The last decade has been characterized by significant legal developments in Africa. A continental approach of promotion and protection of Human Rights has been adopted, leading up to the creation of a comprehensive Africa Human Rights Architecture, with the African Court on Human and Peoples’ Rights at its apex.

To effectively utilize this Architecture, the possibilities for complementarity between its constituent organs, including regional courts and other institutions on the continent, need to be studied and analysed.

Litigants, citizens and the entire African human rights system will benefit from a practical tool, highlighting the instances in which litigants can instigate or initiate motions for complementarity, and further, providing for them precedents they can use to file such motions.

The purpose of this Guide is to foster a strong understanding and commitment from legal practitioners and human rights activists and advocates to promote and fully utilize African institutions and mechanisms in improving the life of the citizenry, support human development and uphold justice and the rule of law on the continent. It further seeks to catalyse a deeper understanding of the interaction between the African Court and the African Commission on Human and Peoples’ Rights, as well as the Courts of the Regional Economic Communities and the African Committee of Experts on the Rights and Welfare of the Child and the complementarity that exists between them in their respective protective mandate. It will finally provide practical guidance to litigants on exploiting the complementarity between these institutions, for the protection of human and peoples’ rights in Africa.

This Guide builds on the work the Pan African Lawyers Union has carried out over the last five years in monitoring and participating in the first cases before the African Court as well as in contributing to the development of the African Human Rights System and the African Governance Architecture.

Guide to Complementarity within the African Human Rights System
The Pan African Lawyers Union (PALU) is a continental membership forum for lawyers and lawyers’ associations founded to reflect the aspirations and concerns of the African people and to promote and defend their shared interests.

Our Vision: A united, just and prosperous Africa built on the rule of law and good governance.

Our Mission: To advance the law and the legal profession, rule of law, good governance, human and peoples’ rights and socio-economic development of the African continent.
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FOREWORD

The past few years have been characterized by significant developments on the African Human Rights landscape. One of the major highlights was the establishment of the African Court on Human and Peoples’ Rights. In December 2009, the African Court disposed of the first ever case to be filed before it: the case of Michelot Yogogombaye versus The Republic of Senegal. The Court had no option but to dismiss the matter at the admissibility stage because Senegal had not made the requisite Article 34 (6) Declaration allowing individuals and NGOs to institute cases against it. With only 7 countries having filed the Declaration so far, this is perhaps the biggest challenge the Court is facing.

In the short term, pending more Declarations allowing direct access before it, the Court will still rely heavily on the African Commission on Human and Peoples’ Rights to refer cases to it for adjudication under the complementarity regime. While this is currently the most practical route of access for cases, it is one that has received the least attention from scholars and practitioners.

This Guide will serve as a valuable tool for litigants and citizens, highlighting the strategies they can use to initiate motions for complementarity, and further provide them with appropriate templates and precedents. It builds on the work PALU has carried out over the last 5 years in monitoring and participating in the first cases before the Court as well as in contributing to the development of the African Human Rights System and the African Governance Architecture.

This Guide is not restricted to complementarity between the above-mentioned institutions but, rather, discusses complementarity within the broader spectrum of the African Human Rights System, including the African Committee of Experts on the Rights and Welfare of the Child and the Courts of the Regional Economic Communities (RECs) recognized by the African Union.

I would like to thank the following authors of the different chapters for their contributions to this guide: Dr. Clement Mashamba, Dr. Solomon Ebobrah, Ms. Osai Ojigho and Mr. Dan Juma as well as the Editor, Prof. Chidi Anselm Odinkalu. I would also like to acknowledge the contributions of individuals who provided valuable insight in the preparation of this Guide, particularly Dr. Ibrahima Kane, Dr. Godfrey Musila and Dr. Joseph Gitari from Ford Foundation. I extend my appreciation to Ford Foundation for supporting this initiative, as well as the Chief Executive Officer of PALU, Donald Deya and all the Staff at the Secretariat for their hard work and dedication to this project and for ensuring the effectiveness of the systems established to promote and protect human rights on the continent.

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African Peer Review Mechanism
Chapter 1

Complementarity Between the African Commission and the African Court

Dan Juma
Guide to Complementarity within the African Human Rights System
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Complementarity Between the African Commission and the African Court

Dan Juma *

1. Introduction

The African Commission on Human and Peoples’ Rights1 and the African Court on Human and Peoples’ Rights2 constitute the core institutional machinery for the promotion and protection of human rights under the African human rights system. Under the African Charter, the Commission’s main functions are to

1) promote human rights through education, standard-setting, international cooperation and interpretation of the Charter;3 and

2) protect human rights through state and individual communications.4

The Court’s main functions are to

1) protect human rights through adjudication of cases and disputes;5 and

2) promote human rights through advisory opinions.6

The Court is mandated to ‘complement and reinforce’ the functions of the Commission,7 particularly its protective mandate.8 Whereas no institutional hierarchy is explicit nor is complementarity used as a term of art, some have argued that hierarchy is implied.9

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3) Article 45(1) and (3) of the African Charter.

4) Article 45(2) of the African Charter.


8) Articles 2 and 8 and Preamble, paragraphs 4 and 5 of the African Protocol.

Although the enhancement of the efficiency of the protective mandate is the main locus of complementarity between the African Commission and the African Court, the African Charter and the preamble to the Court’s constitutive instrument suggest that complementarity between the institutions is not confined to the protective sphere. This systemic approach is reinforced by the interconnectedness of protective, promotional and interpretive functions. For example, the Commission’s promotional visits to state parties are protective by remedying or preventing specific human rights violations. Similarly, remedies adopted by the African Commission or its special rapporteurs not only provide protection to the immediate subjects of human rights violations, but also radiate systemic effects thus performing a promotional role. When reinforced by the Court, these remedies or responses are as much promotional as they are protective.

2. Objectives of Complementarity between the African Commission and the African Court

The African Court’s constitutive instrument invokes complementarity as the guiding principle for its relations with the African Commission, although it provides little guidance on the nature and objectives of complementarity as an organizing principle. Complementarity’s meaning and implication can, however, be constructed from the history and structure of the African human rights system. Moreover, three overriding purposes may be abstracted from the normative aspects of the Protocol and the dual structure of a Commission and a Court built therefrom. First, the primary objective of complementarity is functional; its purpose is to enhance the efficiency and effectiveness of the system. Second, complementarity has a relational purpose; it organizes and regulates the relationship between the Commission and the Court under a system of shared jurisdictional competence and collective enforcement. Finally, complementarity is normative; it is an aspirational medium for realizing the norms and constitutional goods envisaged under the African human rights system.

Objectives of Complementarity between the African Commission and the African Court

1) **Effectiveness and Efficiency:** The principle of enhancing the efficiency of the African Commission is explicitly invoked by the Protocol. In the context of the history of the African human rights system, efficiency denotes that the African Court’s complementarity should enhance the effectiveness of the system’s functions, procedures and outcomes.

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10) Article 45(1)(c) of the African Charter grants the Commission express powers to “cooperate with other African and international institutions concerned with the promotion and protection of human and peoples’ rights.”

11) Preamble to the African Protocol, paragraphs 4 and 5. See Ebobrah (n 9) 22.

12) This relational aspect is expressly mandated in Articles 2 and 8 of the African Protocol. See also Ebobrah (n 9).

13) Preamble to the African Protocol, paragraphs 4 and 5.
II) **Interdependence, cooperation and collective enforcement:** A principle underlying complementarity is to promote collective enforcement of the rights through joint endeavor and collegiality. The objectives of cooperation and collective enforcement are explicitly invoked in the Protocol.\(^{14}\)

III) **Normative Coherence:** The principle of complementarity is integrationist as it seeks the application of protective, promotional and interpretive norms by the African Commission and the African Court in a mutually supportive manner. This has the function of promoting the overall purpose of the African human rights system.

IV) **Subsidiarity:** The principle of subsidiarity denotes the co-existence of multiple or coordinate layers of institutional actors in human rights protection. It is invoked in the African human rights system through the exhaustion of local remedies’ rule.\(^{15}\) Referral and transfer of individual communications between the African Commission and the African Court are forms of horizontal subsidiarity as they distribute functions where they are performed best.

V) **Management of forum shopping:** Although forum shopping is not inherently problematic, it carries the risk of duplication and dysfunctionality of the system where it results in conflicting decisions, leads to delays in disposal of cases, or a subversion of justice. The rules aimed at cooperation between the African Commission and the African Court, including admissibility determination,\(^{16}\) referral of individual communications\(^{17}\) and transfer of cases\(^{18}\) should take cognizance of the management of forum shopping.

3. **Complementarity between the Commission and Court in the Protective Mandate**

The touchstone of any human rights system is its protective mandate. In the African human rights system, the protective mandate is vested in the African Commission, which has the mandate to receive state\(^{19}\) and individual communications,\(^{20}\) and the African Court, which has jurisdiction to deal with all cases and disputes submitted to it regarding the interpretation and application of the Charter, the Protocol and any other human rights instrument ratified by the concerned states.\(^{21}\) Under the complementarity

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\(^{14}\) For example, Article 45(1)(c) of the African Charter grants the Commission express powers to “cooperate with other African and international institutions concerned with the promotion and protection of human and peoples’ rights.”

\(^{15}\) Article 50 of the African Charter.

\(^{16}\) Article 6(2) of the African Protocol.

\(^{17}\) Article 5(1)(a) of the African Protocol.

\(^{18}\) Article 6(3) of the African Protocol.

\(^{19}\) Article 49 of the African Charter.

\(^{20}\) Article 55 of the African Charter.

\(^{21}\) Article 3 of the African Protocol.
principle, the Court does not replace the Commission, but complements the Commission’s protective function.

I) Complementarity in Entrance to the Commission’s and the Court’s Protective System

It is a general practice of international and regional human rights bodies that the exercise of the protective function is initiated by state parties, international organizations, non-governmental organizations or individuals. In accordance with the African Charter and rules made under it, any individual, group, representative, or legal person, including a non-governmental entity, may submit a non-state communication to the African Commission, whether or not such person is an alleged victim. In view of this expansive approach to standing, the authors do not require the consent of the alleged victims to institute the communication. There is no prescribed format of a communication, provided that it presents, at this stage, a prima facie case and satisfies the conditions laid down in the Charter and the Commission’s rules. Thus any person may submit a communication without the assistance of a lawyer.

In contrast, access to the African Court is limited to a category of applicants and subject to conditions. Under Article 5(1) of the Protocol, the following are entitled to submit cases to the Court directly:

a) The Commission;

b) The complainant state party before the Commission;

c) The respondent state party before the Commission;

d) The state party whose citizen is a victim of human rights violation; and

e) African intergovernmental organizations.

The African Court may, in addition, entitle Non Governmental Organizations (NGOs) with observer status before the Commission and individuals to submit cases directly to it, subject to acceptance by the concerned state party to the Protocol. Where NGOs and individuals have direct access, they may submit a case in the prescribed format either directly or through a legal representative. However, in the absence of acceptance of the Court’s jurisdiction by the state party concerned, NGOs and individuals are not precluded from submitting cases indirectly, through the Commission, and less plausibly, African intergovernmental organizations and state parties exercising such right to protect a citizen who has been a victim of human rights violations.

22) Rule 93 of the Rules of the African Commission. Note that Article 55 of the Charter is silent on standing as it does not stipulate a victim requirement.


24) Articles 5(3) and 34(6) of the African Protocol. Seven states: Rwanda, Mali, Senegal, Tanzania, Burkina Faso, Ghana and Cote d’Ivoire as at December 2013.
At the entry stage, known as seizure, the practice of the African Commission is to receive all communications. There is no examination of communications to ascertain admissibility or the existence of jurisdiction. In view of the requirement for complementarity, this provides a pathway through which NGOs and individuals may ultimately submit cases indirectly, through the Commission, to the African Court. Beyond this form of complementarity in ordinary communications, in cases of extreme gravity and urgency, this broad acceptance of communications may reinforce the protective mandate of the African human rights system, whereby the Commission mainly ‘receives to refer.’ The Court, like the Commission, may also receive all cases without any examination to ascertain admissibility beyond prima facie jurisdiction.

At What Stage May the African Commission Refer a Case to the African Court?

The referral of cases by the African Commission to the African Court is a distinct procedural phase and an express function mandated in the Protocol. It is, therefore, not only an exercise of power, but also a duty that flows from the Commission’s protective function. This duty is more compelling if viewed from the optic of complementarity and the limitations of access by NGOs and individuals to the Court. The basis of a duty-based approach, as is the practice in the Inter-American human rights system, is to ensure that the limited access of individuals and the lack of incentives on the part of states to refer cases do not undermine the effective functioning of the system’s protective mandate.  

There are three main stages at which the African Commission may refer a case to the African Court. First, the Commission may refer a case, at any time, after the receipt of a communication, either before or after a decision on seizure, but before examination on its admissibility and merits stages. An example of such case is a communication in which a state party has failed to comply with provisional measures requested by the Commission. In view of the Commission’s power to grant and request provisional measures immediately upon receipt of a communication, such referral may be made immediately [before a decision on seizure]. It may also be made after the expiry of 15 days following receipt of the request by the state. At this stage, the Court’s function is to provide additional reinforcement of the Commission’s protective mandate.

The second stage at which the African Commission may make a referral to the African Court is during the examination of a communication either at the admissibility or merit stages, but before the delivery of a final decision. A prime candidate for such cases are where the Commission determines that

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25) The Inter-American Court has explained in an advisory opinion that, in view of the limited standing of individuals and the lack of incentives on the part of states to refer cases to it, the Inter-American Commission has a special duty to seize the Court so as to ensure the effective functioning of the system’s protective mandate established by the Convention. See Inter-Am. Ct H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85, Series A. No. 5, 86 (1985), at para. 25, available at http://www.corteidh.or.cr/seriea_ing/index.html.


a situation within or related to a case constitutes serious or massive violations of human rights. In order to circumvent the circuitous procedure of notifying the Assembly, which may then request it to undertake an in-depth study of these cases and make a factual report, the Commission may now refer the communication to the Court directly, without delay. Finally, where the African Commission considers that a state party has not complied or is unwilling to comply with its final recommendations in respect of a state or non-state communication under the Charter, it may submit a case to the African Court. This type of referral comes late in the life of a communication, and is premised on the normative weight of the Court’s finding relative to the recommendatory nature of the Commission’s decisions. Its function is to provide an avenue for the Court to complement the Commission’s protective mandate.

What is the role of the African Commission where it refers a case to the African Court?

There is a related question that touches on complementarity: What is the role of the African Commission where it refers a case to the African Court? As a general principle, the role of the Commission depends on the type of referral. In cases where the Commission refers a case for non-compliance or unwillingness of a state party to comply with its recommendations in respect of a communication, or provisional measures, the Commission is expressly a party to the proceedings. In addition, where the Commission refers a matter to the Court before the merits stage, the Commission is not merely an interested party, but a party to the proceedings alongside the litigant.

What Criteria Determine Referrals by the African Commission to the Court?

The African Commission is entitled to refer a case to the African Court. In a regional human rights system with a Commission and a Court, ‘hard cases,’ ‘complex cases,’ and ‘urgent cases’ are prime candidates for judicial resolution. The Commission may also play the role of a filter, isolating and referring only cases that meet some criteria. The Commission’s rules provide a general category of cases it may refer to the Court, but these do not constitute criteria per se. The Commission has, therefore, recently passed a resolution directing its Secretariat to further research and propose criteria for referral of cases to the African Court. These criteria may consolidate and improve upon the rules of the Commission and the following preliminary indicia apparent in the first three cases it submitted to the Court:

30) Article 58(2) of the African Charter.
31) Rules 84(2) and 118(3) of the Rules of the African Commission.
35) 49th Ordinary Session, paragraph 37.
a) Cases in which the Court has prima facie jurisdiction, that is, the state party concerned has ratified the African Charter and Protocol;

b) Cases in which the NGOs and individuals do not have direct access to the Court;

c) Cases of extreme gravity and urgency, with the risk of irreparable harm, requiring protective measures such as preliminary measures;

d) Cases involving weighty and far-reaching issues of law;

e) Cases in which there is a promotional and protective value in adjudication in public; and

f) Situations constituting serious or massive violations of human rights.

What Criteria Determine Transfer of Cases by the African Court to the Commission?

The African Court is entitled to transfer a case to the African Commission. Apart from the Court, it is also plausible that the Commission, litigant or victim may request a transfer of a case from the Court to the Commission. The Court’s rules provide no category of cases it may transfer to the Commission. The Commission’s rules provide no guidance whether the Court would be required to appear before the Commission in such cases, as does the Commission where it refers a case to the Court. The Court should develop and publish criteria for transfer of cases, based on complementarity (for example, transferring a case to the African Commission for joinder with another similar case), subsidiarity (for example, transferring a case to the African Commission, based on geographical proximity, without compromising the litigants’ access to justice) and system effectiveness (for example, transferring a case whose outcome implicates a wider array of actors beyond the litigants). Other transfers may seek to advance some of the human rights system’s functions such as amicable settlement, fact-finding or determination in the merit stage.

(II) Complementarity in Protection through Provisional Measures

The granting of provisional or interim measures as a means of preventing irreparable harm in cases of extreme gravity and urgency has become a standard procedure in international, regional and domestic human rights systems. Human rights bodies have implied and/or express authority to grant requests or orders for precautionary measures without which their examination of the case before them would be meaningless. The African Commission may, therefore, request a state to adopt provisional measures under its procedures notwithstanding the absence of express authority in the African Charter, whereas the African Court has express authority under the Protocol to issue orders for provisional or interim measures against a state party on its own initiative or at the request of the Commission.
or a party to the communication.⁴¹ Such provisional measures may be granted at any time after the receipt of a communication, including during the intersession period before a decision on seizure or determination on the merits.⁴²

Provisional measures by the African Court provide an additional bulwark to complement and reinforce the African Commission’s protective mandate. In cases of urgency and gravity in which provisional measures have been requested, the Commission may refer the case to the Court immediately before examining its admissibility.⁴³ It may also refer a case in which a state party has failed to comply with its requests for provisional measures.⁴⁴ As is with the Commission, the Court may issue orders for provisional measures at any time after the receipt of a communication.⁴⁵ The orders are binding given the Court’s adjudicative function, its express powers to issue provisional measures, and its protective powers as a judicial body whose judgments are binding. It also follows that non-compliance with an order for interim measures constitutes non-compliance with the Court’s judgment. The Court therefore reports non-compliance with its orders for interim measures to the Assembly, in conformity with the requirement of the Protocol.⁴⁶

A robust practice of clear interim measures, supported by timely follow-up procedures by the African Court, may remedy some of the problems of non-compliance with requests for provisional measures. In view of claims by states parties that the African Commission’s provisional measures are not binding in the absence of express Charter authority, the Court’s express mandate under the Protocol may improve the effectiveness of the interim measures. A further opportunity is presented in the requirement that the Court present its annual report to the African Union Assembly, identifying states that have not complied with its orders for interim measures and making recommendations as appropriate.⁴⁷

The following mechanisms may promote complementarity towards the effectiveness of provisional measures issued by the Commission and the Court:

a) The enlistment of fast-track procedures focusing on reinforcing interim remedial action where a case is referred to the Court for non-compliance with provisional measures.

b) Harmonization of monitoring and follow-up procedures to ensure effectiveness of provisional measures.

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⁴¹ Article 27(2) of the Protocol and 51(1) of the Rules of the Court.


⁴⁴ Rule 118(2) of the Rules of the African Commission.

⁴⁵ Article 27 of the African Protocol.


⁴⁷ ibid.
(III) Complementarity in Determination of Admissibility Requirements

The determination of admissibility is generally the stage that follows seizure of the African Commission and the African Court. In determining which communications or cases may be terminated or considered on merit in the subsequent stage, admissibility standards and procedures serve as a filter into the system. Therefore, where all the conditions are not met, the case may be declared inadmissible and thereby terminated provided that it could be reviewed at a later date where the complainant can provide information to the effect that the grounds for inadmissibility no longer exist.48

In making their findings on admissibility in communications and cases, the African Commission is required to consider, whereas the African Court may take into account, the admissibility requirements contained in the African Charter.49 The Court has some degree of inherent discretion to consider other requirements of admissibility, whereas the Commission is not precluded from drawing from comparative experience, where appropriate.50 Under the Charter and their rules of procedure, the Commission and the Court will generally find a communication or case admissible or inadmissible based on a cumulative assessment of the conditions.

