



Annales de la Faculté de Droit d'Istanbul

RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Can the Rome Statute of the International Criminal Court be Considered as the Relevant Human Rights Instrument in the Context of the Advisory Jurisdiction of the African Court on Human and Peoples' Rights?

Uluslararası Ceza Mahkemesi Roma Statüsü Afrika İnsan ve Halkların Hakları Mahkemesinin Danışma Görüşü Verme Yetkisi Bağlamında İlgili İnsan Hakları Belgesi Olarak Değerlendirilebilir Mi?

Ali Saçar¹

Abstract

Paragraph 1 of article 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights authorizes the African Court to give an advisory opinion within the broad scope of material jurisdiction. Although that is true in a textual sense, the African Court has preferred to the strict construction on the material jurisdiction and refused to give an opinion relating to the Rome Statute of the International Criminal Court. According to the author of this study, the African Court's advisory jurisdiction contains any subject, relating to the international human rights obligations of the African states, including instruments on the most serious crimes of international concern that have an impact on human rights.

Keywords

African Court on Human and Peoples' Rights, Rome Statute of the International Criminal Court, advisory jurisdiction, advisory opinion, human rights instruments

Öz

Afrika İnsan ve Halkların Hakları Şartı'nın Afrika İnsan ve Halkların Hakları Mahkemesi Kurulmasına İlişkin Protokolü'nün 4. maddesinin 1. fıkrası, Afrika Mahkemesi'nin danışma görüşü verme yetkisinin konu bakımından kapsamını oldukça geniş düzenlemektedir. Buna rağmen, Afrika Mahkemesi yetkisini dar yorumlayarak Uluslararası Ceza Mahkemesi Roma Statüsü'ne ilişkin danışma görüşü vermekten çekinmiştir. Bu çalışmanın yazarına göre, Afrika Mahkemesi'nin danışma görüşü verme yetkisi, insan haklarını da etkileyen en ağır suçların düzenlendiği belgeler dahil Afrikalı devletlerin uluslararası insan hakları yükümlülükleriyle ilgili her konuyu kapsamaktadır.

Anahtar Kelimeler

Afrika İnsan ve Halkların Hakları Mahkemesi, Uluslararası Ceza Mahkemesi Roma Statüsü, danışma görüşü verme yetkisi, danışma görüşü, insan hakları belgeleri

1 Corresponding Author: Ali Saçar (Res. Asst./PhD.), Tekirdağ Namık Kemal University, Faculty of Law, General Public Law Department, Tekirdağ, Turkey. E-mail: ali.sacar01@gmail.com ORCID: 0000-0002-2984-0543

To cite this article: Saçar A, "Can the Rome Statute of the International Criminal Court be Considered as the Relevant Human Rights Instrument in the Context of the Advisory Jurisdiction of the African Court on Human and Peoples' Rights?", (2020) 69 Annales de la Faculté de Droit d'Istanbul 277. <https://doi.org/10.26650/annaes.2020.69.0011>



Can the Rome Statute of the International Criminal Court be Considered as the Relevant Human Rights Instrument in the Context of the Advisory Jurisdiction of the African Court on Human and Peoples' Rights?

I. Introduction

In human rights law, all regional human rights courts have the advisory jurisdiction.¹ The African Court on Human and Peoples' Rights (African Court) is one of them. Paragraph 1 of article 4 of the Protocol to the African Charter on Human and Peoples' Rights (African Charter)² on the Establishment of an African Court on Human and Peoples' Rights (African Protocol)³ states that "At the request of a Member State of the OAU,⁴ the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission."⁵ However, the advisory jurisdiction of the African Court is not effective because of the strict construction of this court within the scope of the advisory jurisdiction. Mostly, requests for an advisory opinion have been rejected, so the advisory jurisdiction of the African Court has become nonfunctional.⁶ In this study, the orders of the African Court, which have requested an advisory opinion on international obligations of the African states related to the cooperation with the International Criminal Court (ICC) were examined.

