

An Appraisal of the Application of the Principle of Complementarity in the Functioning of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights Within the African Human Rights System

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Abstract

The principle of complementarity is a very vital principle in international law. The principle of complementarity promotes respect for national sovereignty, encourages domestic accountability, prevents impunity, ensures efficient allocation of resources, and strengthens international-domestic cooperation. This article examines or makes an appraisal on the application of the principle of complementarity in the functioning of the African Human Rights Commission and the African Human Rights Court system. The study uses a qualitative research methodology, employing primary data sources from vital conventions like the Rome Statute, African Charter on Human and Peoples' Rights, and a host of others. Secondary data came from textbooks, journal articles, reports, and newspapers. The study is underpinned or anchored by the natural law theory and the functional theory. The findings in the study reveals blatantly like that the principle of complementarity is crucial to the African human rights system, fostering a cooperative and mutually reinforcing relationship between the Commission and the Court but however, its effectiveness in practice has been characterized by variability, with both successful instances and significant challenges. And as result of this, there is need to enhance cooperation between the commission and the court, increase awareness and visibility, develop clear guidelines and to improve access to the court.

Keywords: appraisal, principle of complementarity, African commission on human and peoples' rights, African court on human and peoples' rights, and functioning

1. Introduction

Complementarity is a fundamental concept in international law, which refers to the relationship between international institutions and national institutions in achieving common goals. The concept of complementarity is a development that builds upon the post-World War II era, when the international community came together to establish the United Nations (UN) and other international institutions. The UN Charter, adopted in 1945, emphasizes the importance of cooperation between the UN and its member states in achieving common goals, including the promotion and protection of human rights.¹ The principle of complementarity is based both on the respect for the primary jurisdiction of States and on considerations of efficiency and effectiveness, since States generally have the best access to evidence and witnesses and the resources to carry out proceedings.²

In the context of human rights law, complementarity holds that international human rights institutions and

¹ United Nations, Charter of the United Nations, 24, October 1945, IUNTS XVI.UN, Article 1.

² Informal Expert Paper, *The Principle of Complementarity in Practice*, ICC-OTP, 2003, p. 3.

national human rights institutions should work together to promote and protect human rights. This is reflected in the Universal Declaration of Human Rights (UDHR)¹, which provides that “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”². The UDHR’s emphasis on national remedies reflects the principle of complementarity, which holds that international institutions and national institutions should work together to promote and protect human rights.³

Within the context of International Criminal Law, complementarity principle has its roots in the early days of international criminal law. The concept of complementarity originated in the International Law Conference draft but was substantially remodeled during the negotiation. It was crucial for the success of the negotiations that the complementarity principle be settled at an early stage before they could agree to support the establishment of a new international court. States which were content with their own administration of justice had to be satisfied that the new court would not be able to take over cases which were being dealt with perfectly at home. The provision which is now Article 17 was therefore substantially agreed before the conference even began.⁴

The Rome Statute, which was adopted in 1998, marked a significant turning point in the development of the complementarity principle. The Statute provides that the ICC will only exercise jurisdiction over international crimes where national courts are unable or unwilling to investigate or prosecute.⁵ The Rome Statute also sets out the criteria for determining whether a state is unable or unwilling to investigate or prosecute. These criteria include: the State is unable to investigate or prosecute due to a lack of capacity or resources;⁶ the State is unwilling to investigate or prosecute due to a lack of political will or because the state is shielding the perpetrator;⁷ the State’s investigation or prosecution is not impartial or independent⁸.

This principle has a different preview within the context of African Human Right System where complementarity can be linked to different forms of institutional relationships in the AU framework. This is because apart from the traditional continental human rights supervisory bodies, several other organs of the AU are involved in the business of human rights realization.⁹ Furthermore, with the growing involvement of African sub-regional institutions in the field of human rights, complementarity and related issues can be raised in relation to the relationship between such sub-regional institutions and the traditional continental human rights supervisory bodies.¹⁰ New regional human rights documents and documents relevant to human rights in Africa have also been adopted, including a Protocol to merge the African Court on Human and Peoples Rights with the African Court of Justice to form an African Court of Justice and Human Rights.¹¹ However, the main focus of

¹ United Nations, Universal Declaration of Human Rights, Adopted by the General Assembly of the United Nations, 10 Dec. 1948.

² Universal Declaration of Human Rights, Article 8.

³ C. Heyns and M. van der Linde, (2022). *International Human Rights Law in Africa and Domestic Human Rights Law in Africa*. Brill, p. 381.

⁴ R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, (2007). *An Introduction to International Criminal Law and Procedure*. Cambridge University Press, p. 127.

⁵ The principle of complementarity is enshrined in paragraph 10 of the Rome Statute’s Preamble in which States Parties to the Rome Statute were “emphasizing that the international criminal court established under this statute shall be complementary to national jurisdictions.” Article 1 also provides: “An international criminal court (the Court) is hereby established...and shall be complementary to national criminal jurisdictions.” The principle is also embodied in article 17 (rules of admissibility) which refers to article 1 and paragraph 10 of the preamble of the Rome Statute and gives States primary jurisdiction. See The Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 U.N.T.S. 90.

⁶ Rome Statute, Article 17(1)(a).

⁷ Rome Statute, Article 17(1)(b).

⁸ Rome Statute, Article 17(2)(c). See also, *Prosecutor v. Thomas Lubanga Dyilo* (2012) ICC-01/04-01/06: In this case, the ICC held that the Democratic Republic of Congo was unable to investigate or prosecute Thomas Lubanga Dyilo, a Congolese national accused of war crimes; *Prosecutor v. Uhuru Muigai Kenyatta* (2014) ICC-01/09-02/11: In this case, the ICC held that Kenya was unwilling to investigate or prosecute Uhuru Muigai Kenyatta, the President of Kenya, accused of crimes against humanity and; International Criminal Court Rules of Procedure and Evidence, ICC-ASP/1/3, 2002, Rule 51 which sets out the procedure for determining whether a State is unable or unwilling to investigate or prosecute.

⁹ S.T. Ebobrah, (2011). Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations. *European Journal of International Law*, 22(3), pp. 663-688, p. 670.

¹⁰ *Ibid*.

¹¹ The Protocol on the Statute of the African Court of Justice and Human Rights was adopted on 1 July 2008. Available at: www.africa-union.org/root/au/Documents/Treaties/list. (Consulted on 25th February 2023).

this research will be to express the complementary relationships between the African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights.

The African Commission was established by Article 30 of the African Charter, which provides that "an African Commission on Human and Peoples' Rights shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa"¹. The African Commission was created with quasi-judicial functions and not with full judicial mandate.² The rationale for this was to avoid the confrontational style of dispute resolution which is associated with the received judicial systems in Africa. In the process of establishing the Charter, a Commission was chosen over a Court because it was compatible with the reconciliatory nature of disputes resolution entrenched in African culture.³ In addition, having a judicial body was considered a premature task partly because the principle of non-interference had been the bedrock of the OAU and states were not ready to give away part of their sovereignty.⁴ Besides, during the drafting process of the African Charter, the drafters envisioned that Africa is not ready for a supranational judicial institution at the time.⁵

While the African Commission plays a crucial role in promoting and protecting human rights in Africa, it has been lambasted as ineffective.⁶ One of the major drawbacks of the African Commission was its lack of binding decisions. The African Commission, for one, is not a judicial body and does not have status that is equal to continental court of law. It is only a quasi-judicial body and its decisions and recommendations often are conceived of as not binding on state parties. This reality evidences many a scenario where state parties found culpable under the African Charter and supplementary instruments do not comply with its decisions and recommendations and do so without the slightest consequence.⁷ This limitation is rooted in the African Charter, which establishes the African Commission on Human and Peoples' Rights as a quasi-judicial body that can only make non-binding recommendations. However, it's worth noting that these recommendations can become binding if adopted by the African Union Assembly of Heads of State and Government.⁸ The lack of binding decisions undermined the African Commission's credibility and effectiveness in promoting and protecting human rights in Africa.

The African Commission also lacked enforcement powers. The Commission's lack of enforcement power has rendered it ineffective in holding states accountable for human rights violation. Consequently, and notably, without the requisite enforcement mechanisms to ensure states' implementation of such recommendations, human rights protection on the continent remains elusive and the lack of implementation calls for an evaluation of the system in practice.⁹

The African Commission was also dependent on state cooperation. The African Commission relied on states parties to provide information and cooperate with its investigations.¹⁰ This limitation made it difficult for the African Commission to investigate and address human rights violations in states that were not cooperative. For

¹ Article 30 African Charter, 1981, OAU Doc. CAB/LEG/67/3 rev. 5. See also OAU Council of Ministers Resolution CM/Res. 519 (XXVII) Establishing the African Commission on Human and Peoples' Rights. See also, R. Crawshaw and L. Holmstrom, (2006). *Essential Cases on Human Rights for the Police: Reviews and Summaries of International Cases*. Leiden/Boston, Martinus Nijhoff Publishers, p. 24.

² C. Okoloise, (2018). Circumventing Obstacles to the Implementation of Recommendations by the African Commission on Human and Peoples' Rights. *African Human Rights Law Journal*, 18(1), pp. 27-57, p. 31.

³ E. Bondzie-Simpson, (1988). A Critique of the African Charter on Human and Peoples' Rights. *Howard Law Journal*, 31(4), pp. 643-665, p. 650.

⁴ M. A. Sanchez, (2023). The African Court on Human and Peoples' Rights: Forging a Jurisdictional Frontier in Post-Colonial Human Rights. *International Journal of Law in Context*, 19(3), pp. 352-366, p. 356.

⁵ F. Ouguergouz, (2003). The Establishment of an African Court of Human and Peoples' Rights: A Judicial Premier for the African Union. *African Yearbook of International Law Online*, 11(1), pp. 79-141, pp. 82-83.

⁶ E. P. Mendes, (2022). *Global Governance, Human Rights and International Law*. Taylor and Francis, p. 15.

⁷ C. Okoloise, (2018). Circumventing Obstacles to the Implementation of Recommendations by the African Commission on Human and Peoples' Rights. *African Human Rights Law Journal*, 18(1), pp. 27-57, p. 31.

⁸ R. Murray and D. Long, (2015). *The Implementation of Findings of the African Commission on Human and Peoples' Rights*. Cambridge University Press, p. 55. See also, African Charter, Articles 54 and 59.

⁹ G. M. Wachira, (2006). Twenty Years of Elusive Enforcement of the Recommendations of the African Commission on Human and Peoples' Rights: A Possible Remedy. *African Human Rights Law Journal*, 6(2), pp. 465-493, p. 470.

¹⁰ Rachel Murray, (2004). *Human rights in Africa: From the OAU to the AU*. Cambridge University Press, p. 122.

example, the Commission “heard statements from a Burundi government envoy on the tragic events which took place in that country” before it had ratified the Charter. The Chairman was instructed by the Commission to meet with the current Chair of the OAU to consider in cooperation with the government of Burundi on sending a delegation to the country to conduct an in depth study of the human rights situation.¹ Some states often refuse rapporteurs to carry out promotional and fact finding missions. This resistance limits the ability of the Commission to effectively monitor the implementation of its decisions and assess human rights situation on the ground.² Thus, reliance on State cooperation limits the promotional and protective mandate of the Commission.