Admissibility Criteria: Article 56 of the African Charter

a) Communication discloses its authors and their contact information.

b) Communication is compatible with the African Union Constitutive Act and the African Charter.

c) Communication may not contain disparaging or insulting language.

d) Complaint may not be based exclusively on media reports.

e) Communication to be exhausted following exhaustion of effective local remedies.

f) Communication does not raise any matter previously settled by the parties in accordance with international law.

There are three forms of complementarity in the determination of admissibility. The first is normative. The Protocol sanctions the application of the African Charter’s standards of admissibility by the African Court,51 thus promoting normative convergence. This objective underwrites the Court’s power to request the African Commission for an opinion on admissibility in cases instituted by NGOs or individuals,52 although it retains its power to rule on such opinion. When it rules on the opinion,

48) Under Rule 89(2) of the Rules of the African Commission, the Commission gives its reasons for decisions on admissibility.

49) Article 56 of the African Charter and Article 6(2) of the African Protocol.

50) Article 60 of the African Charter enjoins the Commission to draw inspiration from international law on human and peoples’ rights.

51) Article 6 of the African Protocol requires the Court to take into account the provisions of Article 56 of the African Charter.

52) Article 6(1) of the African Protocol.
the Court complements the Commission by transforming the norms embedded in those opinions into judicial rulings. However, when it reexamines the opinion and overrules the Commission, a delay may be caused, even where the outcome may advance the normative scope of human rights. This latter scenario is reduced where there is normative convergence.

The second form of complementarity is functional, aimed at efficiency gains. A burgeoning caseload caused by requests for admissibility opinions by the African Court to the African Commission may have the effect of triggering reforms of the system to address any delays attendant to admissibility determination in the Commission. It may also be designed so as to provide an entry point for cooperation in amicable resolution by the Commission, since such often follows admissibility determination. In principle, therefore, the Court should proceed to the merits stage without reopening the Commission’s opinion on admissibility, or transfer it to the Commission for determination on its merits under the Protocol.53 However, this does not foreclose the Court from exercising its inherent powers to reexamine an admissibility opinion.

The third form of complementarity is relational. Relationally, a practice of complementarity in the determination of admissibility by the African Commission and the African Court may discourage perverted forms of forum shopping or hopping thus preventing tensions, conflicts and inefficiencies. In this sense, where the Commission declares a communication inadmissible for failure to meet the system’s legal requirements, the Court may, in principle, not admit such case. However, where it is reintroduced following further developments or information, the Court may admit the case. This genre of cases, particularly those submitted by NGOs or individuals, should constitute the category of cases in which the Court may request the Commission for an opinion on admissibility. In reviewing such case, the Commission may build upon its previous observations to determine whether the conditions for admissibility have been met. In order to promote complementarity in determination of admissibility, the African Court and the African Commission should develop criteria for cross-referral of cases in which an opinion is sought on admissibility of a case.54

**IV) Complementarity through Amicable Resolution and Monitoring Procedures**

The African human rights system provides for amicable resolution of communications before the African Commission and the African Court.55 At any stage following a finding of admissibility of a communication, the African Commission may, on its own initiative, or, at the request of any of the parties concerned, promote an amicable settlement between the parties.56 In principle, the amicable settlement procedure may only continue or be concluded with the mutual consent of the parties. In

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53) Article 6(3) of the African Protocol.

54) See Article 6 of the African Protocol.


the process of friendly settlement, the role of the Commission, where it is participating, is to serve as an independent umpire. However, at the conclusion of an amicable settlement, the Commission shall ensure that the substance, terms and conditions of such amicable settlement are based on respect for human rights.\textsuperscript{57} In order to ensure equality of arms, the Commission is further required to ensure the consent of the victim of the alleged rights violation, regardless of the petitioner in the communication.\textsuperscript{58} Further, the Commission may continue to process the communication through the ordinary procedures where there is non-compliance with these requirements or non-implementation of the settlement.

The African Court has two main tracks for amicable settlement of disputes. The first track is a party driven ‘out-of-court-settlement,’ initiated, concluded and reported to the Court by the parties or their agents.\textsuperscript{59} The second track is a ‘court-annexed’ form of amicable settlement, initiated by and concluded under the auspices of the Court.\textsuperscript{60} In both tracks, in the event of an amicable settlement, the Court is required to render its judgment thereon limited to a brief statement on the facts and the solution adopted.\textsuperscript{61} However, the Court may, in exercise of its discretion, proceed with the hearing of the application notwithstanding the notice of amicable settlement.\textsuperscript{62}

Amicable settlement of communications and cases is an area of potential complementarity between the African Commission and the African Court as suggested by the practice of the Inter-American human rights system.\textsuperscript{63} Although the practice of court-annexed amicable settlement of disputes has become commonplace, at least, within domestic systems, quasi-judicial organs are viewed as the better platform for friendly settlement. Complementarity between the Commission and the Court would, therefore, harness the comparative advantage of the Commission in this function. A further aim of complementarity is to prevent prejudice in the determination of communications and cases at the merits stage as it prevents entanglement with the claims and counterclaims during the process of amicable settlement.

\begin{itemize}
  \item \textsuperscript{57} Article 52 of the African Charter and Rule 90(5) of the Rules of the African Commission.
  \item \textsuperscript{58} Rule 90(5) of the Rules of the African Commission.
  \item \textsuperscript{59} Rule 56 of the Rules of the African Court.
  \item \textsuperscript{60} Rule 57 of the Rules of the African Court.
  \item \textsuperscript{61} Rules 56(2) and 57(3) of the Rules of the African Court Rules.
  \item \textsuperscript{62} ibid.
  \item \textsuperscript{63} See Article 48(1)(f) of the American Convention on Human Rights in Basic Documents Pertaining To Human Rights in the Inter-American System 25, OEA/Ser.L/V/ II.82, doc.6, rev.1 (OAS General Secretariat 1992 and Article 52 of the African Charter.
\end{itemize}
There are three main models:

a) The Commission may refer cases finalized through amicable settlement to make them binding on states, whereas the Court may, at any time following a finding of admissibility, transfer a case whose resolution by amicable settlement is particularly suitable to the Commission.

b) The Commission and the Court may promote amicable settlement within their procedures and institute joint monitoring procedures without any referral or transfer of cases.

c) A less plausible model is to develop a system under which all cases requiring amicable resolution are referred to the Commission. While the quasi-legal nature of the Commission commends this model, it is less plausible because amicable resolution may come late in the life of a case, at which stage there may be need for the Court to retain control over its determination.

(V) Complementarity in the Consideration of Merits of Communications/Cases

The merits stage is the substantive part of the examination of a communication or case following a finding of admissibility. The purpose of the merits stage is to determine the facts of the violations alleged and legal responsibility of the State for the violation of its obligations under the African Charter, and, where the case is at the African Court, of any other relevant human rights instrument ratified by the state concerned.

The merits stage at the African Commission follows notification of the parties and submission of observations and responses by the complainant and the state party concerned. Following these submissions, the Commission may, on its own initiative, or, at the request of one of the parties, hold a hearing in camera where the parties and amici, where applicable, present their arguments alone or through counsel or agents. Generally, the complainants in the communication have the burden of substantiating the facts in support of their claims through personal statements of victims, witnesses, expert evidence and other sources. These are determinative, for the Commission adopts a decision on the merits of the communication in private, after deliberation on these submissions and evidence. Such decision remains confidential until adopted by the Assembly of the African Union.

The African Court’s procedures are somewhat similar, although there are substantive variations in the nature of proceedings, the parties, speediness, adjudicative principles and normative weight of the orders emanating therefrom. Parties to a case are entitled to be represented or assisted by legal

64) Under Rules 56 and 57(3) of the Rules of the African Court.
65) This may include cases relating to situations the Commission has dealt with in the past.
counsel and/or by any other person of the party’s choice. In general, following an application containing a summary of the facts of the case, the Court’s procedure consists of written proceedings, comprising applications, statements of the case, defenses, observations and replies, whereas the oral proceedings consist of a hearing of representatives of parties, witnesses and experts. Like the African Commission, which may use ‘any appropriate method of investigation’ or hear from ‘any other person capable of enlightening it’, the Court may use any source of information, and may assign a member to conduct an enquiry or a visit to the scene. These procedures end with the conclusion of the hearing, and issuance of judgment after deliberations by the Court.

(VI) Complementarity in Protective Missions

In accordance with its power to use ‘any appropriate method of investigation’ or hear from ‘any other person capable of enlightening it’, the African Commission conducts on-site investigative missions, also known as protective missions or country visits. In practice, country visits are undertaken in countries from which the Commission has received numerous communications. However, like country visits by special rapporteurs, these visits are conditioned upon the consent of the host state under investigation. The upshot is a delay between the time of decision and country visits thus undermining the effectiveness of their protective function.

(VII) Complementarity in the Declaration and Monitoring of Remedies

It is a general principle of international human rights that remedies follow violations of rights. In contrast with the formative years of the African human rights system, a practice of granting remedies for violations of rights guaranteed under the system is under evolution, especially with the establishment of the African Court. Despite lack of guidance under the African Charter or its Rules, the African Commission’s findings are now accompanied by recommendations to remedy the violations found, with subsequent monitoring of the measures taken by the state to implement the decisions. This evolution of jurisprudence, however, has been mismatched by the recommendatory nature of the Commission’s findings, and the delays occasioned by confidentiality and requirement for adoption by the Assembly of the African Union. A further challenge remains the weakness of monitoring or follow-up procedures, with little immediate recourse beyond drawing the attention of the African Union’s organs to situations of non-compliance with its decisions.

70) Article 46 of the African Charter.
72) Article 46 of the African Charter.
It follows, given the importance of remedies in human rights protection, that the African Court has a mandate to complement and reinforce the African Commission’s practice of remedies. In contrast with the African Commission, the Court has express powers to make appropriate orders to remedy violations of human rights, including the payment of fair compensation or reparation. Further, the embodiment of remedies within the Court’s judgments renders them binding, given that the Court’s judgments are binding. Its further strength is the requirement that the Court notifies parties to the case and the African Union organs and any person concerned immediately following its Court’s judgments.

The effectiveness of remedies does not flow from mere declaration or publication of the African Court’s decisions. It is in monitoring and enforcement of decisions in individual communications and cases that the real value of protection flourishes. The Executive Council is, therefore, mandated to monitor execution of the Court’s decision on behalf of the Assembly. In its annual report to the Assembly, the Court may identify states that have not complied with its judgments, making recommendations as appropriate. This institutional framework provides additional reinforcement to the African Commission’s monitoring mechanism.

The following are avenues through which the African Court and the African Commission may complement and reinforce each other:

a) Development of fast-track procedures focusing on remedial action than rehearing in cases referred to the Court by the Commission for non-compliance or unwillingness of a state party to comply with its recommendations in respect of a communication.

b) Joint monitoring and follow-up measures to ensure effectiveness of remedies in cases referred by the Commission to the Court or transferred by the Court to the Commission under the Protocol.

4. Complementarity in the Promotional Mandates of the African Commission and the African Court

Complementarity between the Court and the Commission is not limited to the protective function; it extends to the promotional and interpretive functions, both of which are interconnected to the protective function. Remedies in individual communications or cases, for example, not only provide protection, but also radiate systemic or discursive effects thus promoting human rights. Similarly, the system’s promotional activities, such as the work of the Commission’s special rapporteurs, may be protective by remediing or preventing specific violations.

76) Article 27(1) of the African Protocol.
79) ibid.
The promotional mandate of the African Commission under Article 45 of the Charter is exercised through research, educational and information dissemination programs including seminars, conferences and symposia, standard-setting through development of human rights norms, and legal interpretation through advisory opinions following a request of a state party, an organ of the AU or an African organization recognized by the AU. The African Court, like the Commission, undertakes promotional functions of a similar nature. It sends a representative to the Commission’s sessions, conducts seminars, commissions research and studies, and undertakes promotional visits. These activities reinforce the Commission’s promotional mandate, and lay ground for complementarity in other promotional mechanisms. They also provide the African Court with an avenue for judicial education and learning, socialization of state parties and reinforcement of its protective mandate.

(I) Complementarity Through State Reporting Procedures

It is the duty of every state party to submit an initial, and thereafter a periodic report to the African Commission every two years on its constitutional, legislative, administrative or other measures to give effect to the African Charter.\(^ {83} \) The Commission, following the approval of the Assembly, is mandated to receive, examine and monitor compliance through the state reporting cycle. In addition to the state report, the Commission further receives information from institutions, organizations or any interested party wishing to contribute to the examination of the report and the human rights situation in the country concerned.\(^ {84} \) During the consideration of the report, the Commission explores all the pertinent information relating to the human rights situation in the State concerned, including statements and shadow reports from NHRIs and NGOs which may attend the Commission’s public sessions.\(^ {85} \) The assessment by the Commission and resulting dialogue serves to promote rights, and may be protective where the state adopts remedial or prophylactic action on general and specific human rights concerns.

State reporting provides a mechanism for complementarity between the African Commission and the African Court and the promotional and protective functions. In the course of examining state reports, the African Commission may raise specific questions regarding particular situations of violations of human rights or the implementation of its recommendations in individual communications. The state reporting process may thus provide an avenue for reinforcing the protective mandate of the Commission and the Court.

However, a balance need be struck so as not to transform the promotional focus of state reporting. The following may be considered further:

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\(^ {83} \) Article 62 of the African Charter.

\(^ {84} \) Rule 74 of the Rules of the African Commission.

\(^ {85} \) Rule 75 of the Rules of the African Commission.
a) Integration of follow-up and monitoring procedures in respect of protectional activities (including provisional measures, amicable settlements, judgments and recommendations of the African Commission and the African Court) within the state reporting process without undermining its promotional role.

b) Development of mechanisms for joint monitoring by the African Commission and the African Court of the implementation of the Commission’s ‘concluding observations’ where they are of a protective nature.

(II) Complementarity through Special Mechanisms

The African Commission has established special rapporteurs and working groups as subsidiary mechanisms to supplement its promotional mandate. In view of their investigative and monitoring role, special rapporteurs are appointed exclusively from among Commissioners whereas the standard-setting function of working groups has necessitated the enlargement of their membership to include, among others, experts and representatives from non-governmental organizations. While these mechanisms have been promotional of human rights, they have been beset by limitations of mandate, delays in visits, lateness in examination and publication of reports and weak follow-up procedures. This notwithstanding, they provide pathways for complementarity in the African human rights system as follows:

a) Development of mechanisms with which to enable the African Court to secure information for its inquiry and evidence collection procedures from the Commission’s special rapporteurs.86

b) Reinforcement of urgent appeals through an expedited referral and examination of individual cases at the African Court where there is failure of governments to remedy the alleged violations following the intervention of a special rapporteur.

(III) Complementarity in the Adoption, Enforcement and Monitoring of Resolutions

The African Commission adopts resolutions as part of its promotional mandate under the Charter. The resolutions, which are of thematic and geographic nature, cover norms and country situations respectively. Thematic resolutions advance human rights standards by supplementing the normative framework of the African Charter and other applicable human rights instruments. They, therefore, perform a promotional function in guiding the state parties on the range of measures required to comply with the requirements of the African human rights system. In contrast, country-specific resolutions target human rights violations within a country, thus performing concurrent promotional and protective functions. Thus, some resolutions are formulated in terms of recommendations following a finding of a violation in an individual communication. In practice, country-specific resolutions further urge fact-

86) See Article 26(1) of the African Protocol and Rule 45(3) of the Rules of the African Court.
finding missions to investigate the situation in the country concerned, although these are often beset by significant delays. As a form of complementarity, the reports of such missions may be authoritative sources of information for the African Court’s inquiry and evidence collection procedures. A way to promote exchange of information is to adopt common protocols for fact-finding and investigation.

(IV) Complementarity in Promotional Missions

The African Commission conducts promotional visits upon the invitation of state parties with the objective of assessing the human rights situation in the host state party. The aim of these missions is to promote dialogue with the state and other stakeholders on how to implement the African Charter, its protocols and other human rights instruments as mandated under the African Charter. However, the Commission may undertake protective functions during these missions. During these missions, the Commission may broaden its radar to include discussions on the implementation of its recommendations in individual communications or judgments of the African Court. In this approach, the Commission stands to be reinforced in its protective and promotional functions by the emerging practice of similar visits by the African Court.

(V) Complementarity in the Development and Issuance of Advisory Opinions

The African Court’s non-contentious jurisdiction extends to the issuance of authoritative but non-binding advisory opinions on any legal matter relating to the Charter or any other relevant human rights instruments upon request of a member state of the AU, any of its organs, or any African organization recognized by the AU. In exercising this mandate, there has been built mechanisms of comity between the Court and the African Commission as follows. First, the Court may not issue an advisory opinion on a subject matter that is under examination by the Commission. Second, with leave of the Court, the Commission may also appear as an interested party in respect of an advisory opinion pending before the Court. Third, where the Commission is requested to issue an advisory opinion under the Charter, it is required to immediately inform the President of the Court.

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90) Article 45(3) of the African Charter.

There remains, however, more to complementarity. The following are further avenues:

a) Development of criteria and mechanisms for transfer of requests for advisory opinions between the African Commission and the African Court.

b) Establishment of working groups with membership from the Commission and the Court to oversee the development of advisory opinions.

5. Conclusion and Further Questions

Complementarity has become an overarching principle in international, regional and domestic legal systems. In light of the infancy of the practical application of the doctrine of complementarity under the African human rights system, the above portrait cannot provide a comprehensive insight on the doctrinal foundations and practice of complementarity between the African Commission and the African Court. Beyond the Rules of the Commission and the Court, the elaboration and alignment of policies and approaches, while respecting the key institutional differences, is yet to be undertaken. The uspshot is that the potential of complementarity has been realized only to a very limited extent.

This chapter serves only as a foundation for further work. The labours of all actors should remain focused on the examination of the factors that impede and inform resistance to its implementation. Its end objective should be to ensure a coexistence that improves the effectiveness of the African human rights system. Particular attention needs to be paid so that institutional complementarity does not obscure the more complex issues regarding normative complementarity, that is, the encounters between different international, regional and domestic human rights and other legal regimes. Towards this end, the following part raises some questions and issues for further reflection:

1. The Subject of Complementarity and the Primacy Question

Between the African Commission and the African Court, which institution is the complementor, and the compleemntee? Is complementarity unidirectional, that is, a function of one institution upon the other, or bidirectional, implying shared functionality? Does it matter, or does it follow that primacy inheres in the ‘complemented’ institution? If so, what are the implications? Moreover, is hierarchy implied in Articles 2 and 8 of the Protocol, Rule 114 of the Commission’s Rules and Rule 29 of the Court’s Rules (note that the word appears nowhere in the Court’s Rules), vis a vis Article 45(1)(c) of the Charter?

2. The Hierarchy Question

Does the African Protocol and its system imply a hierarchy, as of necessity or logic in the relationship between the African Commission and the African Court?
Consider the following:

a) Judicialization as Hierarchization: Supposing the African Court’s judgments have a greater normative weight, does judicialization, that is, the addition of the Court to the African human rights system imply hierarchy?

b) Comparative Advantages: Are there any comparative advantages, supposing the African Court’s judgments have a greater normative weight than the African Commission’s do? If so, do these comparative advantages support claims of hierarchy?

c) Jurisdictional competence: Does a larger jurisdictional competence of the African Court (ratiōne materiae) imply institutional hierarchy? Conversely, does the Court’s limited jurisdiction under Articles 5(3) and 34(6) of the African Protocol imply co-equality between the Court and the African Commission?

(d) Geographical access in forum choice: How do claims of hierarchy deal with the relative geographical limits of access to the African Court for West and Northern African petitioners, and the African Commission, for East and Southern African petitioners?

3. Dialogue and Institutional Deference

How should dialogue be promoted between the African Commission and the African Court? In what areas, and how should the Commission and the Court defer to each other?

4. Vertical Complementarity

Does the complementarity extend beyond the horizontal relations between the African Commission and the African Court? How does the principle of subsidiarity require forms of vertical complementarity between the African Commission and the African Court?

5. Human Rights Effectiveness and Impact

Are there rigorous comparisons between the experiences of state compliance with the African Commission’s and the African Court’s decisions? What are the reasons for the differences in state compliance?
Guide to Complementarity within the African Human Rights System
Chapter 2

Complementarity between the African Court and the African Committee of Experts on the Rights and Welfare of the Child

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Complementarity between the African Court and the African Committee of Experts on the Rights and Welfare of the Child

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1. Introduction to the ACRWC

The African Charter on the Rights and Welfare of the Child (ACRWC) is the first and only regional human rights treaty that specifically protects and promotes the rights and welfare of the child in the world. It was adopted in 1990 by the Organisation of African Unity (OAU) to provide a specific and comprehensive mechanism for the protection and promotion of children’s right in the African region. The creation of the ACERWC marked a very significant historic milestone and was a response to the need for the legal protection of children in Africa. It represents further progress, coming after the promulgation of the Declaration of the Rights and Welfare of the African Child in 1979 which was adopted by the Assembly of Heads of State and Government of the OAU at its 16th Ordinary Session.