Inter-American Court of Human Rights (Inter-American Court) has the most effective implementation of the advisory jurisdiction among human rights courts. It has given 25 advisory opinions to date. In this study, the advisory case law of the Inter-American Court will be used as a guide due to the similarity between the advisory jurisdiction of the Inter-American Court and the African Court. Both of them can give an advisory opinion on human rights instruments other than the instrument

1 Article 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), which was adopted on 4 November 1950 and entered into force on 3 September 1953, authorizes the European Court of Human Rights (European Court) to give an advisory opinion. The advisory jurisdiction of the European Court was first recognized by Protocol No. 2, which had been adopted on 6 May 1963 and had entered into force on 21 September 1970, then it was inserted to the European Convention by Protocol No. 11, which was adopted on 11 May 1994 and entered into force on 1 November 1998. Lastly, Protocol No. 16 to the European Convention, which was adopted on 2 October 2013 and entered into force on 1 August 2018, extended the advisory jurisdiction of the European Court. Article 64 of the American Convention on Human Rights (American Convention), which was adopted on 22 November 1969 and entered into force on 18 July 1978, authorizes The Inter-American Court of Human Rights (Inter-American Court) to give an advisory opinion.

2 The Charter was adopted on 1 June 1981 and entered into force on 21 October 1986.

3 The Protocol was adopted on 10 June 1998 and entered into force on 25 January 2004.

4 The OAU means the Organization of African Unity. After the Constitutive Act of the African Union, which was adopted on 7 November 2000 and entered into force on 26 May 2001, the Organization of African Unity was replaced by the African Union.

5 The Commission means the African Commission on Human and Peoples' Rights (African Commission). For the request which was rejected on the ground of this criteria, see *Request for Advisory Opinion No. 002/2012 by Pan African Lawyers' Union and Southern African Litigation Centre* Order of 15 March 2013, 4, para 8.

6 For the first and last advisory opinion given by the African Court, see *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child Before the African Court on Human and Peoples' Rights* Request No. 002/2013 Advisory Opinion of 5 December 2014.

which authorizes it. Paragraph 1 of article 64 of the American Convention on Human Rights (American Convention) states that “The member states of the Organization⁷ may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States,⁸ as amended by the Protocol of Buenos Aires,⁹ may in like manner consult the Court.”

II. The Meaning of “Relevant Human Rights Instruments”

According to paragraph 2 of Rule 82 of the Rules of Court of the African Court,¹⁰ any request for an advisory opinion has to contain a concrete provision of the relevant instrument that is a subject of the advisory opinion, and circumstances lying behind the request. The sole advisory opinion given by the African Court was related to the African Protocol.¹¹ There has been no advisory opinion about human rights instruments other than the African Charter and the African Protocol. Therefore, it is not clear which instruments will be considered relevant,¹² and qualify as a human rights instrument. The advisory case law of the Inter-American Court can give an opinion on this matter.¹³

The first advisory opinion of the Inter-American Court has been about interpreting the phrase “other treaties concerning the protection of human rights in the American states” of article 64 of the American Convention.¹⁴ The Inter-American Court has stated that its advisory jurisdiction has not been limited to international instruments adopted within the Organization of American States (American States) system.¹⁵ On the other hand, a relevant instrument that might be a subject of an advisory opinion has had to be directly related to the protection of human rights in a member state of the American States.¹⁶ Because of the text in article 64 of the American Convention has not contained

7 The Organization means the Organization of American States.

8 The Charter was adopted on 30 April 1948 and entered into force on 13 December 1951.

9 The Protocol of Buenos Aires was adopted on 27 February 1967 and had entered into force on 27 February 1970. After the amendment to the Charter of the Organization of American States with the Protocol of Cartagena de Indias, which was adopted on 5 December 1985 and entered into force on 16 November 1988, competent organs are listed in Chapter VIII.

10 The Rules were adopted on 1 September 2020 and entered into force on 25 September 2020.

11 *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child* (n 6) 5, para 8.

12 Frans Viljoen, *International Human Rights Law in Africa* (2nd ed, Oxford University Press 2012) 448.

13 AP van der Mei, “The Advisory Jurisdiction of the African Court on Human and Peoples’ Rights” (2005) 5/1 *African Human Rights Law Journal* 27, 38. Paragraph 1 of article 31 of the Vienna Convention on the Law of Treaties, which was adopted on 23 May 1969 and entered into force on 27 January 1980, states 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.” So, the existence of similar texts in the same field requires a similar interpretation in line with the purpose of the effective protection of human rights.

