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Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations

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Abstract

According to the Protocol to the African Charter on Human and Peoples' Rights establishing the African Court on Human and Peoples' Rights, the main function of the Court is to complement the protective mandate of the already existing African Commission on Human and Peoples' Rights. Thus, complementarity was introduced into the framework of the African human rights system. Since then, the concept of complementarity has also been brought into play in the Protocol to the Statute of the proposed African Court of Justice and Human Rights. Although the interim rules of procedure of the Court and of the Commission have sought to give meaning to the concept of complementarity, there is still very little understanding of how it will pan out in the system. Questions abound as to the exact implication it would have on the existing mechanisms of the Commission. Almost nothing has been said or written on its impact on the African Committee of Experts on the Rights and Welfare of the Child. Against this background, this article argues that complementarity in the African human rights system can be applied positively by adopting a normative approach that allows for the prescription of what the system's supervisory institutions should do and how they should relate to each other in their work. The article argues further that the justifications for the introduction of judicial organs can also be employed to prescribe complementary functions for each supervisory institution. It concludes that applying complementarity positively would require encouraging each institution to focus on its strengths with a view to strengthening the overall effectiveness of the system.

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1 Introduction

On 9 June 1998, a Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol or Protocol) was adopted by African heads of state and government on the platform of the Organization of African States (OAU).[1] The adoption of the Protocol was the climax of the OAU's reaction to sustained agitation and pressure from different quarters for the creation of a truly judicial body to guarantee the protection of human rights contained in the African Charter on Human and Peoples' Rights (African Charter). Since then, several events of immense significance to the system have taken place. The African Court Protocol has entered into force and the Court itself has been operationalized.[2] 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 (African Human Rights Court or the Court) with the African Court of Justice to form an African Court of Justice and Human Rights (ACJHR).[3]

At the time the African Court Protocol was adopted, a few other international institutions created by the OAU to supervise aspects of the promotion and protection of human rights in the continent were already in existence. In this regard, the African Commission on Human and Peoples' Rights (African Commission), a treaty body created in the African Charter, and the African Committee of Experts on the Rights and Welfare of the Child (African Child Rights Committee or the Committee) are prominent. Naturally, this raises a need to address inter-institutional relationships between international institutions created under the same organizational structure with almost similar goals. Apparently in a bid to address this need, the concept of complementarity has been introduced into institutional relations in the African human rights system. First introduced with regard to the relationship between the African Human Rights Court and the African Commission, the concept has also now been applied to the relationship between the proposed ACJHR and other human rights treaty bodies of the African Union (AU).[4] Consequently, it can be argued that complementarity is the functional concept regulating the institutional configuration of the African human rights system.

While it seeks to clarify the relationship between institutions, the concept of complementarity is not without its own ambiguities. Described as 'a notion in motion',

[1] Adopted 10 June 1998 and entered into force on 25 Jan. 2004. The Protocol is reproduced in C. Heyns and M. Killander (eds), *Compendium of the Key Human Rights Documents of the African Union* (2007), at 42–46.

[2] The Court began operation in 2006 with the election of its first set of judges.

[3] The Protocol on the Statute of the African Court of Justice and Human Rights (Statute) was adopted on 1 Jul. 2008. As at June 2010, it had been signed by 21 states and ratified by two. Available at: www.africa-union.org/root/au/Documents/Treaties/list.

[4] The African human rights system emerged on the platform of the OAU. The OAU was replaced by the AU in 2001. The Constitutive Act of the AU (AU Act) was adopted on 11 July 2000 and entered into force on 26 May 2001. The AU Act is reproduced in Heyns and Killander, *supra* note 1, at 4.

complementarity is said to be usable in normative and descriptive dimensions.[5] In other words, complementarity can describe as well as prescribe the relationship between institutions. In the context of the African human rights system, the use of the concept with little or no detailed explanation aids its character as a tool of description but does very little in terms of prescribing the relations between the African Human Rights Court and the proposed ACHJR on the one hand, and the system's non-judicial supervisory institutions on the other hand. This despite the fact that it is commonly agreed that the establishment of the judicial institutions after several years of existence of the quasi-judicial bodies has the potential to impact significantly on the relationship between these institutions.[6] While it would be expected that the rules of procedures of the various institutions would be used to give more concrete meaning to the concept, this has not been the case. As this article will argue, the rules have not gone too far beyond the instruments in explaining how the concept is to be applied in practice.