Before the adoption of the ACRWC, the then OAU Secretariat had recognised and streamlined various children’s rights issues including child trafficking, child labour [working in collaboration with the International Labour Organization (ILO) under the International Programme to Eliminate Child Labour (IPEC)], and children in situations of armed conflict into its programmes. African states were also committed to international children’s rights through both the ratification and implementation of the Convention on the Rights of the Child (CRC).

(I) Why the ACRWC?

There are several reasons why the OAU adopted the ACRWC despite the fact that all African countries, except one, are party to the CRC. The most significant reasons are the following: African States were under-represented during preparatory work on the CRC; also, during the CRC preparatory work, issues peculiar to Africa such as child soldiers, early marriage, female genital mutilation, illiteracy, as well as the role of the extended family were not appropriately taken into account. Therefore, when the decision to formulate an African Children’s Charter was made, it took into account all these issues. To date, the ACRWC has been ratified by 46 of the 54 AU Member States.

(II) The Significance of the ACRWC

Regional human rights systems are essentially more potent than the UN human rights system because they are in a better position to take into account regional conditions.92 The ACRWC, together with the

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92) UN General Assembly Resolution A/RES/47/125 passed at its 92nd Plenary Meeting held in December 1992.
African Charter on Human and Peoples’ Rights (ACHPR), form the pillar of the African Human Rights System. In particular, the ACRWC recognises children in Africa as the direct bearers of rights, and, children, in turn, bear responsibilities to others. This is a unique African context, missing in the CRC. With the adoption of the ACRWC, African states have an obligation to implement the CRC and ACRWC in a complementary manner.

(III) The Normative Framework of the ACRWC

Normatively, the ACRWC adequately addresses issues relating to the rights of the child on the continent in an African context. It reinforces and complements the protection given to children by the CRC regarding:

- the child’s best interests principle;
- the participation of children in armed conflicts;
- marriage and children marriage promises;
- juvenile justice;
- refugee and internally displaced children;
- protection of children against apartheid and discrimination; and
- socio-economic and cultural rights.\(^{93}\)

In order to reinforce the foregoing protection, the ACRWC contains Basic Principles similar to those enshrined in the CRC: definition of the child, the best interests of the child, non-discrimination, the child’s right to life, survival and development and participation.

a) Definition of the child

The ACRWC, unlike the CRC, is more concise and clear in its definition of who a child is. In Article 2, it defines a child as ‘every human being below the age of 18 years.’ This is a very strong definition of who a child is. Therefore, the definition in the ACRWC is more useful as ‘there are no limitations or attached considerations’\(^{94}\) as is the case with the definition in the CRC.\(^{95}\)

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93) The socio-economic rights guaranteed in the ACRWC include the right to education and the right to health and nutrition.


95) Article 1 of the CRC defines a child as ‘every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.’ By subjecting the definition of the child to applicable laws obtained in States Parties, the definition in the CRC has been described as ‘ambiguous and weak, lacking specific protection …, such as in relation to child betrothals, child participation in armed conflict and child labour.’ Ibid.
b) The Best Interests of the Child

Article 4(1) of the ACRWC explicitly states that: ‘In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.’ The principle of the best interests of the child provides a ‘yardstick by which to measure all the actions, laws and policies affecting children.’ It is the lens through which all other child rights are viewed. The principle is also referred to in numerous other provisions of the ACRWC, the CRC and their international human rights instruments.

c) Non-discrimination

According to Article 3 of the ACRWC, every child is entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the ACRWC Charter without discrimination irrespective of:

“the child’s or his/her parents’ or legal guardians’ race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.”

This Article implies that States Parties to the ACRWC have an obligation to always ensure that discrimination against children, on any of the listed grounds, is not allowed in all actions, decisions, policies, practices and/or legislative enactments concerning children.

It should be noted that, whereas the ACRWC extends the obligations not to discriminate against a child to states and non-state actors (Article 26(2) and (3)), the CRC (Art. 2(1)) imposes the obligation to ensure that children are not discriminated against on the state only.

d) The Child’s Right to Life, Survival and Development of Children

According to Article 5 of the ACRWC, every child has an inherent right to life, a right which shall be protected by law. States are to ensure “to the maximum extent possible, the survival, protection and development of the child. Death sentence shall not be pronounced for crimes committed by children.”


98) See, for example, Articles 5 and 16(1)(d) of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). In particular, Article 5(b) of the CEDAW provides that States Parties shall take all appropriate measures ‘To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.’ Article 16(1)(d) of the CEDAW obliges States Parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: ‘The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount.’ (emphasis added).
The principle of the child’s right to life, survival and development ‘ensures that children have the capacity to ascertain their rights and ensure the protection of their welfare.’\textsuperscript{99} This principle does ‘not only prioritize children’s rights to survival and development but also puts emphasis on the right to develop to their fullest potential in every respect, including their personalities, talents and abilities.’\textsuperscript{100} This principle underscores that States Parties to the ACRWC should ensure that the inherent right to life provided for under Article 5(1) is guaranteed by prohibiting, inter alia, the imposition of death penalty on children (Article 5(3). By extension, States Parties are obliged to ensure that, in order to guarantee this right, there is maximum survival and development of the child in their respective jurisdictions.\textsuperscript{101}

e) Child Participation

The right to be heard (Article 7) is a general principle of the ACRWC relevant to the implementation and interpretation of all other rights. Article 7 asserts that all children are capable of and entitled to express their views. This applies equally to boys and girls of all ages, rural and urban children, ethnic minorities and children with disabilities. The implementation of the provision of this Article at the domestic level requires:

- us to begin to listen to what children say and to take them seriously;
- that we recognise the value of their own experience, views and concerns; and
- us to question the nature of adult responsibilities towards children.

Recognizing that children have rights does not mean that adults no longer have responsibilities towards children. On the contrary, children cannot and should not be left alone to fight the battles necessary to achieve respect for their rights. What is implied by the ACRWC, and its philosophy of respect for the dignity of children, is that adults need to learn to work more closely with children to help them articulate their purpose in life, develop strategies for change and exercise their rights.

Participation is a fundamental human right and a core element of a human rights-based approach. Participation represents the right of rights-holders - including children - to demand their rights and to hold-duty bearers to account. Right-holder participation and duty-bearer accountability are complementary parts of a human rights-based approach.\textsuperscript{102} In seeking to effectively protect children’s right to participation, including respect for the views of the child in a democratic society, it is important to understand clearly what Article 7 of the ACRWC does and does not say:

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\textsuperscript{99} Mezmu (n 5) 37 and Mashamba, C.J., “A Study of Tanzania’s Non-Compliance with its Obligation to Domesticate International Juvenile Justice Standards in Comparison with South Africa” Ph.D. Thesis, Open University of Tanzania, 2013.

\textsuperscript{100} CI Mashamba, Introduction to Family Law in Tanzania (Dar es Salaam: IPPL/NOLA, 2010) 84.

\textsuperscript{101} Article 5(2) of the ACRWC.

\textsuperscript{102} G Lansdown, Promoting Children’s Participation in Democratic Decision-making (Florence: UNICEF’s Innocent Research Centre, 2001) 3.
• It does not give children the right to autonomy;

• It does not give children the right of control over all decisions irrespective of their implications either for themselves or others; and

• It does not give children the right to ride roughshod over the rights of their parents.

However, it does introduce a radical and profound challenge to traditional attitudes which assume that children should be seen and not heard.

(IV) Obligations of States under the ACRWC

The ACRWC begins by setting out the obligations of States Parties in Article 1. The obligations imposed on States Parties to the ACRWC include taking necessary measures to implement the provisions and principles in the Charter. The “measures” envisaged by the Charter are two-pronged: first, the recognition of the rights, freedoms and duties enshrined in the Charter. Second, to ‘undertake to the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.’

Imperative to these obligations is the duty imposed on African states to promote positive cultural values and traditions as well as measures which demote those traditions and values which are inconsistent with the rights, duties and obligations contained in the ACRWC. Thus, every State Party to the ACRWC is obliged to implement the rights, duties and freedoms in this Charter.

2. The ACERWC Collaboration with Other AU Human Rights Organs

The adoption of the ACHPR in 1981, the ACRWC in 1990 and the AU Constitutive Act in 2001 has strengthened the “African regional human rights system.” This system revolves around diverse institutions and normative frameworks within the AU set up based on treaties that are elaborated and explained by other non-binding documents such as resolutions, declarations and guidelines.\(^{103}\)

In this context, it is argued that the normative framework for the protection of human rights in the African regional human rights system is premised on the objectives of the Constitutive Act of the AU,\(^{104}\) one of which is to ‘promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights [ACHPR] and other relevant human rights instruments\(^{105}\) including the ACRWC. Whereas the ACHPR’s principal implementation mechanism is carried out

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\(^{103}\) Mashamba (n 8).

\(^{104}\) Adopted in Lome, Togo, on 11th July 2000 and entered into force on 26th May 2001. The Assembly of the AU held its inaugural meeting in Durban, South Africa in July 2002.

through the AComHPR and judicially reinforced by the AfCHPR, the ACRWC is mainly implemented by the African Committee of Experts on the rights and Welfare of the Child (ACERWC).

It should be noted that the relationship between the Court and the Commission ‘is the closest, as well as the most lucid and unique amongst the interactions between various human rights stakeholders on the continent.106 This is mainly because the Court and the Commission are the most closely linked human rights organs on the continent in terms of their mandates, which is reflected in the Court’s role “to complement the protective mandate” of the Commission.107

However, the relationship between the Commission and the Court, on the one hand, and the Committee, on the other, is not so overt as there is no explicit provision spelling out this relationship in the African Children’s Charter, the ACHPR and the Protocol on the Establishment of the African Court on Human and Peoples’ Rights. Nonetheless, in respect of children’s rights and welfare, all the three African Human Rights organs can promote and protect such rights through their respective mandate, processes and procedures.

(I) How does the ACERWC fit into the AU?

As one of the three human rights organs in Africa, the ACERWC’s effectiveness in discharging its Charter’s mandate depends largely on its positive collaboration with other HR organizations as well as other structures and organs of the AU. Currently, the Human Rights Strategy for Africa requires that the three human rights institutions and other relevant AU organs collaborate in their work to harmonise their effectiveness. There is also a move towards ensuring that all the human rights organs revise their rules of procedure.108

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108) One of the eight priorities of the African Union Commission’s 2014-2017 Strategic Plan is to ‘Promote peace and stability, including regional initiatives, good governance, democracy and human right as a foundation for inclusion, security and the development of the continent and its people.’ Key Priority Area 1: Draft Strategic Plan 2014-2017 for the African Union Commission, Assembly/AU/3(XXI), p. 67, para. 231. With this priority area, the AUC envisions to strive, as one of its Outcomes (Outcome 1), to ensure that ‘Peace and stability, good governance, democracy and human rights as foundations for development and stable societies [are] promoted.’ One of the actions envisaged to be undertaken in pursuing this key priority is formulated in para. 252 of the Strategic Plan, thus: ‘With respect to Human rights, the Commission will promote the full implementation of the African Charter on Human and Peoples’ Rights, as well as the implementation of the African Human Rights Strategy. The capacity of the African Human Rights Commission will be strengthened. Increased efforts will be deployed in terms of advocacy and sensitization of ordinary citizens on these African human rights instruments, including the African Charter on the Rights of the Child (ACRWC), and strengthen work with civil society organizations.’ In this regard, the AUC Strategic Plan seeks, inter alia, to pursue the following strategies and actions, i.e. to:

1. Promote the ratification and full implementation of the African Charter on Human and People’s Rights Protocol on the Rights of Women;
• The normative principles of human rights in the AU human rights instruments are enforced by diverse institutions of the AU, which include:

(a) The AU itself,

(b) The African Commission on Human and Peoples’ Rights (AComHPR), the African Court on Human and Peoples’ Rights (ACtHPR), and


• These institutions are also complemented by a number of existing specialized agencies or personnel whose mandates are specifically aimed at human rights protection and promotion in Africa.

• The AU is not a single entity but is constituted of over 15 structures and institutions with overlapping levels of authority, which have a great potential for engaging with children’s rights at national and regional levels.

• To have a full understanding of how the ACREWC works, it is important to understand the character of the relationships it has with the other AU bodies both in practice and in theory.

(II) **Key Institutions and Structures of Relevance for Children**

There are several key institutions and structures that are relevant for the realization and enforcement of children’s rights in Africa. Some of them are:

• The African Committee of Experts on the Rights and Welfare of the Child (ACERWC);

• The African Commission on Human and Peoples’ Rights (ACHPR);

• The African Court on Human and Peoples’ Rights (AfCHPR);

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2. Promote ratification and full implementation of the African Charter on the Rights and Welfare of the Child;

3. Support implementation of the African Youth Charter;

4. Promote ratification and full implementation of the Charter for African Cultural Renaissance;

5. Undertake measures to accelerate adoption, domestication and implementation of shared values instruments;

6. Set up and implement communication and advocacy campaigns and thematic media plans to raise awareness and ensure stakeholders’ information and citizens’ involvement and ownership;

7. Support implementation of the Continental Plan of Action on the African Decade of Persons with Disabilities (2010-2019);

8. Develop guidelines for addressing gender imbalance in Member States.
• The Assembly of Heads of State and Government;
• The Executive Council;
• The Permanent Representatives Committee (PRC);
• The Commission of the African Union (AUC);
• The Peace and Security Council (PSC);
• The Economic, Social and Cultural Council (ECOSOCC);
• The Pan African Parliament (PAP);
• Regional Economic Communities (RECs);
• New Partnership for Africa’s Development (NEPAD); and the
• African Peer Review Mechanism (APRM).

(III) Cooperation between the African Commission and the Committee

In order to meet their full potential as mechanisms for fulfilling children’s rights on the continent, the Committee and the African Commission have established close cooperation. For instance, in collaboration with child rights-focused CSOs, the Commission is helping to raise awareness about the Committee and the Children’s Charter and trying to mainstream child rights into broader human rights’ discussions. CSOs have also supported the participation of members of the ACERWC in the African Commission’s work and, during its 45th session in 2009, the African Commission adopted a Resolution on Cooperation with the Committee. Currently, the CSO Partners are supporting the ACERWC, through the SIDA Project, in collaboration with the Commission.

(IV) Collaboration Between the Committee and the Court

The ACERWC is not explicitly mentioned in the 2004 Protocol as a body which is able to bring cases to the Court. But, discussions between the Court and the ACERWC heads resulted in the resolution that the ACERWC should apply to the Court for advisory opinion.109 And application for advisory opinion has, so far, been made to the Court in the context of Article 4(1) of the Court Protocol, which provides that:

At the request of a member state of the [AU], the [AU], any of its organs, or any African organisation recognised by the [AU], the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instrument, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.

109) The application for advisory opinion was filed by the author of this Chapter on behalf of the ACERWC in November 2013 and is awaiting determination by the Court.
Under Article 4(1) of the Court Protocol, one of the bodies entitled to request for an advisory opinion is the AU or any of its organs recognised by the AU. The Committee has the locus standi to request an advisory opinion before the Court within the framework of the AU as an organ established, recognised and operating within the framework of the AU.

It should be noted that, by bringing cases before the Court, the Committee would not only strengthen its mandate but would also offer child rights defenders a means to access the Court when their states have not made the requisite declaration to allow individual access to the Court.

3. Enhancing Existing Relationship Between the Court, the Commission and the Committee

In order to strengthen the complementary relationship between the Committee, the Court and Commission in the promotion of human and peoples’ rights (including the rights and welfare of the child) at the continental level, a number of activities should be jointly undertaken, as elaborated below.

(I) Harmonizing the Rules of Procedure

A successful collaboration and relationship between the Court, the Commission and the Committee largely depends on how their rules of procedure reflect the letter and spirit of the ACHPR, the ACRWC, the Protocol Establishing the Court and their rules of procedure. Up until now, only the Court and the Commission have harmonized their rules of procedure. The rules of procedure of the Committee are yet to be harmonized with those of the Court and the Commission. There are several areas where harmonization of the rules of procedure of the Court and the Commission has proved successful and can be extended to the rules of procedure of the Committee, as elaborated below.

a) Application of the Doctrine of lis pendens

The doctrine of lis pendens simply means “the pending suit” which means that ‘if a case is pending before one forum, it cannot be heard in another, unless it has been formally withdrawn from the other.’ The Rules of Procedure of the Court and the Commission have incorporated the doctrine ‘to the effect that the Court may not consider any matter which is before the Commission, and vice-versa.’ The doctrine of lis pendens can, therefore, be incorporated in the Rules of Procedure of the Committee to reflect the letter and spirit of the doctrine.

110) Asuagbor (n 15).

111) Ibid.

112) See particularly, Article 4 of the Protocol on the Establishment of the African Court on Human and Peoples’ Rights; Rules 29(6) and 68(3) of the Rules of Procedure of the Court and Rule 123 of the Rules of Procedure of the Commission.

113) A cursory reading of Article 1(iii)(1)(c) of the Committee’s Guidelines for the Consideration of Communications provided for in Article 44 of the African Charter on the Rights and Welfare of the Child (ACERWC/8/4) points to the fact that the Committee may not consider a communication brought before it if the same issues have been considered ‘according to another investigation, procedure or international regulation.’ However, this is not explicit in enhancing Complementarity between the Committee, the Court and the Commission.
b) Referral of Cases

Under Article 6(3) of the Protocol on the Establishment of the African Court on Human and Peoples’ Rights, the Court may consider a case or refer it to the Commission. So far, the Court has referred to the Commission a total of five (5) cases after having found that it lacked jurisdiction to entertain them. Thus, ‘in order to ensure that the alleged victims of human rights violations are not left without remedies, the Court had referred these cases to the Commission.’\textsuperscript{114}

For its part, the Commission may refer cases to the Court in three instances: first, in cases of massive violations of human rights;\textsuperscript{115} second, on grounds of failure or unwillingness of a State Party to comply with its recommendations or Provisional Measures;\textsuperscript{116} and, third, at any stage of the consideration of a Communication.\textsuperscript{117} So far, the Commission has referred to the Court a total of three (3) cases.

However, there are no clear provisions for referral from the Committee to the Commission or the Court. Between the Commission and the Court, there are clear provisions and processes in respect of matters that the Court or Commission are themselves seised of jurisdiction for referrals.

c) Consultations in Amending Rules

Rule 29(2) of the Court’s Rules of Procedure requires the Court to consult the Commission before amending its Rules or any issues of procedure governing relations between the two institutions. This could also be replicated in terms of the relationship between the Committee, the Court and the Commission.

d) Provision of Notifications

The Commission and the Court have a practice where they are required to notify each other about their respective decisions or judgments. Whereas Article 29 of the Protocol requires the Court to notify and transmit all its judgments to the Commission, Rule 116 of the Commission’s Rules of Procedure requires the Commission to inform the Court of any request to interpret the provisions of the ACHPR, and to transmit a copy of such interpretation by the Commission to the Court. This should be replicated in terms of the similar undertakings by the Committee.

\textsuperscript{114} Asuagbor (n 15).

\textsuperscript{115} See particularly Centre for Minority Rights Development – Kenya and Minority Rights International (on behalf of the Ogiek Community of the Mau Forest) v Kenya Communication 381/09 (the Ogiek case); and Egyptian Initiative for Personal Rights (EIPR), Human rights Watch (HRW) INTERIGHTS, and Libyan League for human Rights (on behalf of the People of Libya) v Libya Communication 394/11.

\textsuperscript{116} See particularly the Ogiek case and Saif Al-Islam Ghaddafi (represented by Mishana Hosseinin) v Libya Communication 411/2012.