14 “*Other Treaties*” *Subject to the Consultative Jurisdiction of the Court* Advisory Opinion OC-1/82 of 24 September 1982, 2, para 8.

15 *Id* 5, para 20.

16 *Id* 5, para 21.

any other restriction, the advisory jurisdiction cannot be interpreted restrictively.¹⁷ The Inter-American Court has stated that "... the advisory jurisdiction of the Court can be exercised, in general, with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto."¹⁸ However, the advisory jurisdiction of the Inter-American Court has not included any matter concerning international obligations of a state that is not a member of the American States and the structure or operation of an international organization other than the American States.¹⁹

In the advisory case law of the Inter-American Court, there has been an example of interpreting international instruments, which has not been adopted for the protection of human rights but has contained a provision relating to human rights.²⁰ The Inter-American Court has stated that "... Article 36 of the Vienna Convention on Consular Relations²¹ concerns the protection of the rights of a national of the sending State and is part of the body of international human rights law."²²

When interpreting the phrase "relevant human rights instruments" in article 4 of the African Protocol, the aforesaid advisory case law of the Inter-American Court must be kept in mind. So, the advisory jurisdiction of the African Court shall be interpreted broadly.²³ However, the African Court has preferred the strict construction of the material jurisdiction already.

Coalition on the International Criminal Court, Legal Defence & Assistance Project, Civil Resource Development & Documentation Center and Women Advocates Documentation Center, which have been "... registered non-governmental organizations based in Nigeria and undertake work for the promotion and protection of human rights and the fight against impunity across Africa, especially in West Africa ...",²⁴ requested an advisory opinion related to the interpretation of some provisions of the Rome Statute of the International Criminal Court (Rome Statute)²⁵, the Vienna Convention on the Law of Treaties and the Constitutive Act of the African Union.²⁶ Resolutions of the African Union that had been calling on member states to

17 Id 8, para 37.

18 Id 12, para 52.

19 Ibid.

20 *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* Advisory Opinion OC-16/99 of 1 October 1999, 47, para 76.

21 The Convention was adopted on 22 April 1963 and entered into force on 19 March 1967.

22 *The Right to Information on Consular Assistance* (n 20) 64, para 141(2).

23 Mei, "The Advisory Jurisdiction of the African Court" (n 13) 39-40.

24 *Request for Advisory Opinion 001 of 2014*, 1-2, para 1.

25 The Statute was adopted on 17 July 1998 and entered into force on 1 July 2002.

26 *Request for Advisory Opinion 001 of 2014*, (n 24) 4-5, para 11.

refuse to cooperate with the Office of the Trial Prosecutor of the ICC to the arrest and surrender of president Omar al Bashir of Sudan were lying behind the request.²⁷ In conclusion, the applicants asked these questions:

“a. Whether the Treaty obligation of an African state party to the Rome Statute of the ICC to cooperate with the court is superior to the obligation of that state to comply with the AU resolution calling for non-cooperation of its members with the ICC?

b. If the answer to question (a) above is in the affirmative, whether all Africa State parties to the ICC have overriding legal obligation above all other legal or diplomatic obligations arising from resolutions or decisions of the African Union to arrest and surrender President Omah Al Bashir any time he enters into the territory of any of the African State parties to ICC?”²⁸

The African Court received the request on 28 March 2014.²⁹ The African Commission confirmed that the request had not related to any case before itself.³⁰ However, the African Court refused to give an opinion upon the request on the grounds that “... it raises issues of general Public International Law and not human rights law, and does not specify any provisions of the Charter” and the lack of interest of the applicants to pursue the case.³¹

