory but also preliminary as it appears immediately within the first sections of the Court's judgments, usually following that on the 'Subject matter of the Application'. At a point in time, the section on the facts as it currently features in decisions of the Court was covered rather by either a section on the 'Subject matter of the Application' or 'Proceedings before the national

[42] *Reverend Christopher Mtikila v Tanzania* (merits) (2013) 1 AfCLR 34 paras 66–75.

[43] Ibid paras 101–105, and 107 onwards.

courts' or 'Historical/factual background/context of the case' or a bit of all these sections.[44] The practice is multifaceted but observed across the board as in the case of *Konaté v Burkina Faso* where detailed facts and reasons supporting the Applicant's prosecution in domestic courts for defamation are provided ahead of the Court's determination on the merits which either does not restate the facts or does so to a limited and summarised extent.[45] Under the 15-paragraph long 'historical and factual background' in the judgment in *Thomas v Tanzania*, pure facts for which the Applicant was tried in domestic courts for theft were mixed with extensive details of the national proceedings.[46] In *Owino v Tanzania*, the '[s]ubject matter of the Application' recounted the very originating facts of suspected robbery for which the Applicants were tried in Kenyan courts and their extradition to Tanzania ordered where they were then tried for the main offence.[47]

The most relevant expression of a factual determination as discussed here is arguably the Court's assessment of evidence adduced before domestic courts, which indirectly ends up in regional adjudication. An illustration is provided for instance in the *Abubakari* judgment where the Court held in respect of the evidence relied on to convict the Applicant that it is '… not incumbent on it to decide on their value for the purposes of reviewing the said conviction.' However, the Court ruled that '… nothing prevents it from examining such evidence as part of the file evidence laid before it so as to ascertain in general, …' whether domestic courts considered the same in abidance with international human rights law.[48]

The difficulty in the above position is how to segregate the Court's rightly purported conventionality control and an assessment of the facts as the determinative basis for arriving at one finding or the other. To stick with the *Abubakari* judgment, while it asserted not making an evidentiary determination, the Court concluded that the fact that the Applicant appeared alone on the charge sheet as opposed to the other co-accused did not infringe fair trial. It held that '… criminal liability is personal, … and the fact that mention was not made … of other persons [offenders] does not impact on the key question of the possible liability of the Applicant and punishment incurred.'[49] The Court consequently found that the alleged violation was not established. Similarly, the facts related to the conflict of interest by the prosecutor, and lack of assistance

[44] See *Wilfred Onyango Nganyi and Others v Tanzania* (merits) (2016) 1 AfCLR 507 paras 2–23; *Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (merits) (2016) 1 AfCLR 668 paras 4–19; *Thomas* paras 23–34.

[45] *Konaté* para 5.

[46] *Thomas* paras 23–34.

[47] *Owino* paras 3–12.

[48] *Abubakari* para 26.

[49] Ibid para 105.

by counsel were determined based on facts that had made the core of the pleadings before domestic courts.[50] An examination of decisions rendered by domestic courts in the matter reveals that the African Court dealt with the very issues of facts that had already been determined by national courts.

The African Court also adjudicates matters before it based on the same law as domestic courts.

When the Court holds, as earlier recalled, that it lacks appellate jurisdiction because it does not apply the same law as its domestic counterparts, it means law made by parliament or the Respondent State's constitution. The Court has thus expressly held in *Abubakari* that it does not apply Tanzanian criminal law, and in *Owino* that enforcing the Constitution falls out of its jurisdictional ambit. It also found in *Umuhoza* that it cannot assume legislative powers. These findings are well-founded to the extent that the Court reads 'law' as legislation made by parliament and regulations. The issue is that such understanding is partial within both the international and national arenas.

First, under article 1 of the African Charter, State parties pledge to undertake all measures, legislative, administrative and others, to give effect to the substantive rights therein. Municipal law is therefore made in the implementation of that provision and in furtherance or towards enforcement of international law ratified by the State. This explains why rights holders resort to international courts to assess municipal law against ratified treaties when domestic remedies have not been satisfactory. The African Court's jurisprudence is in support of this point as illustrated in the *Zongo* case where the Court held that by not exercising due diligence in investigating the assassination of the journalist and his companions, the Respondent State violated not only article 7(1) of the Charter, which guarantees fair trial but also '… simultaneously violated article 1 … by failing to take appropriate measures to guarantee respect for the rights …' protected in article 7(1).[51] There is ample case law of the Court to the effect that municipal law is adopted in implementation of the African Charter. As a matter of fact, the Court has consistently held that a violation of any substantive provision of the Charter automatically results in the consequential violation of article 1 of the Charter.[52]

Second, once ratified, international law becomes part and parcel of municipal law and falls within the jurisdiction of domestic courts. The latter then becomes the natural and proxy enforcers of international

[50] Ibid paras 107–122.