\textsuperscript{117} These instances are set out in Article 5(1)(a) of the Protocol on the Establishment of the African Court on Human and Peoples’ Rights and Rules 84(2) and 118 of the Rules of Procedure of the Commission.
e) Interpretation of the Charter and Advisory Opinions

Whereas the Court may request the opinion of the Commission when deciding on issues of admissibility,\textsuperscript{118} the Commission may request for hearing in respect of an Advisory Opinion upon being notified by the Court of a request for such an Advisory Opinion.\textsuperscript{119} It should be noted that, while the Commission and the Court have the power to interpret the African Charter and other relevant human rights instruments including the ACRWC, the Protocol provides that the subject matter of the request for an advisory opinion before the Court should not be related to ‘a matter being examined by the Commission.’\textsuperscript{120} Therefore, this can be extended to include the rendering of advisory opinions by all the three organs, with particular mandate to render advisory opinion being given to the Committee when the Court and the Commission are faced with matters relating to the rights and welfare of the child.

f) Joint Meetings, Sessions and Consultations between the Committee, the Commission and the Court

Rule 29(1) of the Court’s Rules of Procedure and Rule 115 of the Commission’s Rules of Procedure oblige the Court and the Commission to meet at least once a year or, whenever necessary, in order to ensure a good working relationship between both institutions. Under this collaborative framework, the bureau of the two institutions must meet as often as necessary to undertake any function that may be assigned to them by both institutions.\textsuperscript{121}

With respect to the Committee, there is a formalized collaborative framework where the Committee has been meeting with the Court and the Commission. However, this process has not been embedded in the rules of procedure of the three organs. The harmonized rules should, therefore, incorporate the need for joint meetings and consultations amongst the three organs in order to strengthen their working relations as well as the human rights protection and promotion mandates.

(II) Institutional Strategies

Institutionally, the Commission, the Committee and the Court have ‘devised a series of institutional strategies for integrating each other in their respective activities.’\textsuperscript{122} These strategies include attendance at each other’s sessions, information exchange, joint missions and staff exchange and joint staff training. These strategies are geared towards strengthening institutional capacity, enhancing collaboration and linkages between the three organs as well as consolidating their initiatives to effectively promote and protect human rights on the continent.

\textsuperscript{118} Article 6(1) of the Protocol and Rule 29(4) of the Rules of Procedure of the Court.

\textsuperscript{119} Rule 117 of the Commission’s Rules of Procedure.

\textsuperscript{120} Asuagbor (n 15).

\textsuperscript{121} Ibid.

\textsuperscript{122} Ibid.
4. How can the ACERWC’s Core Mandates Complement the Enforcement of Decisions of the Court

(I) General Overview

The Court is obliged to deliver a judgment within ninety (90) days after completion of the deliberations on a matter before it. Such judgment must be notified to the parties and, also, copies of same have to be transmitted to the Council of Ministers and to all African Union Member States. The judgment may set out remedies which may include payment of fair compensation or reparation for violations of rights. States parties are obliged ‘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.’

The undertaking by States Parties to comply with judgments of the Court is reinforced by the mandate entrusted to the Council of Ministers to monitor the execution of the Court’s judgments on behalf of the Assembly of Heads of State and Government. In reinforcing the enforcement of the judgments of the Court, the Court has an obligation to submit, to each regular session of the Assembly, a report on its work during the previous year. Under Article 31 of the Court’s Protocol, the report ‘shall specify, in particular, the cases in which a State has not complied with the Court’s judgment.’

Although criticisms have been raised that ‘the enforcement mechanism provided by the Protocol does not ensure compliance with judgments of the Court and that much is left to the willingness of the State judgment debtor,’ the Judges of the Court ‘do not subscribe to that school of thought.’ According to Judge Ramadhani, the Judges of the Court are of the opinion that there are two effective means of enforcement of the Court’s judgments: “mobilization of shame” and “politics of litigation.”

a) Mobilization of Shame

This theory of enforcement of the Court’s judgments was pioneered by Judge Fatsah Ouguergouz who opines that the provisions on enforcement of judgments of the Court lay down the mechanism of “mobilization of shame.” This mechanism is justified in the sense that: ‘the repeated reporting by the Court to the Assembly that a State has not complied with a judgment of the Court puts the State concerned into disrepute in the eyes of other States.’ As States normally do not like to appear in

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123) Article 28 of the Court’s Protocol.
124) Ibid, Article 29.
125) Ibid, Article 27(1) and Rule 63 of the Court’s Rules of Procedure. See also Tanganyika Law Society, Legal and Human Rights & Rev. Christopher Mtiikila v The United Republic of Tanzania Application No’s. 009 and 011/2011.
126) Article 30 of the Court’s Protocol.
127) Ibid, Article 29(2).
129) Ibid.
130) Ibid.
disrepute before other States,\textsuperscript{131} it is expected that “shamed” States will enforce the decision of the Court to avoid being shunned away by fellow States.

b) Politics of Litigation

The theory of “politics of litigation” was coined by Judge Bernard Ngeoep who contends that there are times when success in a court action is not the whole object of the proceedings and, in fact, the applicant or the plaintiff is certain that the outcome would never be in his or her favour. In such situations therefore, part of the aim of litigation is ‘at least to have an unrestricted forum or a platform from which a party articulates a grievance or advocates a proposal for the whole world to know.’\textsuperscript{132} As such, it is envisaged that in situations where publicity is the target and when it is accomplished, then the theory of “politics of litigation” can prove to be an effective enforcement mechanism.

(II) How Can the ACERWC Reinforce the Enforcement of Judgments of the Court?

The Committee can assist in the enforcement of the judgments of the Court through its mandates: state reporting, promotional and investigative missions as well as through its advisory opinion framework. These are elaborated below.

a) Reporting Mandate

The Committee can require States to indicate how they have implemented the ACPHR and the ACRWC judgments in their periodic reports. States can also be required to indicate how they have ratified the Protocol, deposited declarations under Article 34(6) of the Protocol and how they have implemented judgments of the Court, if there is one made against the respective reporting State. The Committee may also require CSOs to indicate in the alternative or in shadow reports on the extent to which their respective States have implemented judgments of the Court rendered against such States within their reporting period.

b) Promotional Mandate

In promotional missions it undertakes in States Parties, the Committee can also seek explanation from respective States on the enforcement of the decisions of the Court, if any, in respect of children. It can also enquire with the respective States about issues of ratification of the ACPHR, the ACRWC and the Protocol, depositing of declarations under Article 34(6) of the Protocol and enforcement of decisions of the Court, if any.

\textsuperscript{131} Ibid.

\textsuperscript{132} Ibid.
c) Investigation Mandate

In discharging its investigation mandate, the ACERWC can help in the enforcement of the Court’s judgments by advising States Parties to execute the decisions in accordance with the letter and spirit of the ACPHR, the ACRWC and other relevant international human rights law.

d) Advisory Opinion

In rendering advisory opinions, the Committee may assist in the enforcement of the Court’s judgments by, particularly, advising respective States Parties to execute such decisions.

5. Conclusion

It is argued that the normative framework for the protection of human rights in the African regional human rights system is premised on the objectives of the Constitutive Act of the AU. One of such objectives aims at promoting and protecting human and peoples’ rights in accordance with the ACHPR and other relevant human rights instruments\textsuperscript{133} including the ACRWC. Whereas the ACHPR’s principal implementation mechanism is carried out through the AComHPR and judicially reinforced by the AfCHPR, the ACRWC is mainly implemented by the ACERWC.

Therefore, we have noted that, whereas the relationship between the Court and the Commission ‘is the closest, as well as the most lucid and unique amongst the interactions between various human rights stakeholders on the continent,’\textsuperscript{134} the relationship between the two organs and the Committee is still evolving. This is mainly because the Court and the Commission are the most closely linked human rights organs on the continent in terms of their mandates, as reflected in the Court’s role: “to complement the protective mandate” of the Commission.\textsuperscript{135} However, the relationship between the Commission and the Court, on the one hand, and the Committee, on the other, is not so overt as there is no explicit provision spelling out this relationship in the African Children’s Charter, the ACHPR and the Protocol on the Establishment of the African Court on Human and Peoples’ Rights. Nonetheless, in respect of children’s rights and welfare, all the three African Human Rights Organs can promote and protect such rights through their respective mandate, processes and procedures.

\textsuperscript{133} Article 3(h) of the Constitutive Act of the AU. See also, Olowu (n 14); and Murray (n 14).

\textsuperscript{134} Asuagbor (n 15).

\textsuperscript{135} Article 2 of the Protocol on the Establishment of the African Court on Human and Peoples’ Rights.
Chapter 3

Complementarity between the African Court and the judicial organs of Regional Economic Communities in Africa

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Complementarity between the African Court and the judicial organs of Regional Economic Communities in Africa

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1. Introduction

The landscape of international adjudication in Africa has changed significantly since the 1980s when the African Charter on Human and Peoples Rights (the African Charter or the Charter) was adopted. At the time the Charter was adopted, no operational international court existed on the African continent. In fact, as far as human rights are concerned, the idea of international supervision by an international court in Africa was even considered ‘premature’ at the time the African Charter was being drafted.136 Since then, Africa has seen the emergence of several international adjudicatory bodies particularly in the area of international criminal law and economic integration.137 In the field of economic integration, by some account, at least up to fourteen economic integration groupings are identifiable on the continent.138 A number of these Regional Economic Communities (RECs) currently boast of a judicial organ known either as a court or a tribunal.139 By the late 1990s, the idea of a continental judicial body to supervise the implementation of the African Charter became a reality with the establishment, in 1998, of the African Court of Human and Peoples Rights (African Court of Human Rights or African Court).140 Thus, effectively, the concept of proliferation of international courts, that has intrigued international lawyers around the world in recent times, is now a present reality in Africa.

The attention that the proliferation of international courts has attracted in international law generally has both facilitated an understanding of the phenomenon and an appreciation of the gains and challenges associated with the phenomenon. In relation to international law generally, the attention has also enhanced the search for mechanisms to address some of the main challenges associated with the proliferation of international courts. As a former President of the International Court of Justice

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137) The UN sponsored International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone are two such prominent international courts that have operated in Africa.

138) See Viljoen, (n 1) 475. Of the fourteen mentioned by Viljoen, eight are officially recognized by the African Union (AU) as building blocks of the Union.

139) For instance, while the judicial organ of the Economic Community of West African States (ECOWAS) is known as the Community Court of Justice, the judicial organ of the Southern Africa Development Community is known as the SADC Tribunal.

140) The African Court is billed to be replaced by yet another international court – the Africa Court of Justice and Human Rights which has been conceived to replace the moribund African Court of Justice and the African Court of Human and Peoples Rights.
(ICJ) has noted, the phenomenon may well be ‘a process of adaptation to ... fundamental changes in international law’ such as expansions in inter-state relations.¹⁴¹ We dare say such changes would also include the increased internationalisation of issues that previously were the preserve of domestic law. This, it is argued, has led to the diversification of international law such that international law has been ‘rendered ... more complex’ and certain areas, such as human rights, have become ‘specialised branches of international law.’¹⁴² Special courts have been created to cater to the adjudication needs in these specialised areas of international law. However, those courts operate within the framework of general international law and do not really claim exclusive jurisdiction over their sphere of influence. Thus, even the specialised courts are faced with the challenges that the proliferation of international law has brought.

As very eminent commentators such Judge Gilbert Guillaume have noted, some of the consequences of proliferation of the international courts include overlapping jurisdiction and inter-institutional competition.¹⁴³ These come with further consequences of forum shopping and conflicting decisions amongst others.¹⁴⁴ Arguably, one of the main reasons why the proliferation of international courts results in these challenges is the absence of hierarchy among international courts. In the anarchic environment in which international courts operate, jurisdictions overlap, litigants forum shop, sometimes engaging in simultaneous or successive litigation before more than one court. Operating in ‘clinical isolation’ where no court is bound by the rules and decisions of another,¹⁴⁵ competition among international courts becomes a danger to the unity and legitimacy of the international legal system.¹⁴⁶

As has been previously noted, the risks of proliferation are even greater in relation to situations where courts, which do not belong to the same international structure, apply the same rules.¹⁴⁷ This is the case in Africa in relation to international judicial review of human rights. The African Court of Human Rights, which was created for the primary purpose of strengthening the protective aspect of the African

¹⁴¹ Judge Gilbert Guillaume, Former President of the International Court of Justice (ICJ) in his Oct 2000 speech to the Sixth Committee of the General Assembly of the United Nations titled ‘The proliferation of International Judicial Bodies: The outlook for the International Legal Order.’¹

¹⁴² Ibid.


¹⁴⁷ Guillaume (n 6) 1.
Charter, suddenly finds itself sharing and competing for jurisdiction over the Charter with the judicial organs of African RECs. Considering the acclaimed need for consistency in decisions rendered in the field of human rights, this competition for jurisdiction is a cause for anxiety especially as it is not likely that hierarchy will be introduced anytime soon to regulate international courts.

Presently, the judicial organs of African RECs actually or potentially constitute the overlapping regimes that contend and contest with the African Court for authority in the field of human rights. Thus, RECs courts represent some of the greatest danger to the unity and coherence of Africa’s international human rights law to the extent that such unity and coherence is desirable in an otherwise anarchical international law system. Proceeding on the premise that this contingent overlap of jurisdiction calls for the application of complementarity in the regulation of their relationship, this contribution addresses complementarity in the relationship between the African Court and the RECs courts.

2. Subregional courts in Africa

As previously noted, the African Union (AU) officially recognizes eight (8) RECs as building blocks of its African Economic Community (AEC). Accordingly, the discourse in this contribution focuses on the eight AU recognized RECs. They are the Arab Maghreb Union (AMU), the Community of Sahel-Saharan States (CEN-SAD), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Inter-Governmental Authority

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150) The decision to officially recognize 8 RECs was taken at the AU Summit in Banjul, the Gambia in July 2006. Arguably, the AEC is now almost completely enveloped in the AU and hardly exhibits any independent existence. As such, reference to the AU in this contribution should be understood to encompass the AEC.

151) UMA is the French (and official) acronym. Although the first conference of the Maghreb Economic Ministers is reported to have been held in Tunis as far back as 1964, the Treaty establishing the AMU was only adopted on 17 Feb 1989. The members of the AMU are Algeria, Libya, Morocco, Mauritania and Tunisia.

152) CEN-SAD was established on 4 Feb 1998 when its Treaty was established. Its members include Benin, Burkina Faso, the Central African Republic, Cote d’Ivoire, Djibouti, Egypt, Eritrea, the Gambia, Ghana, Guinea Bissau, Liberia, Libya, Mali, Morocco, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Togo and Tunisia.

153) The COMESA Treaty was adopted in 1993 to replace the Preferential Trade Area of Eastern and Southern Africa States. Member of COMESA are Burundi, the Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

154) Although it was originally established in 1967, the EAC became defunct in 1977. The EAC was revived in 1999 when its new Treaty was adopted. The 1999 Treaty was signed by Kenya, Tanzania and Uganda. Burundi and Rwanda have since joined the EAC.

155) ECCAS was established on 18 Oct 1983. The members of ECCAS are Angola, Burundi, Cameroon, Central African Republic, Congo, Democratic Republic of Congo, Gabon, Equatorial Guinea, Sao Tome and Principe and Chad.

156) The original founding ECOWAS Treaty was adopted in 1975. However, ECOWAS is currently established and operates under an amended Treaty adopted in 1993. Member states of ECOWAS are Benin, Burkina Faso, Cape Verde, Cote d’Ivoire, the Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.
on Development (IGAD), and the Southern Africa Development Community (SADC). As can be
glimpsed from the objectives set out in their respective founding documents, apart from IGAD, most of
these RECs were essentially, though not necessarily, exclusively established for the purpose of pursuing
economic integration.

Of the eight RECs enjoying official AU recognition, two have structures that make no mention whatsoever,
of any judicial organ. Those are CEN-SAD and IGAD. Of the remaining six, four RECs (COMESA, EAC,
ECOWAS and SADC) have not only established the judicial organ envisaged in their respective treaties
but the judicial organs have engaged in some form of judicial activity. The remaining two RECs, AMU
and ECCAS, make provisions for a judicial authority and a court of justice respectively in their respective
treaties but both institutions have not been particularly active. The discussion in this contribution will
therefore be around judicial organs that have been established and are operational. However, the
lesson and analysis can be generalized to cover all the RECs.

The judicial organ of AMU is established by Article 13 of the AMU Treaty and is known as the Judicial
Authority. The Judicial Authority is required by Treaty to comprise two judges from each of the AMU
Member States. By Article 13 of the AMU Treaty, the Judicial Authority is authorised to rule on
disagreements arising from the interpretation and application of the Treaty and agreements of the
AMU. The Judicial Authority may also deliver advisory opinion on any legal questions submitted by the
Presidential Council of AMU just as it can issue advisory opinions in disputes between AMU and its
staff. Decisions of the Judicial Authority are to be submitted to the Presidential Council even though
the judgments are said to be final and binding. A significant feature of the AMU Judicial Authority is
that access to it is only available to State parties.

Articles 7 and 19 the 1994 COMESA Treaty provide the legal platform for the establishment of the
COMESA Court of Justice. By Article 20 of the COMESA Treaty, the COMESA Court is composed of
seven judges without prejudice to the power of the COMESA Authority of Heads of State to appoint
additional judges. The COMESA Court has jurisdiction to ensure adherence to law in the interpretation
and application of the Treaty as well to adjudicate on all matters referred to it pursuant to the Treaty.
The COMESA Court is also authorised by Article 32 to issue advisory opinions on questions of law

157) IGAD was created 1996 to replace the Intergovernmental Authority on Drought and Development. The member states of IGAD are Djibouti, Eritrea, Ethiopia, Kenya, Somalia, Sudan and Uganda.

158) SADC was established in August 1992 in the place of the Southern Africa Development Coordination Conference (SADCC). SADC member states are Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

159) The purpose for which RECs have been established is significant in locating the purpose and functions of the judicial organs of these international organizations.

160) The Judicial Authority of AMU was established in Nov 1989 and became operational on 30 Nov 2001. The Judicial Authority operates from Nouakchott, Mauritania.

161) Art 13 of the AMU Treaty.

162) See Arts 19 and 23 of the COMESA Treaty.
arising from the provisions of the Treaty affecting the Common Market. The COMESA Treaty allows for references to be brought to the COMESA Court by Member States, the Secretary General of COMESA and by residents (legal and natural persons) of member states. Actions by natural and legal persons should relate to ‘the legality of any act, regulation, directive or decision of the Council or Member State ...’ which is unlawful or infringes on the Treaty. The COMESA Court enjoys exclusive jurisdiction over disputes involving the interpretation and application of the Treaty and its judgments are final, conclusive and not open to appeal.

The judicial organ of the EAC, the East African Court of Justice (EACJ) is established under Articles 9 and 23 of the EAC Treaty and has the primary responsibility to ‘ensure the adherence to law in the interpretation and application of and compliance with the EAC Treaty. The jurisdiction of the EACJ is divided into two parts: an initial jurisdiction over the interpretation and application of the Treaty and an envisaged jurisdiction that would include jurisdiction over human rights. This envisaged and extended jurisdiction is expected to be operationalized by a protocol. The EACJ is also competent to give advisory opinions on questions of law arising from the Treaty.

The EACJ has a First Instance Division and an Appellate Division and normally has a maximum of 15 judges, not more than ten of whom are appointed to the First Instance Division. Access to the EACJ is open to the EAC Partner States, the Secretary General of the EC and to legal and natural persons. By Article 35 of the EAC Treaty, subject to the rules relating to review, judgments of the EACJ are final, binding and conclusive.

Articles 7 and 16 of the ECCAS Treaty establish the ECCAS Court of Justice to exercise the function of ensuring that law is observed in the interpretation and application of the Treaty and for application of the Treaty. The ECCAS Court of Justice, therefore, has jurisdiction to determine the legality of ECCAS Community decisions, directives and regulations. The ECCAS Court of Justice is empowered to give preliminary rulings on the interpretation of the Treaty and the validity of the decisions of Community institutions. The Court of Justice is also competent to give advisory opinions on any legal matter, at the request of the ECCAS Conference of Heads of State or the ECCAS Council of Ministers. Decisions of the ECCAS Court of Justice are binding on its Member States and on its Community institutions.

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163) Arts 24 to 26 of the COMESA Treaty.

164) Art 26 of the COMESA Treaty.

165) See Art 31 of the COMESA Treaty.

166) Art 27(2) of the EAC Treaty.

167) The EACI became operational in 2001 when the six judges of the Court and the Registrar of the Court were sworn in. As at June 2010, no protocol had been adopted for the purpose of extending the jurisdiction of the EACJ. See ST Ebobrah, ‘Litigating Human Rights Before Sub-Regional Courts in Africa; Prospects and Challenges’ 17 African Journal of International and Comparative Law (2009) 79 – 101, p. 81.

168) Art 36 of the EAC Treaty.

