Invigorating the African system on human and peoples’ rights through institutional mainstreaming and rationalisation

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The African system on human and peoples’ rights has encountered a proliferation of new institutions, programmes and initiatives since the end of the second millennium. This may partly be attributed to the emergence of the African Union (AU), which is more receptive and attuned to human rights than its predecessor the Organisation of African Unity (OAU). However, the proliferation of human rights institutions in the region has some disadvantages. In the main, the mandates and functions of some of the institutions overlap, resulting in unnecessary duplication. The main thesis of this contribution is that, for the regional human rights system to be effective, institutional mainstreaming and rationalisation are a prerequisite. The failure to mainstream and rationalise the subsisting and emerging institutions will most likely entrench the weaknesses of the regional human rights system. Through an in-depth analysis of the mandates and functions of some of the institutions, this contribution systematically proposes some possible strategies for rationalising the regional human rights system.

1. INTRODUCTION

The developments registered by the African system on human and peoples’ rights over the last few decades are a clear indication and a positive sign that the system is gradually moving towards success. The complete success of the system, however, calls for a closer relationship amongst all its institutions. These institutions should complement rather than
compete with one another; the relationship between them should be one of collaboration, as distinguished from that of control.\(^1\) Although it is encouraging to note that the system has made some positive contributions in the sphere of international human rights law in its relatively short period of existence, there is an emerging trend of institutional proliferation that needs to be addressed. This is because the existing and emerging institutions tend to overlap and duplicate each other’s mandates and functions.\(^2\)

It is therefore necessary to mainstream and rationalise the regional human rights institutions in a way that they will complement and not duplicate or compete with each other. In this context, ‘mainstreaming’ refers to the process of consolidating the regional human rights mechanisms within the African Union (AU) framework.\(^3\) The AU, as the ‘parent’ institution, would therefore hold the central place in ensuring the co-ordination and synergy of these mechanisms. Rationalisation, on the other hand, would involve defining the ‘inter-personal’ relationships and synergies between the human rights mechanisms in order to minimise or overcome overlaps and duplication of functions and mandates. In other words, while mainstreaming intends to improve the ‘vertical relationship’ between the AU and regional institutions with human rights responsibility, rationalisation will harmonise the ‘horizontal relationship’ between these human rights institutions.

The main intention of this contribution is to propose possible strategies of institutional mainstreaming and rationalisation under the African human rights system. The article begins with a review of the definition and scope of the African human rights system then proceeds to analyse the mandates and functions of some of the key enforcement

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institutions under the system. Before proposing possible strategies of rationalisation, the article elucidates the extent to which some of the institutions overlap and duplicate each other’s functions and mandates. The article concludes with some general recommendations on the way forward.

2. A REVIEW OF THE DEFINITION AND SCOPE OF THE AFRICAN HUMAN RIGHTS SYSTEM

The expression ‘African system on human and peoples’ rights’ refers to the regional system of norms and institutions for enforcement of human and peoples’ rights in Africa. There appears to be uncertainty on the scope and definition of this system. Gutto, for example, argues that a distinction should be made between the broader ‘African human rights system’ and the narrower ‘African Charter system’.\(^4\) Accordingly, whereas the African Charter system centres around two enforcement institutions— the African Commission on Human and Peoples’ Rights (hereafter the ‘African Commission’ or ‘Commission’) and the African Court on Human and Peoples’ Rights (hereafter ‘African Court’ or ‘Court’) — the African human rights system goes beyond to include the ‘political institutions’ and other organs created under the AU.\(^5\)

Gutto’s observations could be faulted because the African Charter, which is at the core of his so-called ‘African Charter system’, is a very important instrument of the broader ‘African human rights system’, hence the latter cannot be construed separately from the former. Secondly, it will not be correct to view the ‘African Charter system’ distinctly from the pan-continental ‘political institutions’ principally because the latter seem to anchor the former. This position is confirmed by the fact that the African Charter effectively puts the African Commission under the control of the Assembly of the Head of State and Government (AHSG), which is a regional ‘political institution’.\(^6\) Again, just before the inception of the AU, the former Organisation of African Unity (OAU) Council

\(^4\) Idem, p. 176.
\(^5\) Idem, p. 184.
\(^6\) See Article 58 of the African Charter.
of Ministers called for the incorporation into the union, ‘organs, institutions/bodies which have not been specifically mentioned in the Constitutive Act.’ This explains why the AU Assembly, at its first ordinary session, decided that, ‘the African Commission on Human and Peoples’ Rights and the African Committee of Experts on the Rights and Welfare of the Child shall henceforth operate within the framework of the African Union.’

These are just a few illustrations of the links and synergies between the regional political institutions and the African Charter system, which makes it difficult to conclude they operate distinctly from each other. As a variant of Gutto’s proposition, I consider the African human rights system as the complex-whole that embodies two inter-related components, namely the ‘political’ (AU-based) and the ‘legal’ (African Charter-based) components. While the former is more concerned with regional politics than with human rights, the latter is wholly involved in human rights affairs. The confluence of the two components, however, is their involvement in regional promotion and protection of human rights. In other words, both have a hand, and are therefore necessary, in the human rights agenda of the region.

Odinkalu contended for a much broader definition of the expression ‘African human rights system.’ According to him, the system encapsulates not only the subsisting regional human rights mechanisms but also supra-national, pan-continental systems and mechanisms and the domestic legal systems in Africa. This depiction, however, is overbroad and therefore misleading. It ignores the all-important fact that, whereas supra-national and domestic systems in Africa may enforce regional human rights norms, the

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8 *Idem.*
11 *Idem.*
latter are not mandated to enforce, or even interpret, supra-national or domestic laws. They may only interpret and enforce those norms created under, or that are relevant to, the system.\textsuperscript{12}

It is worthy to note, under the African human rights system, the rule of exhaustion of domestic remedies serves as the link between domestic and regional human rights mechanisms.\textsuperscript{13} This rule, however, was not intended to incorporate domestic legal mechanisms into the regional human rights system. Rather, the rule was evolved to uphold sovereignty of states by granting them the first opportunity in domestic dispute resolution.\textsuperscript{14} The African Commission unequivocally confirms this position when it states that the rule prevents it from acting as a court of first instance as long as domestic remedies are available, effective and sufficient.\textsuperscript{15} Through this assertion, the Commission verifies that domestic and international legal mechanisms are indeed distinct.\textsuperscript{16} Odinkalu’s position should therefore not be entertained because one could be misled to understand that the African human rights system includes the human rights norms and institutions created in the aegis of the United Nations (UN), as long as African states are privy to UN treaties.

The African human rights system is better understood as the system of norms and institutions for enforcing human and peoples’ rights in Africa, consisting of the relevant

\textsuperscript{12} See for example Article 3(1) of the Protocol to the African Charter on Human and Peoples’ Rights Establishing the Africa Court on Human and Peoples’ Rights. The Article provides that: ‘the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned.’ (emphasis mine)

\textsuperscript{13} See Article 56 (6) of the African Charter.


\textsuperscript{15} Communications 147/95, 149/95, \textit{Sir Dawda K Jawara v The Gambia}, Thirteenth Annual Activity Report.

pan-continental ‘political’ and ‘legal’ mechanisms. In this regard, the system comprises a number of normative instruments including the Constitutive Act of the African Union (hereafter the ‘CAAU’ or ‘Act’); African Charter on Human and Peoples’ Rights (hereafter the ‘African Charter’ or ‘Charter’); Convention Governing the Specific Aspects of Refugee Problems in Africa; Convention on the Elimination of Mercenaries in Africa; African Charter on the Rights and Welfare of the Child; Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa; and Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights. There are two African treaties dealing with the environment, although not from a human rights perspective, which have also been included by some scholars in the list of norms informing the African human rights system. These are the African Convention on the Conservation of Nature and Natural Resources and the Bamako Convention on the Ban of the Import into Africa and the Control of Trans-boundary Movement and Management of Hazardous Wastes within Africa.

In addition to the normative instruments, a number of institutions are involved, either directly or indirectly, in the enforcement of the norms of the system. These are the AU

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17 See the Constitutive Act of the African Union adopted by the 36th ordinary session of the Assembly of Heads of State and Government, 11 July 2000, Lomé, Togo. Article 3(h) of the CAAU stipulates that the union aims, among other things, at ‘promoting and protecting human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments.’


22 Adopted by the Second Ordinary Session of the Assembly of the Union in Maputo, July 11, 2003.


and its organs, African Commission, African Court and African Committee of Experts on the Rights and Welfare of the Child established under the African Charter on the Rights and Welfare of the Child (hereafter the ‘African Committee of Experts’ or ‘African Committee’ or ‘Committee’). Despite the proliferation of norms and institutions, the African Charter remains the main substantive normative instrument of the African human rights system. Similarly, only until recently when the African Court was established to complement it, the African Commission has been the sole institution with the mandate to ensure state compliance with the Charter’s norms.