The African Court on Human and Peoples’ Rights (African Court/the Court) was established by the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (Protocol/Court’s Protocol).³ The Protocol was adopted by the OAU Assembly of Heads of State and Government on June 10, 1998.⁴ The idea of creating an African human rights court dates back to the 1960s.⁵ However, it was not until the 1990s that the idea gained momentum. The 1990s saw African states move towards establishing a human rights court due to various factors. The end of the Cold War enabled Western nations to tie development aid to Africa to human rights improvements.⁶ Meanwhile, there was development of a new constitutionalism which coincided with a new democratic order in the early 1990s.⁷ NGOs, particularly those engaged with the Commission championed the Court’s creation. For example, at the symposium organized in Mombasa, Kenya by World Organization against Torture and the Kenyan section of the International Commission of Jurists in 1993.⁸ The establishment of an African human rights court was also a recurring theme in the discourse at a succession of seminars convened by the Friedrich-Naumann-Stiftung, focusing on regional mechanisms for safeguarding human rights.⁹

2. Conceptual Clarifications

This section shall give clarity to key concepts associated to this study.

2.1 Complementarity

The word complementarity is defined as ‘the state or quality of being complementary’¹⁰.

Within the context of international criminal law, the complementarity states that, the International Criminal Court is complementary to national jurisdiction in prosecuting core international crimes set out in article 5 of the Rome Statute of the International Criminal Court.¹¹ The doctrine in international law also entails that, a country with control of a person accused of violating international criminal law has the jurisdiction to charge and try the person. Because the jurisdiction of the International Criminal Court is Complementary to the criminal jurisdiction of countries, that tribunal can assert jurisdiction over the accused person only if the country is unable or unwilling to undertake a genuine investigation and prosecution.¹² This principle is embodied in Article 17 of

¹ R. Murray, (2000). *The African Commission on Human and Peoples Rights and International Law*. Bloomsbury Academic, p. 116.

² L. W. Kembabazi, (2024). The Role of the African Commission in Enhancing Compliance with its Decisions on Communications. *African Human Rights Law Journal*, 24, pp. 781-803, pp. 794-795.

³ K. Parlett, (2011). *The Individual in the International Legal System*. Cambridge University Press, pp. 330-331.

⁴ Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, June 10, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT(III).

⁵ M. A. Sanchez, (2023). The African Court on Human and Peoples’ Rights: Forging a Jurisdictional Frontier in Post-Colonial Human Rights. *International Journal of Law in Context*, 19(3), pp. 352-366, p. 356.

⁶ G. Bekker, (2007). The African Court on Human and Peoples’ Rights: Safeguarding the Interests of African States. *Journal of African Law*, 51(1), pp. 151-172, p. 159.

⁷ J. C. Mubangizi, (2006). Some Reflections on Recent and Current Trends in the Promotion and Protection of Human Rights in Africa: The Pains and the Gains. *African Human Rights Law Journal*, 6(1), pp. 146-165, p. 156.

⁸ N. Udombana, (2013). Toward the African Court on Human and Peoples’ Rights: Better Late than Never. *Yale Human Rights and Development Law Journal*, 3, pp. 45-111, p. 76.

⁹ G. Oestreich, (1992). “Conference Report” in W. Heinz (ed.) *The System of Human Rights Protection in Africa and Europe: An Exchange of Experience and Perspectives, Afro-European Conference*, (26-31 March 1990, Strasbourg, Proceedings of the Conference) Friedrich-Naumann-Stiftung, p. 8.

¹⁰ B. A. Garner and Henry Campbell Black, (2009). *Black’s Law Dictionary*, 9th edn, St. Paul, MN, West, p. 324.

¹¹ See J. T. Holmes, (2002). “Complementarity: National Courts versus the International Criminal Court” in A Cassese, P Gaeta and J Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 1, pp. 667-672.

¹² B. A. Garner and Henry Campbell Black, (2009). *Black’s Law Dictionary*, 9th edn, St. Paul, MN, West, p. 324.

the Rome Statute. The principle requires that the ICC defer to national judiciaries when crimes against humanity, genocide, aggression and war crimes have been committed and a Member State has asserted its criminal jurisdiction over those crimes.¹

Complementarity as it is used in this context should not be taken in the technical sense provided in the Rome Statute. Here, it is used in its ordinary and plain meaning referring to “a relationship or situation in which two or more different things improve or emphasize each other’s qualities.”²

2.2 African Commission on Human and Peoples’ Rights

The African Commission on Human and Peoples’ Rights is the foremost human rights organ of the African Union established under the African Charter on Human and Peoples’ Rights with the mandate to promote and protect human rights through examining state reports on the implementation of their obligations under the African Charter, receiving and adjudicating on complaints of human rights violations from State Parties, individuals and non-governmental organizations and providing guidance to Member States through elaborations on the African Charter provisions in the form of resolutions, guidelines, general comments among others.³

Welch,⁴ defined the African Commission on Human and Peoples’ Rights as a quasi-judicial body tasked with promoting and protecting human rights and collective peoples’ rights throughout the African continent as well as interpreting the African Charter on Human and Peoples’ rights and considering individual complaints of violation of the Charter. This includes investigating human rights violations, creating and approving programs of action towards encouraging human rights, and set up effect.

The 2020 Rules of Procedure of the African Commission on Human and Peoples’ Rights defined the African Commission as an autonomous treaty body working within the framework of the African Union to promote human and peoples’ rights and ensure their protection in Africa.⁵ Thus, the above definition used is adopted in the study.

2.3 African Court on Human and Peoples’ Rights

The African Court on Human and Peoples’ Rights is a continental court established by the African states to ensure the protection of human and peoples’ rights in Africa. It complements the functions of the African Commission on Human and Peoples’ Rights.⁶ Hence, the study adopts this definition throughout.

2.4 Applicability

Applicability is the process of implementing the law to a particular subject matter.⁷ The Webster Dictionary defines applicability as: “capable of or suitable for being applied.”⁸ Applicability as used in this research entails the manner in which laws or doctrines are capable of being applied to an issue under discussion.

2.5 Principle

Principle is a basic rule or a doctrine.⁹ The Webster dictionary defines it as: “a comprehensive and fundamental law, doctrine, or assumption.”¹⁰ Thus, this usage is employed in this research.

2.6 Functioning

As per the Black’s Law Dictionary¹¹, functioning is the carrying out of a particular activity that is appropriate to an institution or organization. In Merriam Webster Dictionary, functioning means to carry out an operation or be in action. This research will employ the definitions discussed above.

¹ See article 17 of the Rome Statute.

² *Oxford English Dictionary*, available online at: <http://dictionary.cambridge.org/dictionary/english/complementarity> (Consulted on 6th April, 2023).

³ See Articles 45 to 59 of the African Charter on Human and Peoples’ Rights adopted in 1986.

⁴ C. Welch, (1991). Organization of African Unity and the Promotion of Human Rights. *Journal of Modern African Studies*, 29(4), 533-548.

⁵ See Rule 3 (1) of the 2020 Rules of Procedure of the African Commission on Human and Peoples’ Rights.

⁶ See Articles 1 and 2 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples Rights, adopted by Member States of the OAU in June 1998 and entered into force on 25th January 2004.

⁷ B. A. Garner and Henry Campbell Black, (2009). *Black’s Law Dictionary*, 9th edn, St. Paul, MN, West, p. 116.

⁸ *Merriam-Webster’s Dictionary of English Usage*, Springfield, Mass, Merriam-Webster, Inc., 1994, p. 145.

⁹ B. A. Garner and Henry Campbell Black, (2009). *Black’s Law Dictionary*, 9th edn, St. Paul, MN, West, p.1313.

¹⁰ *Merriam-Webster’s Dictionary of English Usage*, Springfield, Mass, Merriam-Webster, Inc., 1994, p. 1185.

¹¹ Garner and Black, *op.cit.*, p.742.

3. Methodology

This research employs the qualitative research methodology.¹ Qualitative research refers to a scientific method of observation to obtain non-numerical data. In legal research, this is doctrinal in nature. It adopts an in-depth content analysis and interpretation of both primary and secondary sources of data related to human rights systems. In essence, it adopts an analytical approach in the interpretation of relevant statutes at the regional and international levels such as the Statute of the International Criminal Court, the African Charter, the European Court of Human Rights, the Inter-American Court of Human Rights just to name a few. This research also collects and analyses primary data in the form of decided cases, treaties and statutes. Also, this study involves the collection and analysis of secondary sources of data, principally from text books, journals, encyclopedias and periodicals like human rights reports, as well as internet sources (such as West Law, JSTOR and Google). In so doing, the University of Buea libraries and other public libraries were used. In support of these primary data, the research adopts direct unstructured interviews with representatives of human rights bodies and NGOs. The reason for interviewing these groups of people is based on their role they play in the functioning of human rights bodies such as the African Commission and African Human Right Court. This constitutes primary data.

Case law as a source of primary data incorporates constitutions, statutes and regulations. The review of primary sources in an in-depth manner is to better appreciate the dynamics of the complementary relationship between the Commission and the Court. More so, interviews of personnel engaged in the activities of the Commission and the Court is to clarify views earlier held by researchers in this area of the law.

Secondary data comprise the use of textbooks, journal articles, internet sources, reports, theses and newspaper articles. The review of these sources informs the study the functioning of the principle of complementarity between the Commission and the Court. It further stimulates a better understanding of the context of the study and also formulates and guides the research. Besides, it is from a review of these secondary sources that the research draws insights from other jurisdictions such as the European and Inter-American human rights systems. The qualitative research brings out the functioning of the principle of complementarity and its influence on the African Human Rights System, and what accounts for the effectiveness and ineffectiveness of the principle.

4. Theoretical Framework

To achieve the aim of this study, the research used two major theories that is, the natural law theory and the functional theory. Each of the theories shall be examined seriatim.

4.1 Natural Law Theory

This theory has a crucial place in this research because it provides the platform to evaluate the effectiveness of the mandates of the Commission and the Court through its laws and implementation mechanisms and to ascertain that those they aim to protect benefit from it. Natural law theory posits that there exists a universal moral code, inherent in nature that guides human behavior and informs human laws.² This theory asserts that certain principles and values are inherent in human nature and should be reflected in the laws and institutions of society.

One of the earliest proponents of Natural Law Theory was Aristotle, who argued that humans have a unique potential for rational thought and that this potential should be cultivated through education and the development of virtuous habits.³

Thomas Aquinas, a medieval philosopher and theologian, further developed Natural Law Theory, arguing that natural law is a participation in the eternal law of God.⁴ John Locke, an enlightenment philosopher, also drew on Natural Law Theory, arguing that individuals have inherent rights to life, liberty, and property, which are protected by natural law.⁵ In modern times, Natural Law Theory has been influential in the development of

¹ Qualitative research is a situated activity that locates the observer in the world. It consists of a set of interpretative, material practices that make the world visible. It involves an interpretative, naturalistic approach to the world. It attempts to make sense of, or to interpret phenomena in terms of the meaning people bring to them. See N. K. Denzin and Y. S. Lincoln, Introduction: The Discipline and Practice of Qualitative Research, in N.K. Denzin and Y.S. Lincoln (eds), *The Sage handbook of qualitative research*, Sage Publications Ltd, 2008, pp. 1-32, 3.

² T. Aquinas, (1920). *Summa Theologica*, translated by Fathers of the English Dominican Province, Christian Classics Ethereal Library, pp. 113-114.