169) Very little, if any information is available on the ECCAS Court of Justice.
The ECOWAS Community Court of Justice (ECOWAS CCJ) is the judicial organ of ECOWAS. The ECCJ is established under Articles 6 and 15 of the 1993 Revised ECOWAS Treaty and Article 2 of 1991 ECOWAS Protocol on the Community Court of Justice. The ECOWAS CCJ is composed of seven judges. By the original Article 9 of the 1991 Protocol, the jurisdiction of the ECOWAS CCJ was restricted to the interpretation and application of the provisions of the ECOWAS Treaty.

In 2005, the 1991 Protocol was amended by a supplementary protocol. One of the high points of the 2005 Supplementary Protocol was the expansion of the jurisdiction of the court to include competence over a variety of issues such as the failure of Member States to honour their obligations under the ECOWAS Treaty and other instruments as well as to ‘determine cases of violation of human rights that occur in any ‘Member State’ of ECOWAS. The ECOWAS CCJ is also competent to give advisory opinions at the request of the ECOWAS Authority, Council, President of the ECOWAS Commission or Member States. Although originally, access to the ECOWAS CCJ was restricted to Member States and ECOWAS organs, the 2005 Supplementary Protocol also gave individuals access to the ECOWAS CCJ on certain issues. Individuals coming before the ECOWAS CCJ with claims of human rights violation do not need to exhaust local remedies. By Article 19 of its 1991 Protocol, decisions of the ECOWAS CCJ are final and immediately enforceable.

The judicial organ of SADC, the SADC Tribunal is established by Articles 9 and 16 of the SADC Treaty and constituted by 2 of the Protocol and Rules of Procedures of the SADC Tribunal (SADC Tribunal Protocol). The Tribunal is composed of ‘not less than ten members.’ By Treaty, the Tribunal is established to ‘ensure adherence to and proper interpretation’ of the Treaty. The Tribunal is also competent to give advisory opinions on matters referred to it by the SADC Summit or the SADC Council. By Article 16 of the SADC Treaty, the decisions of the Tribunal are also final and binding. Access to the Tribunal is open to states and both legal and natural persons. Non-State Actors coming before the Tribunal must have first exhausted local remedies.

It would be noticed that all the judicial organs summarily considered above share at least two common features. First, they are all established to ensure the observance of law in the interpretation and application of their respective treaties. Second, none of them has any express link with the African Charter or the African Court on Human Rights. Not even the ECOWAS CCJ, which enjoys an express human rights competence, can boast of a clear link with the main instrument or the main judicial organ of the African human rights system. This fact is an indication that it was not the intention of the drafters that these institutions should meet at any stage. However, as will be shown shortly, in the course of

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170) Protocol A/P1/7/91 on the Community Court of Justice.

171) See ECOWAS Supplementary Protocol A/SP.1/01/05 Amending the Protocol A/P1/7/91 Relating to the Community Court of Justice.

172) See Art 15 of the SADC Tribunal Protocol. However, it has to be noted that, following events that occurred between 2011 and 2012, the SADC Summit of Heads of State and Government has suspended aspects of the Tribunal’s activities, including especially, individual access to the Tribunal.
their evolution, judicial organs of the RECs have crossed path with the African Human Rights Court. The next section discusses the place of the African Human Rights Court in the continent’s human rights architecture and briefly explores how the judicial organs of African RECs have become involved in the African Human rights system.

3. An emerging network of international human rights courts in Africa: One instrument, several courts

It cannot be disputed that the African Charter occupies the central position in the galaxy that is the African human rights system. Technically, the African Human Rights Court is the only international human rights court within the galaxy since it is the only one established for the sole purpose of judicial supervision of the African Charter. However, in recent times, there have been developments in the African human rights system such that the African human rights architecture now comprises structures other than the African Commission on Human and Peoples Rights and the more recently established African Court on Human Rights. These developments could either be seen as an expansion of the African human rights system as we know it, or, at the very least, as the evolution of a network of African International courts in the field of human rights law.

Citing Tanja Borzel, Claes and de Visser define network as ‘a set of relatively stable relationships which are of non-hierarchical and independent nature linking a variety of actors who share common interests with regard to a policy or who exchange resources to pursue those shared interests, acknowledging that cooperation is the best way to achieve common goals.’ Claes and de Visser go further to state that ‘the core feature of network is a series of interlocking and non-hierarchical relationship between the various actors.’ This section argues that, as a result of shared use of the African Charter, such a network of international courts has emerged or is emerging in the African human rights system.

(I) The African human rights system and the place of the African Court in that system

The African human rights system is one of three established human rights systems that exists in the world today. As some commentators have argued, where binding norms exist with institutions recognised by states as having authority to interpret and supervise the application of those norms, a human rights system is in existence. In relation to the African human rights system, it is widely accepted that the African Charter is the central normative instrument upon which the system is based. In spite of the fact that the OAU Convention Governing the Specific Aspects of the Refugee Problems in Africa (OAU


174) The other two, arguably older and more established human rights systems are the European Human Rights System and the Inter-American Human Rights System.


Refugee Convention) preceded the African Charter and, is arguably the oldest human rights normative instrument in Africa, the African Charter enjoys pride of place in the African human rights system. In addition to being the repository of a wide range of human rights, the Charter also gave the continent its first dedicated human rights supervisory institution – the African Commission on Human and Peoples’ Rights (African Commission). Further, the African Charter has also inspired a number of other African thematic human rights instruments such as the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, the African Charter on Democracy, Elections and Governance and the AU Convention for the Protection and Assistance of Internally Displaced Persons.

At the time it was drafted, the African Charter was only fitted with the African Commission as its supervisory institution. The African Commission is, by design, a quasi-judicial body which exercises quasi-adjudicatory functions as part of its protective mandate. It was only in the late 1990s that the idea of an African Human Rights Court gained sufficient acceptance which led to the adoption of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (African Human Rights Court Protocol). By Article 2 of its Protocol, the African Human Rights Court is to complement the protective mandate of the African Commission. Seasoned commentators accordingly classify the African Human Rights Court (along with the African Commission and the Committee of Experts on the Rights of Children in Africa) as the ‘primary bodies with a human-rights-related mandate’ that bear ‘primary responsibility for human rights’ in the continent.

The drafters of the African Human Rights Court Protocol have carefully avoided any language to suggest that the African Human Rights Court is at the apex of the judicial and quasi-judicial mechanisms for supervising implementation of the African Charter. Further, although, the Protocol cloths the African Court with jurisdiction in ‘all cases and disputes ... concerning the interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ...’, this jurisdiction is not made exclusive to the Court. Effectively, it means that other institutions, especially the African Commission and (particularly important for present purposes) judicial organs of RECs, can share in the jurisdiction conferred on the African Human Rights Court. This raises the question whether the African

177) The OAU Refugee Convention was adopted in 1969 while the African Charter came into existence in 1981.
179) Generally see Viljoen (n 1) on the establishment, character and functioning of the African Commission.
180) The African Human Rights Court Protocol is reproduced in Heyns and Killander (n 43 above) 41.
181) Viljoen, (n 1) 169.
Human Rights Court’s competence over the Charter is of the same quality as the competence claimed by these other actors.

Arguably, there are at least two main grounds to support a claim that the African Court occupies a significantly higher position in the African human rights system and, accordingly, should occupy (if it does not already occupy) a leading and authoritative position vis-à-vis the African Charter. The first ground is that the African Human Rights Court is a judicial body established for the specific purpose of human rights supervision, with authority to make final and binding decisions on the interpretation and application of the African Charter. The specificity of its purpose and the finality of its decision give it the advantage of having the last word in the interpretation of the African Charter and a number of other African human rights instruments.\(^{183}\) The second ground that would support such a claim is that other bodies are granted access to the Court to seek interpretation of the Charter,\(^{184}\) whereas no equivalent access is available to the African Court on Human Rights before the other judicial and quasi-judicial bodies exercising jurisdiction over the Charter. Linked to this point is the fact that the African Human Rights Court enjoys competence to advise all organs of the AU regarding the proper interpretation of the African Charter. The primacy of the African Court in the African human rights architecture is further captured in the observation that the Court is competent to overrule findings of the African Commission on the Charter. Considering the wealth of jurisprudence that has been developed by the African Commission, the authority that the African Court has to overrule the Commission is an indication that, in years to come, it is the wisdom of the African Court that will drive the interpretation given to the Charter.

Despite its prominent position vis-à-vis the Charter, the African Human Rights Court enjoys no hierarchical relationship with any other international court because the Court is currently the only court in its specific legal system. It is the first and last court in the legal system created under the AU framework. However, the African Human Rights Court is not the only court in the African human rights system, if the system is understood to cover all institutions that apply the African Charter and its associated normative instruments. Apart from the domestic courts of AU Member States, judicial organs of African RECs are now players in the field since these latter courts also apply the Charter directly or indirectly. It is in this sense of shared application of the African Charter that the idea of a network of African international human rights courts come into play. In other words, despite its central role in relation to interpretation and supervision of the application of the African Charter, the African Human Rights Court shares its jurisdiction over the Charter with other international courts – the judicial organs of African RECs.


\(^{184}\) Generally, see Art 4(1) of the African Human Rights Court Protocol.
(II) Human rights in the mandates of judicial organs of the RECs

As previously mentioned in this contribution, generally, the mandates of the judicial organs of African RECs are commonly linked to the economic integration objectives of their parent organisations. Accordingly, nearly all, if not all, the judicial organs of the RECs are mandated by their respective founding instruments to ensure adherence to law in the interpretation and application of the treaties and other legal instruments of their respective legal orders.¹⁸⁵ These judicial organs are therefore, primarily, guardians of Treaty in their respective international legal orders. It goes without saying then, that the judicial organs of the RECs differ from the African human rights courts whose primary responsibility is to see to the interpretation and implementation of the African Charter.

In line with what scholars have termed ‘new regionalism,’ African RECs have, since the 1990s, moved from strict and exclusive focus on economic integration to pay attention to other issues, including politically volatile issues such as human rights. African RECs have come to a realisation that integration of any sort would be nearly impossible where the domestic political environment in their member states is conflict-ridden.¹⁸⁶ Probably realizing that respect for human rights is critical for domestic peace and security, most African RECs introduced the idea of respect, promotion and protection of human rights in their treaties as part of the fundamental principles upon which economic integration should take place.¹⁸⁷ In certain cases, Treaty recognition of human rights has led to the adoption of other normative instruments with consequences for human rights.¹⁸⁸ However, despite declaration of intention to do so in some cases, no REC in Africa has as yet (at the time of writing in September 2013) adopted a catalogue of rights upon which the acclaimed realisation of human rights can be founded.¹⁸⁹ Instead, a number of RECs specifically tie their intention to respect, promote and protect human rights to the African Charter.¹⁹⁰ While others have not specifically mentioned the African Charter in their treaties, the possibility of applying the Charter as an inspiration in the absence of a human rights catalogue has not been ruled out. Thus, whereas the continental human rights system appears to be pursuing integration through human rights by converging states around the African Charter, the RECs protect or promise to protect human rights whilst (or in spite of) pursuing economic integration.¹⁹¹ This is a significant difference because, although human rights feature in both cases, in the one,

¹⁸⁵) In some sense, it could be argued that each REC is a form of self-contained legal regime even none of them exists completely independent of general international law.

¹⁸⁶) See the 2008 ECOWAS Conflict Prevention Framework for instance.

¹⁸⁷) See Art 6 of the EAC Treaty and art 4 of the ECOWAS Treaty.

¹⁸⁸) For instance, in the SADC framework, a Charter of Fundamental Rights has been adopted to cater for labour rights. Similarly, a protocol to cater for the rights of women in Southern Africa has also been adopted.

¹⁸⁹) The EAC has come closest to adopting an East African bill of rights but even its bill of rights is still a work in process.

¹⁹⁰) See for instance Art 6(d) of the EAC Treaty and Art 4(h) of the ECOWAS revised Treaty.

improvement of human rights situation is the end whereas, in the other, the pursuit of human rights is only instrumental.

With the mainstreaming (or at least recognition of the importance) of human rights in regional integration, the judicial organs have gradually entered into the space of judicial supervision of human rights in Africa. In this regard, there are three classes into which the judicial organs of RECs can be placed. In the first class is the ECOWAS CCJ which, since 2005, has been clothed with express competence to adjudicate on cases involving violation of human rights in ECOWAS Member States.\(^{192}\) Over the years, as its human rights jurisprudence grew, the ECOWAS CCJ has affirmed that, by reason of clear reference to the African Charter in the 1993 revised ECOWAS Treaty, its human rights mandate is tied to the substantive aspects of the African Charter.\(^{193}\) The ECOWAS CCJ’s human rights jurisdiction does not depend on prior exhaustion of local remedies. In the second class are the judicial organs that have not been granted express competence to receive human rights cases, but which can or have adjudicated on human rights cases or human rights-related cases based on the Treaty reference to human rights. In this category are the COMESA Court of Justice, the ECCAS Court\(^{194}\) and the SADC Tribunal.\(^{195}\) The third class comprises the EACJ which has been promised a human rights mandate, but has handled human rights-related cases despite the fact that the promised jurisdiction is yet to be conferred.\(^{196}\) Of these three classes, only the ECOWAS CCJ currently directly invokes the African Charter as its preferred human rights catalogue.\(^{197}\) Before the EACJ, although reference is sometimes made to the African Charter, such references are only for inspiration as the EAC Treaty is currently the basis upon which human rights related cases are brought.\(^{198}\) Of the three judicial organs in the second class, only the SADC Tribunal has heard human rights or rights-related cases. In at least one of those cases, the SADC Tribunal made some reference to the African Charter.\(^{199}\)

The use of the African Charter, the judicial organs of the RECs, (whether such usage is direct or indirect) is the link between the African Human Rights Court and these sub-regional courts.\(^{200}\) In their

\(^{192}\) The ECOWAS CCJ’s human rights jurisdiction is conferred by a 2005 Supplementary Protocol.


\(^{194}\) The ECCAS Treaty alludes to the rule of law but not human rights per se. Thus, the potential for human rights realization on the platform of the ECCAS Tribunal is somewhat lower.

\(^{195}\) In the case of the SADC Tribunal, while it had exercised a human rights mandate for a while, events in 2012 have led to the suspension of the activities of the Tribunal. Although there are talks of reviving of the Tribunal, it is envisaged that individual access to the Tribunal will be removed. This is likely to negatively affect any exercise of human rights mandate by the Tribunal.

\(^{196}\) Art 27(2) of the EAC Treaty. In spite of that provision, beginning with its decision in Katabazi and Others v Sec Gen EAC and others, the EACJ has exercised jurisdiction that touches on human rights.

\(^{197}\) In the all the over 100 human rights cases finalized by the ECOWAS CCJ, the African Charter has either been invoked exclusively or together with other international human rights instruments.


\(^{200}\) Some commentators take the view that judicial organs of RECs are regional courts and not sub-regional courts. In their view, AU institutions are continental rather than regional bodies. Without engaging in a debate as to the correctness of any particular view, the term sub-regional courts should be understood as meaning regional courts for those who prefer that nomenclature.
relationship with the African Charter (and by implication, the African Human Rights Court), judicial organs of the RECs act independently of both supervisory bodies of the Charter and do not exist in any sort of hierarchical relationship with either the African Court or the African Commission. However, despite the fact that they act independently, these judicial institutions share actors in some ways as the member states of the respective RECs are the AU members and state parties to the Charter. The actors (state and non-state actors alike), before the sub-regional courts are also currently or potentially the actors before the African Court. Applying the definition of a network as set out above, it can be argued that a network of African international human rights courts has emerged or is emerging around the African Charter.

This network theory is further strengthened by the fact that the RECs (and by extension, their organs, including judicial organs,) are building blocks of the AU. A Protocol signed among the AU and the eight RECs recognized by the AU reaffirm the link but is silent on critical aspects of the relationship, including issues such as the relationship between the courts established on the platform of the AU and the judicial organs of the RECs. The special relationship existing between the AU and the RECs and the consequent allocation of role to RECs in AU affairs is also evident in the framework of the African Peace and Security Architecture. However, despite acknowledgement of the judicial organs of the RECs and their human-rights-protecting role in the Human Rights Strategy for Africa, there is no clear documentation of the relationship between the African Human Rights Court and the sub-regional courts.

As is evident from the discourse above, the mere fact that there is no hierarchical relationship amongst the African Human Rights Court and the sub-regional courts is, in itself, not abnormal. However, in a networking relationship shaped around the African Charter, the principle of complementarity, particularly from a perspective of cooperation and coordination amongst the different judicial actors, becomes very important. As Lavranos has observed in relation to coherence in international law, international courts are under an inherent obligation to ‘contribute to uniform interpretation and application of international law.’ The need for consistency in interpretation of an international instrument such as the African Charter and the duty it imposes on judicial actors is further captured in the observation that interpretation is integral to a legal system since legal texts find meaning within the context of the legal system from authority is derived. Put differently, ‘interpretation encapsulates a dialectic between the text itself and the legal system from which it draws breathe.’ Thus, despite the lack of clarity as to how they connect and where they are situated in the judicial architecture of the AU generally and in the African human rights architecture specifically, the sub-regional courts share the

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201) Protocol on Relations Between the African Union and the Regional Economic Communities 2008.

202) See the Memorandum of Understanding in the Area of Peace and Security Between the African Union, the Regional Economic Communities and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern Africa and Northern Africa.

203) Lavranos (n 10) 615.


205) Leathley (n 11) 286.

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obligation to ensure coherence and consistency in the African human rights (legal) system. The Human Rights Strategy for Africa apparently recognizes this fact as it recommends ‘complementarity and subsidiarity amongst AU organs and institutions, RECs and member states.’ Accordingly, the value of applying complementarity in this uncertain relationship is not disputed. The challenge is translating the principle into concrete processes in real terms.

4. Different faces of complementarity amongst the African Human Rights Court and judicial organs of the RECs

To some extent, the form complementarity takes or should take in the network of international human rights courts in Africa is determined by the nature of risk that is sought to be addressed in the framework of the network. The most obvious (and perhaps most significant) risk is the potential for the emergence of conflicting jurisprudence which could result in a situation where more than one court is approached on the same issue simultaneously or successively. Other dangers include the risk of lowered quality of output when international courts compete for popularity in order to make their particular forum more attractive to prospective litigants. In order to address such challenges, international law has borrowed certain principles such as comity, res judicata and lis pendens from domestic law. Those principles, in one form or another, can be found in the relevant documents of some of the international courts exercising human rights jurisdiction in the continent. Arguably, principles already captured or envisaged in the relevant documents are less complicated and can be applied more easily with the principles of complementarity and subsidiarity envisaged in the Protocol regulating the relationship amongst the AU and the RECs. Bearing in mind that that Protocol envisages cooperation even in areas such as promotion of good governance, human rights, the rule of law, humanitarian concern, this section focuses on those relatively uncontroversial possible faces of complementarity.

(I) Comity

Arguably, an important essence of complementarity is to ensure that international courts relate in a mutually beneficial rather than in a disruptive manner. Lavranos captures this essence in the argument that ‘courts and tribunals must exercise ... jurisdiction in a way that does not undermine the authority of other courts and tribunals whose jurisdiction is also potentially triggered.’ In the form it is captured, it is a court’s duty to ensure comity towards other courts in the international system. Hence, Lavranos makes the point that ‘justice towards the other international courts and tribunals entails showing respect for the other court’s jurisdiction by relinquishing its own jurisdiction, staying the proceeding or taking full account of the other court’s decision.’

206) See the AU’s Human Rights Strategy for Africa, Principle 27(i)

207) Para. 9 of the Preamble to the Protocol.

208) Lavranos (n 10) 615.

209) Ibid.
since, in what she proposes as her list of inherent powers of judicial functions, she lists the powers to ‘determine whether the court is competent to hear a particular matter’ and ‘determine whether the court should refrain from exercising jurisdiction that it has.’

Whatever else it may mean, the operation of comity as a face of complementarity in the network of international human rights courts in Africa requires that each court or tribunal seised with a human rights claim should make the conscious determination whether its exercise of jurisdiction is likely to negatively impact on proceedings already going on before another court. While this may appear, at first glance, to be strictly a function of the courts, court-users have a role to play in encouraging comity amongst the courts. Litigators (either as applicants or respondents) have a duty to inform any court before which they have come as to whether a case arising from the same or similar facts has been previously filed before any other court. For instance, in a case brought before the African Court, litigants ought to inform the Court whether a case on those or similar facts had been filed before any sub-regional court. With or without such information from litigants, the Registry of the African Court and the registries of each of the sub-regional courts ought to contact other registries (African Court and other sub-regional courts with overlapping membership) to confirm whether a similar case has been filed previously in the other court(s). This information should be the basis of the determination to be made by the judges.