Applicants claimed the African Court re-listed the request because of the document showing interest in them to pursue the case, which had been transmitted to the Court before the order on inadmissibility was adopted.³² The African Court refused to give an opinion because the applicants had not supplied any evidence about their assertion.³³ Also, it reiterated that “... the Authors have not specified the provisions of the Charter or any other international human rights instrument in respect of which the advisory opinion is being sought. The issues raised by the Authors are rather of general public international law and not of human rights. Indeed, the issues raised have to do with the hierarchy of norms in Public International Law”.³⁴

Former judge Fatsah Ouguergouz from Algeria dissented from the order of the African Court.³⁵ In addition to his dissenting view about the procedure followed in

27 Id 3-4, paras 8-9.

28 Id 5, para 12.

29 *Request for Advisory Opinion No. 001 of 2014 by the Coalition for the International Criminal Court, the Legal Defence & Assistance Project (LEDAP), the Civil Resource Development & Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC)* Order of 5 June 2015, 5, para 6.

30 Id 5, para 8.

31 Id 6, para 13.

32 *Request for Advisory Opinion No. 001 of 2015 by the Coalition for the International Criminal Court, the Legal Defence & Assistance Project (LEDAP), the Civil Resource Development & Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC)* Order of 29 November 2015, 5, para 15.

33 Id 6, para 16.

34 Id 6, para 18.

35 *Request for Advisory Opinion No. 001 of 2015 by the Coalition for the International Criminal Court, the Legal Defence & Assistance Project (LEDAP), the Civil Resource Development & Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC)* Dissenting Opinion of Judge Fatsah Ouguergouz 1, para 1.

the treatment of the request,³⁶ he argued that the request was within the material jurisdiction of the African Court.³⁷ Judge Ouguergouz stated that "... the Authors indicated their reliance in particular on Articles 1, 4, 5, 12, 13 and 86 of the Rome Statute of the International Criminal Court; they also specified the circumstances giving rise to their request."³⁸ So, the matter of debate was whether the Rome Statute could be considered within the "relevant human rights instruments".³⁹

According to judge Ouguergouz, the protection of human rights is based on international law, so matters that relate to the law of treaties or the hierarchy of norms in international law may also be a concern with human rights.⁴⁰ The author of this study shares this opinion but it must be extended. Firstly, the phrase "relevant human rights instruments" can be interpreted as any human rights instrument or provision of another kind of international instrument relating to the protection of human rights, which deal with international human rights obligations of the member states of the African Union. There is an argument that the material jurisdiction of the African Court contains all human rights matters including ones which are not related to legal obligations arising from the signature or ratification of relevant instruments by any African state.⁴¹ The author of this study does not agree with this argument because the word "relevant" requires the existence of necessity among the member states of the African Union to make international human rights obligations clear. Secondly, if a question in the request for an advisory opinion is formulated imperfectly, the African Court may reformulate the question and give an advisory opinion. The latter argument can be deduced from the practice of the Inter-American Court.⁴²

36 Id 1-2, paras 2-8.

37 Id 2-5, paras 9-24.

38 Id 3, para 16.

39 Id 3, para 17.

40 Id 4, para 19.

41 Frans Viljoen, "Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights" (2018) 67/1 *International and Comparative Law Quarterly* 63, 91-92.

42 For more information, see *Enforceability of the Right to Reply or Correction* Advisory Opinion OC-7/85 of 29 August 1986, 3-4, paras 12-17. It can also be deduced from the advisory practices of the Permanent Court of International Justice and the International Court of Justice. For more information about former, see *Interpretation of the Greco-Turkish Agreement of December 1st, 1926* Advisory Opinion of 28 August 1928 Series B. – No. 16, 15; Georg Schwarzenberger, *International Law*, vol I (2nd ed, Stevens & Sons Limited 1949) 485–86. For more information about latter, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion of 9 July 2004 ICJ Reports 2004, 136, 153–54, para 38; Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005*, vol I (4th ed, Martinus Nijhoff Publishers 2006) 345–46; Jochen Abr. Frowein and Karin Oellers-Frahm, "Article 65" in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 2006) 1401, 1409, para 23; Mahasen M. Aljaghoub, *The Advisory Function of the International Court of Justice 1946-2005* (Springer 2006) 133–34. Because of not resulting with binding judgment on a specific dispute between applicant and respondent, international courts generally have not refused a request unless there have been compelling reasons to find an application inadmissible. There has been no concrete example of what have been the compelling reasons. International courts have used this phrase for interpreting advisory jurisdiction broadly. For the practice of the African Court, see *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child*, (n 6) 11, para 40.