The hazy usage of complementarity in the African system has attracted more attention in the context of the relationship between the African Human Rights Court and the African Commission. This relationship has been variously characterized as 'peculiar',[7] 'unique',[8] and 'organic'.[9] However, the lack of clarity is not restricted to this relationship as it is bound to appear in relation to other institutions of the African system. It is also common to most situations where complementarity is used to characterize relations between a judicial and a quasi-judicial institution as well as relations between two or more institutions established under the same organizational framework. Hence, some of the challenges that complementarity introduces into the African human rights system have been or are still being experienced in other international legal (sub-)systems where a two-tiered institutional structure has been introduced. These challenges include duplication of functions resulting in redundancy of institutions, waste of resources,[10] or lengthening of the time frame for concluding procedures,[11] the creation of institutional tension as a result of struggle for supremacy, and the creation of loopholes for states to avoid responsibility by manipulating institutions.

Paying attention to the specific context of the African human rights system and the usage of complementarity in the system, this article explores complementarity from

5 Clapham, 'On Complementarity: Human Rights in the European Legal Orders', 21 *Hmn Rts LJ* (2000) 313.

6 Nmehielle, 'Towards an African Court of Human Rights: Structuring and the Court' 6 *Annual Survey of Int'l and Comp L* (2000) 27, at 46.

7 Österdahl, 'The Jurisdiction *Ratione Materiae* of the African Court of Human and Peoples' Rights: A Comparative Critique', 7 *Revue Africaine des Droits de l'Homme* (1998) 132, at 133.

8 *Ibid.*, at 150.

9 *Ibid.*, at 133.

10 Sepúlveda, 'The Inter-American Commission on Human Rights of the Organisation of American States', *German Yrbk Int'l L* (1985) 65, at 83. Also see Cowen, 'Foreword', 21 *Hmn Rts LJ* (2000) 290.

11 Pasqualucci, 'The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law', 26 *U Miami Inter-Am L Rev* (1994–1995) 297, at 311; Viljoen, 'A Human Rights Courts for African, and Africans', 30 *Brook J Int'l L* (2004–2005) 1, at 19.

the functional and relational perspectives. The article argues that complementarity in the African human rights system can be applied positively by adopting a normative approach that allows for the prescription of what the system's supervisory institutions should do and how they should relate to each other in their work. The article argues further that the justifications for the introduction of judicial organs can also be employed to prescribe complementary functions for each supervisory institution. It concludes that applying complementarity positively would require encouraging each institution to focus on its strengths with a view to strengthening the overall effectiveness of the system. The article is divided into four main sections. This introduction is followed by an examination of complementarity in international law. The third section explores the use of complementarity in the African human rights system, engaging in a detailed analysis of the functional and relational dimensions of the concept. The last section is the concluding section.

2 Complementarity in International Law

In contemporary international law discourse, complementarity as a concept has largely been associated with international criminal law, particularly with the Statute of the International Criminal Court.[12] However, complementarity or aspects of the concept can be found in different forms in international law. Notwithstanding this fact, complementarity has arguably not yet developed as a concrete principle of international law. Hence, there is apparently no single, generally acceptable meaning that can be ascribed to the concept in international law. The aim of this section of the article is to consider some of the more obvious manifestations of complementarity in international law, with a view to understanding its various applications for adaptation in the context of African international law.