Comity, as proposed above, has been applied elsewhere in the international legal system and has become understood as ‘a rule of respect for the sovereignty and competence of another legal actor.’ As between the European Court of Justice (ECJ) and the UN Convention on the Law of the Sea Tribunal (UNCLOS Tribunal), in, at least, one case, the UNCLOS Tribunal is known to have suspended its own proceedings to give a chance to the ECJ to decide whether an application filed before that court (ECJ) raised similar issues as those before the UNCLOS Tribunal. One commentator takes the view that the UNCLOS Tribunal's decision was based on a reasoning that ‘the ECJ might be better suited to answer the question at hand.’ In other words, the court or tribunal more suited to a given claim should be the beneficiary of comity by the less suited court. While this may give the impression that all human rights cases should generally go to the African Court, there are, at least, two good reasons why this may not necessarily be the case. First, in situations where a litigant files a case before the African Court, despite the fact that the Article 34(6) declaration required by the African Court Protocol has not been made, a sub-regional court could be better suited to hear the case. Secondly, the exigencies of regional context might make sub-regional courts more suitable. In any of these or other relevant cases, the African Court ought to adopt the approach of the European Court of Human Rights (ECtHR) in relinquishing jurisdiction once it is satisfied that the quality of human rights protection available in the sub-regional framework is comparable to that the African Court itself promises.

210) Shelton (n 13) 545.
211) WT Worster, ‘Competition and Comity in the Fragmentation of International Law’ 34(1) Brooklyn Journal of International Law 121.
212) Cited by Worster, ibid.
213) Ibid.
214) See Case C-84/95, Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transp., Energy & Commc’ns, 1996 E.C.R. 1-3953 regarding the comparison between the human rights protection of the ECJ and the ECtHR.
The application of comity in the existing relationship amongst the African Court and the sub-regional courts does not even require any particular legal basis and, therefore, can begin immediately. As Lavranos argues, comity is more a “gentlemen’s agreement” between courts and tribunals so that it is totally at the discretion of the courts themselves.\(^{215}\) However, even assuming that a legal basis is required to trigger comity, as Leathley argues, international courts have the option of ‘implying powers from their constitutive instruments,’ the sort of inherent powers that Shelton had referred to.\(^{216}\) Thus, one face of complementarity that courts in the network ought to apply is comity towards other courts in the network.

(II) Res judicata

A second face of complementarity, somewhat connected to comity, is the invocation of res judicata by international courts as a principle to put an end to litigation and avoid conflicting jurisprudence. Shelton suggests that the power to consider a matter as finalized, falling under a zone of res judicata and ‘agreeing to be bound by the judgment in future rulings’ is also an inherent power of courts.\(^{217}\) Complementarity in the network of international human rights courts in Africa should mean that, where the one court has heard a particular case on a given set of facts and has delivered a judgment, no other court, not even the African Court, should re-open the case or hear a case on those same facts.

There are at least three main bases upon which the rule of res judicata can be applied in the African human rights system. As such, a court or tribunal in the network which does not consider itself as competent on any one basis can look towards any of the other two to found application of the rule. The first of the three bases is the inclusion of the rule (or a variation of it) in the admissibility requirement of the given court. The most obvious is Article 56(7) of the African Charter which the African Court is required to apply in its determination of admissibility. Although it is not restricted to judicial outcomes and does not envisage settlement by sub-regional courts, it would be difficult to find a compelling reason to exclude those courts from the ambit of Article 56(7) of the Charter. No equivalent provision exists in the relevant instruments and documents of the sub-regional courts. Although Article 10(ii) (d) of the 2005 Supplementary Protocol of the ECOWAS CCJ embodies provisions that suggest the rule of lis pendens is one of the requirements for admissibility of human rights cases, even that regime lacks clear provisions on res judicata. As such, if, like the ECOWAS CCJ, other sub-regional courts do not consider themselves bound to apply procedural aspects of the African Charter, it is to either of the other two bases that sub-regional courts can turn to be able to apply res judicata. The second basis is premised on the argument that res judicata is now a general principle of international law.\(^{218}\) If that argument is correct, as international courts, the African Court on Human Rights as well as the sub-regional courts can and do have an obligation to apply the rule in their proceedings. The third

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\(^{215}\) Lavranos \(n 10\) 614.

\(^{216}\) Laethley \(n 11\) 295.

\(^{217}\) Shelton \(n 13\) 556.

\(^{218}\) See generally, Shany \(n 9\) for instance.
basis is Shelton’s argument that the power to apply res judicata is inherent in courts generally.\textsuperscript{219} Thus, unlike the complementarity relationship between the African Commission and the African Court which Viljoen thinks should exclude res judicata,\textsuperscript{220} complementarity between the African Court and the sub-regional courts necessarily invites the application of res judicata.

(III) Judicial dialogue

A third face of complementarity that should occur more in the network of international human rights courts in Africa is judicial dialogue amongst the various courts in their interpretation of the African Charter. Although, the jurisprudence of the African Court is still very much at its infancy,\textsuperscript{221} so that there is currently nothing that sub-regional courts can consider from that court, the African Court itself ought to pay attention to the existing jurisprudence of the sub-regional courts. Ideally, sub-regional courts ought to also engage with the jurisprudence of the African Commission and vice versa, despite the fact that the Commission is not a judicial body in the strict sense. At this infancy, drawing the attention of lawyers and judges to the need for judicial dialogue in the system is critical to maintaining the coherence of the international human rights law in Africa.

In relation to international law generally, the suggestion has been made that, even in the absence of an appellate or review jurisdiction over other international courts, the ICJ ‘has an important role to play in maintaining the coherence of international law.’\textsuperscript{222} This is a role the ICJ plays by addressing itself to the jurisprudence of other international courts. In order to be able to play a similar stabilizing role in the African human rights system, the African Court needs to engage more in judicial dialogue with the other courts in the network.

In a complementary relationship such as that envisaged amongst the African Court on Human Rights and the judicial organs of African RECs, judicial conversation has to be a dialogue and not a monologue or even a diatribe. The experience of the ICJ is again relevant in this regard. Observers note that the ICJ ‘keeps careful track of the judgments rendered by other courts’, increasingly making reference to those judgments where necessary, in a conscious bid to ensure coherence and consistency.\textsuperscript{223} Even more relevant to the present discourse is the European experience where judicial dialogue occurs between the ECJ and the EChHR in respect of the European Convention on Human Rights (ECHR) notwithstanding the fact that the EChHR is the specialized court established to interpret and supervise implementation of the ECHR. By one account, the ECJ is said to have ‘cited and followed EChHR for years,’\textsuperscript{224} while the EctHR, for its part, ‘carefully observes the case-law of the ECJ and follows it where necessary.’\textsuperscript{225}

219) Shelton (n 13)
220) Viljoen, (n1) 425
221) At the time of writing, the African Court had only delivered one judgment on the merit.
222) Charney (n 14) 705.
223) Guillaume (n 6).
Despite the absence of any formal hierarchy within the network, the African Court on Human Rights is ideal for the stabilizing role in view of the specificity of its establishment to the African Charter as well as the context constrains that the sub-regional courts face in relation to the Charter. An important point to note is that courts generally introspect in the development of jurisprudence just as they look to the decisions of other courts to which they are referred by counsel appearing before them. The implication is that, in this complementary relationship, lawyers and litigants have as much role to play in encouraging judicial dialogue as do the judges. It is the litigants and their lawyers who should first point these courts towards their complements by citing existing jurisprudence on the subject before the court rather than constantly referring courts in the network to the jurisprudence from Europe and the Inter-Americas. The international human rights courts in Africa do not need any legislative framework to engage in judicial dialogue since courts have an inherent power to decide questions relating to the exercise of their jurisdictions. Thus, judicial dialogue within the network is immediately realisable.

(IV) Reference but not review

Another possible, albeit not-totally-uncontroversial, face of complementarity relates to preliminary referral of cases to the African Court by the sub-regional courts. By a combined reading of Articles 4 and 5 of the African Human Rights Court’s Protocol, it is obvious that RECs, in their capacity as ‘African intergovernmental organisations,’ are competent to seek advisory opinions from the African Court just as they are competent to bring contentious actions before the African Court. If the RECs, parent organisations to the sub-regional courts can access the African Court’s advisory jurisdiction, this contribution argues for an extension of that access to the judicial organs as far as novel questions regarding the African Charter are concerned. The preliminary ruling mechanism exists in the founding instruments of the sub-regional courts vis-à-vis national courts in favour of rulings from the sub-regional courts on Treaty-related questions. It is contended here that such a mechanism is preferable to a right of review by the African Court.

The idea of international courts seeking advisory opinions in the form of preliminary ruling from another international court is not novel but has been previously mooted. Drawing inspiration from the preliminary ruling procedure upon which the relationship between the ECJ and national courts of EU member states is hinged, former President Guillaume of the ICJ had advocated a procedure by which international courts created by the United Nations (UN) could request for advisory opinion from the ICJ. Finding a legal basis in the ICJ’s competence to receive requests for advisory opinions from UN organs such as the Security Council and the General Assembly, President Guillaume proposed that the relevant international courts could seek advisory opinion through the organs empowered to make

226) C/f Charney (n 14) 706 in relation to the ICJ in international law generally.
227) See also Leathley (n11) 267.
228) Guillaume (n 6) 4.
such requests. Citing the example of the practice of the Council of the League of Nations, President Guillaume even proposed further that international courts, which are not organs of the UN, could also seek advisory opinion through the General Assembly of the UN even where this was not a practice expressly provided for under the existing legal regime.\textsuperscript{229}

With respect to the sub-regional courts in Africa, complementarity could be practiced in a manner that allows the relevant political organs of the given REC to make the request for advisory opinion to the African Court.\textsuperscript{230} The outcome of the request should then become the interpretation of the African Charter upon which the sub-regional court in question can address a human rights claim before it. As previously noted, this could only apply to novel and complicated questions of Charter interpretation as otherwise, it could become an unduly prolonged bureaucratic process in the African human rights system.

Generally, creating a procedure for the African Court of Human Rights to be able to review certain decisions of sub-regional courts in relation to interpretation of the African Charter is conceivable. However, considering that there is currently no hierarchy in the international judicial system (and it is not likely that any such hierarchy would be introduced soon), a process of preliminary reference is more feasible and desirable than a possible process of review by the African Court of decisions of the sub-regional courts. As Ahdieh has observed, while a review is different to an appellate procedure, it shares the feature of effectuating ‘its mandate without the consent subject to review.’ Such a procedure, in addition to undermining the autonomy of the sub-regional international court, also potentially eliminates the advantages of multiple forums\textsuperscript{231} and the autonomy exercised by litigants in choosing to approach a particular court instead of the African Court. A review or appellate procedure would also introduce a further danger of creating a dichotomy in which ‘the very loci of a judicial decision-making carries with it a dominant or subordinate role.’\textsuperscript{232} Thus, the reference face of complementarity is recommended as it arguably allows the sub-regional courts to retain their independence and judicial autonomy.

5. Thorny and evolving issues in a budding relationship

While the discourse in the immediately preceding section dealt with complementarity as it relates to preserving the coherence and unity of the African human rights system, this section focuses on issues that speak to positive complementarity and constitutive application of comparative advantages in the system. This section will also flag thorny issues in the relationship within the network of international human rights court in Africa that need to be clarified and sorted out.

\textsuperscript{229} Ibid
\textsuperscript{230} Viljoen (n 1) above, agrees that under the existing legal regime, RECs can directly access the African Court.
\textsuperscript{231} Charney (n 14) 698.
\textsuperscript{232} Leathley (n 11) 272.
(I) Sub-regional courts are routes to the African Court: Tackling the Article 34(6) debacle

One of the major prevailing challenges of the African Human Rights Court is the obstacle to individual access to the Court occasioned by the requirement in Article 34(6) of the African Human Rights Court’s Protocol.\textsuperscript{233} Considering that only very few states have made the relevant declaration,\textsuperscript{234} for now, only a tiny percentage of state parties to the African Charter can be brought before the African Court by individuals or NGOs. Accordingly, in line with the complementarity relationship existing between the African Court and the African Commission, currently the Commission is the most likely route by which African people can access the African Court. A question worth considering is, whether in pursuit of a complementary relationship amongst the African Court and sub-regional courts, these later courts can also become routes by which prospective litigants can bring issues before the African Court.

As already argued above, the most obvious option by which litigants can place issues before the African Court using the sub-regional courts as a conduit is by way of a request for preliminary ruling or advisory opinion where a case is before the sub-regional court. In that option, it is the sub-regional court that exercises jurisdiction even though the African Court makes an input. In the normal workings of preliminary rulings, the application of the principle(s) enunciated by the African Court rests at the discretion of the requesting sub-regional court. The more controversial question is thus, whether sub-regional courts can either refer a pending case by way of transfer to the African Court or act in a capacity similar to the role played by the African Commission before the African Court.\textsuperscript{235} It is difficult to envisage a sub-regional court participating as a litigant before another international court – the African Court. It is even undesirable that such a practice should be contemplated. Thus, the more beneficial task will be to evaluate the possibility of transfer of cases from sub-regional courts to the African Court. It has to be re-emphasized that there is, as yet, no legal foundation for such a transfer to occur. This fact is perhaps the biggest obstacle on this point.

Notwithstanding how attractive it is for sub-regional courts before which cases have been filed to be able to transfer such cases to the African Court, there are serious obstacles in that regard. A first difficulty relates to the question whether Article 5(1)(e) of the African Human Rights Protocol can be interpreted to grant such an access to the African Court. Although, Article 5(1)(d) allows states, whose citizens are victims of human rights violation, to bring actions directly before the Court (similar to the old regime of the ECOWAS CCJ under its 1991 Protocol by which individuals could only access the

\textsuperscript{233} Art 5(3) of the African Human Rights Court Protocol allows individual and NGOs access to the African Court only against state parties that have made a declaration in line with Art 34(6) of the Protocol allowing such access.

\textsuperscript{234} At the time of writing, only Burkina Faso, Cote d’ivoire, Ghana, Malawi, Mali, Rwanda and Tanzania had made the Art 34(6) declaration.

\textsuperscript{235} Although the complementarity practice of the African Court and the African Commission is still emerging, so far, there is indication that it takes the form of the old European Commission of Human Rights before the ECtHR and the Inter-American Commission on Human Rights before the Inter-American Court of Human Rights. In both cases, the Commission is a litigant before the Court, acting in the role of a minister of justice.
ECOWAS CCJ through their own state), it is difficult to read such an intention in Article 5(1)(e). However, even assuming that interpretation was a possibility, it is still difficult to conceive of a sub-regional court in the capacity of a litigant.

Another practical question relates to the exhaustion of the local remedies requirement under Article 56(5) of the African Charter. Considering that that provision relates to proceedings before national courts that need to be concluded before the African Court can assume jurisdiction, it is not likely that sub-regional courts can be considered as domestic remedies which need to be exhausted before the case can be admissible. In other words, where a litigant had exhausted local remedies before approaching the sub-regional court, can the proceedings before the sub-regional court be considered as a continuation of domestic proceedings? This question is even more significant when it is recalled that the determination of reasonable time under Article 56 (6) of the African Charter starts to count from the actual finalization of the domestic proceedings. It even becomes more complicated in relation to the ECOWAS CCJ which regime does not require the exhaustion of national remedies. In the event of a potential transfer from the ECOWAS CCJ to the African Court, it would be problematic to determine whether the ECOWAS CCJ becomes the domestic remedy that has been exhausted. Equally problematic would be the question whether the process before the sub-regional court makes a case potentially inadmissible before the African Court by operation of the res judicata principle envisaged in Article 56(7) of the African Charter.

As previously noted, commentators such as Viljoen hold the view (correctly in my opinion) that Article 56(7) of the Charter does not apply in the complementary relationship between the African Court and the African Commission. The question then becomes whether that could (and should) be the position in relation to the African Court and the sub-regional courts. As attractive as it may appear, such a position would subtly create an appellate or review relationship such that the African Court is placed in a superior position to the sub-regional courts. Apart from any other argument, such a situation will offend the protocols establishing the respective sub-regional courts since those protocols stipulate that decisions of those courts are final, binding and not subject to appeal. Another angle could be to suggest that, in appropriate cases, sub-regional courts should transfer a complaint at the level of an admissibility decision so that it would not have been ‘settled’ as envisaged in Article 56 (7) of the Charter. However, such a transfer can only be possible with further amendment to the existing treaties – an unlikely event in the near future. Hence, the prospect of a transfer from the sub-regional court is as bleak as the possibility of a formal transfer from the African Court to sub-regional court. The best option would therefore remain one by which sub-regional courts seek preliminary rulings from the African Court in matters pending before them.

236) Koroau case (n 58).
(II) Network member-courts as facilitators of judgment implementation by states

A common challenge that international courts, particularly international human rights courts, face is the difficulty of ensuring that states comply with the decisions of the international courts. As a result of its infancy, the African Court is yet to record any resistance of state to comply with its judgments. Sub-regional courts, on the other hand, have varying experiences in this regard. Overall, although the argument remains that certain factors, including peer pressure from a smaller group of proximate states (what some have termed communitarianism) increase the probability of compliance with the decisions of sub-regional courts, some of those courts have also experienced challenges with compliance. Accordingly, the question considered here is, whether in furtherance of complementarity, the African Court and the sub-regional courts can mutually reinforce compliance with human rights decisions through their respective judicial processes.

An important point to note is that the ultimate responsibility for ensuring compliance with or implementation of judgments of international courts lies with political organs of international organisations. However, in some of the regimes in Africa, judicial organs are given competence to make a determination whether there has been non-implementation of a judgment of the given judicial organ. In regimes such as the ECOWAS regime, non-implementation of decisions of the ECOWAS CCJ is even classified as a violation of community obligation under the Treaty. Effectively, it is suggested that judicial organs have some role to play in encouraging implementation of their own decisions. The critical question therefore is, whether as a face of complementarity, the failure of a state to implement the human rights decision of the African Court can trigger an action before a sub-regional court and vice versa.

As far as sub-regional courts are concerned, the crucial consideration is whether non-implementation of a judgment in protection of human rights constitutes a breach of REC obligation. A common treaty formulation is that ‘recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights’ and ‘the recognition and observance of the rule of law’ are fundamental principles of integration. In the case of ECOWAS, Article 56(2) of the ECOWAS Treaty obligates member states to ‘cooperate for the purpose of realising

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237) This challenge has been the subject of doctoral research in some institutions in the recent past.


239) The most infamous non-compliance challenge and fallout of non-compliance is the refusal of Zimbabwe to comply with the decision in Campbell v Zimbabwe before the SADC Tribunal and the shutting down of that Tribunal in the aftermath of efforts to ensure implementation of that decision.

240) For instance, in respect of the African Human Rights Court, it is the Council of Ministers that is responsible for ensuring implementation. In the ECOWAS regime, it is the ECOWAS Authority of Heads of State that is responsible for implementation of decisions of the ECCJ.

241) This is the regime that prevailed in the SADC framework before the current travails of the SADC Tribunal.

242) By virtue of a new regime introduced by the 2012 Supplementary Act A/SP.13/02/12 on Sanctions Against Member States that fail to honour their obligations to ECOWAS.

243) See for instance, Art 6(e) and (g) of the COMESA Treaty; Art 6(d) of the EAC Treaty and Art 4(g) and (j) of the ECOWAS Treaty.
the objectives...’ of the African Charter. At the very least, this should mean that, similar to an argument that the failure of a state to comply with the judgment of its own courts is a violation of a REC Treaty obligation, a failure of a state to implement a decision of the African Court amounts to a breach of Treaty obligation to recognise, promote and protect human rights and to respect the rule of law. In the ECOWAS context, it should amount to a breach of Article 56(2) of the ECOWAS Treaty. In any of these situations, sub-regional courts should be able to reach a finding of violation that will trigger implementation in accordance with the more compact procedures of the relevant REC.