Africa’s is the youngest and least developed of the three regional human rights systems; but to attain its present status, it evolved under difficult circumstances. In the main, the OAU leadership resisted its inception because they feared that giving human rights credence at the regional level could compromise their cherished state sovereignty, which to them was more important at that time. When the African Charter was adopted in 1981, there was no proper plan on how the ‘legal component’ of the human rights system would interface with its ‘political parent’ as well as other pan-continental institutions. Apparently, the intended relationship between the OAU and the system was to be one of control and manipulation, only to later lead to overlaps and duplication as more institutions were established in more or less a random manner. It is therefore expedient to evaluate the mandates and functions of some of the institutions under the African human

26 The CAAU refers to the African Charter in its objectives. Additionally, various institutions and organs have since been established within the AU framework, most of which will be directly or indirectly responsible for human rights protection and promotion.


29 The Charter of the OAU is reputed for its protection of state sovereignty at the expense of human rights. Article 3(2) of the Charter, for example, proclaimed ‘non-interference in the internal affairs of states’ as one of the basic principles of the OAU. Another principle required ‘respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence.’ See Charter of the OAU, 479 UNTS 39.
rights system in order to expose the potential or actual overlaps and duplication, and to build up the case for mainstreaming and rationalisation.

3. **THE ‘POLITICAL INSTITUTIONS’ OF THE AFRICAN HUMAN RIGHTS SYSTEM**

The CAAU, which is the main instrument of the political component of the African human rights system, provides for the establishment of a number of organs within the AU framework. Most of these organs are involved in regional human rights protection and promotion, one way or the other. The AU has also adopted programmes and initiatives that cement its role in human rights enforcement in the region. These are, for example, the New Partnership for Africa’s Development (NEPAD), African Peer Review Mechanism (APRM) and the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA).

### 3.1 African Union’s organs with human rights responsibility in the region

Article 5 of the CAAU provides for the establishment of a number of organs within the AU framework. These include the Assembly of the union; Executive Council; Pan-African Parliament; Court of Justice; Commission; Permanent Representatives Committee; Specialised Technical Committees (STCs); Economic, Social and Cultural Council; and Financial Institutions.  

Each of these organs has its own composition, power, sphere of operation, and procedures. The union could also establish more organs as and when it may deem proper.\(^{31}\)

The Assembly serves as the supreme organ of the AU vested with the ultimate political authority. In other words, it is to the AU what the General Assembly is to the United Nations (UN), or the European Council is to the European Union (EU). The Assembly comprises of the Heads of State and Government of member states or their

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30 See Article 5(1) (a)- (i) of the CAAU.

31 Article 5(2) of the CAAU.
representatives. Among other functions, it is mandated to receive, consider and decide on reports and recommendations from the other organs of the union; and to monitor the implementation of policies and decisions of the union as well as to ensure their compliance by all member states. Additionally, the Assembly performs other functions that are not enumerated in the Act. These include the appointment of members of the African Commission; replacement of a member of the African Commission in the event of death or resignation; appointment of judges of the African Court; and replacement of the judges in the event of any vacancy. It also receives and adopts the annual activity reports of both the Commission and Court.

In line with its mandate and functions, the Assembly is strategically placed to ensure the efficiency of the African human rights system. For example, it could choose to be more proactive and act on the findings and recommendations of the African Commission, as well as the judgements of the African Court when it commences its proceedings. After all, the Court’s Protocol mandates the Assembly to receive annual reports detailing the work of the Court. Such reports are to specify, inter alia, the cases in which a state has not complied with the Court’s judgements.

Further, the Assembly could invoke Article 9(1)(e) of the CAAU to punish any member state that fails to respect its decisions on matters relating to human rights. In such cases, the recalcitrant state may be subjected to sanctions such as ‘the denial of transport and communications links with other member states, and other sanctions of a political and

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32 Article 6(1) of the CAAU.
33 Article 9(1)(b) of the CAAU.
34 Article 9(1)(e) of the CAAU.
35 See Article 33 of the African Charter on Human and Peoples’ Rights.
36 Article 39(3) of the African Charter on Human and Peoples’ Rights.
37 See Article 14 (1) of the Protocol establishing the African Court.
38 Article 20(2) of the Protocol establishing the African Court.
39 Article 31 of the Protocol establishing the African Court.
40 Idem.
economic nature that may be determined by the Assembly.\textsuperscript{41} The initial scepticism on whether the union would be courageous enough to invoke this provision against its members was diffused when it suspended Madagascar in 2002\textsuperscript{42} and the Central African Republic in 2003.\textsuperscript{43} Madagascar, having been re-admitted in 2003,\textsuperscript{44} was suspended again in early 2009 following an unconstitutional change of government.

It is also encouraging to note that the Assembly’s summit held in 2004 deliberated on the perturbing deterioration of respect for human rights in Zimbabwe. At least, this serves as a strong indication that African leaders are no longer prepared to ignore the cries of victims of human rights violations on the continent. Through the Assembly, the union has also played a significant role in conflict resolution in the region. For instance, it took the initiative to send an observation mission to the Sudanese province of Darfur where militia allied to the Khartoum government are accused of gross human rights violations. Similarly, the Assembly has adopted a number of declarations, decisions and resolutions touching on various human rights issues,\textsuperscript{45} only that most of them are a mere rhetoric without any binding force. Overall, the Assembly is pivotal to a workable and effective regional human rights system.

\textsuperscript{41} Article 23(2) of the CAAU.


\textsuperscript{43} Ninetieth Ordinary Session of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution at Ambassadorial Level, 17 March, 2003, Communiqué, Central Organ/MEC/AMB/Comm.(XC).


Another AU organ of relevance to regional protection and promotion of human rights is the Executive Council (EC).

The EC, comprising of Foreign Affairs Ministers, has two principal functions. First, it coordinates and decides on policies in areas of common interest to member states. Such areas include foreign trade; energy, industry and mineral resources; education, culture, health and human resource development; and social security. Secondly, it considers issues referred to it and monitors the implementation of policies formulated by the Assembly. Of the two functions, the latter could be pursued to further the human rights agenda of the continent. Arguably, this function strategically positions the EC to ensure the enforcement of the recommendations of the African Commission and the decisions of the African Court. In fact, the Protocol establishing the African Court mandates the EC to monitor execution of the Court's judgments on behalf of the Assembly.

The Pan-African parliament is also potentially at the core of human rights enforcement in the region. In compliance with Article 17(2) of the CAAU, a Protocol that defines the composition, functions, powers and organisation of the Parliament was adopted. From the wordings of certain provisions of the Protocol, it can be deduced that human rights promotion and protection are within the remits of the Parliament. For instance, it is mandated to facilitate the effective implementation of the policies and objectives of the AU. Since promotion and protection of human rights is an objective of the AU, it is inevitable for the Parliament to play an instrumental role in the advancement of the regional human rights system.

46 See Articles 10-13 of the CAAU.
47 Article 13(1) of the CAAU.
48 Article 13(2) of the CAAU.
49 See Article 29(2) of the Protocol establishing the African Court.
50 The Protocol relating to the Treaty establishing the African Economic Community relating to the Pan-African Parliament was adopted by the 5th Ordinary Summit of the OAU in Sirte, Libya, on 2 March 2001.
51 Article 3(1) of the Protocol establishing the Pan-African Parliament.
52 Article 3(h) of the CAAU states one of the objectives of the AU is to ‘Promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.’
More expressly, Article 11 of the Protocol empowers the Parliament to ‘examine, discuss or express an opinion on any matter, either on its own initiative or at the request of the Assembly or other policy organs and make any recommendations it may deem fit relating to, *inter alia*, matters pertaining to respect of human rights, the consolidation of democratic institutions and the culture of democracy, as well as the promotion of good governance and the rule of law.’\(^53\) Additionally, the Parliament may make recommendations aimed at contributing to the attainment of the objectives of the AU, particularly those touching on human rights.\(^54\) Such recommendations may include, for example, ways of curbing impunity and the sanctioning of a member state that perpetrates human rights violations unabatedly. Further, the Parliament may promote the human rights programmes and objectives of the AU in the member states\(^55\), as well as perform such other functions, as it deems appropriate to achieving the objectives set out in Article 3 of its Protocol.\(^56\)

Another organ in the AU institutional framework that is relevant to human rights enforcement in the region is the Court of Justice (hereafter the ‘African Court of Justice’ or ‘ACJ’).\(^57\) According to its Protocol,\(^58\) the ACJ shall have jurisdiction over the interpretation and application of the CAAU; interpretation, application or validation of AU treaties and all subsidiary legal instruments adopted within the framework of the union; any question of international law; all acts, decisions, regulations and directives of the organs of the union; breach of an obligation by a state party and the nature and extent of the reparation to be made for the breach of an obligation.\(^59\) The Assembly may also confer jurisdiction on the ACJ over any other dispute.\(^60\) Such disputes may include matters involving violations of human rights.