³ Aristotle, (1999). *Nicomachean Ethics*, translated by Terence Irwin, Hackett Publishing, pp. 13-15.

⁴ T. Aquinas, (1920). *Summa Theologica*, translated by Fathers of the English Dominican Province, Christian Classics Ethereal Library, p. 113.

⁵ J. Locke, (1988). *Two Treaties of Government*, Peter Laslett (eds). Cambridge University Press, pp. 13-14.

human rights law and international justice.¹

This theory has a crucial place in this research because it provides the platform to evaluate the effectiveness of the mandates of the Commission and the Court through its laws and implementation mechanisms and to ascertain that those they aim to protect benefit from it.

4.2 Functional Theory

Functional theory grew out of the writings of English philosopher, Herbert Spencer², who saw similarities between society and the human body. He argued that just as the body functioning, the various parts of organizational structures in the society work together to keep society functioning.³ The parts of society that Spencer referred to were institutions or patterns of beliefs and behaviors focused on meeting social needs such as government, education, economy, and the family. Emile Durkheim applied Spencer's theory to explain how societies change and survive over time. Durkheim believed that society is a complex system of interrelated and independent parts that work together to maintain stability. Each of these facts has different functions within an organizational set up in the society.⁴

Within the context of this research, functional theory is relevant as it explains how the Commission and Court, being organs, work together as a system of interconnected parts to maintain stability and order, thereby fulfilling the mandates set out for them in the Charter and Protocols establishing them.

5. Mandate of the African Commission and the African Court

The first regional institution that was set up with the aim to protect human rights on a regional level in Africa was the African Commission.⁵ Since it was limited to making recommendations, its enforceability was a significant setback due to the fact that the Charter does not provide for a specific provision or mechanism to ensure that Commission's decisions are binding.⁶ As a result, the African Court on Human and Peoples' Rights was established to specifically support the African Commission's protective role.⁷ Both the African Commission's and the African Court's mandates are outlined in Article 45 of the African Charter and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, respectively.⁸ Below is a more detailed explanation of these two mandates.

5.1 Mandate of the African Commission

The Commission was created with two main goals as stated in Article 30 of the African Charter, which calls for its creation: to advance and defend human and peoples' rights throughout the African continent. The Commission's duties are listed in Article 45 of the Charter as follows:⁹

- Promoting and defending human and peoples' rights;
- Interpreting the Charter's provisions; and
- Carrying out any other duties delegated to it by the OAU Assembly.

5.2 The Commission's Promotional Mandate

With the primary mandate of advancing and safeguarding human rights across the continent¹⁰, the African

¹ J. Finnis, (1980). *Natural Law and Natural Rights*. Oxford University Press, pp. 23-25.

² H. Spencer, (1896). *The Principles of Sociology*. Williams and Norgate, Vol. 3, p. 26.

³ *Ibid*.

⁴ E. Durkheim, (1895). *The Rules of Sociological Method*. Sage Publications, pp. 60-81.

⁵ K. Deichmann, (2020). *Regional Integration, Human Rights and Democratic Participation in Africa*. Gottingen University Press, p. 35.

⁶ B. T. Nyanduga, (2006). Conference Paper: Perspective on the African Commission on Human and Peoples' Rights on the Occasion of the 20th Anniversary of the Entry into Force of the African Charter on Human and Peoples' Rights. *African Human Rights Law Journal*, 6(2), pp. 255-267, p. 261.

⁷ Court's Protocol, Article 2. See also, C. Heyns, *Human Rights Law in Africa 1999*, Springer, 2002, p. 251.

⁸ *Ibid*.

⁹ OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) entered into force 21 October, 1986. Available at www.achpr.org/files/instruments/achpr/banjul_charter.pdf (Consulted on 16 January, 2024). See also, George M. Wachira, *African Court on Human and Peoples' Rights: Ten Years and Still No Justice*, Minority Rights Group International, 2008, p. 8; and Mandate of the African Commission, available at <https://achpr.au.int/index.php/en/abput/mandate> (Consulted on 17 January 2024).

¹⁰ African Charter, Article 30. See also, L. W. Kembabazi, (2024). The Role of the African Commission in Enhancing Compliance with its Decisions on Communications. *African Human Rights Law Journal*, 24, pp. 781-803, p. 782.

Commission continues to be a crucial organization within the African human rights system. The promotional mandate, as stated in the African Charter, is essential to fostering a human rights culture and guaranteeing that the Charter's provisions are widely understood and applied.¹ States have a primary role in promoting human rights through various means such as education² and the establishment of human rights research institutes.³ The scope, workings, and effects of the African Commission's promotional mandate are further examined in this sub-section, which shed more light on the relevance of the Commission.

Article 45(1) of the African Charter serves as the cornerstone of the Commission's promotional mandate, which specifically calls on the Commission to promote Human and Peoples' Rights and in particular: to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights.⁴ This clause offers a comprehensive framework for a multipronged strategy of promoting human rights that includes teaching, research, awareness-building, and interaction with both state and non-state actors.⁵

Undertaking studies and research is one of the main ways the African Commission carries out its promotional mandate.⁶ These academic pursuits greatly advance a sophisticated comprehension of the human rights issues facing Africa. General Comments, which give authoritative interpretations of the provisions of the African Charter and advice nations on how to implement them, are frequently adopted as a result of the Commission's study. These General Comments are important interpretive instruments that influence how the rights outlined in the Charter are understood and they also serve as reference for international tribunals. For example, in the case of *Democratic Republic of the Congo v Uganda*⁷, the International Court of Justice referenced the African Commission's General Comment No. 4, on the right to redress for victims of torture when interpreting the Geneva Conventions and determining the laws and customs of war. Also, General Comment No. 3 on the Right to Life offers a thorough examination of Article 4 of the African Charter that goes beyond a limited interpretation of the ban on willful killing.⁸

In addition, the African Commission regularly participates in conference, symposium, and seminar organization. Diverse stakeholders, including as governmental leaders, academics, civil society organizations, and foreign partners, can communicate and exchange knowledge more easily thanks to these platforms. The Commission has held a number of Seminars in collaboration with the UNESCO, the International Commission of Jurists, the Raoul Wallenberg Institute of Human Rights and Humanitarian Law as part of its promotional activities.⁹ The Commission also carries out information distribution. Through its website, publications¹⁰, and outreach initiatives, the Commission makes the African Charter, its rulings, and other pertinent human rights resources

¹ C. Heyns and M. van der Linde, (2022). *International Human Rights Law in Africa Volume Two: Domestic Human Rights Law in Africa*. Brill, p. 567.

² Recommendation on some Modalities for Promoting Human and Peoples Rights, Second Annual Activity Report of the African Commission on Human and Peoples' Rights 1988-1989, ACHPR/RPT/2nd, Annex IX (Documents of the African Commission, p. 185).

³ M. D. Evans and R. Murray, (2000). *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000*. Cambridge University Press, p. 349.

⁴ *Ibid*, Article 45 (1) (a), (b) and (c) African Charter. See also, N. Rubner, (2023). *The African Charter on Human and Peoples' Rights Volume 2: The Political Process*, James Curry, pp. 358-359.

⁵ African Commission on Human and Peoples Rights, Working Group of Experts on Indigenous Populations/Communities, African Commission on Human and Peoples' Rights, International Work Group for Indigenous Affairs, *Rapport Du Groupe de Travail de la Commission Africaine Sur Les Populations/Communaute Autochines: Mission en Republique de Namibie 26 Juillet – 5 Aout 2005*, African Commission on Human and Peoples' Rights, 2008, pp. 28-29.

⁶ African Charter, Article 45 (1) (a). See also, Articles 75-76 of the Rules of Procedures of the African Commission, 2020.

⁷ *Armed Activities on the Territory of the Congo, the Democratic Republic of Congo v Uganda*, Judgment, reparations, ICJ GL No. 116 (2022), ICJ Rep 13, ICGJ 558 (ICJ 2022), 9th February 2022.

⁸ Working Group on the Death Penalty and Extrajudicial, Summary or Arbitrary Killings in Africa, General Comment No. 3 on the Right to Life (Article 4 of the African Charter on Human and Peoples' Rights) African Commission on Human and Peoples' Rights, December 12, 2015.

⁹ U.O. Umzurike, (2023). *The African Charter on Human and Peoples' Rights*. Brill, p. 70.

¹⁰ In order to fulfill the human rights mandate, the Commission introduced so-called documentation Centre, which published several books that deal with human rights. See Karim Deichmann, (2020). *Regional Integration, Human Rights and Democratic Participation in Africa*. Gottingen University Press, p. 41.

widely available, enabling people and communities to comprehend and assert their rights.¹ The Commission also probes into human rights issues in Africa and makes recommendations to governments that require implementation at the national level.²

Supporting local and national organizations that are concerned with human and peoples' rights is another important function of the African Commission.³ This entails cooperating with national and local civil society organizations, including National Human Rights Institutions (NHRIs).⁴ The Commission's adopted Principles Relating to the Status of National Institutions (the Principles) highlight the vital role that NHRIs play in bridging the gap between national realities and regional norms, and they offer a framework for the efficient establishment and operation of NHRIs.⁵ The Commission is further empowered by Article 45(2) of the African Charter to "formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation."⁶ This clause emphasizes how the Commission actively shapes the African legal environment for human rights protection.

The African Commission on Human and Peoples' Rights' Rules of Procedure provide additional details about the promotional mandate. The Commission's dedication to its promotional efforts is reaffirmed in the 2020 Rules of Procedure.⁷ Rule 77, for example, outlines the steps for conducting country visits, highlighting their goal of obtaining information and conversing with state officials and other interested parties in order to advance human rights.⁸ Additionally, the nomination and operation of Special Rapporteurs and Working Groups, which are crucial in carrying out in-depth research and increasing awareness of certain human rights situations throughout the continent, are also outlined in the Rules.⁹ Their technical aspects are detailed in the recently concluded Standard Operating Procedures on the Special Mechanisms of the African Commission.¹⁰

The Commission's continuous attempts to address new human rights issues under its promotional mandate are demonstrated by the creation of new Special Mechanisms in line with the provisions of Rules 23 and 97 of the Rules of procedures and Article 45(1) African Charter, which include: the Special Rapporteurs established by the Commission are Special Rapporteurs on Prison and Conditions of Detention,¹¹ Special Rapporteur on the Rights of Women,¹² Special Rapporteur on Freedom of Expression and Access to Information,¹³ Special Rapporteur on Human Rights Defenders,¹⁴ and Special Rapporteur on Refugees, asylum Seekers, Migrants and Internally

¹ See, for example, African Commission on Human and Peoples' Rights, *Examination of State Reports: Ghana, 14th Session, December 1993* (Copenhagen: Danish Centre for Human Rights, 1995).

² C. Okoloise, (2018). Circumventing Obstacles to the Implementation of Recommendations by the African Commission on Human and Peoples' Rights. *African Human Rights Law Journal*, 18(1), pp. 27-57, p. 31, p. 40.

³ African Charter, Article 45 (1) (c).

⁴ M. Ssenyonjo, (2011). *The African Regional Human Rights System: 30 Years After the African Charter on Human and Peoples' Rights*. Brill, p. 208.

⁵ African Commission on Human and Peoples' Rights, *Guidelines for the Establishment and Strengthening of National Human Rights Institutions in Africa (the Principles Relating to the Status of National Institutions)*, Banjul, 2002.