According to at least one commentator, the linguistic origin of complementarity is not very clear. He contends that complementarity is not an English word, but was probably 'borrowed' from the French language.[13] Despite this apparent obscurity of its origin, complementarity and its root word 'complement' can now safely be considered to be English words. Accordingly, in various dictionaries, it is explained as 'companion'; 'completion'; 'supplement'; 'complete'; 'addendum'; and 'appendix'.[14] In its adjectival form, 'complementary' has been translated as 'concordant'; 'correlative'; 'completing'; 'companion'; and 'interdependent'.[15] It is apparently from this adjectival form that the term 'complementarity' emerged as 'the concept of' or 'principle of complementarity' in international law.[16]

In its ordinary dictionary meaning, 'complementary' is arguably employed as a word to capture relations. The use of the term 'complementarity' in international law

[12] Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9*(1998), reprinted in 37 ILM (1998) 999 (Rome Statute of the ICC).

[13] Tallgren, 'Completing the "International Criminal Order"', 67 *Nordic J Int'l L* (1998) 107, at 120 (n. 53).

[14] L. Brown (ed.), *The New Shorter Oxford English Dictionary* (1993), at 460.

[15] Collins Thesaurus (1995), at 178.

[16] Tallgren, *supra* note 13, at 120.

is not far from this ordinary usage. It is essentially an instrument of language used to explain institutional relationship between otherwise autonomous institutions in international law. As Klabbers has noted, while the benefits of autonomy cannot be denied, autonomy has its limitations.[17] According to Klabbers, autonomy is limited by the 'equally valued notions of solidarity and cooperation' as well as by the risk it carries of 'lapsing into unilateralism' and thereby resulting in autarchy.[18] His conclusion is that the autonomy of one institution could intrude into the autonomy of another institution if the autonomy were carried to extreme limits.[19] While Klabbers' analysis was made in a different context, it represents the threat in international law that necessitates the introduction of the concept of complementarity. In the anarchical field of international law where institutions are created as autonomous entities without any hierarchical structure to regulate their interactions, complementarity is surely an important tool for the restriction of the abuse of autonomy by any single institution. It is against this background that the manifestations of the concept in international law will be analysed.

A *International Institutions Exhibiting Complementarity*

Perhaps the most commonly known manifestation of complementarity in international law can be found in the Rome Statute of the International Criminal Court (Rome Statute of the ICC). First, in its preamble,[20] and then in its Article 1, the Rome Statute of the ICC emphasizes that the International Criminal Court (ICC) 'shall be complementary to national criminal jurisdictions'. Thus, complementarity regulates the relationship between the ICC and the national criminal jurisdictions of states. Similarly, global international law employs complementarity in relation to the relatively newly established Universal Periodic Review mechanism.[21] In its resolution setting up the mechanism, the United Nations (UN) stipulates that the mechanism 'shall complement and not duplicate the work of treaty bodies'.[22] Again, in this formulation, complementarity regulates the relationship between the Universal Periodic Review mechanism and the various UN human rights treaty bodies.[23] A third express use of

[17] Klabbers, 'Checks and Balances in the Law of International Organisations', in M. Sellers (ed.), *Ius Gentium, Comparative Perspectives on Law and Justice*, i, available at: http://law.ubalt.edu/downloads/law_downloads/Ius_Gentium_Autonomy.pdf, 141, at 145, also available at: www.helsinki.fi/eci/Publications/JKChecks_and_Balance.pdf.

[18] *Ibid.*

[19] *Ibid.*

[20] Para. 10 of the Preamble to the Rome Statute of the ICC, *supra* note 12.

[21] I have used global international law here in contrast to regional international law which I have impliedly or expressly referred to in this article.

[22] Clapham, 'The Complementarity of Universal Periodic Review in the New Human Rights Council' (15 May 2006), Speaking Notes for Lausanne III, at 1.