\(^{53}\) Article 11(1) of the Protocol establishing the Pan-African Parliament.
\(^{54}\) Article 11(4) of the Protocol establishing the Pan-African Parliament.
\(^{55}\) Article 11(6) of the Protocol establishing the Pan-African Parliament.
\(^{56}\) Article 11(9) of the Protocol establishing the Pan-African Parliament.
\(^{57}\) Created under Article 5(d) of the CAAU.
\(^{58}\) Adopted by the Assembly of the Union in Maputo on 11 July 2003.
\(^{59}\) Article 19(1) of the Protocol establishing the African Court of Justice.
\(^{60}\) Article 19(2) of the Protocol establishing the African Court of Justice.
The jurisdiction of the Court of Justice is to be exercised in accordance with the CAAU, international treaties, international customs, the general principles of law recognised universally or by African states, judicial decisions and writings of highly qualified publicists of various nations as well as directives, regulations and decisions of the union.\^{61} It may be argued that the African Charter also embodies ‘principles of law recognised by African states’ and therefore the ACJ must have regard to it in determining issues of human rights that may be brought before it. This presents it with the opportunity to adjudicate over human rights matters.

It is important to note that there are ongoing initiatives to merge the ACJ with the African Court.\^{62} This is indeed a welcome idea as far as it would ensure the realisation of effective enforcement of human rights in the region. It is expected that the merger will help to facilitate the much desired institutional mainstreaming and rationalisation of the regional human rights system. The issue of the merger of the two courts shall be revisited later below.

Another organ of the AU— the Commission (Secretariat) — is also relevant in regional enforcement of human rights because it is involved in the coordination of the activities of the union.\^{63} The same could be said of the Permanent Representatives Committee, which is charged with the responsibility of preparing the work of, and acting on the Executive Council’s instructions.\^{64} Similarly, the STCs, could be relevant in, for example, assessing states’ compliance with their human rights obligations. These committees are mandated to ‘submit to the Executive Council, either on its own initiative or at the request of the Executive Council, reports and recommendations on the implementation of the provisions

\[^{61}\text{Article 20(1) of the Protocol establishing the African Court of Justice.}\]

\[^{62}\text{At the 5th Ordinary Session of the Union held in Sirte, Libya in July 2005, the AU Assembly made a decision to merge the African Court on Human and Peoples’ Rights and the African Court of Justice of the African Union. See Assembly Decision No. Assembly/AU/Dec.83 (V).}\]

\[^{63}\text{See Article 20 of the CAAU, for the functions of the Commission.}\]

\[^{64}\text{Article 21 of the CAAU.}\]
of this Act.’ These could of course include reports on states’ compliance with their human rights obligations under the Act.

The financial institutions listed in the CAAU are also needful in facilitating the human rights agenda of the continent. Their role in financing other institutions and organs, particularly those concerned with human rights enforcement, cannot be overemphasised. Limited financial resources have always hampered the effective enforcement of human rights in the region. There is therefore the need to ensure adequate funding if the African human rights system is to function properly.

Besides the organs highlighted above, some of AU’s directorates are also involved in human rights promotion and protection in the region. The Political Affairs Directorate, for example, is concerned with democratisation, governance, the rule of law and human rights. Its core functions include, among others, to monitor the implementation of international humanitarian law by member states, the situation and flow of refugees and displaced persons in Africa, and to collaborate with the CSSDCA and NEPAD to ensure harmonisation of activities. Within this directorate, there are various divisions that deal with human rights issues, including, the Democracy, Governance, Human Rights and Elections Division; and Humanitarian Affairs, Refugees and Displaced Persons Division. The former is principally is mandated to strengthen the African Commission and Court on Human and Peoples’ Rights. Furthermore, it is expected to promote and strengthen co-operation between member states, civil society organisations and Regional Economic Communities (RECs) on human rights issues, as well as to promote transparency, accountability and the rule of law.

65 Article 15(d) of the CAAU.
67 Idem.
68 Idem.
70 Such as the Community of Sahel-Saharan States (CEN-SAD), Economic Community of Central African States (ECCAS), Common Market for Eastern and Southern Africa (COMESA), Economic Community of...
Another directorate of the AU concerned with human rights is the Women, Gender and Development Directorate. It is suspected that this directorate was established to further one of the principles of the AU, namely, the promotion of gender equality.  

The directorate is currently building on the activities begun by the former OAU, such as the policy Framework on Ageing and the Addis Ababa Declaration on the Eradication of Harmful Traditional Practices.  

The AU also has a Peace and Security Council (PSC). Among the aims of the PSC is to develop a common defence policy and to ‘promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts.’

3.2 African Union’s programmes (initiatives) with human rights responsibility in the region

As already stated above, the AU embodies two initiatives (programmes) — the NEPAD and APRM — that are instrumental in the regional human rights agenda. NEPAD is a vision and strategic framework for Africa’s renewal. It is an initiative designed to support the vision, objectives and principles of the AU. Although designed to be an economic development programme, it emphasises the fact that human rights, peace and

West African States (ECOWAS), Intergovernmental Authority for Development (IGAD), Southern African Development Community (SADC), Union du Maghreb Arabe (UMA).

71 Article 4 (l) of the CAAU.

72 Other programmes and policies are the African Women Committee on Peace and Development; the Plan of Action on Enhancing the Participation of Refugee, Returnee and Internally Displaced Women and Children in Post-Conflict Reintegration, Rehabilitation, Reconstruction and Peace Building and the Kampala Declaration and Plan of Action on the Empowerment of Women Through Functional Literacy and Education of the Girl-Child. See www.africa-union.org.


development are interdependent matters. The programme, which reflects the commitment of African leaders to, among other things, promoting and protecting democracy and human rights, embodies three initiatives. These are the Peace and Security Initiative, Economic and Corporate Governance Initiative and Democracy and Political Governance Initiative; the latter is relevant to human rights. Through it, ‘Africa undertakes to respect the global standards of democracy, the core components of which include political pluralism, allowing for the existence of several political parties and workers unions, and fair, open and democratic elections periodically organised to enable people to choose their leaders freely.’

In July 2002, the Heads of State and Government of the AU agreed to the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance (DDPECG). In the particular context of human rights, paragraph 15 of the Declaration states as follows:

To promote and protect human rights, we have agreed to:

- facilitate the development of vibrant civil society organisations, including strengthening human rights institutions at the national, sub-regional and regional levels;

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76 NEPAD Document, para. 49.
77 Comprising development and security, early warning and prevention, management and resolution of conflicts.
78 NEPAD Document, para 79.
• support the Charter, African Commission and Court on Human and Peoples’ Rights as important instruments for ensuring the promotion, protection and observance of human rights;
• strengthen co-operation with the UN High Commission for Human Rights; and
• ensure responsible free expression, inclusive of the freedom of the press.

NEPAD is also designed to engage in the prevention, management and resolution of conflicts, peacemaking and peace enforcement, post-conflict reconciliation, rehabilitation and reconstruction, and combating the illicit proliferation of small arms, light weapons and landmines. To further these objectives, a sub-committee on peace and security has been established within NEPAD.

NEPAD is implemented through a number of mechanisms. First, there is the Heads of States and Governments Implementation Committee (HSIC) composed of 20 states, which meets every four months. Secondly, its Secretariat based in South Africa assists in administrative work. The third mechanism is the APRM. Paragraph 28 of the DDPECG states that the APRM is based on voluntary accession. The mandate of the APRM is to ensure that the policies and practices of the participating states conform to the agreed political, economic and corporate governance values, codes and standards contained in the declaration. The primary purpose of the mechanism is to:

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80 NEPAD Document, para 74.
81 See Communiqué issued at the end of the first meeting of the HSIC, Abuja, 23 October 2001.
82 This was expanded from 15. They are: Nigeria, Senegal, Algeria, Egypt and South Africa as the five founding states; as well as the central African states of Cameroon, Gabon, Sao Tome and Principe; East African states of Ethiopia, Kenya, Mauritius and Rwanda; North African states including Libya and Tunisia; Southern African States of Angola, Botswana and Mozambique, and West African states of Ghana and Mali.
83 African Peer Review Mechanism, Doc AHG/235(XXXVIII), Annex II (hereafter ‘APRM Document’).
84 APRM Document, para 2.
foster the adoption of policies, standards and practices that lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental economic integration through sharing of experiences and reinforcement of successful and best practice, including identifying deficiencies and accessing the needs of capacity building.  

In this sense, the mechanism intends to ensure that all participating countries adopt and implement the priorities and programmes of NEPAD and achieve the mutually agreed objectives in compliance with the best practices in respect of each of the areas of governance and development enumerated therein. Accordingly, APRM is executed through four types of reviews, three of which are compulsory and periodically mandated, and an optional one. The compulsory reviews include (i) the initial country review, which is carried out within 18 months of accession to the APRM; (ii) the periodic review that takes place every two to four years; and (iii) a review that can be decided by participating Heads of State and Government, prompted by an ‘impending political or economic crisis.’ The optional review may be solicited by a participating state for its own reasons and is not part of the periodical reviews.