The use of the African Court as a platform for enhancing the implementation of decisions of sub-regional courts is a bit more complicated. First, unlike the RECs which provide for the African Charter specifically or human rights generally in their treaty frameworks, the Charter which the African Court is established to implement does not envisage or provide for RECs. Second, the Charter does not provide for a general right to effective remedy. Further, even the read-in right to effective remedy relates to effective remedies at the domestic rather than the sub-regional level. However, a liberal reading of Article 1 of the African Charter could provide a basis for an argument that the states parties commitment to adopt ‘other measures’ to give effect to the Charter includes cooperation at the sub-regional level. By such a liberal reading, the failure of a state to comply with a decision of a sub-regional court aimed at protecting a Charter-guaranteed right could become a violation of Article 1 of the Charter and, thus, a matter within the competence of the African Court. Even with such a liberal interpretation, there is currently insufficient evidence that the African Court will enjoy a robust rate of compliance with its decisions or such a rate that is higher than the rate of compliance currently enjoyed by sub-regional courts. Hence, by a doctrine of comparative advantage, complementarity is more likely to favour sub-regional courts’ contribution to enhancing implementation of the African Court’s judgments.

(III) Thorny issues in an ambiguous relationship

Notwithstanding the arguments made above with respect to mechanisms to ensure that complementarity in the relationship amongst the African Court and sub-regional courts is applied positively, it has to be remembered that the very existence of a relationship is rather contingent as it was never intended. The haphazard manner in which the African Court’s human rights jurisdiction is now shared by the sub-regional courts gives rise to certain thorny issues that need to be carefully and consciously addressed. This section isolates and discusses two out of several critical yet thorny issues triggered by the ambiguous nature of the relationship in the network of international human rights courts in Africa.

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244) See particularly the EACJ case of Katabazi & Ors v Sec. Gen of EAC & Anor.
(a) Inter-court competition

As already alluded to above, one of the commonest fears expressed by international lawyers in relation to the proliferation of international courts is that overlapping jurisdiction leads to a variety of trends such as forum shopping and its attendant consequences. While forum shopping may not necessarily be such a negative thing from certain perspectives, the fact remains that forum shopping results in some sort of inter-court competition that ought to be tackled through the instrumentality of complementarity. As former President Guillaume correctly noted, where litigants engage in forum shopping, there is a tendency to shop for the most convenient and favourable (even if only by perception) forum. President Guillaume states that, in their determination of the forum to access, prospective litigants consider the nature of access to the courts, the simplicity of procedure before each court, the composition of the court, history of the ‘case law of each court, and the power granted to each court to make certain types of orders. In other words, the reputation that a court has built through its practice is significantly a factor in the choice of forum. The danger in this reality is captured in the expression that ‘Every judicial body tends —whether or not consciously, to assess its value by reference to the frequency with which it is seised.’

As far as the African human rights system is concerned, the question becomes, whether in their competition for business, network court-members would not seek popularity such that quality control in the system becomes compromised. By ignoring complementarity, international courts in Africa could engage in competition that would threaten a loss of the overall perspective of maintaining the legitimacy of the African Charter. For instance, a highly watered down admissibility procedure could make a given court a favourite of litigants and civil society such that it becomes the preferred destination once there is a remote possibility that it can exercise jurisdiction. However, once such watered down admissibility merges with a compromised substantive jurisprudence, states parties are increasingly likely to doubt the legitimacy of that particularly and eventually make nonsense of the entire African system. This is an aspect of inter-competition that complementarity should address and the courts themselves should discuss in their formal and informal engagements.

(b) Revisiting the review question

The need for ensuring normative and jurisprudential coherence in the African human rights system warrants a return to the question whether complementarity favours a regime that empowers the African Human Rights Court to exercise some sort of review competence over sub-regional courts in their exercise of their human rights mandates. It has to be noted that generally, the exercise of appellate or review competence by one international court over another international court, not of the same system, is extremely rare if not unheard of. Notwithstanding the rarity, it is beneficial to examine the desirability of conferring a review competence on the African Court as a face of complementarity.

246) Guillaume, (n 6) 2.
247) Ibid.
Robert Ahdieh’s discourse on international review of national courts provides a veritable platform for engaging this issue in relation to the emerging judicial network in the African human rights system. The first point to be noted is the similarity between review and the appeal process. According to Ahdieh, while they are not the same, review and appeal share ‘some potential to effectuate ... mandate without the consent of the court subject to review.’\textsuperscript{248} If Ahdieh is correct, then, it would mean that the review as well as appellate mandate is characterised by the exercise of authority to ‘undo the determinations of law, and sometimes ... the findings of fact reached by the court subject to review....’\textsuperscript{249} The question that arises is whether complementarity amongst international courts across organisational divides necessitates such authoritative review by one court over another, especially given the fact that each court ought to be independent and supreme within its own sphere of authority. In essence, the question becomes whether, in the face of a glaring absence of hierarchy as between the African Human Rights Court and the sub-regional courts such that each court is allowed to act ‘formally and legally ... in clinical isolation’,\textsuperscript{250} complementarity can be read to mean the authority of one court to review the decision of any other court. Hence, if similar to what Ahdieh suggests in relation to international review of national courts, the authority to review is likely to position the African Human Rights Court ‘in a relationship of superiority rather than parity with the courts subject to ... review’,\textsuperscript{251} it cannot be the case that complementarity envisages such a review relationship. Complementarity, rather, invites jurisprudential dialogue between the courts with due regard being paid to the fact that the African Human Rights Court enjoys a sphere speciality in relation to the African Charter so that its voice should be resonate more within the network.

\textbf{(c) Attaching appropriate weight-value in jurisprudential dialogue}

A final question that warrants attention in this contribution relates to the appropriate value that should be attached to the jurisprudence of a court by other courts within the emerging network of international human rights courts in Africa. This question could very well be a variation of the discourse on judicial dialogue within the network. However, it is treated separately as it is a question that is unsettled and on which guiding principles are yet to be developed. Viljoen poses a similar question in relation to the African Court vis-à-vis the African Commission.\textsuperscript{252} Considering that the sub-regional courts have been more active in the interpretation of the Africa Charter, an interesting question becomes whether the African Court is under any sort of complementarity-triggered obligation to consider an existing jurisprudence of a sub-regional court and, if so, what value needs to be attached to such jurisprudence. It is also important for courts in the network to address their minds to the question whether sub-regional courts are obliged to consider the emerging jurisprudence of the African Court, what value to

\textsuperscript{249} Ibid 2045.
\textsuperscript{250} Lavranos (10) 577.
\textsuperscript{251} Ahdieh (n 113) 2047.
\textsuperscript{252} Viljoen (n 1) 425.
attach to such jurisprudence, especially if it is new and whether there is an obligation on sub-regional courts to reverse their position on a given issue in order to bring about an alignment with a subsequent, contradictory decision of the African Court.

Although, as Viljoen observes, the African Human Rights Court is not bound to follow the findings of the African Commission in any given case, there is nothing to suggest that the Court should ignore those decisions either. Applying the same principle to the complementary relationship within the network of courts, while the African Court may not be bound to follow an existing African-Charter-based human rights jurisprudence of a sub-regional court, certainly, the African Court cannot also ignore such existing jurisprudence. As argued earlier in this contribution, litigants and their lawyers also have a duty to bring notice of the existence of such decisions to the attention of the Court. However, in the event of a failure on the part of litigants and lawyers, similar to the ICJ, the African Court should make a positive effort to trace judgments of other court-members of the network that are based on the African Charter.253 The value of such judgments cannot be anything more than persuasive as the ultimate responsibility of any court’s judgment remains with that court. In the absence of a principle of stare decisis, the African Court can be persuaded by a judgment of sub-regional courts but retains the right to disagree with an interpretation or application given in a case. In the interest of legitimacy of the African human rights system, the tool of distinguishing used by common law courts could be handy in the event that the African Court disagrees with an earlier reasoning, without compromising the right of the Court to subtly overrule a clearly erroneous interpretation of the Charter.

In relation to the jurisprudence of the African Court before sub-regional courts, suggestions on the role of the ICJ in relation to international law generally provide some guidance. As Charney has noted in relation to international law generally, while other international courts ‘may decide disputes ... it remains for the ICJ to place its imprimatur on the law it examines ...’254 By analogy, the judgments of the African Court should be the high point of interpretation of the African Charter. Thus, while the argument can be made that the judgment of the African Court need not be considered as binding on sub-regional courts in the same manner that binding precedence under the stare decisis principle operates, the Court’s judgments should be instructive in the creation of Charter-based human rights jurisprudence.255 In the end, complementarity in the network should be interpreted to mean that, in the absence of formal hierarchy, all the courts can, and should ‘contribute collectively’ to the creation of a formidable body of jurisprudence in the African human rights system.256

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253) See Guillaume, (n 6) regarding the practice of the ICJ in collating decisions from other international courts.
254) Charney (n 14) 706.
255) Laethley (n 11) 275 in respect of the instructive nature of the ICJ judgments.
256) c/f Charney (n 14) 699.
6. Conclusion

The sudden and unplanned entry of the judicial organs of African RECs into the field of human rights protection has attracted mixed reaction since it began to be entrenched. Impressive arguments can be made for and against the appropriateness of sub-regional engagement in this issue area. However, whatever the arguments may be, there is no evidence to indicate that the growth of these sub-regional regimes will cease anytime soon. Despite the challenges faced by the SADC Tribunal with respect to its erstwhile budding human rights regime, even the main actors of the African human rights system seem to have accepted it as a reality that has come to stay. What remains is to find the best possible ways by which the relationship between the more established and the budding mechanisms for human rights protection in the continent can co-exist and mutually reinforce the entrenchment of a human rights culture in Africa.

This contribution has attempted to address the relationship between the African Human Rights Court and the sub-regional courts in their common but separate movements towards building the African human rights system. Adopting a perspective that the common goal and the use of a common primary normative instrument is indicative of a judicial network in the African human rights system, the contribution has explored how complementarity amongst the courts in such a network would pan out. Although no exhaustive discourse has been made here, it is hoped that the contribution has raised salient issues that stakeholders in the African human rights system will find useful in their work.
Chapter 4

Legal Assistance and Client Care

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Legal Assistance and Client Care

Osai Ojigho

1. Introduction

It is well established that, for courts to effectively administer justice, parties must have equal opportunities to present their case and to be heard fairly in an independent, non-partisan and transparent process. Article 7(1) of the African Charter on Human and Peoples’ Rights (hereinafter the African Charter) provides that every individual has the right to have his cause heard. This right includes, among other things, the right to be defended by a lawyer of his or her choice.257

International human rights law and practice recognises that certain persons or groups may, due to lack of means or social factors, be excluded from accessing justice if not provided with assistance in the adjudication process. Some national constitutions entrench the right to legal counsel (i.e. a lawyer) as fundamental to preserving the right to fair hearing in cases where persons have been charged with serious crimes such as murder, in the interest of justice.258 The system of legal aid or legal assistance is, therefore, a means through which this could be carried out.

Several forms of legal aid exist and availability varies depending on legal systems, court procedures, resources and nature of the matter brought before the court. Legal assistance typically involves the services of a lawyer for representation in court but can also take the form of legal advice, payment of court fees, transportation for witnesses, or other costs which are essential for successfully presenting the case.

2. Defining Legal Aid in Context

Defining legal aid is limited to the context in which it is applied which, commonly, is in criminal proceedings. Legal aid has been defined simply as ‘the provision of legal advice, assistance or representation to indigent persons.’259

For the purposes of this paper, a definition of legal aid shall be adopted taking elements from recommendations made by Mrs. Gabriela Knaul, the Special Rapporteur on the independence of judges and lawyers, for strengthening access to legal aid in the administration of justice.260


259) Legal Aid Act 2012 of Sierra Leone, S. 1.

Legal aid is the provision of effective legal assistance in any judicial or extrajudicial procedure aimed at determining rights and obligations. It covers legal representation in proceedings before a court and includes access to legal information and other services to persons who face criminal prosecution or whose rights or freedoms have been violated as a result of an act, or a failure to act, perpetrated by a state actor or who participate in judicial or extrajudicial procedures aimed at determining rights and obligations at no cost to the beneficiary but provided for at the state’s expense or other non-state legal aid provider.\(^{261}\)

Legal aid is often provided free to the beneficiary and can serve either of two purposes:\(^{262}\)

1. To ensure that all parties to the case are treated fairly and have equal access to the courts.
2. To serve the needs of social justice.

Traditionally, legal aid schemes were designed to cover indigent persons who cannot afford to pay for and retain the services of a lawyer. The scheme however, can be extended to cover persons disadvantaged due to status or incapacity. Each system determines criteria based on problems it seeks to alleviate and resources at its disposal.

3. Forms and Schemes of Legal Aid

Legal aid may be provided by the state or by non-State bodies and may include any of the following:

1. National legal aid institutions/boards/councils established by the state often under statute and having independent status.\(^{263}\)
2. Public Defender model where state lawyers or law officers provide services to the public.\(^{264}\)
3. Appointed Counsel model where the court designates a lawyer to provide legal services as appropriate in the interest of justice and the lawyer is paid from a fund set up for that purpose.\(^{265}\)
4. Public-Private Partnership providing a mixed pool of state and non-state resources for provision of legal assistance under the state’s legal aid infrastructure or set up for a specific purpose or period e.g. to decongest prisons.\(^{266}\)

\(^{261}\) Ibid at paras 87-89, 94 at 18-19.


\(^{263}\) Examples are: Legal Aid Board of South Africa, Legal Aid Council of Nigeria, Legal Aid Board of Ghana and the National Legal Aid and Awareness Scheme of Kenya; See also, David McQuoid-Mason, ‘Legal Aid in Nigeria: Using National Youth Service Corps Public Defenders to Expand the Services of the Legal Aid Council,’ Journal of African Law, (2003) 47(1), 107-116.


\(^{265}\) Ibid.

5. Private Lawyers who offer pro bono services voluntarily or as part of a requirement set by regulators for the issuance or validity or legal practicing certificates.\textsuperscript{267}

6. Bar associations or law societies who run a scheme at local or national level.

7. Universities or student law clinics.\textsuperscript{268}

8. Paralegal schemes often supported at community level but may also be incorporated in either state funded or privately funded schemes.\textsuperscript{269}

9. Professional Groups or Public Interest Organisations who regularly provide legal aid services.\textsuperscript{270}

10. Non-Governmental Organisations who do not primarily provide legal aid but can offer support in select cases.

11. Faith-based organisations.

4. Provision of Legal Assistance under the African Human Rights System

The Protocol to the African Charter on Human and Peoples’ Rights on the establishment of the African Court on Human and peoples’ Rights (African Court Protocol) provides that the African Commission on Human and Peoples Rights (ACHPR), State parties, African intergovernmental organisations and, where applicable, NGOs and individuals may submit cases to the African Court on Human and Peoples’ Rights (African Court).\textsuperscript{271} Currently, only 7\textsuperscript{272} out of the 26 State Parties\textsuperscript{273} to the African Court Protocol have made the declaration permitting NGOs and individuals to directly petition the Court as provided for in Article 34(6) of the African Court Protocol. This limits access to the Court, therefore, a majority of claimants would probably make their complaints via the ACHPR. Since the African Court was established to complement the protective mandate of the ACHPR,\textsuperscript{274} these two institutions have found ways to harmonise their working relationship including procedures for referral of cases and communication between them.

Compared to national courts, the African regional human rights courts, including the African Court, do not charge filing fees. Also, the proceedings may be started and concluded on the basis of written

\textsuperscript{267} The South African parliament is considering a bill that would institute minimum mandatory pro bono work for solicitors in the form of community services which can include delivery of free legal services to the public – See Legal Practice Bill, S. 29.

\textsuperscript{268} E.g. Network of University Legal Aid Institutions (NULAI) Nigeria.

\textsuperscript{269} E.g. Paralegal Service run by Timap for Justice, Sierra Leone.

\textsuperscript{270} E.g. LAC, FIDA (International Federation of Women Lawyers), Women Legal Aid Centre, Zambia.

\textsuperscript{271} Art. 5 African Court Protocol.

\textsuperscript{272} These are Mali, Burkina Faso, Ghana, Tanzania, Malawi, Rwanda and Cote d’Ivoire as at 3 September 2013.

\textsuperscript{273} Full list of State parties available on treaties section of AU website <http://www.au.int/en/treaties> Last accessed 3 September 2013.

\textsuperscript{274} African Court Protocol, Art. 2; Rules of Court of the African Court 2010 (hereinafter ‘Rules of Court), Rule 29.
submissions by the parties.\textsuperscript{275} It is therefore relatively cheaper to bring a case before a regional court. However, the costs of pursuing the case can astronomically rise, when there is need for oral testimonies and addresses requiring physical presence of witnesses, parties and their lawyers. The African Court can hold public hearings\textsuperscript{276} and, in carrying out its function, require oral proceedings including statements made by representatives of parties, witnesses and opinions of experts.\textsuperscript{277} In a similar manner, the ACHPR may, on its own initiative, or, on the request of any of the parties, hold a hearing on the matter before it.\textsuperscript{278} Therefore, the likelihood that a public hearing may be called for is an element that must be considered in terms of costs to time and finances for the case.

Travel and related costs incurred, in order to participate in the African Court’s public hearing or ACHPR’s session, can be high. This can discourage people from exercising the option to bring a case before a regional institution and, to a certain degree, challenges potential litigants to limit cases to those that can have greater impact or present a grave and continuous danger to the protection of human rights.\textsuperscript{279}

Prior to 2010, the ACHPR did not formalise any form of legal assistance for claimants. Rule 104 of the Rules of Procedure\textsuperscript{280} of the African Commission on Human and Peoples’ Rights provides that:

1. The Commission may, either, at the request of the author of the communication, or, at its own initiative, facilitate access to free legal aid to the author in connection with the representation of the case;

2. Free legal aid shall only be facilitated where the Commission is convinced:

   a. That it is essential for the proper discharge of the Commission’s duties, and to ensure equality of the parties before it;

   b. The author of the communication has no sufficient means to meet all or part of the costs involved.

The author of the communication is the person initiating the matter before the ACHPR. Although, the ACHPR recognises that NGOs may bring public interest suits or represent complainants,\textsuperscript{281} it can be inferred that the envisaged beneficiary of any legal assistance provided under this rule would be victims.

\textsuperscript{275} See African Charter, Art. 56; African Court Protocol, Art. 6(2); Rules of Court, Rule 27(1) & (2).

\textsuperscript{276} Art. 10(1) African Court Protocol.

\textsuperscript{277} Art. 26 African Court Protocol and Rule 27(3) Rules of Court.

\textsuperscript{278} Rule 99(1) & (2) ACHPR Rules of Procedure 2010.

\textsuperscript{279} This, in fact, counters the argument given by States for their reluctance to make the Article 34(6) declaration granting NGOs and individuals direct access to the African Court that permitting such access would lead to an avalanche of cases.

\textsuperscript{280} These rules were approved by the ACHPR at its 47th Ordinary Session held from 12 to 26 May 2010 in Banjul, The Gambia.

\textsuperscript{281} ACHPR Rules 2010, Rule 93(2)(a) & (3).
From its establishment, it was understood that the African Court would provide some form of legal aid. Article 10(2) of the African Court protocol states that ‘Any party to a case shall be entitled to be represented by a legal representative of the party’s choice. Free legal representation may be provided where the interests of justice so require.’

Rule 28 of the Rules of Court emphasises the right to legal representation by expanding it to include assistance by legal counsel or any other person. Finally, Rule 31 of the Rules of Court categorically provides that: ‘Pursuant to Article 10 (2) of the Protocol, the Court may, in the interest of justice and within the limits of the financial resources available, decide to provide free legal representation and/or legal assistance to any party.’

5. The African Court’s Legal Aid Policy

The Legal Aid Policy for the African Court on Human and Peoples Rights 2013-2014\(^{282}\) is the first attempt by the Court to regulate and implement its Legal Aid Scheme as provided for under the African Court Protocol and its Rules.\(^{283}\)

The development of the legal aid policy would resolve many of the challenges the Court faced in determining how to administer requests for legal assistance as many of such cases were treated on an ad hoc basis. In the case of Tanganyika Law society and Legal and Human Rights Centre, and Rev. Christopher Mtikila v The United Republic of Tanzania\(^{284}\) the second applicant, Rev. Mtikila had made an application, on 1 June 2012, for legal aid to pay for travel for the applicant and two legal representatives to attend the public hearing taking place on 14 and 15 June 2012 at Arusha, Tanzania. Unfortunately, this application was not granted because the legal aid policy had not been set up.

However, in Urban Mkandawire v The Republic of Malawi,\(^{285}\) where the applicant brought a claim that the State had violated, among other things, his right to fair hearing and his right to work by terminating his teaching appointment at the University of Malawi without due process, the applicant was granted legal aid. The Court’s headquarters is in Arusha, Tanzania but, from time to time, it holds sessions outside Tanzania. The first two hearings set for the matter were in June and September 2012.