[23] Clapham takes the view that three different complementarities can be distilled from the UN Resolution. These include the complementarity between the obligations undertaken by a state under the treaties it has ratified and the state's other obligations and commitments; the complementarity between the treaty body reporting process and the new review process; and the complementarity involved in choosing the order in which states should be reviewed. See *ibid.*, at 1.

complementarity in global international law by the UN is in relation to the Special Court for Sierra Leone. Probably explaining the institutional relations of the Special Court, the UN Secretary General is quoted as follows:

> Care must be taken to ensure that the Special Court for Sierra Leone and the Truth and Reconciliation Commission will operate in a complementary and mutually supportive manner, fully respectful of their distinct but related functions.[24]

This position of the UN Secretary General was reinforced by the Planning Mission sent by the UN to facilitate the ground work for the Special Court. The Planning Mission noted that the Special Court and the Truth and Reconciliation Commission of Sierra Leone 'perform complementary roles' that are 'mutually supportive' and 'in full respect for each other's mandate'.[25] Thus, complementarity is used to describe (and perhaps prescribe) the relationship between another two autonomous institutions.

At the regional level of international law, complementarity has also been employed in some form or another. It is important to emphasize that it is not in all cases that the term 'complementarity' has been expressly employed by the drafters of treaties and other international documents. Hence, in some cases, it is in the practice and work, rather than in the documents, that complementarity is found. For example, on the premise that there is a 'multiplicity, indeed a proliferation, of mechanisms and means of action in the sphere of human rights', it has been suggested that some form of complementarity is displayed in the regime of the Council of Europe (CoE).[26] With specific reference to the European Convention on Human Rights (ECHR), the argument is made that 'a certain degree of complementarity between the roles of the different bodies has been provided for'.[27] In this context, complementarity relates to the adjudicatory role of the European Court of Human Rights (ECtHR) and the enforcement role of the Committee of Ministers.[28] This relation is perceived as complementary or 'tandem' between existing institutions.[29]

Another manifestation of complementarity in the CoE regime is that between existing structures and newly created human rights supervisory institutions. Thus, complementarity is invoked in the relationship between the ECtHR and the monitoring system of the Framework Convention for the Protection of Minorities.[30] A similar argument is made in relation to the Commissioner for Human Rights *vis-à-vis* the work of the CoE's human rights supervisory bodies. The evidence proffered in support of this contention is that several provisions in the Resolution setting up the Office of Commissioner

[24] Letter from the UN Secretary General to the UN Security Council on 12 Jan. 2001, UN Doc S/2001/140, at para. 9, cited by Schabas, 'Internationalized Courts and their Relationship with Alternative Accountability Mechanisms: The Case of Sierra Leone', in C.P.R. Romano, A. Nollkaemper, and J.K. Kleffner (eds), *International Criminal Courts* (2004), at 157, 158.

[25] Schabas, *supra* note 24, at 158.

[26] Imbert, 'Complementarity of Mechanisms within the Council of Europe/Perspectives of the Directorate of Human Rights', 21 *Hmn Rts LJ* (2000) 292, at 292.

[27] *Ibid.*, at 293.

[28] *Ibid.*

[29] *Ibid.*

[30] *Ibid.*

for Human Rights impose an obligation on that office to respect the competences of the existing institutions. Specifically, Article 1(2) of the Resolution is to the effect that 'the Commissioner shall respect the competence of, and perform functions other than those fulfilled by, the supervisory bodies set up under the ECHR or other human rights instruments and that the Commissioner shall not take up individual complaints'.[31]

Still within the framework of the CoE, the European Committee for the Prevention of Torture (CPT) which was created after the ECtHR, is another manifestation of complementarity. The CPT was said to have been created 'with the express intention of complementing existing CoE mechanisms . . . and in particular, of strengthening the system of judicial protection against ill-treatment protected by art 3 of the ECHR'.[32] Here, the CPT is a non-judicial body established to 'supplement' the judicial protection provided by the ECtHR without duplicating or usurping the functions of the ECtHR.[33] In view of these different manifestations of the concept in international law, it can be argued that complementarity exists or is invoked expressly or impliedly whenever two or more international institutions with similar and potentially conflicting functions exist on the platform of an international organization.