[51] *Zongo* (merits).

[52] Ibid paras 198–199; *African Commission on Human and Peoples' Rights v Kenya* (provisional measures) (2011) 1 AfCLR 17; *Thomas* paras 132–137; *Guehi* paras 148–150; *Owino* paras 158–160.

norms.[53] Third, and as a consequence of the above, in most cases before international forums, domestic courts have adjudicated the matter based directly or indirectly on international instruments incorporated through constitutions and other pieces of legislation adopted in implementation of international law. Finally, the chronology of the international court's intervention positions them at an appellate stage in the order of adjudication, thus by structure. For instance, one of the most important admissibility requirements in international – human rights – litigation, is the exhaustion of local remedies, which systematically shapes a structure between international and national courts as the latter very often adjudicate the matter first prior to international litigation.

These last three propositions find support in the African Court's jurisprudence. In very few cases adjudicated by the Court have domestic courts not previously examined the matter. In the vast majority of cases, especially those that may be considered as important or landmark, the issue before the Court had been adjudicated by the highest domestic courts. For instance, in *Mtikila v Tanzania*, the Court of Appeal had considered to its finality the same issue whether subjecting independent candidatures to endorsement by a political party is consonant with the right to political participation. Similarly, in the *Konaté* Case, the Court of Appeal had affirmed the decision of the High Court[54] and the last situated Court of Cassation's jurisdiction was limited to assessing propriety of the lower decision in law and not in fact. The African Court found that both the Court of Cassation and Constitutional Council were ineffective, insufficient or unavailable.[55] With respect to fair trial rights, the African Court's judgment in the *Thomas* Case comes on point. There, the Court found that the Court of Appeal had incidentally examined the procedural issues raised by the Applicant and that further remedies such as the request for review or the constitutional petition were extraordinary, thus not compulsory.[56]

There are more impacting decisions of the African Court that evidence determination of the same issues by domestic courts prior to regional adjudication. One such is the Court's judgment in the matter of *APDH v Côte d'Ivoire* where the Constitutional Council had twice examined the same issue of whether the composition of the Independent Electoral Commission exhibited the independence and impartiality required by the African Human Rights and Democracy Charters, and the ECOWAS

[53] See in general, Tzanakopoulos, A. 'Domestic courts in international law: The international judicial function of national courts' (2011) 34 *Loyola of Los Angeles International & Comparative Law Review* 133; Killander & Adjolohoun op cit note 22.

[54] *Konaté* para 7.

[55] Idem paras 108–115.

[56] *Thomas* paras 62–65.

Protocol on Governance.[57] The same applies almost systematically in the African Court's case law into its second decade of operation. A representative sample of recent pronouncements include its judgments in *Woyome v Ghana*,[58] *Guehi v Tanzania*,[59] and *Umuhoza v Rwanda*.[60]

Assessment of facts or evidence as originating in domestic proceedings appears to be quasi systematic in the African Court's judicial law-making. It is worth noting that criminal matters make the bulk of the cases involved. The Court's pronouncement in the *Guehi* Case is of a critical interest in that respect. The matter was concerned mainly with violations of fair trial rights in proceedings that led to the imposition of the death sentence. In dealing with the Respondent's objection that it lacks appellate jurisdiction to examine issues of facts that had been finally determined by the Court of Appeal of Tanzania, the African Court restated its established case law that its jurisdiction is one of conventionality review.[61] The difficulty in following this legitimate disclaimer is that the Court proceeds to delve into just what it had disclaimed. For instance, to determine if the failure to provide an interpreter during the police interview affected the right to a fair trial, the Court set to establish whether the Applicant was conversant with the English language at the time of the facts.[62] In doing so, the Court considered that the 'Applicant's ability to communicate in English should be assessed against his behaviour and the purpose of each of the processes referred to.' It then held that at the stages of police interview, committal proceedings and preliminary hearing, 'the said purpose does not require one to have an outstanding mastery of the English language.'[63] Against these considerations, the Court proceeded to rely on a wide set of facts originating in the proceedings before domestic courts. These included the facts that the Applicant submitted that he interned with an international organisation at the time of the event; the police statement showed that he was aware of the charges preferred against him; he confirmed in the statement not to require an interpreter during the interview; he signed the statement and confirmed the same at subsequent stages of the proceedings;

[57] See Adjolohoun, SH. 'The making and remaking of national constitutions in African regional courts' (2018) *African Journal of Comparative Constitutional Law* 58–60.