⁶ *Ibid.*

⁷ African Commission on Human and Peoples' Rights, Rules of Procedure of the African Commission on Human and Peoples' Rights, Banjul, 2020.

⁸ *Ibid.*

⁹ Rules of Procedure of the African Commission, 2020, Rule 93.

¹⁰ Adopted during the 27th extraordinary session of the African Commission, held from 19 February to 4 March 2020 in Banjul, The Gambia. https://www.achpr.org/public/Document/file/English/SOP%20on%20the%20Special%20Mechanisms%20of%20the%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99Rights_ENG.pdf (Consulted on 22 May 2025). See also, K. Kariseb, (2021). Understanding the Nature, Scope and Standard Operating Procedures of the African Commission Special Procedure Mechanisms. *African Human Rights Law Journal*, 21(1), pp. 149-175, p. 155.

¹¹ This was established in October, 1996. See Final Communiqué of the Twentieth Ordinary Session of the African Commission, 21-31 October, Grand Bay, Mauritius, Para. 18

¹² This was established in April, 1998. See Final Communiqué of the Twenty-third Ordinary Session of the African Commission, 20-29 April, Banjul, The Gambia at Para.11.

¹³ Established in December, 2004. See Resolution on the Mandate and Appointment of a Special Rapporteur on Freedom of Expression in Africa, ACHPR/Res. 71 (XXXVI) 04.

¹⁴ Established in June 2004. See Resolution on the Protection of Human Rights Defenders in Africa, ACHPR/Res.69 (XXXV) 04.

Displaced Persons.¹ The Special Rapporteur on Extra-Judicial, Summary and Arbitrary Executions² was created in April, 1994 and was the first special mechanism to be established within the Commission.³ Aside these Special Rapporteurs there are also working groups. The working groups are the Working Group of Experts on Indigenous Populations/Communities in Africa;⁴ the Working Group on Economic, Social and Cultural Rights in Africa;⁵ the Working Group on Specific Issues Relevant to the Work of the African Commission on Human and Peoples' Rights,⁶ the Working Group on the Question of the Death Penalty,⁷ Working Group on the Rights of Older Persons and people with Disabilities, Working Group on Extractive Industries and Human rights Violations and the Working Group on Communications.⁸

By submitting and reviewing State Reports⁹ in accordance with Article 62 of the African Charter, the African Commission engages with member states and demonstrates its promotional efforts.¹⁰ The process of examining state reports offers a chance for productive discussion and for the Commission to offer suggestions to states on how to enhance their human rights records, even if it is essentially a monitoring instrument.

Numerous examples demonstrate the influence of the African Commission's promotional mandate. For instance, the Commission's persistent lobbying and the efforts of its Special Rapporteur on the Rights of Women in Africa have helped some African nations pay more attention to and implement legal reforms pertaining to issues like advancement in education, promotion of women's rights and protection against Gender-Based Violence.¹¹ The impact of the Commission's advocacy work in promoting women's rights in this area is demonstrated by the 2003 ratification of the Maputo Protocol¹². The Special Rapporteur on the Rights of Women in Africa has also formulated several Guidelines and General Comments as part of its contribution to the promotional mandate of the African Commission.¹³

Succinctly, the African Commission on Human and Peoples' Rights' promotional mandate is an essential component of its activities. The Commission's dedication to these endeavours is further reinforced by the revised 2020 Rules of Procedure. Notwithstanding ongoing obstacles like inadequate funding and non-collaboration by some state collaboration, the Commission's persistent work and expanding impact on national legislation and the

¹ This was established in December, 2004. See Resolution on the mandate of the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa, ACHPR/Res.72 (XXXVI) 04.

² Final Communiqué of the Fifteenth Ordinary Session of the African Commission, 18-27 April, 1994 Banjul, The Gambia at paragraph 20.

³ Final Communiqué of the 15th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 18-27 April 1994, ACHPR/FIN/COM/XIV. See also M. D. Evans and R. Murray, (2000). *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000*. Cambridge University Press, p. 268.

⁴ Established in November 2003, see the Resolution on the Adoption of the Report of the African Commissions Working Group on Indigenous Populations/Communities, ACHPR/Res.65 (XXXIV) 03.

⁵ Established in December 2004, see Resolution on Economic, Social and Cultural Rights in Africa, ACHPR/Res. 73 (XXXVI) 04.

⁶ Established in May 2005, see the Resolution on the Creation of a Working Group on Specific Issues relevant to the Work of the African Commission on Human and Peoples Rights, ACHPR/Res.77 (XXXVII) 05.

⁷ Established in December 2005, see the Resolution on the Composition and the Operationalization of the Working Group on the Death Penalty as adopted at the 38th Session, December 2005.

⁸ Established on November 2011. See Resolution 194 on the Establishment of a Working Group on Communications available at www.achpr.org/sessions/50th/resolutions/194 (Consulted on 17 January, 2024).

⁹ This constitutes the core of the Commission's promotional mandate. See, F. Viljoen, *International Human Rights Law in Africa*, 2nd edn., Oxford University Press, 2012, p. 349.

¹⁰ *Ibid*.

¹¹ ACHPR, *Statement by the Special Rapporteur on the Rights of Women in Africa on the Occasion of International Women's Day*, Banjul, The Gambia, 8 March 2025.

¹² African Union: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, Mozambique, 11th July 2003, entry into force 25th November 2005.

¹³ For example, African Commission General Comment 1 on article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted during the 52nd Ordinary Session of the African Commission held in Yamoussoukro, Ivory Coast, 9-22 October 2012. See C. N. Musembi and T. M. Makunya, *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A Commentary*, Pretoria University Law Press, 2023, p. 86; ACHPR, Guidelines on Combating Sexual Violence and its consequences in Africa, Nov. 05, 2017, available at <https://achpr.au.int/index.php/en/documents/2017-11-05/guidelines-combating-sexual-violence-and-its-consequences-africa> (Consulted 25 July 2024).

African Court's case law highlight how crucial its promotional mandate is to advancing human and peoples' rights throughout Africa.

5.3 Protective Mandate of the African Commission

The protective mandate of the African Commission finds its principal legal basis in the African Charter, which entered into force on 21 October 1986, is now ratified by all member states of the AU.¹ Specifically, Article 45(2) explicitly mandates the Commission to ensure the protection of human and peoples' rights under conditions laid down by the present Charter.² This core provision empowers the Commission to take concrete actions aimed at preventing and addressing human rights violations within the African continent. Furthermore, other clauses within Article 45 contribute to the protective capacity of the Commission, including the authority to interpret the provisions of the Charter at the request of State Parties, African Union institutions, or recognized African organizations³, and to undertake any other tasks entrusted to it by the Assembly of Heads of State and Government of the African Union.⁴ The Commission itself emphasizes the intrinsic link between the promotion and protection of human rights, recognizing that they are two interrelated and indistinguishable functions of the Commission because the objective of promoting human and peoples' rights is mainly to reduce the likelihood of their violation.⁵

The primary goal of the protective mandate is handling individual communications that allege human rights violations by states.⁶ This competence aims to ensure the enjoyment of the rights and freedoms of the Charter through the collaboration with several stakeholders, such as governments and human rights organizations.⁷ Thus, in complying with the protective mandate of the Commission, an interview conducted on April 2024 at the head office of the Cameroon Women's Peace Movement (CAWOPEM), Yaoundé, the co-founder, Madam Yvonne Muma Bih, expressed the active role the institution has played in protecting human rights in Cameroon. As part of this, the CAWOPEM together with eighty one organizations wrote an open letter to the African Commission on Human and Peoples' Rights, urging the Commission to address serious and systematic human rights violations in Cameroon carried out in the Northwest and Southwest Regions as a result of the ongoing Anglophone crisis.⁸ The communications procedure and the state reporting process are essential to this protective role.

6. Functional Application of Complementarity in Accessing the African Commission

The operability of complementarity in the access to the African Commission is examined under two sub-heads which are: the commission's access to the court and complementarity within the context of cases referred by the Commission.

6.1 The Commission's Access to the African Court on Human and Peoples' Rights

The Protocol to the African Charter establishes a clear legal framework governing the African Commission's access to the African Court. Several key articles delineate the scope and conditions of this access. Article 2, as previously noted, lays the foundation by establishing the complementary relationship between the two bodies.⁹ The purpose of this article is for the Court to build upon and enhance the protective mandate already entrusted to the Commission.¹⁰

The Court's jurisdiction as defined in the Protocol 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

¹ The last State to ratify the African Charter was Eritrea. Morocco is not a member state of the AU, but the Sahrawi Arab Democratic Republic is. See, F. Viljoen, (2000). State Reporting Under the African Charter of Human and Peoples' Rights: A Boost from the South. *Journal of African Law*, 44(1), pp. 110-118, p. 110.

² *Ibid.*

³ Article 45(3).

⁴ Article 45(4).

⁵ S. Gumede, (2003). Bringing Communications Before the African Commission on Human and Peoples' Rights. *African Human Rights Law Journal*, 3(1), pp. 118-148, p. 119.

⁶ L. W. Kembabazi, (2024). The Role of the African Commission in Enhancing Compliance with its Decisions on Communications. *African Human Rights Law Journal*, 24(2), pp. 781-803, p. 781.

⁷ K. Deichmann, (2020). *Regional Integration, Human Rights and Democratic Participation in Africa*. Gottingen University Press, p. 42.

⁸ Interview No.1, conducted on April 2024.

⁹ *Ibid.*

¹⁰ C. Heyns, (2002). *Human Rights Law in Africa 1999*. Springer, p. 239.

ratified by the States concerned”.¹ The phrase “cases and disputes submitted to it” is broad and implicitly encompasses those brought before the Court by entities authorized to do so, including the African Commission.² This provision ensures that the Court has the legal competence to hear matters referred to it by the Commission, as these cases invariably involve the interpretation and application of the African Charter or other relevant human rights instruments.

Also, Article 5 of the Protocol explicitly addresses access to the Court and unequivocally states that the Commission is one of the entities that can bring cases before the Court.³ This provision grants the Commission direct and unfettered access to the Court, enabling it to bring cases of alleged human rights violations that it has considered to the judicial body for a binding decision. This access is not contingent upon any further conditions or declarations from member states, highlighting the central role envisioned for the Commission in the two-tiered protective system as it is entrusted to submit cases directly to the court.⁴

In contrast, Article 34(6) of the Protocol introduces a conditional element for the direct access of individuals and NGOs. It stipulates that: “At the time of 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”.⁵ Article 5(3) refers to the Court potentially entitling relevant NGOs with observer status before the Commission, and individuals to institute cases directly before it.⁶ This creates a two-track system for accessing the Court. While the Commission enjoys direct access upon ratification of the Protocol, individuals and NGOs face a significant hurdle in the form of the Article 34(6) declaration. To the present date, whereas 12 states have ever made the Article 36 (4) declaration, regrettably, Tunisia’s withdrawal on third March 2025 increases to five the number of states that have since withdrawn the declaration.⁷

6.2 Complementarity within the Context of Cases Referred by the African Commission

Article 5 of the Protocol lays the legal foundation for the referral of cases from the African Commission to the African Court, granting the Commission the explicit power to submit cases to the judicial body.⁸ This mechanism is a critical component of the complementarity principle in action. Under the former Rules of the Commission, there exist three primary stages at which the African Commission may initiate a referral to the African Court. Firstly, a referral can occur at any time after the Commission receives a communication but before it has completed its examination on admissibility and merits. This is particularly relevant in situations where a State party fails to comply with provisional measures⁹ requested by the Commission, highlighting the need for the Court’s binding authority to ensure immediate protection.¹⁰ Secondly, the Commission may refer a case during its examination of a communication, whether at the admissibility or merits stage, but before delivering a final decision.¹¹ This avenue is deemed suitable for cases where the Commission identifies serious or massive violations of human rights, recognizing the Court’s capacity to provide more robust remedies in such

¹ African Court’s Protocol, Article 3.