B *The Functioning of Complementarity in International Law*

While the term 'complementarity' has been employed expressly or impliedly by the global and the regional international regimes considered above, the term does not take on exactly the same meaning in every context. Put differently, although the term may appear universal, its application or functioning in practice differs according to each specific context. This point is important in order to demonstrate that complementarity in the context of the African human rights system needs to interpreted with due regard to the specific context of the system.

Under the ICC regime, complementarity apparently functions as an instrument of limitation to dictate priority of jurisdiction. Arguing that complementarity in the Rome Statute of the ICC applies to all the institutions of criminal justice and not just the courts, one commentator contends that complementarity limits the powers of the ICC *vis-à-vis* national institutions.[34] Another commentator argues that 'one of the most important roles of the principle of complementarity is to encourage the State Party to implement the provision of the Statute, strengthening the national jurisdiction over those serious crimes listed in the Statute'. In effect, there is complementarity of purpose which is to prevent impunity for international crimes, but complementarity favours priority of action by national systems.

In relation to the Special Court of Sierra Leone *vis-à-vis* the Truth and Reconciliation Commission of Sierra Leone, complementarity does limit jurisdiction, but not in the same way as it does under the ICC regime. Rather, in that context, complementarity

[31] *Ibid.*

[32] Kelly, 'Perspectives from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment', 21 *Hmn Rts LJ* (2000) 301, at 301.

[33] *Ibid.*

[34] Tallgren, *supra* note 13, at 120–122.

functions to ensure mutual respect in a manner that reinforces the separate yet interrelated mandates of the institutions involved. In the words of Bishop Joseph C Humper, Chair of the Truth and Reconciliation Commission of Sierra Leone, the two institutions are 'going to the promised land, but by different roads'.[35] Thus, both institutions operate simultaneously without encroaching on each other's jurisdiction.

Within the framework of the CoE, complementarity also functions in a manner that encourages mutual respect and simultaneous operation. However, in the CoE regime there appears to be agreement that complementarity presupposes a need for coherence between and amongst different actors.[36] In support of this position, it is contended that 'complementarity must involve an acceptance of the principle of comparative advantage in action. That is, each organisation as a rule, should take the action for which it is best suited.'[37] Applied in this manner, complementarity envisages consistency and coherence in the functioning of a regime and aims at preventing 'wasteful duplication of scarce resources'.[38] Clearly, the focus here is on cooperation and coordination of institutions with the emphasis on specialization of competence.

In his analysis of complementarity in the European human rights regime, Clapham makes the argument that 'complementarity can either point to the need to resolve divergences or complementarity can be used to neatly disguise the fundamental tension between different goals and actors'.[39] Arguably, it is the constructive usage of complementarity that is intended each time the concept is invoked in international law. In order to realize this aim, the concept needs to be applied normatively just as it is understood in its descriptive role.

3 Complementarity in the African Human Rights System

Liberally interpreted and applied, 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.[40] Further, 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. However, while these issues are no less important, it is within the traditional structures of the African human rights system that the concept of complementarity has been expressly invoked. Hence, the focus of the discourse in this article is on such express complementary relationships.

35 Cited by Schabas, *supra* note 24 at 158.

36 See generally Clapham, 'On Complementarity in the European Legal Orders', 21 *Hmn Rts LJ* (2000) 313 and Imbert, 'Perspectives of the Directorate of Human Rights', 21 *Hmn Rts LJ* (2000) 292.

37 Cowen, *supra* note 10, at 290.

38 *Ibid.*

39 Clapham, *supra* note 5, at 315.

40 For, e.g., the Assembly of heads of state and government, the AU Commission, the Peace and Security Council are organs that are somewhat involved in the human rights work of the AU.