[58] *Woyome* paras 99–107. The Supreme Court had heard one of the central substantive issues before the African Court, which is whether by assuming jurisdiction to hear a commercial case vested with the High Court, the apex domestic court had violated the Applicant's right to a fair trial.

[59] *Guehi*, see section of the judgment on the merits. The Court of Appeal had ruled finally on all the issues raised by the Applicant before the African Court as to whether his trial, conviction and sentencing to death for the murder of his wife upheld the right to a fair trial.

[60] *Umuhoza* paras 69–74. The Supreme Court had examined the very questions posed to the African Court, which are whether the sentencing of the Applicant by the High Court to imprisonment for denial of the genocide breached her rights to a fair trial and to freedom of expression.

[61] *Guehi*, 33–34.

[62] Ibid para 74.

[63] Ibid para 75.

he raised issues with the statement during the trial but only with respect to the number of pages and not assistance of an interpreter.[64] It is worth noting that the Court expressly stated reaching the conclusion that the Applicant had the 'minimum understanding required' of the English language 'against these undisputed facts.'[65] Reference to notes from the record of proceedings of the High Court of Tanzania is made to support the accuracy of factual information borrowed therefrom.[66]

The African Court's judgment in the matter of *Umuhoza v Rwanda* exemplifies appellate jurisdiction in yet a varied approach. In assessing whether the limitation imposed by the Respondent on free speech met the criterion of legality, the Court delved into domestic criminal law, which it found was couched in broad and general terms. The Court held that such wording of the law may be subject to various interpretations. The relevant provisions were reproduced in a footnote yet the Court did not provide any explanation as to why it reached such a critical conclusion that the Respondent's law was vague.[67] Reasoning is mandatory in judicial law-making and more so in the present case because it had the effect of contradicting or reversing the final determination of domestic courts on facts and impliedly on their legal pronouncement.

While making its determination on the merits, the Court relied again on facts with respect to the statement for which the Applicant was convicted for denial of the Tutsi genocide. The issue set for pronouncement was whether the restriction on free speech was necessary and proportional. The Court reproduced the statement in three versions, that by the Applicant from her submissions;[68] and those used by the High Court[69] and the Supreme Court[70] in their respective judgments. From assessing the necessity and proportionality of the restriction, the Court recalibrated the issue to whether the statement propagated 'double genocide'. This in itself reveals a shift from a conventionality control to a domestic law-oriented review. The shift became more apparent when the Court reverted to domestic law by quoting the 2013 Rwandan legislation[71] on the basis of which it found that the three statements were at variances, which is pure facts as already finally determined by the High Court and Supreme Court of Rwanda.

The preliminary determination on facts served as a ground for the Court to lay its reasoning on the law. The Court held that variances in

[64] Ibid paras 76–77.
[65] Ibid para 77.
[66] Idem.
[67] *Umuhoza* paras 134–137.
[68] Ibid para 150.
[69] Ibid para 152.
[70] Ibid para 153.
[71] Ibid para 154.

evidence should benefit the Applicant.[72] This finding is catalytic because it impacted the entire proceedings before domestic courts especially with respect to the Applicant's responsibility as already finally settled by national courts. As would have been expected, the Court laid down a substantial analysis to conclude that in the case, nothing in the statement denied or belittled the genocide.[73] It further found that 'double genocide' was not established as per the valid statement, which the Court backed with the version used by the High Court.[74] The logical conclusion was to overrule the determination of domestic courts by finding that the Applicant's conviction and sentencing for making the said statement constituted a restriction that does not meet the requirement of proportionality and necessity in a democratic society.[75] Notably, the conclusion namely addressed domestic courts directly and not via the Respondent as would usually be the case.