² See African Court Protocol, Article 5. See also F. Ouguergouz, (2003). *The African Charter on Human and Peoples’ Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*. Kluwer Law International, p. 715.

³ African Court Protocol, Article 5(1)(a).

⁴ R. Murray, (2019). “The Human Rights Jurisdiction of the African Court of Justice and Human and Peoples’ Rights”, in Charles C. Jalloh, Kamari M. Clarke and Vincent O. Nmeihelle (eds) *The African Court of Justice and Human and Peoples’ Rights in Context: Development and Challenges*. Cambridge University Press, p. 984.

⁵ *Ibid.*

⁶ See also S. Kahl, (2019). *African Court of Human and Peoples’ Rights Development and Procedural Problems*. GRIN Verlag, p. 6.

⁷ Centre for Human Rights, Faculty of Law, “Press Statement: Centre for Human Rights Expresses Concern About Tunisia’s Withdrawal of Access to the African Court by Individuals and NGOs”, Centre for Human Rights, University of Pretoria, 20 March 2025. For the 12 States, they are Burkina Faso, Malawi, Mali, Tanzania, Ghana, Rwanda, Cote D’Ivoire, Benin, Tunisia, Gambia, Niger, Guinea Bissau. For the 5 withdrawals they are Tanzania, Rwanda, Cote D’Ivoire, Benin and Tunisia. See AfCHPR, *Declarations*, available at <https://www.african-court.org/wpafc/declarations/> (Consulted on June 15, 2025).

⁸ *Ibid.*

⁹ A provisional (‘precautionary or interim’) measure is issued to prevent irreparable harm to a victim while the case he or she has submitted to the relevant monitoring body is still under consideration. They aim to prevent the deterioration of the situation or the specific targeting of the victims. See G. Zyberi, (2013). *An Institutional Approach to the Responsibility to Protect*, Cambridge University Press, p. 493. See also Rule 100 of the 2020 Rules of Procedure of the African Commission.

¹⁰ Rules of the African Commission, 2010, Rule 98 (4).

¹¹ Rules of the African Commission, 2010, Rule 118 (4).

grave situations.¹ Thirdly, a referral can take place when the African Commission concludes that a State party has not complied or demonstrates an unwillingness to comply with its final recommendations.² This type of referral occurs later in the communication process, aiming to provide an avenue for the Court to complement the Commission's protective mandate by enforcing its findings.³

The Principle of Complementarity finds practical expression in the jurisprudence and working relationship between the African Commission and the African Court. A key case that exemplifies the intended complementarity is *African Commission on Human and Peoples' Rights v. Republic of Kenya*.⁴ This case concerned the rights of the Ogiek community, an indigenous group in Kenya, who alleged violations of their rights to property, culture, and non-discrimination due to evictions from their ancestral lands.⁵ The African Commission, after receiving and considering the communication from the Ogiek community and failing to achieve a resolution at the Commission level, referred the case to the African Court for a binding judicial determination.⁶ This referral demonstrates the operational aspect of complementarity, where the Commission, having fulfilled its quasi-judicial role, referred a human rights violation to the Court for a final legal judgment.⁷ The Court accepted the case and ultimately found that the evictions amounted to violations of several rights under the African Charter.⁸ This instance demonstrated the Commission's utilization of its direct access to the Court to bring important human rights matters before it.

However, it is important to consider the more recent developments in the Commission's procedural rules. Rule 130 of the African Commission's 2020 Rules of Procedure has introduced a narrowing of the circumstances under which the Commission can refer cases to the Court compared to the 2010 Rules.⁹ The four scenarios under Article 118 no longer exist and have been replaced by just one which reads: The Commission may, before deciding on the admissibility of a communication submitted under Articles 48, 49 and 55 of the African Charter, decide that the communication should be referred to the Court, provided that the respondent State has ratified the Protocol Establishing the African Court on Human and Peoples' Rights.¹⁰ Referral to the African Human Rights Court is a question which is 'prima facie' be raised at the beginning of the process.¹¹ However, this scenario is far from being incongruous with actual practice, still seems to clash head-on with the way the Court envisages its own relationship with the quasi-judicial body (the Commission).¹² The article also provides that in cases where the Commission refers a matter due to non-compliance with its recommendations or provisional measures, the Commission is expressly recognized as a party to the proceedings before the Court.¹³

7. Effectiveness of the Principle of Complementarity

The effectiveness of the principle of complementarity in the African human rights system can be evaluated by examining instances where it has been applied in practice through the case law of the African Court, as well as

¹ African Charter, Article 58 (2); Rules of the African Commission, Rules 84 (2) and 118 (3).

² Rules of the African Commission, 2010, Rule 118 (1).

³ Pan African Lawyers Union, *Guide to Complementarity Within the African Human Rights System*, PALU, 2014, p. 12.

⁴ Application 006/2012, judgment of the African Court of Human and Peoples' Rights, issued 26 May 2017 (the Ogiek Judgment).

⁵ *Ibid*, paras. 114-119.

⁶ Minority Rights Group and Lucy Claridge, (2017). *Victory for Kenya's Ogiek as African Court Sets Major Precedent for Indigenous Peoples' Land Rights*, Minority Rights Group, p. 3.

⁷ See Article 5 (1)(a) Court's Protocol.

⁸ Minority Rights Group and Lucy Claridge, (2017). *Victory for Kenya's Ogiek as African Court Sets Major Precedent for Indigenous Peoples' Land Rights*. Minority Rights Group, p.6.

⁹ *Ibid*. The 2010 Rules of Procedure of the African Commission were amended at the 27th Extra-Ordinary Session of the African Commission which was held in Banjul, Gambia, between 4th February and 4th March 2020. It entered into force on June 2020 in accordance with Article 145 of the text.

¹⁰ Rules of the African Commission 2020, Rule 130 (1).

¹¹ A. Gattini, (2024). *Time and International Adjudication: The Temporal Factor in Proceedings Before International Courts and Tribunals*. Brill, p. 137.

¹² M. Ssenyonjo, (2018). Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987-2018). *International Human Rights Law Review*, 7(1), pp. 1-42, p. 38.

¹³ Rules of the African Commission, 2020, Rule 130 (3); *African Commission (Saif Al-Islam Gadafi) v Libya*, Application 2/2013, Order of Provisional Measures (15 March 2013); *African Commission (Ogiek Case) v Kenya*, Application 6/2012, Order for Provisional Measures (15 March 2013).

cases where its application has faced challenges or limitations.

One prominent example of the successful application of complementarity is the case of *African Commission on Human and Peoples' Rights v. Republic of Kenya* (the *Ogiek case*).¹ In this landmark case concerning the rights of the indigenous Ogiek community in Kenya, the African Commission, having received a communication alleging violations of the African Charter, ultimately referred the application to the African Court pursuant to Article 5(1)(a) of the Protocol. This referral followed a period of inaction by the State in relation to provisional measures ordered by the Commission.² The Commission's decision to bring the case before the Court allowed the latter to exercise its binding judicial authority and issue a judgment on the merits, finding that the Kenyan government had violated several rights of the Ogiek people, including their rights to property, culture, religion, development, and non-discrimination. Subsequently, the Court also issued a judgment on reparations, ordering Kenya to take specific measures to remedy the violations, including restitution of their ancestral lands and financial compensation.³ This case serves as a significant illustration of how the Commission can effectively utilize its mandate to investigate human rights situations and then leverage the Court's binding powers through referral, leading to a more impactful outcome for victims and demonstrating a positive aspect of complementarity in action. The Commission's initial engagement with the Ogiek community's grievances, followed by a thorough assessment and the strategic decision to refer the case to the Court, showcases a sequential and coordinated approach where the Commission's fact-finding and admissibility assessment paved the way for the Court's authoritative judgment on the substantive issues and the provision of remedies.

While specific examples of the Court requesting the opinion of the Commission on admissibility are not many, the Court's Protocol and Rules of the Court establish this mechanism.⁴ This provision allows the Court to draw upon the Commission's extensive experience and specialized knowledge in human rights matters within the African context when considering the admissibility of cases, particularly those brought by individuals and NGOs under Article 5(3) of the Protocol.⁵ The Commission's long history of receiving and reviewing a wide range of communications alleging human rights violations across the continent equips it with valuable insights into the specific challenges and legal contexts of different African states. By seeking the Commission's opinion on admissibility, the Court can potentially make more informed decisions, ensuring that cases are properly vetted before proceeding to the merits stage.⁶ This collaborative approach reflects a recognition by the Court of the Commission's unique expertise and contributes to a more nuanced and effective application of the admissibility criteria within the African human rights system.

However, the principle of complementarity has also encountered challenges in its application, as evidenced by cases where admissibility has been contested based on the "exhaustion of local remedies" rule. Article 56 of the African Charter, which outlines the criteria for admissibility of communications to the Commission, is made applicable to the Court through Article 6(2) of the Protocol.⁷ The case of *Urban Mkandawire v. Republic of Malawi*⁸ provides an example where the Court, acting *proprio motu*, found an application inadmissible due to the applicant's failure to exhaust local remedies, even though the respondent state had reportedly declared before the African Commission that it did not dispute the exhaustion of local remedies.⁹ This instance highlights a potential tension where the Court, while aiming to complement the protective mandate of the Commission, may independently and strictly apply admissibility criteria, potentially limiting access to the Court despite the Commission's initial consideration of the matter. The requirement for the exhaustion of local remedies, while a fundamental principle of international law intended to give states the first opportunity to address alleged

¹ App. No. 006/2012, AfCHPR, 28 November 2012. The Ogiek are a community of hunter-gatherers living mostly in Kenya's Mau forest "since time immemorial." See R. Rosch, (2017). Indigenous and Peoples' Rights in the African Human Rights System: Situating the Ogiek Judgment of the African Court on Human and Peoples' Rights. *Verfassung Und Recht in Uebersee/Law and Politics in Africa, Asia and Latin America*, 50(3), pp. 242-258, p. 245.

² Minority Rights Group and Lucy Claridge, (2017). *Victory for Kenya's Ogiek as African Court Sets Major Precedent for Indigenous Peoples' Land Rights*. Minority Rights Group, p. 3.

³ *Ibid.* pp. 5-8.

⁴ Article 6 of the Court's Protocol and Rule 37 of the Rules of Court.

⁵ *Ibid.*

⁶ See African Charter, Article 56; Rules of Procedure of the African Court, Rules 39 and 40; Rules of Procedure of the African Commission, Rule 131.

⁷ *Ibid.*

⁸ *Urban Mkandawire v. Republic of Malawi*, App. No. 003/2011, (Merits), AfCHPR, 21 June, 2013.