It is in the preamble to the African Court Protocol that the concept of complementarity was first introduced. Paragraph 7 of the Preamble speaks of 'the establishment of an African Court on Human and Peoples' Rights to complement and reinforce the functions of the African Commission on Human and Peoples' Rights'. In the body of the African Court Protocol itself, complementarity appears twice. In Article 2 relating to the relationship between the African Human Rights Court and the African Commission, it is emphasized that the Court shall 'complement the protective mandate' of the African Commission. Article 8 of the Protocol relating to the 'Consideration of Cases' requires the Court to bear in mind 'the complementarity between the Commission and the Court' in making its rules of procedure. In these three provisions, the concept of complementarity entered into the discourse of the African human rights system.

In the making of a protocol to merge the African Court of Justice[41] and the African Human Rights Court, the term 'complementarity' was once again employed in the legal framework of the AU. In Article 27(2) of the Protocol on the Statute of the African Court of Justice and Human Rights (Court Statute), the ACJHR is invited to bear in mind 'the complementarity it maintains with the African Commission and the African Child Right'[42] in the course of making its rules of court. Further, in Article 38 of the Court Statute relating to the procedures before the ACJHR, that Court is again required to take 'into account the complementarity between the court and other treaty bodies of the Union'. Effectively, this Court Statute has consolidated complementarity as a defining principle in the relationship between judicial and non-judicial or quasi-judicial human rights supervisory bodies in the African human rights system. It also has to be noted that in all their employment of complementarity, drafters in the African human rights system have stopped short of giving a clear definition of complementarity and how it ought to function in the system. Thus, there is need to explore the possible interpretations and application of the principle in the system.

In order to locate the meaning and, hence, the implications of complementarity in the system, it is necessary to recall the rationale behind the establishment of the institutions that are expected to co-exist in a complementary fashion. In this context, Nmehielle reiterates that the essence of the African Charter is 'the protection of human rights in accordance with international standards rather than a particular African standard'.[43] As is now common knowledge, under the Charter itself only the African Commission was established to supervise compliance. Whatever promise it may have held at the time it was conceived and established, it did not take long for the alleged ineffectiveness of the African Commission to emerge as one of the main criticisms against the African Charter and the entire African human rights system. In the

[41] The African Court of Justice was established by Art. 5 of the AU Constitutive Act 2000.

[42] The African Committee of Experts on the Rights and Welfare of the Child (African Child Right Committee) is the treaty body established in Art. 32 of the African Charter on the Rights and Welfare of the Child to 'promote and protect the rights and welfare of the child' in Africa.

[43] Nmehielle, *supra* note 6, at 30.

vast literature that emerged on the African human rights system, the inadequacy of the African Commission was almost common ground.[44]

As Viljoen notes, there are seven main 'inter-linked difficulties associated with the Commission's efforts'.[45] These include the fact that the Commission's findings are non-binding;[46] uncertainty of the Commission's legal basis for creating remedies;[47] and the *ad hoc* nature of the enforcement system for the implementation of the Commission's decision.[48] Other difficulties include the strict confidentiality of the Commission's proceedings[49] and the notorious delay in the Commission's consideration of communications.[50] Perhaps it was these and other reasons that led Udombana to come to the conclusion that the 'the greatest weakness of the Banjul Charter . . . was its failure to provide for an institutional safeguard in the form of a judicial organ in the African system'.[51] As far as Udombana was concerned, with regard to the protection of rights the African Commission was a 'toothless bulldog', especially because it lacked 'any enforcement power or remedial authority'.[52] Arguably, the African Child Right Committee is not so different from the African Commission. In fact, within the period of its existence, the Committee has proved to be less effective than the African Commission in the execution of its functions. As these two are the existing treaty bodies for human rights supervision in the AU framework, it can be argued that the establishment of a judicial body aims to remedy the shortcomings of these bodies.