The African Court has also exercised imperium from an appellate perspective through jurisprudential principles arguably borrowed from other areas of law. One that is of interest is the 'bundle of rights' concept, which mainly applies in property law in both civil and common law traditions. It is easily understood that the idea of a bundle refers to the tri-fold nature of property as encompassing *usus*, *fructus* and *abusus*, which are the rights to use, derive profit from, and dispose of a good. The Court inaugurated the 'bundle of rights' jurisprudence in the *Thomas* judgment. The theory posits that where domestic courts were or should have been aware of the issue raised before the African Court, the latter will consider that the said issue is part of a 'bundle of rights and guarantees' that needed not to pass the test of exhaustion of local remedies.[76] In the post-*Thomas* era, the Court systematically reverted to the principle to dismiss the Respondent's objection that the Applicant has either raised the issue for the first time in international litigation or did not attempt to have it addressed by domestic appellate courts. Although the related case law can be said to be consistent in that respect, it has remained unprincipled and diffuse. First, the *Thomas* decision was never a principle setter to begin with as it merely stated that 'The alleged non-conformity by the trial court, with the due process, with its bundle of rights and guarantees, formed the basis of his appeals to the High Court and the Court of Appeal.'[77] In its subsequent application of the principle, the Court made limited attempts to lay its foundations in terms of applicable principles, factors for assessment, as well as which issues may be bundled and under

[72] Ibid para 156.
[73] Ibid para 157.
[74] Ibid para 158.
[75] Ibid para 161.
[76] *Thomas* para 60.
[77] Idem.

what circumstances. It only came about semantic variances that confused law-making further as illustrated in the case of *Nguza v Tanzania* where it held that due to the bundles rights, '[t]he domestic judicial authorities thus had ample opportunity to address these allegations even without the Applicants having raised them explicitly.'[78] The *Nguza* precedent was reiterated *verbatim* in the *Owino* judgment.[79]

There seemed to be a slight move towards jurisprudential methodology in the case of *Minani v Tanzania* as the Court attempted to explain that legal aid whose violation was alleged was bundled with other fair trial rights, which formed the bulk of the case adjudicated in domestic courts, especially before the Court of Appeal.[80] However, attempts to resolve the quandary have apparently added to the problem as shown in the matter of *Anaclet Paulo v Tanzania*. There, the Court held that '… when alleged violations of the right to a fair trial form part of the Applicant's pleadings before domestic courts, the Applicant is not required to have raised them separately to show proof of exhaustion of local remedies.'[81] The issue with this finding is that the Court does not demonstrate or set out how the said rights bundled with the pleadings referred to.

As it has been applied so far, the 'bundle of rights' jurisprudence affirms the postulate of the African Court's appellate jurisdiction over national courts. This is so because in adopting such law-making approach, the Court substitutes itself to domestic courts, in the same way, a national appellate court would do in certain instances of failure such as where the lower court passed sentence without first convicting the accused. Furthermore, this approach exempts Applicants from exhausting remedies by circumventing the national mechanisms without a systematic and preliminary assessment of whether the claim of assumed awareness of domestic authorities is proved and which of the issues elect for bundling.

This approach to law-making does not appear to uphold fundamental principles of international human rights adjudication such as exhaustion of local remedies, sovereignty and state-centred nature of international law, subsidiarity as well as margin of appreciation especially in light of the obligations of means and results stated under article 1 of the African Charter.[82] The trend may also sound contradicting and surprising against the African Court's posture with regard to the margin of appreciation of state parties. For instance, in the earlier cited *Nguza* judgment, the Court held '… that the decision on evidence to be adduced regarding the form

[78] *Nguza* para 53.

[79] *Owino* para 54. The *Nguza* variance was replicated with slight rewording in *Mangara v Tanzania* (merits) para 46; *Guehi* para 50.

[80] *Minani*, para 43.

[81] *Anaclet* paras 42–43.

[82] See Adjolohoun, SH. 'Les grands silences jurisprudentiels de la Cour africaine des droits de l'homme et des peuples' (2018) 2 *Annuaire Africain des Droits de l'Homme* 24–46.

of identification of accused persons is to be left to national courts since they determine the probative value of such evidence and they enjoy wide discretion in this regard. This Court generally would, therefore, defer to the national Court's determination in this regard, so long as doing so, will not result in a miscarriage of justice.'[83] Manifestly, the Court does not endeavour to uphold such margin of appreciation and other law-making principles when it comes to determining its jurisdiction or assert jurisprudential theories such as that of the bundle of rights and guarantees.

In addition to making determination on both facts and law in relation to issues examined by domestic courts prior to litigation before it, the African Court also exhibits appellate features in respect of the nature and effect of its pronouncements system-wide.

Injunctive and systemic nature of pronouncements

Pursuant to article 30 of its Protocol, '[t]he States Parties … undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.' A literal understanding of the provision is that the Respondent State in each case is not only bound by the judgment but must also enforce it and within a specified time. Most importantly, the Protocol does not provide for an appeal of the African Court's judgment and requests for either review or interpretation do not suspend execution.