III. Why the Rome Statute May be Considered as a Relevant Human Rights Instrument?

The Security Council of the United Nations decided to refer the situation in Darfur since 1 July 2002, which was the date the Rome Statute entered into force, to the Prosecutor of the ICC.⁴³ In this resolution,⁴⁴ there was a reference to a report adopted by the International Commission of Inquiry (Commission of Inquiry) and related to violations of international humanitarian law and human rights law in Darfur.⁴⁵

According to the Commission of Inquiry, the killing of civilians in the armed conflict has violated human rights obligations regarding the right to life in addition to other international obligations.⁴⁶ Also, the wanton destruction of villages or devastation not justified by military necessity has violated the rights of everyone to adequate food, clothing and housing.⁴⁷ The forcible transfer of civilian populations has violated the freedom of movement, the right not to be displaced arbitrarily and the right to adequate housing.⁴⁸ In addition to the use of torture generally,⁴⁹ the rape and other forms of sexual violence have contravened the prohibition of torture and cruel, inhuman or degrading treatment or punishment and the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.⁵⁰ The unlawful confinement, incommunicado detentions and enforced disappearances have violated the right to liberty and security of person and the requirement of humane treatment and respect for the dignity of all persons deprived of their liberty.⁵¹

The Commission of Inquiry stated that "... the Government of the Sudan and the Janjaweed are responsible for a number of violations of international human rights and humanitarian law. Some of those violations are very likely to amount to war crimes, and given the systematic and widespread pattern of many of the violations, they would also amount to crimes against humanity. The Commission further finds that the rebel movements are responsible for violations that would amount to war crimes."⁵² Although it recognized that some individuals, as well as government

43 Resolution 1593 (2005) adopted by the Security Council at its 5158th meeting, on 31 March 2005 S/RES/1593 (2005) 1, para 1.

44 Id 1, preamble.

45 *Report of the International Commission of Inquiry on Darfur to the Secretary-General* adopted on 25 January 2005 (S/2005/60), pursuant to the Security Council resolution 1564 (2004) of 18 September 2004.

46 Id 84, para 291. It referred to paragraph 1 of article 6 of the International Covenant on Civil and Political Rights (ICCPR), which was adopted on 16 December 1966 and entered into force on 23 March 1976, and article 4 of the African Charter.

47 Id 89, para 318. It referred to article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which was adopted on 16 December 1966 and entered into force on 3 January 1976.

48 Id 92, para 330. It referred to article 12 of the ICCPR and article 11 of the ICESCR.

49 Id 106, para 375.

50 Id 101, para 356. It referred to article 7 of the ICCPR and article 5 of the African Charter. Article 37 of the Convention on the Rights of the Child, which was adopted on 20 November 1989 and entered into force on 2 September 1990, has been referred for the protection of the child against from all forms of sexual exploitation and sexual abuse.

51 Id 111, para 403. It referred to articles 7, 9 and 10 of the ICCPR.

52 Id 170, para 630.

officials, might have committed acts with genocidal intent,⁵³ it found the government of Sudan had no genocidal policy.⁵⁴

The Pre-Trial Chamber I of the ICC issued the warrant of arrest for the president Omar al Bashir of Sudan based upon the reasonable grounds to believe that he was responsible for some war crimes and crimes against humanity perpetrated in Darfur.⁵⁵ After that, another warrant of arrest, which contained the accusation of genocide, was issued⁵⁶ because the Appeals Chamber of the ICC had stated that the application of the erroneous standard of proof had caused the Pre-Trial Chamber to reject issue warrant of arrest in respect of genocide.⁵⁷