In the opinion of some commentators, the establishment of a human rights court in Africa was essential to 'salvage the entire system from its near-total irrelevance and obscurity'.[53] Thus, it is believed that the adoption of the African Court Protocol is 'to give teeth and meaning to the rights guaranteed in the Banjul Charter'.[54] Viljoen's view is that 'the overarching aim of the African Court is to supplement the African Commission's individual communications procedure'.[55] Extending these views to the African Child Right Committee, it would seem that the establishment of the Court is also aimed at bringing about an improvement in the promotion and protection of the rights and welfare of children in Africa. Against this background, conscious of the remedial purpose of the Court, the question arises whether complementarity as

[44] The system was seen as resting on 'shaky foundations' by Naldi and Magliveras, 'The Proposed African Court of Human and Peoples' Rights: Evaluation and Comparison', 8 *RADIC (African J Int'l and Comparative L)* (1996) 944, at 945; and short in 'public confidence' by Udombana, 'An African Human Rights Court and An African Union Court: A Needful Duality or a Needless Duplication?', 28 *Brooklyn J Int'l L* (2002–2003) 811, at 829.

[45] Viljoen, *supra* note 11, at 13.

[46] *Ibid.*

[47] *Ibid.*, at 14.

[48] *Ibid.*, at 15.

[49] *Ibid.*, at 16.

[50] *Ibid.*

[51] Udombana, 'Towards the African Court on Human and Peoples' Rights: Better Later Than Never', 3 *Yale Hmn Rts and Development LJ* (2000) 45, at 63.

[52] *Ibid.*, at 64.

[53] Mutua, 'The African Human Rights Court: A Two-legged Stool?', 21 *Hmn Rts Q* (1999) 342, at 351.

[54] Udombana, *supra* note 44, at 856.

[55] Viljoen, *supra* note 11, at 13.

employed in the African Court Protocol and in the Court Statute should be restricted to its descriptive function. If complementarity in the context of the African human rights system extends beyond its descriptive function, there is the further challenge of locating the limits of its normative functions in the system.

The existence of a challenge in pinning down the exact meaning and functions of complementarity in the African system is reflected in the difficulty that commentators have in finding common ground on the issue. Considering the relationship between the African Commission and the African Human Rights Court to be one of the 'peculiarities' of the Protocol, Österdahl says it is an 'organic' relationship that lacks clarity.[56] Udombana considers the provisions on the relationship to be 'vague', yet concludes that 'it is clear that the Commission and Court were to share many powers'.[57] Nmehielle also envisages the challenge and suggests that the African Human Rights Court will impact on the work of the Commission, but he emphasizes the need for clarification of the functions of the institutions.[58] These challenges are further complicated by the perception that a relationship of 'hierarchy is established the moment a flat structure is converted into even a two-tier structure'.[59]

These challenges are by no means peculiar to the African system, as Klabber notes that it is typical for international organizations to create multiple organs without specifying the precise relationship between those organs.[60] In relation to the Inter-American human rights system, the definition of the relationship between the Court and the Commission was considered to be one of the more difficult tasks that the system faced.[61] Thus, it is often in the functions of organs and institutions that the nature of relationships is distilled.[62]

It has to be noted that in their enumeration of the functions of the African Human Rights Court (and in the future, the ACHJR), the relevant instruments did not expressly extinguish the competences of the African Commission and the African Child Right Committee to examine communications. Hence, the existing division of labour, if any, complicates rather than clarifies the relationship between judicial and quasi-judicial bodies in the African system. The thesis in this article is that the concept of complementarity can be applied positively to clarify the division of functions and the relations between institutions in the African system. It is along these two broad headings that complementarity in the system will be analysed.