How judgments of the African Court bind domestic courts is a matter that has been settled in international law. First, only States and not their organs hold legal personality in international law. Therefore, any commitment made by States with respect to both the law and outcome of proceedings provided therein bind all state organs. There lies the rule crystallised in article 27 of the Vienna Convention on the Law of Treaties (VCLT) pursuant to which '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.' It is of interest in this regard to refer to the judgment of the International Court of Justice in the *LaGrand* Case, where the world court held that its order for provisional measures to stay execution of LaGrand was binding on the United States. The Court went on to find that the US Government therefore had to transmit the Order to the Governor of Arizona who 'is under the obligation to act in conformity with the international undertakings of the United States'.[84] This position is in line with article 4 of the Draft Articles on State Responsibility, which provides that 'the conduct of any state organ shall be considered an act of that State under international law'.

[83] *Nguza* para 89.

[84] *LaGrand Case* Provisional measures ICJ Reports (1999) para 28.

Orders of the African Court also bind domestic courts through the applicable law and implementation of decisions. As stated above, once the Charter, and other applicable international instruments, penetrate the domestic order, they fall within the jurisdiction of domestic courts not only as domestic law but also as directly applicable international law, especially when self-executing.[85] When the African Court renders a judgment based on the same law and taking into account exhaustion of local remedies, it becomes legally untenable for domestic courts not to recognise and align with the international pronouncement. For instance, in the above-mentioned judgments of *Mtikila* and *APDH*, it would be difficult for both the Court of Appeal of Tanzania and the Constitutional Council of Côte d'Ivoire to ignore the rulings of the African Court if they were to examine future applications on the same issue. National courts are further bound by implementation because where Côte d'Ivoire has taken steps to change the composition of the Electoral Commission as it actually did, then the prior rulings of the Constitutional Council are to no legal effect. This consequence is clearly to the effect that the African Court's judgments have the direct consequence of overruling decisions of domestic courts.

In analysing deference, jurisdictional sovereignty and protectionism cannot be underestimated. Resistance was well illustrated in the matter of *CDP v Burkina Faso* where the ECOWAS Court of Justice ruled that the post-transition Electoral Code which excluded members of the demised president Blaise Compaoré's political party from elections violated their right to political participation.[86] When the Constitutional Council of Burkina Faso considered petitions on candidatures, it ignored the ECOWAS Court's ruling on the ground that the judgment had not been implemented and therefore the impugned provisions remained in force.[87] Be that as it may, resistance cannot begin to justify breach of law or orders made by recognised entities in application of that law.

Just as is generally the case in national appellate courts, the African Court has been performing a system-wide harmonisation function through its judgments. In almost 50 judgments that it had rendered on the merits and reparations as at the time of this writing, the African Court has made rulings that affect the findings of domestic courts whether actually or potentially; directly or indirectly. The impact is multi-fold, ranging from administrative to judicial.

I offer a selection of the most relevant pronouncements in that respect. In the case of *Konaté v Burkina Faso*, the Court ordered prison sentences to be removed and fines to be lowered for press offences after

[85] See in general, Killander (n 22); Ayeni V. (ed), *The Impact of the African Charter and the Maputo Protocol in Selected African States (2018).*

[86] See Adjolohoun op cit note 57 at 60–62.

[87] On similar cases, see generally Adjolohoun as above.

the Court of Appeal affirmed the Instance Tribunal decision to sentence the Applicant to imprisonment, fines, and closure of his newspapers. In *Anudo v Tanzania*, it ordered that the Applicant be allowed to return to the country and his security be guaranteed after the Court of Appeal had affirmed a High Court ruling authorising his deportation and striping him of his nationality. Also, in *Makungu v Tanzania,* it ordered the release of the Applicant whose incarceration proceeded from a ruling of the High Court and after the appeal remedy was unavailable. In the same vein, in *Ajavon v Benin*, the African Court ordered the annulment with full effects of a 20-year imprisonment sentence imposed by a specialised criminal court. Again, in *Umuhoza v Rwanda,* it granted compensation in the amount of US$26,000 to the Applicant and four family members for moral prejudice after finding that the 15-year prison sentence for denial of genocide was disproportionate. In the same case, the Court discarded the Applicant's statement on the basis of which the Supreme Court affirmed her conviction and sentencing. Finally in *Rajabu v Tanzania,* it outlawed the mandatory death penalty for murder which was imposed by the High Court and affirmed by the Court of Appeal.[88] In addition to the *Mtikila* and *APDH* judgments earlier referred to, all these rulings of the African Court had the effect of directly affecting pronouncements made by domestic courts prior to international adjudication.