The Assembly of the African Union (Assembly) expressed its concern about the indictment against Omar al Bashir of Sudan⁵⁸ and stated that it would impair the peace processes underway in Sudan.⁵⁹ At the same time, the Assembly condemned “the gross violations of human rights in Darfur” and urged, “the perpetrators be apprehended and brought to justice”.⁶⁰ That means that the situation in Darfur has been considered by the African Union as a human rights matter, similar to the view of the Commission of Inquiry, since the very beginning. After the first arrest warrant, the Assembly decided that the member states of the African Union should not implement it.⁶¹ Chad made a reservation on this decision.⁶² The Assembly reiterated its decision on not cooperating with the ICC in the 30th session.⁶³ It also requested the “African Group in New York to immediately place on the agenda of the United Nations General Assembly a request to seek an advisory opinion from the International Court of Justice on the question of immunities of a Head of State and Government and

53 Id 173, para 641.

54 Id 172–73, para 640.

55 *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Situation in Darfur, Sudan) Warrant of Arrest for Omar Hassan Ahmad Al Bashir of 4 March 2009 No ICC-02/05-01/09-1, 7–8.

56 *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Situation in Darfur, Sudan) Second Decision on the Prosecution’s Application for a Warrant of Arrest of 12 July 2010 No ICC-02/05-01/09-94, 28.

57 *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Situation in Darfur, Sudan) Judgment on the appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir” of 3 February 2010 No ICC-02/05-01/09-73, 18, para 41.

58 *Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan* Adopted by the 12th Ordinary Session of the Assembly of the African Union in Addis Ababa, Ethiopia on 1–3 February 2009 Assembly/AU/Dec.221(XII) 1, para 1.

59 Id 1, para 2.

60 Id 1, para 7.

61 *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)* Adopted by the 13th Ordinary Session of the Assembly of the African Union in Sirte, Great Socialist People’s Libyan Arab Jamahirriya on 3 July 2009 Assembly/AU/Dec.245(XIII) Rev.1, 2, para 10. For more information about the manner of the African states on this matter, see Elise Keppler, “Managing Setbacks for the International Criminal Court in Africa” (2012) 56/1 *Journal of African Law* 1; Ottilia Anna Maungandze and Anton du Plessis, “The ICC and the AU” in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press 2015) 65, 67–68, 76–77; and especially for the situation in South Africa, see Johan D van der Vyver, “The Al Bashir Debacle” (2015) 15/2 *African Human Rights Law Journal* 559.

62 *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court*, (n 61).

63 *Decision on the International Criminal Court* Adopted by the 30th Ordinary Session of the Assembly of the African Union in Addis Ababa, Ethiopia on 28–29 January 2018 Assembly/AU/Dec.672(XXX) Doc EX.CL/1068(XXXII) 1, para 2(iii).

other Senior Officials as it relates to the relationship between Articles 27 and 98 and the obligations of States Parties under International Law”.⁶⁴ With reference to this decision,⁶⁵ The African States Members of the United Nations demanded the United Nations General Assembly (General Assembly) request an advisory opinion on the conflicting obligations of states relating to immunity of head of states and government or other senior officials.⁶⁶

Although the African Court interprets the debate as the conflict of international obligations that are not related to human rights, the aforementioned historical background proves that since the very beginning, serious human rights violations have been taken into consideration by both the United Nations and the African Union. Nobody has claimed that there has been a matter not relating to human rights.

Article 1 of the Rome Statute authorizes the ICC to “... exercise its jurisdiction over persons for the most serious crimes of international concern ...”. According to article 5 of the Statute, these crimes are the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Perpetrators of these crimes may also violate the human rights of victims. For example, if a person kills many people, who are members of the same religious group, with intent to destroy all of them, there will be both the crime of genocide and widespread violation of the right to life. Therefore, the most serious crimes of international concern may also be considered the most serious human rights violations.⁶⁷

In a contentious case, the African Court considered two instruments as relevant human rights instruments because they relate to international obligations ensuring

64 Id 2, para 5(ii). There is a debate about the obligation to cooperate with the ICC on the implementation of an arrest warrant which is related to a head of state and government not a party to the Rome Statute. In this situation, the obligation to cooperate with the ICC is based on the Security Council resolution. For more information about this matter, see Annalisa Ciampi, “The Obligation to Cooperate” in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol II (Oxford University Press 2002) 1607; Dapo Akande, “International Law Immunities and the International Criminal Court” (2004) 98/3 *American Journal of International Law* 407 in William A Schabas (ed), *International Criminal Law*, vol II (An Elgar Research Collection 2012) 252, 264–78; Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (4th ed, Cambridge University Press 2009) 439–41; William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 1036–46.