The reviews are undertaken by a Panel of Eminent Persons composed of Africans who have distinguished themselves in careers that are considered relevant to the work of the APRM and who are ‘persons of high moral stature and demonstrated commitment to the ideals of Pan-Africanism.’ The Panel has between five and seven members, appointed by Heads of State and Government of the participating countries. The members exercise the oversight function over the review process to ensure its integrity. They serve for a maximum period of four years but the chairperson could serve for a maximum of five years. The panel may engage the services of African experts and institutions that it

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85 APRM Document, para 3.
87 APRM Document, para 14.
88 APRM Document, paras 5 and 6.
89 APRM Document, para 6 & 7.
90 APRM Document, para 8.
considers competent and appropriate to act as its agents in the peer review process.\footnote{APRM Document, para 11 \& 12.} One may conclude that institutions such as the African Commission and Committee of Experts on the Rights and Welfare of the Child qualify to participate in the review process because they are ‘competent’ in some of the priority areas of the APRM.

The review entails five stages, the first one being the study of the political, economic and corporate governance and development environment of the country under review.\footnote{APRM Document, para 18.} This stage includes the preparation of a comprehensive background document (Country Background Document) and the Country Issue Paper (CIP) by the APRM Secretariat based on materials gathered from national, sub-regional, regional and international institutions.\footnote{APRM Document, para 18.} The CIP identifies, \textit{inter alia}, the major shortcomings, deficiencies and areas for capacity building for further investigation by the Country Review Mission (CRM).

Meanwhile, a questionnaire on the four focus areas of APRM, intended for self-assessment, is forwarded by the Secretariat to the country. To expedite this process, the country is expected to convene a Focal Point and an independent National Governing Council (NGC) or a National Commission. Where the need arises, a Country Support Mission (CSM) is sent to assist in the preparation of a Country Self-Assessment Report (CSAR) and a preliminary Programme of Action (POA). The first stage is concluded when the Memorandum of Understanding (MOU) for Technical Assessment and the Country Review Visit are signed between the government of the participating country and the review team led by a member of the panel.

The second stage is conducted in the country being reviewed, during which the review team consults with, among others, government officials, political parties, parliamentarians and representatives of civil society organisations.\footnote{APRM Document, para 19.} In the third stage,
the team prepares its report, which gauges the state’s adherence to the applicable political, economic and corporate governance standards.\textsuperscript{95} A draft report is first prepared and discussed with the government concerned in order to ascertain the accuracy of the information and present the government the opportunity to respond to the findings of the review team. The response is then appended to the team’s report.\textsuperscript{96}

During the fourth stage, the report is submitted to the participating Heads of State and Government for their final report and decision.\textsuperscript{97} At this stage, the Heads of State and Government offer technical and other appropriate assistance to the government under review in order to help it to improve its standards. They may also engage in constructive dialogue or request donor governments and agencies to intervene as best as they can. As a last resort, however, they may put the government on notice to proceed with appropriate measures, should dialogue prove to be unavailing.\textsuperscript{98}

The fifth and final stage entails the presentation of the final report to organs such as the Pan-African Parliament, the African Commission, the Peace and Security Council and the Economic, Social and Cultural Council of the AU.\textsuperscript{99} It is rather unfortunate that there are no sufficient instructions on what these institutions should do with the report. It is therefore difficult to tell whether, for example, they could take any solid stance against a government that fails to comply with its commitment to the prescribed standards and values.

\textsuperscript{95} APRM Document, para 20.  
\textsuperscript{96} APRM Document, para 21.  
\textsuperscript{97} APRM Document, para 23.  
\textsuperscript{98} APRM Document, para 24.  
\textsuperscript{99} Idem.
4. THE ‘LEGAL INSTITUTIONS’ OF THE AFRICAN HUMAN RIGHTS SYSTEM

4.1 The African Commission

The African Commission was established in 1987, a year after the African Charter entered into force.\(^{100}\) Its mandate is stipulated in Chapter II of the Charter. Specifically, Article 45 entrust it with four broad functions, namely, promotion of human and peoples’ rights; protection of human and peoples’ rights under conditions laid down by the Charter; interpretation of the African Charter at the request of a state party, an institution of the AU or an African organisation recognised by the AU; and performance of any other tasks that may be entrusted to it by the AU Assembly.

In its promotional functions, the Commission is mandated to, among other things, engage in: information collection; formulation and development of principles relating to human rights to guide legislative actions by African governments; and, collaboration with other African and international institutions concerned with the promotion and protection of human rights.\(^{101}\) The Commission has initiated several programmes of action and activities touching on the outlined areas. For example, it has been progressive in information dissemination through the publication of several human rights documents, including the ‘Review of the African Commission on Human and Peoples’ Rights’, its Annual Activity reports, the African Charter and its Rules of Procedure.\(^{102}\)

The Commission has also developed a procedure by which each Commissioner is assigned a number of states for promotional activities.\(^{103}\) Commissioners visit these states

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Footnotes:

100 Article 30 of the African Charter.

101 Article 45(1)(a)-(c) of the African Charter.


and organise lectures, seminars, and other activities in collaboration with various institutions. They then report on their promotional activities at each session of the Commission. The Commission has also initiated the internationally recognised Special Rapporteurs mechanism that is not specifically provided for in the African Charter. So far there are five Special Rapporteurs: the Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions (appointed in 1994)\(^{104}\); the Special Rapporteur on Prisons and Conditions of Detention in Africa (appointed in 1996)\(^{105}\); the Special Rapporteur on Women’s Rights in Africa (appointed in 1999)\(^{106}\); the Special Rapporteur on Human rights Defenders (appointed in 2004)\(^{107}\); and the Special Rapporteur on Refugees, Asylum Seekers and Displaced Persons in Africa (appointed in 2004).\(^{108}\)

Further, the Commission receives and evaluates reports from states every two years, indicating the legislative or other measures they have taken to give effect to the rights and freedoms recognised and guaranteed under the Charter.\(^{109}\) State reporting is a non-contentious procedure that not only allows states to present a comprehensive picture of their human rights situations, but also gives them the opportunity to engage in constructive dialogue with the Commission with a view to enhancing their human rights standards.\(^{110}\) Through such dialogue, the difficulties in realising human rights and possible ways to address them are identified.\(^{111}\)

\(^{104}\) Eighth Annual Activity Report of the African Commission, Annex VII.

\(^{105}\) Tenth Annual Activity Report of the African Commission, Annex VII.

\(^{106}\) Eleventh Annual Activity Report of the African Commission, Annex VII.

\(^{107}\) Seventeenth Annual Activity Report of the African Commission, Annex IV.


\(^{109}\) Article 62 of the African Charter states in part: ‘each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter…’


\(^{111}\) The *African Commission on Human and Peoples' Rights, loc.cit.* (note 1), pp. 5-7.
With regard to its protective functions, it is important to note that, although Article 45(2) of the Charter does not specifically state how the Commission may exercise this mandate, Chapter III provides for the ‘communications’ (complaints) procedure, which has been the main way this mandate is exercised. In particular, Articles 47 to 54 make provision for inter-state communications while Articles 55 to 60 establish the machinery for the receipt and handling of individuals’ communications.\(^{112}\) Although marked by a slow start characterised by some form of ‘judicial conservatism’ during its formative years, the Commission has now gathered the momentum to evolve a robust body of ‘case-law’ under its protective jurisdiction. The Commission, determined to interpret the provisions of the Charter more liberally than before, has made landmark pronouncements in order to give effect to the rights it guarantees.

### 4.2 The African Court on Human and Peoples’ Rights

Within less than ten years of existence of the African Charter and Commission, there was mounting pressure to consider appropriate ways of improving the African human rights system. Several strategies were mooted, particularly on how the efficiency of the Commission could be enhanced.\(^{113}\) It was suggested that the Commission be strengthened, complemented, or altogether be replaced by a court. The option of strengthening the Commission was rather a theoretical one because, among other shortcomings, it is not independent of interference from its political parent, the AU.\(^ {114}\) The option of replacing the Commission with a court was also not preferred because a court is not well suited to promote human rights by, for example, conducting studies or organising conferences. Thus, the ‘complementarity’ option, comprising of a dual system was adopted.\(^ {115}\)

\(^{112}\) Article 56 of the African Charter.