The African Court's ability to issue orders that bind domestic courts, albeit indirectly through the Respondent State, is affirmed by the structural superiority derived from the hierarchy of norms.

Appellate jurisdiction by structural superiority

There is no vertical hierarchy between the African Court and domestic courts in terms of functional structure. As stated earlier, they belong to different legal orders and do not operate under a statutory appeal or referral arrangement. Similarly, they do not entertain any horizontal relationship. They nevertheless entertain a *de facto* structural relationship derived from law, and that generates legal impact.

For instance, observance of the principle of exhaustion of local remedies creates a vertical relationship between the African Court and its national counterparts. The twin principles of complementarity and subsidiarity command that international courts exercise jurisdiction only when their domestic counterparts have not been able or willing to address the issue to the satisfaction of the petitioner. Against that understanding, national courts retain primary jurisdiction, which explains why they have, prior to their adjudication in the African Court, examined the issues arising in almost all cases brought for regional litigation. National courts, therefore,

[88] *Ally Rajabu and Others v United Republic of Tanzania*, AfCHPR (merits and reparations, 28 November 2019) para 116.

operate in a sequencing process where the African Court intervenes at a subsequent or second stage. Considering the similarities in the law applied and the facts adjudicated discussed above, it is difficult to deny that the observance of exhaustion of local remedies, complementarity and subsidiarity purport structural relationship.

While the relationship is not superior by statute, it inevitably places the African Court in structural superiority by the superior nature of the international law that it applies, as well as the binding and therefore superior nature of its decisions as enshrined in international law through states' responsibility. Structural superiority of the African Court is, therefore, to be sought in the very essence of the institution as contemplated by the continental lawmakers. Structural hierarchy is in turn drawn from normative hierarchy.

Normative based structural hierarchy is valid beyond state sovereignty and national constitutional supremacy. Similarly, it transcends the legal tradition dichotomy of monism and dualism. There is no dispute on the superiority of treaties over domestic law adopted by parliament. With respect to the Constitution, it has become evident that states generally would amend their fundamental law prior to or in order to join a treaty and not the other way round.[89] In context, all African states are parties to the African Charter and recognise it in their constitutions whether as a principle in the preamble or as a plain substantive provisions in the body of the text or the bill of rights.

Decisions of the African Court are directly applicable in the national sphere and against municipal contrary norms, including judgments of domestic courts. The unitary nature of states in international law, as recalled earlier, needs not be restated. Furthermore, it has not always been clearly understood, including by most relevant stakeholders such as judges, lawyers, academics, and civil society, that decisions rendered by the African Court are international and not foreign. These decisions, therefore, do not seek the help of any subsequent action by any other authority to enjoy enforcement. The common law or dualist mechanism of domestication does not apply to a judgment of the African Court. The same is true of the civil law or monist-oriented *exequatur* or incorporation. This also explains why, even though decisions of the Court may ultimately affect the functioning of national judicial or legislative bodies, the process of their enforcement is exclusively executive led. These factors reinforce the African Court's superiority by structure and affirm the postulate of its appellate jurisdiction over domestic courts.

Finally, the African Court's regime is supported by compliance mechanisms that corroborate structural superiority based on norms. As

[89] *Media Council of Tanzania and Others v Tanzania* Reference No. 2 of 2017, Judgment of 28 March 2019 paras 18–41.

earlier discussed, judgments of the Court are binding on states, including their courts. Pursuant to article 29(2) of the Protocol, the Court transmits its decisions to the Executive Council of the African Union, which will monitor execution on behalf of the Assembly of Heads of State and Government. In terms of article 31 of the Protocol, the Court submits to the Council a report on non-compliance. The enforcement mechanism laid down under article 29(2) has materialised so far in the Court's report being discussed and endorsed by a decision of the Council calling on non-compliant states to live up to their treaty obligations. The Assembly then endorses the Council's decision. Both the Assembly and Council are policy organs of the Union, which pursuant to the Constitutive Act make decisions that are binding on Member States. In 2018, and upon the request of the Council, the Court has submitted for adoption a Framework on implementation and compliance with its decisions. Prior to its final adoption, the Council has requested its consideration by the African Union Specialised Technical Committee on Justice and Legal Affairs. The Framework includes both judicial and political processes to seek enforcement but does not exclude diplomacy and technical support for implementation.