⁹ *Ibid.*, para. 37.

violations within their domestic legal systems, can sometimes become a barrier to accessing the regional court if domestic remedies are ineffective, unduly prolonged, or unavailable.¹ The Court's independent assessment of this criterion, even when differing from the Commission's view or a state's admission, emphasizes the Court's role as the ultimate arbiter of its own jurisdiction and admissibility, which can sometimes lead to divergences in the application of the principle of complementarity in practice.²

On June 4, 2025, a compliance hearing was convened to assess the measures taken by Kenya to implement the Court's 2017 and 2022 judgments.³ The hearing was a direct application of the Court's supervisory jurisdiction over the implementation of its own judgment.⁴ It demonstrated the effectiveness of the principle of complementarity as it showed that the Court's role does not end with the delivery of a judgment but actively monitors compliance, ensuring its decisions lead to tangible remedies for victims. It also demonstrates the continuous role of the Commission as it remains a key party in the compliance phase, having been the original applicant. It further allows for a direct dialogue between the State-party, the Commission and the Court.

In addition, the case of *Victoire Ingabire Umuhoza v The Republic of Rwanda*⁵ before the African Court on Human and Peoples' Rights also stands as a significant example of the effectiveness of complementary relationship between the Commission and Court. While the case was primarily adjudicated by the Court, the spirit of their collaborative functions was evident through the direct application of the Court's jurisdiction and its reliance on the normative guidance developed by the Commission. At the heart of the African human rights system lies the principle of complementarity, where the African Court was established to complement and reinforce the protective mandate of the African Commission.⁶ This relationship allows for a dynamic interaction between the two institutions, ensuring a more robust protection of human rights on the continent. The *Ingabire case*, though not following a linear path from the Commission to the Court, showcases this synergy in action.

Ms. Ingabire, a prominent opposition figure in Rwanda, was convicted by Rwandan courts on charges including genocide denial and threatening state security.⁷ Following the exhaustion of domestic legal remedies, her case was directly filed with the African Court on Human and Peoples' Rights as Application 003/2014.⁸ This direct seizing of the Court is a crucial aspect of the complementary framework. The Protocol establishing the Court allows for direct access by individuals and NGOs from countries that have made a specific declaration under Article 34(6), as Rwanda had at the time.⁹ This provides an alternative and often faster route to judicial remedy, complementing the Commission's quasi-judicial process of considering communications.

While the Commission did not issue a specific ruling on a communication from *Ingabire's case* that was then transferred to the Court, its influence was profoundly felt in the Court's deliberations. In its 2017 judgment, the African Court extensively referenced and applied the African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.¹⁰ This demonstrated a clear instance of judicial dialogue and deference to the normative work of the Commission. The Court, in assessing the fairness of Ingabire's trial, utilized the standards and principles meticulously developed by the Commission over the years.¹¹ This reliance on the Commission's outputs not only strengthened the Court's legal reasoning but also underscored the coherence and consistency of the African human rights system.

Furthermore, the very existence of the Court as a judicial body with the power to issue binding judgments complements the Commission's mandate.¹² The Commission's recommendations, while carrying significant

¹ L. Chenwi, (2019). Exhaustion of Local Remedy Rule in the Jurisprudence of the African Court on Human and Peoples' Rights. *Human Rights Quarterly*, 41(2), pp. 374-398, p. 378.

² *Ibid.*

³ *African Commission on Human and Peoples' Rights v Republic of Kenya*, App. No. 006/2012 (Compliance Hearing), AfCHPR, 4 June, 2025.

⁴ See African Court's Protocol, Articles 28 (3), 29 (2) and 31 (1).

⁵ *Victoire Ingabire Umuhoza v The Republic of Rwanda*, App. No. 003/2014, (Judgment) AfCHPR, Nov. 24, 2017.

⁶ Articles 2 and 8 and Preamble, paragraphs 4 and 5 of the Court's Protocol.

⁷ *Ingabire case*, para. 10.

⁸ *Ibid.*

⁹ Court's Protocol, Article 5 (3) and 34 (6).

¹⁰ *Victoire Ingabire Umuhoza v The Republic of Rwanda*, App. No. 003/2014, (Judgment) AfCHPR, Nov. 24, 2017, paras. 103 and 104.

¹¹ Yakare-Oule Nani and J. Reventlow, (2018). Introductory Note to Ingabire v Rwanda (Afr.Ct.HPR). *International Legal Materials*, 57(3), pp. 373-404, p. 391.

¹² See Articles 2 and 30 of the Court's Protocol.

moral and political weight, are not inherently legally binding in the same way as a court judgment.¹ The mandate of the Commission has a quasi-judicial character, and hence the Commission's recommendations are not binding upon the violating State unless they are adopted by the AU Assembly of Heads of States and Government.² By providing a forum for a legally binding resolution, the Court reinforces the work of the Commission and offers a more definitive avenue for justice for victims of human rights violations.

In the *Ingabire case*, the African Court ultimately found that Rwanda had violated several of Ms. Ingabire's rights under the African Charter on Human and Peoples' Rights, including the right to freedom of expression and the right to an adequate defence.³ This landmark decision, while later leading to Rwanda's withdrawal of its declaration allowing direct individual access to the Court, highlighted the collaboration between the two institutions in their complementarity functions.

Additionally, the Commission and the Court jurisprudence has under-take a comprehensive analysis in the domain of environmental rights explicitly recognized in Article 24 of the African charter thus: "All peoples shall have the right to a general satisfactory environment favorable to their development." The Charter does not define what "the right to satisfactory environment" entails and this has given room to a barrage of individual interpretations.⁴ However, the African Commission has interpreted this right broadly, recognizing the interdependence between environmental degradation and violations of other rights such as health, dignity and life, notably, in *SERAC v Nigeria*, where it was held that the right to a healthy environment enshrined in Article 24 of the African Charter obliges states to refrain from directly threatening the environment of their citizens, for instance, through practices, other policies, or legal measures and states must take reasonable measures to prevent pollution and ecological degradation, to promote conservation and to secure an ecologically sustainable development and use of natural resources.⁵ The Commission stated that these measures are supposed to protect the environment and human rights in a mutually reinforcing manner, as evidenced by the fact that a right to clean and safe environment is closely linked to economic and social rights insofar as the environment affects the quality of life and safety of the individual.⁶ Consequently, the Commission found Nigeria liable for failing to take these measures, hence, in breach of Article 24 of the Charter.⁷

On the other hand, the African Human Rights Court confirmed the right to a healthy environment in *Ligue Ivoirienne des Droits de l'Homme and Others v Cote d'Ivoire*⁸ wherein the Court found the Respondent State responsible for violating Article 24 of the Charter by failing to prohibit the importation of hazardous waste, inadequately managing its disposal, and not promptly cleaning up polluted sites, thereby breaching its obligation to protect the environment and ensure a satisfactory environment favorable to development.⁹

A comparative analysis of the *SERAC v Nigeria* and the *Ligue Ivoriense* cases highlight the complementarity roles of the Commission and the Court in interpreting Article 24 of the Charter. The Commission's decision in *SERAC* laid the groundwork for the Court's judgment in *Ligue Ivoirienne*, demonstrating how both institutions can work together to strengthen environmental human rights protection in Africa.

Furthermore, based on the shared mandate of the Commission and the Court in the interpretation of the Maputo Protocol¹⁰, both bodies have interpreted the Protocol in light of women rights, consequently enhancing their

¹ African Charter, Articles 30 and 59.

² A. Smagadi, (2008). *Sourcebook of International Human Rights Materials*, British Institute of International and Comparative Law, p. 70.

³ *Victoire Ingabire Umuhoza v The Republic of Rwanda*, App. No. 003/2014, (Judgment) AfCHPR, Nov. 24, 2017, paras. 98 and 134.

⁴ E. P. Amechi, (2009). Enhancing Environmental Protection and Socio-Economic Development in Africa: A Fresh Look at the Right to a General Satisfactory Environment Under the African Charter on Human and Peoples' Rights. *Law, Environment and Development Journal*, 5(1), p. 58-72, p. 63.

⁵ *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Comm. No. 155/96, 2001, paras. 5 and 10.

⁶ *Ibid.*, paras. 1, 2, and 52.

⁷ *Ibid.*, para. 54.

⁸ *Ligue Ivoirienne des Droits de l'Homme and Others v Cote d'Ivoire*, App. No. 041/2016, Judgment on Merits and Reparations, AfCHPR, 5 September, 2023.

⁹ *Ligue Ivoirienne des Droits de l'Homme and Others v Cote d'Ivoire*, App. No. 041/2016, Judgment on Merits and Reparations, AfCHPR, 5 September, 2023, paras. 184-186.

¹⁰ F. Viljoen and M. Kamunya, (2023). "Articles 27 and 32: The Interpretative Mandate Under the Maputo Protocol", in C. N. Musembi and T. M. Makunya (eds.), *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A Commentary*, Pretoria University Law Press, p. 538.

normative complementarity. The African Charter provides for the protection of human dignity and prohibition of all forms of exploitation and degradation in Article 5. These rights have been examined extensively by the Commission and the Court.¹ In the domain of women's right, the Niamey Guidelines² developed by the African Commission, addresses violence as flowing from numerous rights protected by treaties such as those under Article 3 (4) of the Maputo Protocol.³ Additionally, the Commission adopted Resolution 522 on the Protection of Women against Digital Violence in Africa, drawing attention to online violence corresponding to Article 3 of the Maputo Protocol which protecting women against exploitation and all forms of violence.⁴

On the other hand, the African Human Rights Court, in *Association pour le Progres et la Defense des Droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v Mali*⁵, examined harmful practices in the context of the Maputo Protocol but failed to find violation to the right of human dignity as it adopted a broad understanding of what constitutes harmful practices. These various human rights instruments (The African Commission, African Human Rights Court and the Maputo Protocol) together create overlapping and connecting ... layers of protection and also provide patchwork of mechanisms for victims to vindicate their rights.⁶

In essence, it can be argued that the Commission, the Court and the Maputo Protocol constitute integral elements of a comprehensive human rights architecture aimed at protecting women's rights in Africa, exemplifying a cohesive relationship that, although still evolving in practice, holds considerable potential for promoting gender equality and justice on the continent through the complementary functions of promotional and quasi-judicial mechanisms alongside a judicial organ, all grounded in a comprehensive treaty to promote women's rights.

8. Challenges of the Principle of Complementarity

Several challenges and limitations impede the effective application of the principle of complementarity in the functioning of the African Commission and Court on Human Rights. These challenges encompass a range of issues, including inadequate institutional autonomy, restrictive access for individuals and NGOs, the absence of clear guidelines for case referrals between the Court and the Commission, insufficient human and financial resources, divergent interpretations of their material jurisdictions, and political interference.

8.1 Limited Decision-Making Power in Prioritizing Cases

Given its interactive relationship with states, the African Commission is well-positioned to act as a filter for cases and shield the Court from applications likely to spark significant controversy. However, challenges related to leadership and institutional preservation have hindered the realization of effective adjudicatory complementarity, which would have benefited the African human rights system.⁷ For example, the Commission declined to consider four cases referred by the Court, citing the transfer mechanism as the reason specifically that these cases were transferred through judicial decisions rather than administrative channels. For a significant period in exercising their complementarity relationship, the African Commission has submitted only three cases to the Court.⁸ This limited engagement has also meant that the system failed to leverage the perception that institutional litigation by the Commission is viewed by states as less personalized and more neutral compared to

¹ See, *Institute for Human Rights and Development in Africa v Republic of Angola*, (2008) ACHPR 83 (22 May 2008); *Guehi v United Republic of Tanzania*, (merits and reparations) (2018) 2AfCLR 477.