According to Article 1 of its Protocol, the African Court is established to operate within the AU framework.\textsuperscript{116} In the narrower sense, its jurisdiction could be categorised into three—contentious (adjudicatory), advisory and conciliatory. In terms of Article 3(1) of the Protocol, the Court’s contentious jurisdiction extends to ‘all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the states concerned.’ When read together with Article 7, the material scope of this jurisdiction is remarkably broad.\textsuperscript{117}

These provisions, it has been argued, give the court a wider adjudicatory jurisdiction than that given to the courts of the other regional human rights systems.\textsuperscript{118} Whereas the European\textsuperscript{119} and Inter-American\textsuperscript{120} human rights courts’ jurisdiction is limited to the conventions under which they were established, the African Court can consider cases brought before it under any human rights treaty ratified by states parties. Naldi and Magliveras opine that the Article:

\begin{quote}
would appear to extend the jurisdiction of the Court over any treaty which impinged on human rights in Africa, e.g., the OAU Convention on Refugees, and the African Charter on the Rights and Welfare of the Child, but also UN instruments such as the International Covenants on Human Rights . . ..\textsuperscript{121}
\end{quote}

Thus, whereas some scholars insist that Articles 3(1) and 7 of the Protocol should be interpreted widely enough to allow the Court to adjudicate on human rights instruments

\textsuperscript{116} Article 1 of the Protocol establishing the African Court reads: ‘There shall be established within the Organisation of African Unity an African Court Human and Peoples’ Rights hereinafter referred to as ‘the court’, the organisation, jurisdiction and functioning of which shall be governed by the present Protocol.’

\textsuperscript{117} Article 7 of the Protocol establishing the African Court provides that ‘the court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the states concerned.’


\textsuperscript{119} Articles 32–34 of the European Convention.

\textsuperscript{120} Article 62(1) of the American Convention.

other than the African Charter\textsuperscript{122}, others advocate for a narrower interpretation because, according to them, these two provisions afford the Court excessively broad jurisdiction.\textsuperscript{123} Some of those advocating for a narrower interpretation argue that if the Court exercises its jurisdiction under these provisions, \textit{stricto sensu}, ‘jurisprudential chaos’ might occur.\textsuperscript{124} This, according to the argument, might occur in two ways. First, the application of treaties other than the Charter would ‘creep into’ the jurisdiction of other human rights organs and could possibly lead to inconsistent interpretations and applications of those treaties.\textsuperscript{125} Secondly, they contend, because this broad jurisdiction exceeds the competence of the African Commission as provided in the African Charter, it would permit the African Court to intrude into ‘a faculty the African Commission itself does not possess.’\textsuperscript{126} This latter argument is predicated on the fact that Article 7 of the Protocol goes beyond Article 60 of the African Charter, which mandates the African Commission to:

draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights as well as from the provisions of various instruments adopted

\begin{itemize}
\item \textsuperscript{124} See, for example, Heyns, \textit{loc. cit.} (note 124), p. 167.
\item \textsuperscript{125} Idem.
\end{itemize}
within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.

Clearly, while the African Commission is expected to draw inspiration from the sources listed in Article 60, its mandate is limited to the interpretation of the African Charter. There is therefore the fear that the apparent jurisdictional asymmetry between the Court and the Commission could give rise to problems in future.\textsuperscript{127} Heyns foresees the possibility of states being deterred not only from ratifying the Protocol, but also from the ratification of other human rights treaties.\textsuperscript{128}

Some of the arguments for a narrow interpretation of Articles 3(1) and 7 of the Protocol are both exaggerated and unfounded. As Udombana observes, although it is true that the wording of Article 3(1) could deter some states from ratifying other treaties in future, it is rather simplistic to deny the Court substantial jurisdiction solely on this argument.\textsuperscript{129} If the jurisdiction conferred to the Court by these provisions would scare any state from ratifying a particular treaty, the state’s commitment to the promotion and protection of human rights should be queried. The argument on ‘jurisprudential chaos’ is also a bit far stretched. Differences in interpretations will obviously occur whenever various organs apply the same instruments, but this may not necessarily result in ‘jurisprudential chaos.’\textsuperscript{130}

Some of those advocating for a broader interpretation of the above provisions insist that the Court does not deserve to limit itself to the spirit and letter of the African Charter. Instead, it must refer to other treaties ratified by the states, including UN treaties, bilateral and multilateral treaties at regional and sub-regional levels. This way, an aggrieved person who is not adequately covered by the African Charter may bring a case in terms of

\textsuperscript{127} Heyns C \textit{loc.cit.} (note 124), p. 167.
\textsuperscript{128} \textit{Idem.}
\textsuperscript{129} Udombana N, \textit{loc.cit.} (note 123), p. 90.
the Protocol under ‘any other international treaty’ that provides a higher level of protection, including sub-regional treaties, such as the ECOWAS treaty.\textsuperscript{131} Thus, the argument goes on, conferring a wider contentious jurisdiction on the Court would expose those states that took ratification as a public relations exercise. After all, it is further contended, the Court has the discretion either to consider or transfer cases to the African Commission.\textsuperscript{132} This should allow the Court to avoid overload and to hear only those cases which have the potential to advance human rights protection in a meaningful way.\textsuperscript{133}

The above observations cannot go uncontested. In the main, it is acknowledged that the purpose of a regional mechanism such as the African Court is to interpret and give effect to the norms and instruments promulgated at the regional level. It would, therefore, be highly unusual for an institution from one system (AU) to enforce the treaties of another system (for example UN). Again, should the Court be allowed to exercise a wider jurisdiction, institutional overlaps and duplication will obviously be experienced. Reference to ‘any other relevant human rights instrument ratified by the states concerned’ in the Protocol could therefore be taken to mean instruments promulgated within the African region. The use of the word ‘relevant’ justifies this position.\textsuperscript{134} It is inevitable to note, however, that the phrasing of these Articles needs to be revisited and their meaning made clear. As they stand, Articles 3(1) and 7 are ambiguous and confusing.

In addition to its contentious jurisdiction, the Court is also vested with advisory powers. In this sense, it has the discretionary competence to give advisory opinions ‘on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the

\textsuperscript{131} Idem. See also Mutua, \textit{loc.cit.} (note 123), p. 354.

\textsuperscript{132} Article 6(3) Protocol on the African Court.

\textsuperscript{133} Eno, \textit{loc.cit.} (note 123), p. 228.

\textsuperscript{134} Heyns, \textit{loc.cit} (note 124), p. 168.
The AU, one of the AU organs, an AU member state, or an African organisation recognised by the AU, can make a request for an opinion. Like its adjudicatory jurisdiction, the Court possesses an advisory jurisdiction that exceeds those of other regional human rights systems in that it can express itself not only on the Charter but also on ‘any other human rights instrument’. Lastly, the Court has conciliatory jurisdiction, which it may exercise by trying to reach an amicable settlement in a case pending before it. Article 9 of the Protocol, which confers this jurisdiction, is discretionary because it uses the word ‘may’. It cannot be understood whether the contending parties are expected to request for an amicable settlement of a pending case or the Court would do so at its own volition. Whichever the position, it is important to allow cases to proceed to a completion so that the human rights jurisprudence of the African system may be developed. An amicable settlement may not allow for such development.

There is an apparent dilemma in conferring both conciliatory and adjudicatory powers on a single body. This has been one of the causes of disquiet in the African Commission, whose practice has leaned more towards conciliation than adjudication. The Court should give a careful thought on this arrangement when drafting its rules of procedure. This, however, should not be taken to mean that amicable settlement is an inappropriate task for a judicial body. Rather, expediency demands that the Court should concentrate on

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135 See Article 4(1) of the Protocol to the African Court, which reads: ‘At the request of a member state of the OAU, the OAU, any of its organs, or any African organisation recognised by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.’

136 Article 9 of the Protocol to the African Court provides that, ‘the court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter.’

137 Van der Mei, loc.cit. (note 115), p. 121.

138 Idem.

139 For the propriety or otherwise of having a judicial body performing both adjudicatory and conciliatory functions, see generally, Chinkin, C., ‘Alternative dispute resolution under international law’, in Evans, M., (ed), Remedies in international law: The institutional dilemma, Cambridge University Press: Cambridge, 1998, pp. 128-129.
adjudicatory functions and leave the quasi-judicial functions to the Commission. Where the parties to a dispute agree to resolve it amicably, the Court may transfer the matter to the Commission for settlement. This would save both the Court’s and the contending parties’ time.\footnote{140}{Van der Mei, \textit{loc.cit.} (note 115), p. 121.}

It should suffice to state that the establishment of the Court is a living proof that the African Charter was not intended to be a static instrument.\footnote{141}{\textit{Idem.}} The Court is a useful addition to the mechanisms for monitoring the rights guaranteed by the Charter, more so because of its relatively broad powers.\footnote{142}{\textit{Idem.}} It is hoped that the institution will be given the necessary support, including the material means, to effectively perform its tasks. At the moment, this institution is challenged by, among other things, the general lack of political will power from states parties and inadequacy of material means that are necessary to ensure its efficiency.