65 *Request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials* Request for the inclusion of an item in the provisional agenda of the seventy-third session 18 July 2018 A/73/144, 3, para 8.

66 Id 1. Meanwhile, paragraph 1 of article 3 of the Protocol on amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, which was adopted on 27 June 2014 and not entered into force, recognizes the international criminal jurisdiction of the new African Court. Also, article 46A bis of the Statute annexed to it gives immunity against the criminal jurisdiction of the Court to head of states and government or other senior officials, during their tenure of office. For more information, see Viljoen, *International Human Rights Law in Africa* (n 12) 450–51; Manisuli Ssenyonjo and Saidat Nakitto, “The African Court of Justice and Human and Peoples’ Rights ‘International Criminal Law Section’: Promoting Impunity for African Union Heads of State and Senior State Officials?” (2016) 16/1 *International Criminal Law Review* 71; Dire Tladi, “Article 46A Bis: Beyond the Rhetoric” in Charles C. Jalloh, Kamari M. Clarke and Vincent O. Nmeihelle (eds), *The African Court of Justice and Human and Peoples’ Rights in Context: Development and Challenges* (Cambridge University Press 2019) 850.

67 Viljoen, “Accessing the African Court on Human and Peoples’ Rights” (n 41) 92. Also, the African Commission has found various human rights violations in the matter of Darfur. For more information about this decision, see Frans Viljoen, “Introductory Note to African Commission on Human and Peoples’ Rights: Sudan Human Rights Org. v. Sudan; Ctr. For Hous. Rights & Evictions v. Sudan” (2010) 49/6 *International Legal Materials* 1569, 1569–72.

the implementation of article 13 of the African Charter, which has prescribed the right to participate freely in the government.⁶⁸ In the terms of paragraph 1 of article 3 of the African Protocol, the material jurisdiction of the African Court in the context of the contentious jurisdiction contains the African Charter, the African Protocol, and any other relevant human rights instrument ratified by the relevant state. The African Court stated, "... 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 State Parties for the consequent enjoyment of the said rights."⁶⁹ So, if an instrument contains specific human rights or obligations on the implementation of human rights, it shall be considered as a relevant human rights instrument. This determination is also valid for the advisory jurisdiction.

In another contentious case, the African Court found violation of latter part of the obligation to adopt legislative or other measures to give effect to human rights enshrined in the African Charter, which has been determined in article 1 of the Charter, in conjunction with paragraph 1 of article 7 of the Charter on the right to have one's cause heard by competent national courts.⁷⁰ Because, the respondent state "... had not acted with due diligence in seeking out, prosecuting and placing on trial those responsible for the murder ..." of four victims.⁷¹ Although, the applicants had alleged that there had been a violation of the right to life,⁷² the African Court did not examine this matter on the grounds that the murder of the victims had occurred on the date outside the jurisdiction of the Court.⁷³ So, it must not mean that any other right cannot be violated in conjunction with the general obligation to adopt all kinds of measures to ensure the implementation of it.

According to the basic principles and guidelines adopted by the General Assembly, if gross violations of international human rights law also constitute an international crime, "... States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations."⁷⁴ This principle contains, "... extradition or

68 Viljoen, "Accessing the African Court on Human and Peoples' Rights" (n 41) 93.

69 *Actions pour la Protection des Droits de l'Homme (APDH) v. The Republic of Cote d'Ivoire* Application 001/2014 Judgment of 18 November 2016, 15, para 57.

70 *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo & the Burkinabe Human and Peoples' Rights Movement v. Burkina Faso* Application 013/2011 Judgment of 28 March 2014, 54, paras 199, 203(3).