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\(^{282}\) The policy was finalised and made public in June 2013. It is available at <http://www.african-court.org/en/index.php/documents-legal-instruments/basic-documents> last accessed 3 September 2013

\(^{283}\) i.e. Art. 10(2) African Court Protocol and Rule 31, Rules of Court 2010.

\(^{284}\) Applications No.009&011/2011 decided 14 June 2013.

\(^{285}\) Applications No.003/2011 decided 21 June 2013.
in Arusha. However, the State had failed, on two occasions, to be available to attend public hearings set by the Court and it decided to defer the hearing of the matter to its next session which would hold in Mauritius, November/December 2012. Because of this, the applicant, Mkandawire, requested, on 28 August 2012, that the court proceeds with the hearing in the absence of the State as he did not have the means to travel to Mauritius for the postponed hearing set to hold from 29 to 30 November 2012. The African Court, in its discretion, decided to grant funds to enable the applicant participate in the proceedings.

It appeared that, in the interest of justice, it was pertinent for the Court in Mkandawire’s case to grant legal assistance. He had not delayed in responding to the Court and had envisaged that he would travel from Malawi to Tanzania for the hearing. The fact that he had no job and now faces the heavy burden of looking for funds to travel to Mauritius, miles away, would have prevented him from attending the hearing. In this regard, the fact that the Court did not have a legal policy in place did not prevent it from acting as in the Mtikila case. Moreover, the applicants and respondent in Mtikila were resident in Tanzania and the hearing took place in Tanzania so the probability that costs cannot be covered or that the applicant Mtikila was indigent was easier to dismiss.

The new legal aid policy presents, in clear language, that only individuals and groups may make applications thereby effectively excluding State parties and their representatives.  

Like with most legal aid schemes, eligible beneficiaries must satisfy the following criteria:

a) Indigence

b) Equality of arms

c) ‘In the interest of justice’ criterion

The Court would support costs that fall into any of the 4 categories of travel, legal representation, witness expenses, including expert witnesses, and Daily Subsistence Allowance (DSA). These categories may be resolved and, following practice of the Court, may be exercised discretionary in the interest of justice on a case-by-case basis. A scale of fees for paying legal counsel that represent legal aid beneficiaries is provided for in detail in the policy document.

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286) Legal Aid Policy of the African Court 2013-2014 (i.e. Legal Aid Policy), para.1.
287) Ibid, para. 2.
288) Ibid, para. 3.
289) Ibid, para. 4 Legal Aid Policy.
In order to implement the scheme, the Court would require:

a) A list of Legal Counsel accredited or registered with the Court. The Court has made a call for African Union (AU) nationals legally qualified to practice law in Africa and in International Tribunals to apply to be included in the list.\(^{290}\)

b) Funds from a trust fund derived from voluntary contributions from AU Member States and other donors.\(^{291}\) It is interesting to note that this fund is open to all AU Member States and not restricted to only State Parties to the Protocol.

The Registrar manages the legal aid scheme but under the supervision of the President of the Court.\(^{292}\) To improve efficiency and service delivery, it is suggested that a committee is set up to receive applications and make recommendations for the grant or refusal of legal aid requests.

6. Evaluating and Monitoring Implementation of Legal Aid at the African Court

In order to determine if the scheme adopted by the African Court has served the interest of justice and contributed to the advancement and protection of human rights in Africa, its effectiveness should be evaluated over time to ensure that:

- Qualifications of lawyers on the list of legal counsel meet minimum standards to ensure that quality services are guaranteed.

- Gender balance requirements for legal counsel promote equal opportunities and access. It provides choice for parties and promotes the values that the African Union seeks to protect.

- Application of the rules to provide legal counsel should protect the right of the applicant to choose a representative of his/her choice without imposition or coercion. This right also covers the right to refuse to be represented by counsel and to represent oneself.

- Quality of legal services rendered to claimants needs to be checked from time to time to ensure that they are receiving the best and are not disadvantaged.

- Regular contributions to the trust fund are monitored and steps taken to sustain it and ensure disbursement of funds as approved.

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\(^{291}\) Legal Aid Policy, para. 8.

\(^{292}\) Ibid para. 6.
• Awareness and publicity on availability of legal aid to ensure that those who require it have information about accessing the services.

• Simplified process of verifying applicants’ means or lack of it without overburdening the Registry with the administration of the legal aid scheme.

• Information sharing and communication at every stage of the process to keep parties engaged and aware of their rights and choices.

• The scheme should also be examined to determine how well it meets the needs of those requiring it, its gender responsiveness and access to those most vulnerable or marginalized.

It remains to be seen whether a claimant, who was awarded legal aid by the ACHPR under its rules, would continue to enjoy it if the case is subsequently referred to the African Court or would be best served by making a fresh application to the Court.

7. NGO-Led Alternatives for Legal Aid

Legal aid may not be available for everyone all the time and it may not be possible to take up every application by indigent claimants. Non-Governmental Organisations (NGOs) have always stepped in to cover the gaps in the system and are a viable source of support for claimants. They also have institutional structures and greater opportunities to apply to donor funds which victims may not be able to access. Experiences of NGOs in the human rights sector and in engaging the African human rights system can assist potential claimants in understanding the justice environment in a non-threatening way and using non-legal language to explain legal processes.

Non-state legal aid providers, including NGOs, provide legal assistance in different ways. Some have a fund that supports legal representation and its antecedent costs, others have a team of lawyers that work actively on legal aid cases dealing with general human rights issues, others take only public interest cases through strategic or impact litigation. Although most work at local or national level, they may partner with others to advocate for justice at the regional or international level. NGOs may also select cases based on specific rights or thematic areas according to their mandate. This limits the kinds of cases they can take and, also, the kinds of clients they can serve.

The Kenyan Section of The International Commission of Jurists (ICJ Kenya)293 has a human rights protection programme that provides legal aid locally in Kenya and also an access to justice programme that extends to human rights litigation at regional level. Similarly, the Social and Economic Rights Action Center (SERAC)294 based in Nigeria, provides legal aid at local level and at regional level to pursue cases before the ACHPR and the ECOWAS Community Court of Justice. However, the focus of

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both organisations differ, with ICJ Kenya dealing with civil and political rights while SERAC focuses on socio-economic rights such as rights to housing, education, and health.

On the other hand, there are organisations that work mainly at regional level and their focus is on cases brought before regional tribunals or that have a high likelihood of succeeding at regional level. Interventions are therefore designed to provide support at that level. For instance, the Institute for Human Rights and Development in Africa (IHRDA) based in Banjul, The Gambia, maintains the Legal Defence Fund that provides support for claimants and NGOs bringing human rights cases\textsuperscript{295} before the African Commission on Human and Peoples’ Rights (ACHPR). The Fund is supported by donors and provides financial support for travel, accommodation and other related expenses to enable claimants cover the daunting costs of litigation. Currently, access to the Fund is by application and is limited to nationals of the ECOWAS countries, Cameroon and Mauritania.\textsuperscript{296}

Interights (i.e. the International Centre for the Legal Protection of Human Rights,)\textsuperscript{297} just like IHRDA, carries out most of its strategic human rights litigation at regional or international level. However, they do not maintain a fund but provide a team of lawyers who work with NGO partners or claimants on legal strategy, legal representation and research.

Provision of legal assistance in some organisations is restricted to a particular group e.g. women, children, refugees, persons with disabilities etc. A good example is the legal aid program for women run by the International Federation of Women Lawyers – FIDA.\textsuperscript{298} FIDA is a professional body of female lawyers that works at the international level\textsuperscript{299} and is present in many countries through its national chapters. Services are provided pro bono by members of the organisation to poor and vulnerable women. FIDA Kenya, for example, runs a justice programme that pursues public interest litigation, provides legal representation, supports self-representation and maintains a list of pro bono lawyers to meet the demands for legal advice and representation in court.\textsuperscript{300}

NGO-led legal aid interventions have the potential of addressing neglected issues or unpopular or controversial cases that are often ignored due to several factors including culture, religion or status. In particular, they make it possible for all voices to be heard. Many decisions on discrimination, socio-economic rights, liberty would not have succeeded without the provision of legal aid by NGOs.

\textsuperscript{295} Cases before the ACHPR are known as ‘communications.’

\textsuperscript{296} More information is available on the IHRDA website at: http://www.ihrda.org.

\textsuperscript{297} http://www.interights.org.

\textsuperscript{298} The acronym is derived from the Spanish version of its name “Federacion Internacional de Abogadas.”

\textsuperscript{299} http://www.fidafederation.org.

\textsuperscript{300} See generally http://fidakenya.org.
8. Practical Considerations

Once a forum is selected and a case is considered worth pursuing, it is best to identify early on what costs are envisaged and to discuss the possibilities for legal assistance at the beginning and throughout the process and, at the end when judgment is given.

a. Services of the Lawyer – Lawyer’s fees can be costly and, in most legal aid schemes, only a token amount is offered, although that provided by the African Court is better than average. One way to cover this cost is by getting private practitioners or law firms to provide pro bono services so that this cost is eliminated. Also, many firms can volunteer the services of a lawyer to strengthen a constituted legal team in a public interest case which can prove valuable in the presentation of the case. In the Mtikila case, the claimant’s case was covered by the Tanganyika Law Society, Legal and Human Rights Centre and a team of independent lawyers led by Prof. Roland Adjovi.

b. Translation of documents – Applications and other submissions must be in the language of the African Court. Care must be taken to ensure that documents are professionally translated. Only one original copy is required for submission and, in any case, the African Court would translate all documents received for the matter into the languages of the Court to assist the judges. With the current composition of the Court, English and French would be the ideal languages to submit a petition in.

c. Interpretation during Court Proceedings – It is also possible that claimants and witnesses may best express themselves in local languages and would require interpreters. The African Court recognises this and may permit the use of non-working languages of the court for obtaining evidence including providing for interpreters.

d. Increase in Allocations to the Trust Fund – Advocacy can be carried out at regional and national level for the African Union to increase budget allocations to institutions in the African Human Rights system to support voluntary donations to the Trust Fund. With States fighting for transfer of illicit wealth trapped in foreign banks to Africa, a scheme can be developed to attract some percentage of recovered sums to be paid into the Trust Fund or any other fund aimed at enhancing access to justice for human rights protection.

e. Role of Technology – Information and Technology systems, especially internet and email, has made it possible to share information faster. The African Court and the ACHPR both receive submissions through electronic means. This eliminates costs of physically filing documents to the

301) The Court adopts the African Union languages which are English, French, Portuguese and Arabic; See also Rules of Court, Rule 18(1).

302) Rules of Court, Rule 34(3).

303) Ibid, Rule 18(3) & (4).
registry of the courts or sending them by courier or posts. Technology also makes it possible to stream or view proceedings live on the internet. With advance use, the courts may also be able to shield witnesses’ faces and voices when collecting evidence in sensitive or dangerous cases. Lawyer, legal teams and NGOs working with clients may adopt videos and other recordings as means of documenting evidence. However, such use of technology must be in line with international human rights standards and must not jeopardise the safety or security of persons giving evidence.

9. Client Care, Engagement and Protection

Rights are individual and, apart from the ‘peoples’ rights recognised in the African Charter, are meant to be enjoyed by individuals. The violation of a right and desire for a remedy raises strong personal expectations for the client which, if not managed, can cause him/her emotional/mental or psychological distress, raise suspicion and lead to disillusionment about the quest for justice. Vulnerable clients such as children, victims/survivors of sexual and gender based violence and persons at risk of losing their lives through their testimonies particularly need special care and protection.

Article 10(3) of the African Court Protocol provides that ‘Any person, witness or representative of the parties, who appears before the Court, shall enjoy protection and all facilities, in accordance with international law, necessary for the discharging of their functions, tasks and duties in relation to the Court.’

It is not clear what form this sort of protection would take as the regional human rights system currently does not offer a formal witness protection program as found in international criminal courts and tribunals. The most obvious privileges this provision grant are permission to travel to court without obstruction and to use the Court’s facilities during the trial.

Requests for anonymity by claimants or petitioners are often considered when petitions are made and treated on a case-by-case basis. The ACHPR would require that States make an undertaken not to victimise or persecute witnesses and experts or carry out reprisals against them or their families as a result of statements or opinions made by them before the ACHPR. Essentially, legal teams and support organisations have to take steps to protect the identity (if anonymity is required) of clients and ensure that they are briefed at each stage of the proceedings so that they can take informed decisions.

It is important that client’s consent is obtained before an action is taken and his/her confidentiality is secured; sensitivity is applied bearing in mind religious, cultural and gender differences; client is engaged during the process and involved in decision-making; and communication is open and documented. Ethical considerations should guide.


305) ACHPR Rules 2010, Rule 100 (4).
10. Conclusion

Legal assistance in human rights litigation at the regional level is an area that has been served in varying degrees and, with the establishment of a trust fund and legal aid scheme within the African Court, there are more opportunities for many victims of human rights violations to obtain redress. The justice institutions implementing such schemes would still require support from NGOs and other experts that have gained much experience engaging with the African Human Rights system.

Limited funding for legal aid schemes should not discourage potential claimants and their legal representatives from pursuing cases at the regional level. In fact, legal aid providers and lawyers are encouraged to “use the scarce resources available for their work to make the greatest impact on their client population.” 306 Tenacious pursuit for justice should be the focus for success and progress.

306) Golden, (n 6) 541.
Conclusion

Relationships Between Regional Courts and Tribunals in Africa:

Some Tentative Conclusions

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Guide to Complemtarity within the African Human Rights System
Relationships Between Regional Courts and Tribunals in Africa: Some Tentative Conclusions

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There was a time when it was relatively easy to unravel Africa’s regional human rights system. There was the African Commission on Human and Peoples’ Rights and that was it. The African Court on Human and Peoples’ Rights and the African Committee of Experts on the Rights and Welfare of the Child also exist at the continental level. In the various sub-regions, there are now also regional courts of justice, all of them with varying degrees of jurisdiction to adjudicate over the African Charter on Human and Peoples’ Rights and related human rights issues.

To the extent that they all can pronounce on the African Charter and on human rights instruments applicable in Africa, it seems prudent and makes instinctive sense that all these institutions should have a continuing relationship with one another. However, there are no hierarchies among or between these institutions and there is no pre-existing design for how such relationships may be conducted. In the case of the relationship between the African Court and Commission, for instance, the Protocol establishing the African Court merely provides that the Court shall “complement the protective mandate” of the Commission without providing further details. Together, these institutions are referred to in this handbook as “Regional Courts and Tribunals” (RCTs).

Relying on the texts of the founding instruments of the various institutions and comparative practice and jurisprudence, this handbook set out to provide some informed guidance on how these RCTs may work with one another. This is what is referred to in this handbook as “complementarity”.

Complementarity is clearly a multi-dimensional, dynamic, even fluid phenomenon. In a non-hierarchical setting, any writing on it can attempt to be no more than a snapshot of the relationships that are configured to be perpetually in a state of evolution. At any point in time, the state of complementarity between the various institutions or organs of any institutional system reflects multiple dialogues between the various RCTs. Much of this dialogue is structured but informal but some of it can also be formal if the RCTs involved so desire.

As described in this Handbook, the evolution of the complementarity relationships among the RCTs of Africa’s regional system reflects six strands of on-going dialogues. One is an intra-institutional dialogue within each of the regional courts and tribunals themselves in which the institutions translate the provisions of their founding instruments into an institutional design and personality, with respect to process, jurisprudence, and ambience. This strand of dialogue would, for instance, reflect on the question of whether an institution, such as the African Commission or the African Committee of Experts, regards itself as a judicial or quasi-judicial institution; whether or not they view their decisions as binding or not on the States parties and extend to the extent to which they see their decisions and actions as importing obligations of compliance.
The second is an inter-institutional dialogue involving how the institutions understand or position themselves with reference to other institutions and with one another. Do any of these institutions evince or assert primacy competence with respect to the interpretation of or adjudication over human rights issues in general or with respect to the African Charter in particular? If so, why and how and, if not, how do they allocate competence, if at all? In the absence of any entity with authority to dispose of such issues, any dispositions on these kinds of questions must reflect and reconcile both intra- and inter-institutional dialogues.

A third form of dialogue is between the RCTs, as specialized institutions on the one hand, and the political and diplomatic organs of regional institutions, such as the Assemblies of Heads of State and Government and the Secretariats of the various political institutions, howsoever called. To the extent that both compliance with the decisions of RCTs and their funding is guaranteed by these political organs, the independence of the RCTs is always a negotiated one. Political and diplomatic constraints on the decision making of the RCTs can take different forms – direct, indirect, explicit or subliminal. Howsoever the constraints are presented, RCTs will always be tasked to navigate political and diplomatic challenges to their decision making with the relevant institutions and organs.

Fourthly, complementarity also involves the institutional geographies of integration in Africa. The relationships between the various RTCs involve a conversation between various geographies among themselves and between sub-regional geographies and continental institutions. These conversations among institutional geographies reflect in turn on the un-evenness in the institutionalization of regional integration in the various regions and sub-regions of Africa. In West and East Africa, for instance, the judicial organs of ECOWAS and the EAC, respectively appear to be growing in both confidence and jurisprudence. The pace of growth in Central Africa is somewhat behind that in these regions. In other regions such as Southern and North Africa, there have been evident reversals or difficulties. As a result, RCTs in the various regions are unevenly evolved and their dialogues with continental institutions would naturally reflect this un-evenness. Unsurprisingly, any unevenness in the text and texture of the chapters in this Handbook reflects the state of uneven field of the specimens examined.

Fifthly, complementarity is also a dialogue between Africa and the rest of the World. It bears recalling that regionalism is an exception to the rule of universality under in international law. The Preamble to the United Nations Charter, for instance, asserts the «equal rights of men and women and of nations large and small» without distinction as to geographies and Article 52(1) of the same Charter, permits “the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.” When, therefore, RCTs articulate themselves in the protection of human rights, they do so within the overriding ambit set out within Article 52(1) of the UN Charter and subject to the provision therein.
Finally, while this dialogue that enunciates complementarities is structured by legal text and methods, it is somewhat un-ordered. Any assertions of primacy within these multiple conversations could be suspect. Leadership belongs to those institutions that over time articulate a coherent identity in response to the challenges presented before them.

In this enterprise, some institutions enjoy the benefit of more variegated armoury. For instance, the African Commission and the African Committee of Experts both have promotional and protective functions, enabling them to take initiative in many cases. Unlike other RCTs also, the instrument creating the African Commission and endowing it with its competences enjoys universal ratification among African countries. By contrast, other RCTs are limited in both geographies and initiative. The Courts, such as the various regional Courts of Justice or the African Court, can mostly only respond to cases filed before them. Any promotional work they may seek to undertake will be limited to seeking to extend their geographical footprint by persuading more states to ratify or accede to their enabling instruments or with addressing the diplomatic or political institutions with respect to discrete issues such as funding, compliance, amendments etc. In the conversations about complementarity, the African Commission thus occupies a unique and unifying position of intersection.

One constant factor in the evolution of institutional complementarities, therefore, is time. The design and definition of complementarity in institutional life are both dynamic and always present continuous. It will continue to evolve with the growth and evolution of the respective institutions. As long as the institutions remain alive, it is never completed.

Two underlying fears that are never far from the surface in the exploration of complementarities RCTs in Africa relate to the need for coherence within the system and to forum shopping. With respect to the former, it is enough to say that any search for coherence that owe their origins and operations to different imperatives and lack a hierarchy among or within them could easily be utopian.

With respect to the latter, there is nothing inherently damaging or dangerous about forum-shopping. On the contrary, the existence of choice for the various users of the system and the possibility of generating different angles on the same text ought to be more of a virtue than a vice. On its own, this possibility should incentivize the various RCTs to seek greater administrative co-ordination in terms of open and regular channels of communication, co-ordination and collaboration. Put differently, the possibility of chaotic forum shopping could itself inspire greater co-ordination and foster coherence to the extent that it is possible in a non-hierarchical institutional system.

This Handbook, thus, offers description, speculation, and hope. As a description it explains the basic dispositions in the foundational instruments of the various RCTs in Africa. By way of analysis and speculation, it explains what could happen following the trajectories offered by the text and some suggestions in jurisprudence. It is to be hoped that the various RCTs will not miss the forest for the trees and will continue to explore and forge synergies in order to encourage a more formidable human rights system for Africa.
Matrix of Legal Aid Service Providers before African Continental and (sub)-Regional Courts and Tribunals