4.3 The African Committee of Experts on the Rights and Welfare of the Child

The African Committee of Experts is the main regional body exclusively mandated to promote and protect children's rights in Africa.\footnote{143}{According to Article 32 of the African Charter on the Rights and Welfare of the Child (hereafter ‘the Children’s Charter’), ‘An African Committee of Experts on the Rights and Welfare of the Child hereinafter called ‘the Committee’ shall be established within the Organisation of African Unity to promote and protect the rights and welfare of the child.’} The Committee, comprising of eleven members, was established on 10 July 2001 with the mandate to perform four functions. These functions are to promote and protect the rights enshrined in the Children’s Charter; monitor the implementation and ensure protection of the rights enshrined in the Charter; interpret the provisions of the Charter at the request of a state party, an institution of the AU or any other person or institution recognised by the AU, or any state party; and
perform such other task as may be entrusted to it by the Assembly of the AU and any other organs of the AU or the United Nations (UN).\textsuperscript{144}

Notably, like the African Commission, the Committee is entrusted with promotional, protective and interpretive functions. It is interesting to note that the Committee is equally mandated to take instructions from the UN. The Children’s Charter, however, fails to clarify the nature and scope of the tasks the Committee can perform with instructions from this world body. In the absence of such clarification, this provision could be interpreted to mean that the Committee can only perform those tasks that accord with its mandate and functions as stipulated in the Children’s Charter.

In addition to the above stated functions, the Committee possesses broad investigatory powers through which it may resort to any appropriate methods of investigating any matter falling within the Children’s Charter, including measures a state party has taken to implement the Charter.\textsuperscript{145} It may request from the state party any information that is relevant to the implementation of the Charter. By virtue of this mandate, the Committee has considerable powers to hold states accountable if they fail to promote and protect the rights and welfare of children as stipulated in the Charter. If this mandate is exercised properly, the Committee could become a formidable guardian of children’s rights on the continent.\textsuperscript{146}

In the performance of its promotional functions, Article 42(a) requires the Committee to, among other things, collect and document information; commission inter-disciplinary assessment of situations on African problems in the fields of the rights and welfare of the child; organise meetings, encourage national and local institutions concerned with the rights and welfare of the child; where necessary give its views and make recommendations to governments; and cooperate with other African, international and

\textsuperscript{144} Article 42 (a)-(d) of the Children’s Charter.
\textsuperscript{145} Article 45(1) of the Children’s Charter.
regional institutions and organisations concerned with the promotion and protection of the rights and welfare of the child.\textsuperscript{147} The Committee has, since its inception, indulged in a number of activities that would ensure the promotion of the rights and welfare of children throughout the continent. For example, it has initiated the Day of the African Child (DAC)\textsuperscript{148}, Pan-African Forum for Children (PAFC)\textsuperscript{149} and lobbying and investigation missions.\textsuperscript{150} Moreover, in recent times it has allowed a number of national institutions and Non-Governmental Organisations (NGOs) to attend its sessions or participate in some of its activities as observers.\textsuperscript{151}

Article 43(1) obligates states parties to submit to the Committee periodic reports on the measures they have adopted to give effect to the provisions of the Charter. The reports are also to indicate the progress made by states parties in guaranteeing the enjoyment of children’s rights.\textsuperscript{152} The Charter contemplates two types of state reporting— one involving initial reports, to be submitted within two years of the entry into force of the

\textsuperscript{147} See Article 42 (a) (i) & (iii) of the Children’s Charter.

\textsuperscript{148} The DAC serves as an advocacy and awareness campaign through which the Children’s Charter is popularised in states parties. See Council of Ministers 52\textsuperscript{nd} ordinary session, 3-8 July 1990; ‘Resolution on African Decade for Child Survival, Protection and Development’, CM/Res. 1290 (LII), http://www.africa-union.org (accessed 8 October 2008).

\textsuperscript{149} The PAFC focuses on the future growth and development of the child. The first PAFC, convened in Cairo, Egypt, in 2001, culminated in a Declaration and Plan of Action for an Africa Fit for Children. This Declaration and Plan of Action served as the basis for Africa’s common position for the UN General Assembly Special Session on Children held in New York in 2002.


\textsuperscript{152} Article 43(1) of the Children’s Charter.
Charter for the state party concerned, and the other requiring subsequent reports to be submitted every three years after the initial report.

Concerning its protective mandate, the Committee has jurisdiction to entertain communications from persons, groups, NGOs or the UN, relating to any matter in the Children’s Charter. This allows it to consider complaints in the same manner as the African Commission. However, neither the Children’s Charter nor its Rules of Procedure, have clear guidelines on how the Committee should deal with communications. Rule 74(1) of the Committee’s Rules of Procedure casually provides that ‘the Committee shall develop guidelines relating to the admissibility and consideration of communications pursuant to the provisions of Article 44 of the Children’s Charter.’ The guidelines are yet to be developed.

Undoubtedly, the Committee will adopt a procedure similar to that of the African Commission. After all, it is permitted to draw inspiration from international law on human rights, ‘particularly from the provisions of the African Charter on Human and Peoples’ Rights, the Charter of the Organisation of African Unity [now CAAU], the Universal Declaration on Human Rights, the International Convention on the Rights of the Child, and other instruments adopted by the United Nations and by African countries in the field of human rights, and from African values and traditions.

Although the Committee is still at its infancy and nothing much can be said of its functions and mandate, it is necessary to emphasise that there is the need to clarify the

153 Article 43(1)(a) of the Children’s Charter.
155 Article 44(1) of the Children’s Charter.
157 Article 46 of the Children’s Charter.
relationship between it and other regional institutions with human rights responsibility. As shall be shown below, the present institutional arrangement tends to encourage overlaps and duplication in the functions of the Committee and the Commission in as far as they are mandated to perform similar tasks, such as receiving periodic state reports and communications relating to the violation of children’s rights.

5. INSTITUTIONAL OVERLAPS AND DUPLICATION UNDER THE AFRICAN HUMAN RIGHTS SYSTEM

From what has been discussed above, it is inevitable to note that the institutional mechanisms of the African human rights system have been established without ample thought as to how they will interface or complement each other. For example, while the NEPAD and APRM programmes are unique in their own right, their development in isolation from the mechanisms under the ‘legal component’ of the regional human rights system is quite disturbing. Despite its commitment to human rights, the NEPAD document does not in any material sense link the programme to the legal arm of the regional human rights system. Consequently, the review process under the APRM, besides being unnecessarily lengthy and over-broad, is in many respects similar to the state reporting procedures of the African Commission and Committee of Experts. Again, both NEPAD and its parent, the AU, have organs dealing with peace and security in the region, the former having a sub-committee on peace and security\textsuperscript{158}, while the latter, a Peace and Security Council. The functions and mandates of these organs are more or less the same.

Generally, NEPAD is ‘over-crowded’ with so many activities ranging from political, social to economic. This partly explains its superficial approach to human rights. It is noticeable, for example, that economic, social and cultural rights are vaguely referred to in terms of greater access to services instead of as concrete, inherent rights.\textsuperscript{159} The

\textsuperscript{158} See Communiqué issued at the end of the first meeting of the HSIC, Abuja, 23 October 2001.

NEPAD document also fails to concretise the relationship between human rights and development, although it is evident that it was intended to do so. This is contrary to the understanding that, if human rights are to be realised, they have to be incorporated in all spheres of life. The present institutional arrangement therefore makes it exceptionally difficult for the NEPAD and APRM to fulfil their intended purpose of evolving uniform human rights standards across the continent. Indeed, they could be instrumental in encouraging uniformity of human rights practices in the region by, for example, persuading African states to ratify treaties that they have not. This way, the programmes could provide the necessary nexus between the legal and political components of Africa’s regional human rights system.

At another level, there is a conspicuous duplication of functions and mandates between the African Commission and the Committee of Experts. As already stated, the Committee performs promotional, protective and interpretive functions that could easily be performed by the Commission. Both institutions are mandated to examine state reports and determine communications from individuals, groups or states. This is regardless the fact that the rights and freedoms of children, although elaborated and expanded in the Children’s Charter, can also be interpreted and enforced through the Commission, as well as the African Court. Since the Commission has the mandate to receive communications, including those alleging violation of children’s rights, there is the potential danger of the two institutions evolving conflicting jurisprudence in this area of human rights law, if caution is not taken.