² African Commission on Human and Peoples' Rights Guidelines on Combating Sexual Violence and its Consequences in Africa adopted during the 60th Ordinary Session held in Niamey, Niger from 8-22 May 2017 (Niamey Guidelines).

³ Niamey Guidelines, 12.

⁴ C. Kreuser, (2023). "Article 3: Right to Dignity" in C. N. Musembi and T. M. Makunya (eds.), *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A Commentary*. Pretoria University Law Press, p. 82.

⁵ *Association pour le Progres et la Defense des Droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v Mali*, Merits, 2018, 2 AfCLR 380, para. 135. See also, C. Kreuser, (2023). "Article 3: Right to Dignity" in C. N. Musembi and T. M. Makunya (eds.), *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A Commentary*, Pretoria University Law Press, p. 84.

⁶ E. Boshoff, (2020). "Women's Environmental Rights Under the African Charter", in M. Addaney and A. O. Jegede (eds.) *Human Rights and the Environment under African Union Law*. Springer, p. 133.

⁷ S. T. Ebobrah, (2011). Towards a positive application of complementarity in the African human rights system: Issues of functions and relations. *European Journal of International Law*, 2(3), pp. 663-688, p. 672.

⁸ *African Commission on Human and Peoples' Rights v Libya* (Provisional Measures) (2011) 1 AfCLR 17; *African Commission on Human and Peoples' Rights v Libya* (Merits) (2016) 1 AfCLR 153; *African Commission on Human and Peoples' Rights v Kenya* (Merits) (2017) 2 AfCLR 9.

proceedings initiated by national political actors or civil society organizations.

Furthermore, the Commission's reluctance to submit cases to the Court may stem from concerns that the Court would conduct a *de novo* examination, potentially reopening settled issues.¹ This apprehension likely contributed to the Commission's failure to invoke Rule 118(1) of its 2010 Rules, which governs the submission of decided cases to the Court.² Additionally, the two institutions did not demonstrate solidarity in their complementary roles when the Commission faced threats from AU policy organs or when these organs demanded that the Court remove the names of non-compliant states from its Activity Report.³

8.2 Limitations on Access for Individuals and NGOs

Restrictions on accessing regional complaint mechanisms in two-tier systems hinder case transfer practices, as barriers to access determine the feasibility and frequency of case transfers.⁴ Within the African system, the African Commission permits individuals, NGOs, and state parties to access its mechanisms when the respondent state is a party to the African Charter.⁵ In contrast, the African Court's access is limited to the African Commission, state parties to the African Charter involved in a matter before the Commission or with an interest in a case before the Court,⁶ and individuals and NGOs with observer status before the Commission, provided their state of nationality has deposited a declaration accepting the Court's competence under Article 34(6) of the Court Protocol.⁷ Complementarity between the African Court and Commission offers a potential solution to the restrictions on direct access to the Court, provided both institutions actively facilitate access to regional justice through their shared mandates.⁸

8.3 Absence of Clear Guidelines for Case Transfers Between the Court and the Commission

The lack of clear criteria guiding case transfers between the Court and the Commission remains a pressing issue in their complementary relationship. Although the Court's Protocol and the institutions' Rules of Procedure provide for case transfers, they inadequately outline the criteria or procedures for such transfers. In cases such as *Soufiane Ababou v Algeria*⁹, *Daniel Amare and Mulugeta Amare v Mozambique*¹⁰, and *Ekollo Moundi v Cameroon and Nigeria*¹¹, the Court lacked jurisdiction due to the respondent states' failure to deposit the required declaration under Article 34(6) of the Court Protocol.¹² Invoking Article 6(3) of the Court Protocol to transfer cases to the Commission was deemed incompatible with the provision's purpose and risked arbitrary case transfers.¹³ The 2020 Court Rules reform did not address the criteria for case transfers to the Commission¹⁴, and the omission of Rule 118 from the 2010 Commission Rules in the 2020 version, which specified circumstances for transferring cases to the Court, was a step backward.¹⁵ However, changes in the 2020 Commission and Court Rules regarding victim participation in case transfers mark a positive development,

¹ Ebobrah, *op.cit.*, p. 664.

² *Ibid.*

³ Decision on the consideration of the 2017 Activity Report of the African Court, adopted by the Executive Council during its 32nd ordinary session (25-26 January 2018) Doc EX.CL/1057(XXXII).

⁴ A complaint mechanism should be easily accessible by people and should be set up so as to prevent barriers to access, including language, literacy, awareness of the mechanism, poverty, distance, or fear of reprisal. See, Transparency International, *Complaint Mechanisms Reference Guide For Good Practice*, Transparency International, 2016, p. 3.

⁵ V. O. Nmehielle, (2021). *The African Human Rights System: Its Laws, Practice and Institutions*. Brill, p. 204.

⁶ Court Protocol Article 5(1) and (2).

⁷ Court Protocol Article 5(3).

⁸ R. Murray, (2002). A Comparison between the African and European Courts of Human Rights. *African Human Rights Law Journal*, 2, pp. 195-208, p. 204.

⁹ (Jurisdiction) (2011) 1 AfCLR 24.

¹⁰ (Jurisdiction) (2011) 1 AfCLR 26.

¹¹ (Jurisdiction) (2011) 1 AfCLR 86.

¹² *Soufiane Ababou v Algeria* para. 11; *Ekollo Moundi v Cameroon and Nigeria* para. 10 and *Daniel Amare and Mulugeta Amare v Mozambique* para. 8 and 10(1).

¹³ *Ekollo Moundi v Cameroon and Nigeria* (Jurisdiction) (2011) 1 AfCLR 86. Dissenting opinion of Judge Fatsah Ouguergouz, paras 16 and 17.

¹⁴ 2020 Court Rules, Rule 38.

¹⁵ 2020 Commission Rules, Rule 130(1).

emphasizing the importance of victim consent and consultation in the transfer process.¹ Ensuring victim participation is crucial, as the discretion for referrals currently lies with the Court and Commission, regardless of the interests of justice or the victim.²

8.4 Inadequate Human and Financial Resources

The African Commission and the African Court face significant challenges due to limited resources. The primary issue stems from the restricted budget allocated to these institutions by the African Union (AU). For instance, the African Commission and Court receive only 2% of the AU's total budget.³ Consequently, they rely heavily on voluntary contributions from member states, national, and multinational entities to supplement their funding. The financial constraints faced by the Commission and the Court necessitate their dependence on international partners to achieve their mandates. While the AU provides some funding based on contributions from member states and international donors, the institutions must seek additional support from external partners. According to Abebe, the Court is less dependent on external aid compared to the Commission, which relies significantly on extra-budgetary sources.⁴ This is because, the Court's budgetary allocation from the outset far exceeded that of the Commission.⁵ The Commission's financial challenges were highlighted in 2019 when it expressed the need for the AU to fully fund its activities following a reduction in funding.⁶ This has led to criticism that its agenda is dictated by non-African governments.⁷ These financial limitations hinder the practical application of complementarity, particularly in case transfers, due to the shortage of human capital and legal expertise within the Commission.⁸

8.5 Discrepancy in the Application of Material Jurisdiction Between the Court and the Commission

A notable discrepancy exists in how the African Court and the African Commission apply their material jurisdiction in relation to other human rights instruments. According to Articles 3(1) and 7 of the Court Protocol, the African Court's jurisdiction extends to interpreting and applying any relevant human rights instrument ratified by the states concerned, beyond just the African Charter. In contrast, the Commission's mandate under Article 60 of the African Charter is more limited, allowing it only to draw inspiration from other regional and international human rights instruments.⁹ This distinction results in a broader material jurisdiction for the Court compared to the Commission, particularly in matters involving the interpretation and application of international human rights instruments other than the African Charter. However, the Court has referenced Article 60 of the African Charter in its jurisprudence to inform its material jurisdiction.¹⁰

As Naldi¹¹ points out, the Court's reliance on Article 60 serves a dual purpose: it can enhance the Court's interpretive capacity by allowing it to consider a wide range of human rights instruments, but it can also limit the Court's jurisdiction by constraining it to merely drawing inspiration from these instruments, rather than applying

¹ 2020 Commission Rules, Rule 130(2).

² R. Murray, (2002). A Comparison between the African and European Courts of Human Rights. *African Human Rights Law Journal*, 2, pp. 195-208, p. 203.

³ See the Executive Council Decision on the 2020 African Union Budget EX.CL/Dec.1069(XXXV) 2 in the Decisions of the Executive Council during its Thirty-Fifth Ordinary Session held on 4-5 July 2019 in Niamey Niger.

⁴ D. Abebe, (2017). Does International Human Rights Law in African Courts Make a Difference? *Virginia Journal of International Law*, 56, pp. 527, 561, p. 560.

⁵ F. Viljoen, (2012). *International Human Rights Law in Africa*, 2nd edn., Oxford University Press, p. 294.

⁶ AU Executive Council Decision on the 2020 AU budget. 47th Activity Report of the African Commission on Human and Peoples' Rights 14 May – 10 November 2019 para. 63.

⁷ See for example the comments of the then Zimbabwean Minister of Information in reaction to a resolution adopted by the Commission on Zimbabwe: "What do you expect from them? They are looking for money and what better way to make money than to vilify Zimbabwe" ("Mugabe Trashes New AU Resolution on Human Rights", <https://www.wmnews.com>, Consulted on 12 January 2024).

⁸ N. Udombana, 'Meaningful Complementarity/Cooperation between the African Court and the African Commission, in Comparative Perspectives', (2016) published conference paper presented in a Conference on the First Decade of the Creation of the African Court on Human and Peoples' Rights (2016) in Arusha, Tanzania, November 2016 10 available at <https://www.researchgate.net/publication/331330403> (Consulted on 14-05-2024).

⁹ *Ibid.*

¹⁰ *Tanganyika Law Society Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania* (merits) (2003) 34 para. 105; *Frank David Omary and Others v Tanzania* (Admissibility) (2014) 1 AfCLR 358, para. 73.

¹¹ G. J. Naldi, (2014). Observations on the Rules of the African Court on Human and Peoples' Rights. *African Human Rights Law Journal*, 14, pp. 366-369, p. 367.

and interpreting them directly as permitted under Articles 3(1) and 7 of the Court Protocol. This approach by the Court may imply a self-limitation on its competence. Nonetheless, the Court's jurisprudence reflects its mandate as outlined in the Court Protocol, navigating the complexities of its material jurisdiction in relation to other human rights instruments.¹

9. Findings

The finding in this study reveals that the principle of complementarity is crucial to the African human rights system, fostering a cooperative and mutually reinforcing relationship between the Commission and the Court. However, its effectiveness in practice has been characterized by variability, with both successful instances and significant challenges. It has faced successes in the application and interpretation by the Court and commission of the various Rules of Procedures. It also finds successes in the jurisprudence of the Court and the Commission in upholding human rights in the continent. Nonetheless, both institutions face challenges such as limited decision-making power, restrictions on accessing regional complaint mechanisms, absence of clear guidelines for case transfers, inadequate human and financial resources, and political interference.