Conclusion

I would have concluded this article by stating the answer to the overarching question set out above, which is whether the African Court assumes appellate jurisdiction over decisions made by its domestic counterparts. Having provided ample substantiation for both answers, I suggest to rather wrap up with brief propositions on what could be the purpose, interest and implications of the Court's jurisprudential policy on its appellate jurisdiction.

The aim could be educational in light of Respondent States' repeated submissions that the Court is defying the legitimacy of their lower and apex courts and encroaching upon sovereignty. As earlier stated, Respondents explicitly raised the issue as an objection, which the Court ruled on mostly as either a question of jurisdiction or admissibility, in no less than 20 cases. The more accurate figure should, however, be doubled since the issue also arose in almost 20 rulings of the Court on provisional measures especially in cases involving the death sentence. The cases prominently involved a consistent challenge by Tanzania of the Court's jurisdiction to make such orders as it oversteps its powers; adjudicates *ex parte* and absent the Applicants' request; overrules final decisions of the Court of Appeal; is counter the legality of the death sentence in the international framework, and is redundant in the face of Tanzania's *de facto* abolitionist status and long-standing moratorium.[90]

[90] See for instance, *Rajabu*, para 116; and *Guehi* (provisional measures, 18 March 2016) para 15.

It appears that the educational purpose has not been achieved over seven years of adjudication to date from the first-ever 2013 *Mtingwi* ruling to the first 2015 *Thomas* judgment involving Tanzania. Meanwhile, the appellate jurisdiction row has extended beyond Tanzania as exemplified in Benin's submissions that the provisional ruling earlier referred to in the *Ajavon* Case is contrary to its constitutional order and challenges the jurisdiction of its Constitutional Court;[91] Ghana's plea that the interim order in the *Woyome* Case reverses the final ruling of its Supreme Court and the human rights jurisdiction of its domestic courts;[92] and Rwanda's objection in the *Umuhoza* Case that '… the African Court is neither a Court of Appeal nor a legislative body which can nullify or reform court decisions and make national legislation in lieu of national legislatives Assemblies'.[93]

The Court's posture could also belong to a political discourse on jurisprudence. The response that built up over the years could be part of an extrajudicial attempt to comfort states that is to engage them on a dialogical yet adjudicatory relationship. The proposition here is that the Court's preamble that it is not an appellate tribunal comes merely as anaesthesia to the subsequent wholesale surgery of domestic law and rulings of national courts. I propose, based on observable reality and logic, that the discourse is still of little relevance as states' confrontational feedback shows that they have an accurate understanding of the ultimate effects of the ruling of a Court that does what it says it does not do.

I believe the Court should rather revisit its law-making policy on appellate jurisdiction. Firstly, the Court is bound to adjust its decisional process on facts, law, and rulings of domestic courts. In particular, it might want to refrain from expressly stating that it is not an appellate court as such preliminary finding manifestly makes no difference to Respondents' submissions nor does it impact its ultimate pronouncements. In most situations that arose so far, a finding that it is an international court with explicit jurisdiction based on articles 3, 7, and 27(1) of the Protocol would largely suffice. Second, the Court should become 'a sober judge'[94] by refraining from making states perceive it as an appellate court especially when it is making reference to proceedings that formed decisions rendered by municipal courts. As presented in this article, the Court, in

[91] See Respondent State's response to the Applicant's request for provisional measures dated 25 January 2019 where Respondent avers that the measure that Applicant must be allowed to participate in an election cannot be ordered by the African Court because the Constitutional Court of Benin has exclusive jurisdiction by virtue of the Constitution to make such determination in application of the Electoral Act.

[92] *Woyome* para 28.

[93] *Umuhoza* para 52.

[94] Saunders, AD. 'The Role of the Court of Appeal in Developing and Preserving an Independent and Just Society' (Distinguished Jurist Lecture 2012) Judicial Education Institute, Trinidad and Tobago.

fact, rules on issues with a mere mention of domestic decisions without proper reference or substantiation. Among other measures in this respect, recourse to foreign borrowed principles such as that the 'bundle of rights and guarantees' deserves thorough overhaul.

Finally, I find it only fair to wake the reader from the jurisprudential fiction on the African Court's appellate jurisdiction *vis-à-vis* domestic courts. I do so by considering the remote scenario of why the African Court might actually need an appellate division in the international understanding of the mechanism or a chamber structure. All things being equal, litigation before the Court has dramatically increased over the years as seizure has more than doubled in the span of five years between 2014 and 2019.[95] In light of the statutory constraint of an 11 single bench adjudication of one case at a time, this docket change requires urgent action. The main one is arguably a chamber structure. At the current pace of adjudication, it could take over a decade to complete the 180 pending cases only.