Duplication and overlaps are also evident between the AU Court of Justice and the African Court. The jurisdiction of the African Court extends to all cases and disputes submitted to it concerning the interpretation and application of the African Charter and any other relevant human rights instrument ratified by the states concerned. Undoubtedly, therefore, the enforcement of human rights is its core business. The Court

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162 Article 3 of the Protocol establishing the African Court.
of Justice, on the other hand, has a broader jurisdiction extending to all AU treaties and conventions and other issues concerning international law, including bilateral issues between AU member states.\textsuperscript{163} Moreover, the Assembly of the union may confer jurisdiction on the Court of Justice over any other dispute.\textsuperscript{164} It follows therefore that there is a broad symmetry between the two courts in both their composition and jurisdiction.\textsuperscript{165}

Since both courts can interpret and apply the CAAU\textsuperscript{166}, their jurisdictions overlap in the sense that, while the Court of Justice could adjudicate on human rights matters that fall within the competence of the African Court, the latter could adjudicate on the human rights provisions of the CAAU. There is therefore the possibility of the two courts rendering conflicting judgements on human rights issues if allowed to operate independently from each other.\textsuperscript{167} There is also potential duplication and jurisdictional overlap between the African Court and Commission. Both the Commission\textsuperscript{168} and the Court\textsuperscript{169} are mandated to interpret the Charter and receive communications. However, there is no clarity as to when it would be appropriate to submit a complaint to the Court rather than to the Commission, or vice versa.

This state of affairs lends credence to the assertion by Magliveras and Naldi that ‘the number of organs of the [African] Union appears to be very large and in the long run it could not only result in the cumbersome operation of the Union but also present a

\textsuperscript{163} See the Protocol Establishing the Court of Justice.
\textsuperscript{164} Article 9 of the Protocol establishing the Court of Justice.
\textsuperscript{165} Both courts consist of eleven Judges, no more than one from each of the states parties and with the president serving full-time. See Baimu, E., and Viljoen, F., ‘Courts for Africa: Considering the co-existence of the African Court on Human an Peoples’ Rights and the African Court of Justice’, \textit{Netherlands Quarterly of Human Rights}, vol. 22 no. 2, 2004, p. 250.
\textsuperscript{166} Article 19(1)(a) and (d) of the Protocol establishing the African Court of Justice.
\textsuperscript{167} Baimu and Viljoen, \textit{loc.cit} (note 166), p. 250.
\textsuperscript{168} Article 45 (3) of the African Charter.
\textsuperscript{169} Article 3 of the Protocol establishing the African Court.
financial burden.’\textsuperscript{170} The proliferation of institutions should be a source of concern, since under-staffing and under-funding already plague the existing human rights institutions and mechanisms in the region.\textsuperscript{171} It is needless to have a myriad of institutions that would only ‘reinvent the wheel’ or propagate unnecessary duplication and overlaps. The African human rights system deserves institutions that would effectively challenge the ‘straight-jacket’ approach to violations of human rights on the continent. This therefore calls for the adoption of suitable approaches that would avert the imminent danger of having a redundant regional human rights system.

6. SOME POSSIBLE STRATEGIES FOR RATIONALISING THE AFRICAN HUMAN RIGHTS SYSTEM

6.1 Rationalising the African Court, Commission and Committee of experts

The mere establishment of a regional Court cannot be construed as the end to the many challenges encompassing the enforcement of human rights under the African system. Much still needs to be done, especially with regard to its relationship with its counterparts, such as the African Commission, to ensure its efficiency. It is rather unfortunate that, although the Court was established to complement and reinforce the Commission, its Protocol fails to demystify the intended relationship between them. Rather, as O’Shea correctly notes, the relationship between the two institutions is defined very superficially.\textsuperscript{172} Article 2 of the Protocol simplistically provides that the Court shall ‘complement the protective mandate’ of the Commission. Article 8 leaves it to the rules of the Court to specify when cases should be brought before it ‘bearing in mind the

\begin{thebibliography}{9}
\bibitem{Baimu} Baimu, \textit{loc. cit} (note 1), p. 313.
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complementarity between the Commission and the Court.' This appears to suggest that the Court will only consider cases which have gone through the Commission, thus following the initial approach of the European human rights system.

Prior to the adoption of Protocol 11 to the European Convention, the European Commission looked at admissibility, tried to reach a friendly settlement, and reported if there was a breach. It would send the case to the Committee of Ministers to be enforced, or it could choose to submit the case to the Court, if the state concerned had accepted its jurisdiction. It was presumed that the European Commission, rather than the Court, would have primary responsibility for fact-finding. This delegation of responsibilities between a Commission that deals with disputes of facts and a Court, which looks at disputes of law, might as well be considered under the African system.

With this in mind, one of two approaches may be considered when rationalising the African Court and Commission. The first approach contemplates a situation where the Court and Commission are vested with protective and promotional functions, respectively. The second one prefers that both institutions be designated with clearly defined protective functions, and in addition, the Commission continues with its promotional functions. This would allow the Court to concentrate on adjudicative functions because it is a judicial institution.

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173 Art 8 of the Protocol establishing the African Court reads, ‘The Rules of Procedure of the court shall lay down the detailed conditions under which the court shall consider cases brought before it, bearing in mind the complementarity between the commission and the court.’


177 Murray, _loc.cit._ (note 176), p. 198.


The first approach is motivated by a number of factors. First, it is important to have a clear division of labour between the Commission and Court. This arrangement will therefore enable them to be more effective in their areas of specialisation and will enhance cooperation and mutual reinforcement between the two institutions.\textsuperscript{180} Secondly, the approach is both time and cost effective. It is questionable whether the allocation of resources to have two separate institutions with a similar judicial mandate is rational, given that the Commission is already severely hampered by inadequate resources.\textsuperscript{181} Instead of the institutions duplicating each other’s functions, it is expedient for them to have distinct roles.

Thirdly, if both the Commission and Court are involved in the interpretation of the Charter, but do so separately, it is likely that the African human rights system will have two separate voices saying different things.\textsuperscript{182} In such circumstances, it would be appropriate to allow only the Court to conduct judicial functions. Other than that, the Court comprises of judges who, unlike Commissioners, may be competent in their work. Lastly, the approach will ensure that the Court operates independently of the Commission, which has been accused of suffering from severe image problems.\textsuperscript{183}

While the first approach makes sense given the reasons fronted to justify it, it has been argued, and rightly so, that the Protocol establishing the Court contemplates a sharing of the protective mandate between the Commission and Court.\textsuperscript{184} Indeed, as stated above, Article 2 of the Protocol incontrovertibly confirms this position. It is on this premise that the second approach, which prefers that the Commission performs both protective and


\textsuperscript{182} Kaguongo, \textit{loc.cit} (note 180), p. 84.

\textsuperscript{183} See generally, Mutua, \textit{loc.cit}, (note 123), pp. 361.

promotional functions, is recommended. This is essentially because stripping the Commission of its protective mandate and reducing it to a ‘human rights promotion body’ would not be in line with the letter and spirit of the Protocol.\textsuperscript{185}

Generally, the Commission and Court may complement each other in a number of ways. For instance, the two institutions could divide the consideration of communications, with the Commission deciding the admissibility as the Court determines the merits.\textsuperscript{186} After all, Article 6(1) of the Protocol gives the Court the right to ask for the opinion of the Commission on questions of admissibility. Henceforth, the Commission could desist from holding hearings and instead act as a body that screens admissibility of cases on behalf of the Court.\textsuperscript{187} Since the Court does not have a promotional mandate, the Commission could continue with its promotional functions.

Alternatively, the Court could leave collection and collation of facts to the Commission and restrict itself to the determination of cases chiefly on the basis of the Commission’s written records. Hearings before the Court could be restricted to oral arguments by Counsel, rather than the examination of witnesses. On the other hand, hearings before the Commission could be restricted to the examination of witnesses and evidentiary documents.\textsuperscript{188} Ultimately, this approach will guarantee the evolution of consistent African human rights jurisprudence. It will also mark a departure from the way communications have traditionally been dealt with by the Commission.

With regard to rationalising the two institutions with the Committee of Experts, the best approach is to first harmonise the functions and mandates of the Committee and Commission. This is because the Committee is not one of the institutions that enjoy direct

\textsuperscript{185} Idem.
\textsuperscript{186} Idem.
\textsuperscript{187} Idem.
\textsuperscript{188} Idem.
access to the Court. The Protocol grants two kinds of access to the court: direct (automatic) and indirect (optional). Direct or automatic access is granted to the potential litigants listed under Article 5(1)(a)-(e), while indirect or optional access is permitted subject to a state’s declaration in accordance with Article 34(6) of the Protocol. Because of the Committee’s lack of direct access, initiating a case alleging the violation of the Children’s Charter may depend on the goodwill of states parties to the Protocol or African intergovernmental organisations. This is a complex situation given that most African states are unwilling to commence proceedings against each other.

It follows therefore that the Committee could access the Court indirectly through the Commission. This calls for greater cooperation and coordination between the two institutions. In this regard, it is recommended that the Committee should limit itself to promotional functions while the Commission takes up all protective functions on matters to do with children’s rights. This will minimise the movement of communications between the three institutions, should an aggrieved party wish to bring before the Court a complaint on the violation of the Children’s Charter. Suffice it to state that there could be more ways of strengthening the relationship between the Commission, Court and Committee of Experts. The decisive factor, however, should be whether the intended

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189 Access to the African Court is governed by Article 5 of the Protocol establishing the African Court, which states as follows: ‘1. The following are entitled to submit cases to the court: a) the commission; b) the state party which had lodged a complaint to the commission; c) the state party against which the complaint has been lodged at the commission; d) the state party whose citizen is a victim of human rights violation; d) African Intergovernmental Organisations. 2. When a state party has an interest in a case, it may submit a request to the court to be permitted to join. 3. The court may entitle relevant Non Governmental Organisations (NGOs) with observer status before the commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol.’