10. Conclusion

This research/paper makes a review of the application of the principle of complementarity in the functioning of the African human rights commission and the Africa human rights court system. The findings of the study shows that the principle of complementarity in the functioning of the African human rights commission and the Africa human rights court system has faced successes in the application and interpretation by the Court and commission of the various Rules of Procedures. It also finds successes in the jurisprudence of the Court and the Commission in upholding human rights in the continent. Nonetheless, both institutions face challenges such as limited decision-making power, restrictions on accessing regional complaint mechanisms, absence of clear guidelines for case transfers, inadequate human and financial resources, and political interference. This research makes important contributions to strengthening of the principle of complementarity especially in the setting in the jurisprudence of the Court and the Commission in upholding human rights in the African continent.

Based on implications, the findings of this study can guide the African Union, state parties, and the two institutions in refining their operational frameworks to ensure better synergy and avoid jurisdictional overlaps. Based on some of the challenges enumerated in this study, there is need for reforms in the Court and Commission relationship to improve case referral efficiency and enforcement of judgments. Legal practitioners, NGOs, and human rights defenders can use this to navigate the complementary roles of the Commission and Court more effectively, knowing which body to approach first and under what circumstances.

Establishing the functions of the African Commission and Court on Human Rights necessitated some movements and acquisition of some relevant materials to the topic which needs finances which were not very easy to obtain. There were equally some difficulties to access written materials due to very limited text books in the university library on the topic and difficulties to access written materials online due to restrictions and limited access to online journals and books. Equally, conducting interviews were challenging as some participants were not willing to participate and those that were willing, scheduling an appropriate time was not easy due to various activities they were engaged in.

However, these limitations did not affect the overall quality of the thesis because some relevant text books were purchased, persisted in getting necessary information by maximizing the use of open access journals and relevant textbooks found online and in the library and also persistent in meeting the interviewers at their preferred scheduling time.

11. Recommendations

From the findings discussed above, this research provides the following recommendations as discussed below.

11.1 Strengthen the African Human Rights System

Strengthening the African human rights system is essential in enhancing its effectiveness in promoting and protecting human rights in Africa. This can be achieved by providing sufficient resources, including funding, technical assistance, and capacity-building programs. States should prioritize strengthening the system by increasing funding, providing technical assistance, and promoting awareness and visibility of the system.

The African Commission and Court should also be given more autonomy to carry out their mandates effectively. This can be achieved by granting them more independence and flexibility in their operations. Additionally, the Commission and Court should be provided with adequate resources, including staffing, equipment, and infrastructure, to enable them to carry out their functions effectively.

¹ See, *African Commission of Human and Peoples' Rights v Kenya (Ogiek Case)* (merits) (2017) 2 AfCLR 9 para. 51.

Also, the African human rights system should be strengthened by fostering greater cooperation and collaboration between the Commission, Court, and other stakeholders, including civil society organizations, national human rights institutions, and governments. This can be achieved through regular meetings, joint training programs, and development of joint policies and guidelines on human rights protection.

11.2 Improve Access to the Court

States should consider making declarations under Article 34(6) of the Protocol, allowing individuals and NGOs to access the Court directly. This will enhance access to justice for victims of human rights abuses and promote accountability. The Court should also develop clear guidelines and procedures for accessing the Court, including rules on admissibility, jurisdiction, and procedure. This will enable individuals and NGOs to access the Court more easily and effectively. The Court should also consider implementing virtual hearings, and online case management platforms to increase accessibility and efficiency.

11.3 Enhance Cooperation Between the Commission and Court

The Commission and Court should continue to work together, sharing expertise and coordinating efforts to enhance human rights protection in Africa. The Commission and Court should develop joint programs and activities to promote human rights protection, including joint training programs, joint research projects, and joint promotional activities. This will enable them to share expertise and coordinate efforts more effectively.

Furthermore, the Commission and Court should develop clear guidelines and procedures for cooperation, including rules on referrals, evidence assessment, and decision-making. This will enable them to work together more effectively and enhance human rights protection in Africa.

11.4 Develop Clear Guidelines

The Commission and the Court should develop and adopt a binding self-regulating mechanism for case management and information sharing. This would establish clear, non-discretionary criteria for when a case should be transferred from the Commission to the Court, and from the Court to the Commission. This mechanism should also provide provision for a binding Advisory Opinion which would be a crucial tool for avoiding friction and promoting a unified approach. The mechanism should also enhance the role of each body as *amicus curiae* (friend of the court) in the other's proceedings. For example, the Commission would have an automatic right to provide written and oral submissions in any case before the Court that it had previously considered. Similarly, the Court could appoint an observer to attend key sessions of the Commission's work. This would increase efficiency by avoiding jurisdictional disputes and strengthen legal certainty through clearer understanding of the procedural path for petitioners' cases.

11.5 Increase Awareness and Visibility

Efforts should be made to increase awareness and visibility of the Commission and Court's roles and functions. This can be achieved through outreach programs, social media, and partnerships with civil society organizations. The Commission and Court should also develop educational materials and programs to promote awareness and understanding of the African human rights system. Additionally, the Commission and Court should engage with the media and other stakeholders to promote awareness and visibility of the African human rights system. This will enable them to reach a wider audience and promote human rights protection in Africa more effectively.

References

- Aristotle, (1999). *Nicomachean Ethics*, translated by Terence Irwin, Hackett Publishing, pp. 13-15.
- B. A. Garner and Henry Campbell Black, (2009). *Black's Law Dictionary*, 9th edn, St. Paul, MN, West, p. 324, 116, 1313.
- B. T. Nyanduga, (2006). Conference Paper: Perspective on the African Commission on Human and Peoples' Rights on the Occasion of the 20th Anniversary of the Entry into Force of the African Charter on Human and Peoples' Rights. *African Human Rights Law Journal*, 6(2), pp. 255-267, p. 261.
- C. Heyns and M. van der Linde, (2022). *International Human Rights Law in Africa and Domestic Human Rights Law in Africa*. Brill, p. 381.
- C. Heyns and M. van der Linde, (2022). *International Human Rights Law in Africa Volume Two: Domestic Human Rights Law in Africa*. Brill, p.567.
- C. Heyns, (2002). *Human Rights Law in Africa 1999*. Springer, p. 251.
- C. Okoloise, (2018). Circumventing Obstacles to the Implementation of Recommendations by the African Commission on Human and Peoples' Rights. *African Human Rights Law Journal*, 18(1), pp. 27-57, p. 31, p. 40.
- C. Welch, (1991). Organization of African Unity and the Promotion of Human Rights. *Journal of Modern*

- African Studies*, 29(4), 533-548.
- E. Bondzie-Simpson, (1988). A Critique of the African Charter on Human and Peoples' Rights. *Howard Law Journal*, 31(4), pp. 643-665, p. 650.
- E. Durkheim, (1895). *The Rules of Sociological Method*. Sage Publications, pp. 60-81.
- E. P. Mendes, (2022). *Global Governance, Human Rights and International Law*. Taylor and Francis, p. 15.
- F. Ouguerouz, (2003). The Establishment of an African Court of Human and Peoples' Rights: A Judicial Premier for the African Union. *African Yearbook of International Law Online*, 11(1), pp. 79-141, pp. 82-83.
- F. Viljoen, (2012). *International Human Rights Law in Africa*, 2nd edn. Oxford University Press, p. 349.
- G. Bekker, (2007). The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States. *Journal of African Law*, 51(1), pp. 151-172, p. 159.
- G. M. Wachira, (2006). Twenty Years of Elusive Enforcement of the Recommendations of the African Commission on Human and Peoples' Rights: A Possible Remedy. *African Human Rights Law Journal*, 6(2), pp. 465-493, p. 470.
- G. Oestreich, (1992). "Conference Report" in W. Heinz (ed.) *The System of Human Rights Protection in Africa and Europe: An Exchange of Experience and Perspectives, Afro-European Conference*, (26-31 March 1990, Strasbourg, Proceedings of the Conference) Friedrich-Naumann-Stiftung, p. 8.
- H. Spencer, (1896). *The Principles of Sociology*. Williams and Norgate, Vol. 3, p. 26.
- J. C. Mubangizi, (2006). Some Reflections on Recent and Current Trends in the Promotion and Protection of Human Rights in Africa: The Pains and the Gains. *African Human Rights Law Journal*, 6(1), pp. 146-165, p. 156.
- J. Finnis, (1980). *Natural Law and Natural Rights*. Oxford University Press, pp. 23-25.
- J. Locke, (1988). *Two Treatises of Government*, Peter Laslett (eds). Cambridge University Press, pp. 13-14.
- J. T. Holmes, (2002). "Complementarity: National Courts versus the International Criminal Court" in A Cassese, P Gaeta and J Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 1, pp. 667-672.
- K. Deichmann, (2020). *Regional Integration, Human Rights and Democratic Participation in Africa*. Gottingen University Press, p. 35.
- K. Kariseb, (2021). Understanding the Nature, Scope and Standard Operating Procedures of the African Commission Special Procedure Mechanisms. *African Human Rights Law Journal*, 21(1), pp. 149-175, p. 155.
- K. Parlett, (2011). *The Individual in the International Legal System*. Cambridge University Press, pp. 330-331.
- Karim Deichmann, (2020). *Regional Integration, Human Rights and Democratic Participation in Africa*. Gottingen University Press, p. 41.
- L. W. Kembabazi, (2024). The Role of the African Commission in Enhancing Compliance with its Decisions on Communications. *African Human Rights Law Journal*, 24, pp. 781-803, pp. 794-795.
- M. A. Sanchez, (2023). The African Court on Human and Peoples' Rights: Forging a Jurisdictional Frontier in Post-Colonial Human Rights. *International Journal of Law in Context*, 19(3), pp. 352-366, p. 356.
- M. D. Evans and R. Murray, (2000). *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000*. Cambridge University Press, p. 349.
- M. D. Evans and R. Murray, (2000). *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000*. Cambridge University Press, p. 268.
- M. Ssenyonjo, (2011). *The African Regional Human Rights System: 30 Years After the African Charter on Human and Peoples' Rights*. Brill, p. 208.
- N. Udombana, (2013). Toward the African Court on Human and Peoples' Rights: Better Late than Never. *Yale Human Rights and Development Law Journal*, 3, pp. 45-111, p. 76.
- Oxford English Dictionary, available online at: <http://dictionary.cambridge.org/dictionary/english/complementarity> (Consulted on 6th April, 2023).
- R. Crawshaw and L. Holmstrom, (2006). *Essential Cases on Human Rights for the Police: Reviews and Summaries of International Cases*. Leiden/Boston, Martinus Nijhoff Publishers, p. 24.
- R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, (2007). *An Introduction to International Criminal Law and*

- Procedure*. Cambridge University Press, p. 127.
- R. Murray and D. Long, (2015). *The Implementation of Findings of the African Commission on Human and Peoples' Rights*. Cambridge University Press, p. 55.
- R. Murray, (2000). *The African Commission on Human and Peoples Rights and International Law*. Bloomsbury Academic, p. 116.
- Rachel Murray, (2004). *Human rights in Africa: From the OAU to the AU*. Cambridge University Press, p. 122.
- S.T. Ebobrah, (2011). Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations. *European Journal of International Law*, 22(3), pp. 663-688, p. 670.
- T. Aquinas, (1920). *Summa Theologica*, translated by Fathers of the English Dominican Province, Christian Classics Ethereal Library, pp. 113-114.
- The Protocol on the Statute of the African Court of Justice and Human Rights was adopted on 1 July 2008. Available at: www.africa-union.org/root/au/Documents/Treaties/list. (Consulted on 25th February 2023).

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