There is also a concurring assessment in academia and among practitioners of increased possibilities of errors or limited appreciation of facts or law in the reasoning of the Court.[96] These views arguably receive support from consistent separate or dissenting opinions within the Court,

[95] As at November 2019, the Court had received 250 contentious applications of which 180 were pending; and 13 requests for advisory opinions of which 12 have been considered.

[96] See for instance, Burgorgue-Larsen L & Ntwari, G-F. 'Chronique de jurisprudence de la Cour africaine des droits de l'homme et des peuples (2018)' (2019) 120 *Revue Trimestrielle des Droits de l'Homme* 851–890; Burgorgue-Larsen L & Ntwari, G-F. 'Chronique de jurisprudence de la Cour africaine des droits de l'homme et des peuples (2015-2016)' (2018) 113 *Revue Trimestrielle des Droits de l'Homme* 128–178; Dzesseu, SFM. 'Le temps du procès et la sécurité juridique des requérants dans la procédure devant la Cour africaine des droits de l'homme et des peuples' (2019) 3 *African Human Rights Yearbook*; Adjolohoun SH. & Oré, S. 'Entre imperium illimité et *decidendi* timoré : la réparation devant la Cour africaine des droits de l'homme et des peuples' (2019) 3 *African Human Rights Yearbook*; Bizimana, E. 'Commentaire de l'arrêt de la Cour africaine des droits de l'homme et des peuples dans la requête *Mariam Kouma et Ousmane Diabaté c. Mali* (2019) 3 *African Human Rights Yearbook*; Kombo, BK. 'Silences that speak volumes: the significance of the African Court decision in *APDF and IHRDA v Mali* for women's human rights on the continent' (2019) 3 *African Human Rights Yearbook*; Novak, A. 'A missed opportunity on the mandatory death penalty: A case commentary on *Dexter Eddie Johnson v Ghana* at the African Court on Human and Peoples' Rights' (2019) 3 *African Human Rights Yearbook*; Mwiza, JN. 'Is the African Court's decision in *Dexter Eddie v Ghana*: a missed opportunity? Reply to Andrew Novak' (2019) 3 *African Human Rights Yearbook*; Oulepo, NHA. 'L'affaire *Armand Guehi c. Tanzanie* et la question du droit à l'assistance consulaire l'intrusion d'une nouvelle préoccupation dans le corpus juridique des droits de l'homme en Afrique' (2019) 3 *African Human Rights Yearbook*; Adjolohoun (n 82); and Possi, A. '"It is better that ten guilty persons escape than that one innocent suffer": the African Court on Human and Peoples' Rights and fair trial rights in Tanzania' (2017) 1 *African Human Rights Yearbook* 311–336.

both on procedural and substantive aspects of its pronouncements.[97] The critique has expanded on lack of clarity or substantiation; limited reasoning prior to reaching findings; weak or inexistent link between reasoning and operative orders; lack of reasoning leading to unprecedented orders or jurisprudential departure. This trend could be explained by a massive effect of a single bench structure for deliberations and decisions, which an appellate mechanism could address. The latter option has the potential to provide a greater, hence deeper, or simply a second scrutiny at appellate level. Having said that, the mode of recruitment cannot be downplayed as one of the most effective fixers among other reasons under the assumption of a higher and tighter adjudication quality at appellate level.[98] Such reform is not unprecedented in international human rights adjudication. The move was adopted for the ECHR through the well-known Protocol 11 with the 17-member Grand Chamber acting as an appellate body with final judgments, those rendered by the first seven member Chamber not being final.[99] Such reform is beyond jurisdictional fiction.

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[97] Justice Fatsah Ouguergouz who served on the Court from 2006 to 2016 is probably the record dissenter and has contributed a great deal to the development of the Court's jurisprudence. See also, Dissenting Opinion of Judge Chafika Bensaoula in *John Robert Penessis v Tanzania* (merits and reparations, 28 November 2019); Separate Opinions of Judge Chafika Bensaoula and Judge Blaise Tchikaya in *Rajabu*; Separate Opinion of Judge Gérard Niyungeko in *Ajavon*; and Joint Dissenting Opinion of Judge Rafaâ Ben Achour and Judge Elsie Thompson in *Thomas*; and the Partly Dissenting and Dissenting Opinion of Judge Rafaâ Ben Achour and Judge Elsie Thompson in *Abubakari*.

[98] Oellers-Frahm op cit note 1 at para 2.

[99] Ibid paras 19 and 20.

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