71 Id 44, para 156.

72 Id 5, paras 12-14.

73 Id 11, para 32(1)

74 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* Resolution adopted by the General Assembly on 16 December 2005 A/RES/60/147, 5, para 4.

surrender offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice ...”.⁷⁵

The Rome Statute determines international criminal responsibility for the most serious crimes of international concern, which may also be serious human rights violations.⁷⁶ If a perpetrator of these crimes is not investigated, tried or sentenced, the protection of human rights shall heavily be harmed. Any state, which prevents the process of criminal responsibility or refrains from cooperating with it, may be responsible for human rights violations because, there are international obligations ensuring criminal responsibility for widespread human rights violations, in the Rome Statute.⁷⁷ Therefore, it should be considered as a relevant human rights instrument which includes obligations on the implementation of human rights such as criminal responsibility for the perpetrators of the human rights violations.

The African Court may give an advisory opinion about whether procedural obligations to the investigation of human rights violations include such an international obligation to cooperate with ICC contrary to the manner of the African Union. It could be possible to give an advisory opinion on this matter after the reformulation of questions of the aforementioned request. For example, the question (a) may be understood as “in the context of the obligation on criminal responsibility for the perpetrators of the human rights violations arising from articles 1 and 7 of the African Charter, whether the obligation of an African state party to the Rome Statute to cooperate with the ICC is superior to the obligation of that state to comply with the African Union resolution calling for non-cooperation of its members with the ICC”.⁷⁸

IV. Conclusion

The advisory jurisdiction of the African Court is recognized so broadly in the text of the African Protocol. However, the strict construction of the African Court on the material jurisdiction makes the effective implementation of the advisory procedure difficult.

⁷⁵ Id 5, para. 5.

⁷⁶ Cryer and others, *An Introduction to International Criminal Law and Procedure* (n 64) 10; Thomas Margueritte, “International Criminal Law and Human Rights” in William A Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011) 435, 436–38.

⁷⁷ Annalisa Ciampi, “State Cooperation with the ICC and Human Rights” in Mauro Politi and Federica Gioia (eds), *The International Criminal Court and National Jurisdictions* (Ashgate 2008) 103, 108–09; Margueritte, “International Criminal Law and Human Rights” (n 76) 438–39. An early example of the criminal responsibility for widespread human rights violations was the Nuremberg prosecutions. Diane F Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime” (1991) 100/8 *Yale Law Journal* 2537 in William A Schabas (ed), *International Criminal Law*, vol II (An Elgar Research Collection 2012) 693, 697–700.

⁷⁸ It is not the matter of this study whether the African Court must give an affirmative or negative response to this question.

According to the African Protocol, the African Court may give an advisory opinion relating to any human rights instrument on the international human rights obligations of the member states of the African Union. Relevant instruments may be adopted for the purpose other than the protection of human rights or may not contain any specific human rights provision. If it includes any provision ensuring the implementation of human rights and deals with human rights obligations of the African states, the African Court shall find itself competent to interpret such an instrument.

When the request to give an advisory opinion about conflicting international obligations of the African states on the Omar al Bashir debate had been received by the African Court, there arose a chance to interpret the Rome Statute as a relevant human rights instrument after reformulation of questions. However, in the decision of the African Court, there was not any discussion on the nature of the Rome Statute⁷⁹ or circumstances lying behind the request. The only reason was that the subject of the request was about international law matters but not related to human rights. The formulation of questions within the request was not enough to assert that the case was about international human rights obligations. Nevertheless, the author of this study reiterates that a request should not be refused if it is possible to reformulate questions. International obligations on the criminal responsibility for widespread human rights violations are related to human rights, therefore the African Court may interpret the Rome Statute as a relevant human rights instrument.

Hakem Değerlendirmesi: Dış bağımsız.

Çıkar Çatışması: Yazar çıkar çatışması bildirmemiştir.

Finansal Destek: Yazar bu çalışma için finansal destek almadığını beyan etmiştir.

Peer-review: Externally peer-reviewed.

Conflict of Interest: The author has no conflict of interest to declare.

Financial Disclosure: The author declared that this study has received no financial support.

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⁷⁹ Lilian Chenwi, "The Advisory Proceedings of the African Court on Human and Peoples' Rights" (2020) 38/1 *Nordic Journal of Human Rights* 61, 67-68.

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