190 Article 34(6) of the Protocol establishing the African Court reads, ‘At the time of the ratification of this Protocol or any time thereafter, the state shall make a declaration accepting the competence of the court to receive cases under Article 5(3) of this Protocol. The court shall not receive any petition under Article 5(3) involving a state party which has not made such a declaration.’

approach circumvents duplication and overlaps. The preferred approach should also be cost effective, convenient and time saving.

6.2 Rationalising the African Court and AU Court of Justice

When considering the possible strategies of rationalising the African Court and AU Court of Justice, it is appropriate to enquire whether in the first place the continent needs more than one regional court. It is possible that the initial desire for two regional courts in Africa was motivated more by the ongoing events in Europe than by the need to improve supra-national adjudication. A critical evaluation reveals that institutions such as the AU are patterned like their counterparts in Europe.\(^\text{192}\) Similarly, Europe has two regional courts— a human rights court and a court of justice— which arrangement might have impressed those fronting for the same in Africa. While such an institutional arrangement could possibly succeed in Europe, it is certainly clear that at the moment, Africa is not prepared to host more than one regional court.

The continent is definitely not prepared to tackle the challenges that come with maintaining two regional courts, which, apart from a few aspects, have more or less the same jurisdiction. Other than the danger of evolving conflicting jurisprudence, vast resources will be required to ensure the effectiveness of the two institutions. Udombana succinctly captures this phenomenon when he states as follows:

To start with, each of the… courts will require a building to house the court rooms, judges’ chambers, and the offices for secretariats, including the Registrars. These offices must be equipped with furniture and other necessary supplies. Accommodation for the judges and their support staff will also have to be provided…. Another major resource the courts will require is a library and documentation centre. The library must be stocked with rich legal materials dealing with both African and comparative law. It must also maintain a comprehensive collection of the laws of member states. In addition, there should

be facilities for users, such as legal research and photocopy services and separate similar facilities for the judges of the courts. Furthermore, like any modern library, they must be equipped with computers and internet access. Competent librarians will need to be employed. They will also have to be trained in each of the principal legal systems and the courts’ languages and regularly exposed to modern information systems.193

The above analysis identifies just some, not all, of what the two courts will require to function properly. It is not surprising that the AU, perhaps compelled by the fear of operating two regional courts, resolved to integrate them.194 However, the failure to reach a consensus on the modalities of the integration made the AU Assembly to sanction the operationalisation of the African Court.

The operationalisation of the African Court notwithstanding, the idea of an integrated regional court is very noble and can only be ignored to the peril of the regional human rights system. First, it would avoid the splitting of resources towards maintaining two courts. Secondly, an integrated court will result in simplicity and is an antidote to the ongoing proliferation of regional institutions.195 Thirdly, it would help to concentrate efforts, energy and focus on one institution rather than two. Finally, an integrated regional court will offer the opportunity to develop unified and cohesive human rights jurisprudence for Africa.196 Noteworthy, however, integration of the two courts, now that the African Court is operational, will be much more difficult because they are at different stages of development. According to Kithure:

193 Idem, p. 860.


195 On the likely impact of proliferation of human rights and other institutions in Africa see generally, Baimu, loc. cit (note 9); Naldi and Magliveras, loc. cit (note 171), p. 421.

196 Udombana, loc. cit (note 123), p.102.
The question to be grappled with remains: Should the integration of the courts be realised, what will happen to the judges of the African Human Rights Court who may not secure slots in the integrated court? Under such circumstances, it is likely that vested interests might make submerging of the African Human Rights Court into the Court of Justice very difficult even though it could be the most pragmatic thing to do. There are bound to be deep-seated vested interests (of judges and others) that may lead to a vehement opposition against any kind of interference with an already functioning human rights Court.\footnote{197}{Kithure, \textit{loc.cit.} (note 2), p. 135.}

Apart from the different stages of development being an obstacle to the integration process, the required qualifications and expertise of the judges of the two courts are also different and may present a problem.\footnote{198}{Idem.} To be a judge of the African Court one is required to be competent in human and peoples’ rights,\footnote{199}{Article 11(1) of the Protocol establishing the African Court.} while competence in international law is the pre-requisite for appointment to the Court of Justice bench.\footnote{200}{Article 4 of the Protocol establishing the Court of Justice.}

The issues relating to the differences in jurisdiction and expertise of the judges of the two courts could nonetheless be resolved. To start with, the Court of Justice, given the nature of its jurisdiction, can adjudicate over human rights disputes. Its core business is the ‘interpretation and application’ of the CAAU.\footnote{201}{Article 19 of the CAAU.} It is needless to reemphasise that pursuant to this Act, the objectives\footnote{202}{Article 3(g) & (h) of the CAAU.} and the fundamental principles\footnote{203}{Article 4(h), (m), (n) & (o) of the CAAU.} of the AU are concerned with various aspects of human rights promotion and protection. Further, it should be noted that since human rights have a nexus with international law, experts in the latter would ordinarily have some knowledge in the former.\footnote{204}{Kithure, \textit{loc.cit.} (note 2), p. 137.} This will then resolve the issue of competence and experiences of the judges in human rights. Alternatively, in the election of the judges of the integrated court, member states could be advised to
nominate some candidates with expertise in human rights who, if elected, would deal with cases on this subject.\footnote{Idem, p. 138.}

When integrating the courts, the AU may settle for one of two approaches. The first would be to replace the existing protocols of the two courts with a new protocol establishing an integrated court. The new protocol could draw inspiration from the provisions of the two court’s protocols. This approach will then lead to the creation of one court, but with different ‘Divisions’ or ‘Chambers’. One Division or Chamber would specifically deal with regional enforcement of human and peoples’ rights, while the other, with international law disputes.\footnote{Udombana, \textit{loc.cit.} (note 193), p. 865.}

In pursuit of an approach similar to the one proposed above, a group of seven experts produced a ‘Draft Protocol’ prior to the AU Assembly summit held in 2005.\footnote{Draft Protocol on the Integration of the African Court on Human and Peoples’ Rights and the Court of Justice of the African Union. EX.CL/162 (VI) Annex I.} The document proposed an integrated court, with the African Court as a ‘specialised human and peoples’ rights division’.\footnote{Article 2(3) of the Draft Protocol.} The new court was to comprise of fifteen Judges of which at least seven would be competent in human and peoples’ rights.\footnote{Article 4 of the Draft Protocol.} Because, the AU Permanent Representatives’ Committee was not impressed with some aspects of the Draft, it proposed the operationalisation of the African Court.

The second integration approach would be to maintain the jurisdiction of the two courts but amend their protocols to enhance their relationship.\footnote{Kithure, \textit{loc.cit} (note 2), p. 141.} In this regard, the integration of the two institutions would be more on ‘essence’ rather than ‘form’. In other words, it is the interaction of the institutions that would be integrated and nothing else. Matters could be referred from one court to another, whenever the need arises, in order to utilise the competence of both courts fully. From this arrangement, it would be prudent for the
Commission to defer its protective mandate to the African Court to avoid duplicity and overlaps.

7. CONCLUSION

For the African human rights system to be effective, the criteria to be followed when setting up new institutions or mechanisms need to be defined. Some preliminary inquiry must be conducted to ascertain important issues such as the potential benefit of a proposed institution; its legal, financial and administrative implications; and how it would interface with existing institutions and mechanisms.211 It is also important to conduct an ‘impact assessment’ before regional human rights mechanisms are established. The efficiency of the African human rights system is not on the number of institutions established, but rather on their relevance and impact. In line with the proposed ‘impact assessment’ is the need to conduct a regular ‘audit’ on the existing mechanisms. Whereas an ‘impact assessment’ should be conducted prior to the establishment of new mechanisms, an ‘audit’ should be done on the already existing ones to gauge their efficacy.

It is proposed that the AU creates a special unit that would be involved in both institutional impact assessment and auditing. While it is appreciated that annual activity reports are useful in gauging the performance of the existing institutions, it is equally essential to have an independent monitoring body. External evaluation is usually more critical and thorough than an internal one. Thus, a special unit entrusted with monitoring and evaluation functions should be formed, specifically to monitor and evaluate the existing regional human rights mechanisms. The unit should be in a position to advise on, among other issues, the need, or otherwise, to create a new human rights institution, financial matters, mainstreaming and rationalisation of the human rights mechanisms and the possible strategies to improve the efficiency of the system.

211 Baimu, loc.cit (note 1), p. 318.