A *Functional Dimension of Complementarity in the African System*

From a functional perspective, the challenge that complementarity poses for the African human rights system is the determination of what functions should be undertaken

[56] Österdahl, *supra* note 7, at 133.
[57] Udombana, *supra* note 51, at 97.
[58] Nmehielle, *supra* note 6, at 46.
[59] Leathley, 'An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?', 40 *Int'l L and Politics* (2007) 259, at 272.
[60] Klabbers, *supra* note 17, at 147.
[61] Sepúlveda, *supra* note 10, at 83.
[62] Klabbers, *supra* note 17, at 147.

by what institution(s). Generally, there appears to be an assumption that whenever there is a two-tier system comprised of a judicial body and a quasi-judicial body, the task of adjudication naturally rests in the judicial body.[63] Along these lines, some commentators have suggested that the judicial organ in the African human rights system should 'completely take over the protective mandate under the Charter'.[64] However, such a simple conclusion is inapplicable in the context of the African system on at least two grounds. First, the role of the African Human Rights Court and its successor institution is to complement rather than usurp the existing protective competences of the quasi-judicial bodies. Both the African Commission and the African Child Right Committee already engage in some sort of adjudication in pursuit of this mandate. Secondly, the protective mandate is not restricted to the adjudicatory process. A possible way out of the quagmire would be to analyse the strengths of the institutions in order to identify in what areas each is more likely to contribute to the system and apply complementarity in favour of such institutional strengths.

1 The Functioning of a Complementary Court

Under its Protocol and from its rules of procedure, the main and perhaps only task that is assigned to the African Human Rights Court and its successor institution is adjudication.[65] The Court's adjudicatory powers are two-fold: contentious and advisory. A function auxiliary to adjudication that is ascribed to the Court is the competence to be involved in the pursuit of amicable settlements.[66] The basic question is whether the Court is suited to these roles and in so doing enhances efficiency in the system in a complementary manner.

From the viewpoint of contentious adjudication, the founding instruments of the judicial bodies empower them to make final and binding decisions that constitute judgments enforceable by the relevant organs of the AU.[67] The power to order appropriate remedies is also incumbent on the Court.[68] Clearly, in this regard, the African Human Rights Court already offers something that is lacking in the existing procedures of the quasi-judicial bodies.[69] Naturally, in view of the commonly known impotence of international law in relation to enforcement, the question could arise whether in practice the Court offers anything more than the persuasiveness associated with the recommendations that the existing quasi-judicial treaty bodies offer. In other words, despite

[63] Buergenthal, 'The American and European Conventions on Human Rights: Similarities and Differences', 30 *Am U L Rev* (1980–1981) 155, at 157; Dulitzky, 'The Relationship between the African Commission and the African Court: Lessons from the Inter-American System', 15 *INTERIGHTS Bull* (2005) 10.

[64] F. Viljoen, *International Human Rights Law in Africa* (2007), at 437, citing Mutua and Nmehielle. Also see the controversy arising from the provisions in Arts 27 and 32 of the African Women's Protocol regarding the question whether the competence of the African Commission to interpret that Protocol ends once the African Human Rights Court begins operation.

[65] References to the African Human Rights Court should be read to include the ACJHR unless a contrary position is expressly stated.

[66] Art. 9 of the African Court Protocol.

[67] Art. 28 of the African Court Protocol; Art. 46 of the Statute.

[68] Art. 27 of the African Court Protocol.

[69] Udombana, *supra* note 51, at 93.

the undertaking by states to comply with the Court's judgments[70] and the potential for more concrete involvement of the AU's political organs in the 'enforcement' process,[71] a risk of non-compliance is as present in relation to the Court as it has been with the quasi-judicial bodies.[72]

Notwithstanding the reality check above, the chances of compliance are higher in relation to the African Court. There are strong arguments that the mere fact that a state has been brought before an international court and the subsequent listing of a state in 'the Court's annual reports as a human rights violator' is a 'potent shaming mechanism' that will enhance compliance with the decisions of an international human rights court.[73] In this regard, complementarity favours the involvement of the Court in the adjudicatory process in order to give meaning to international litigation of human rights in Africa.

Another factor that favours the Court's involvement in the contentious adjudicatory process is the recognition that proceedings before the Court are to take place in public. The perception of fairness triggered by expectation that transparency is more likely in a public trial works in favour of a higher degree of public confidence in the Court. Further, the crippling confidentiality clause in Article 59 of the African Charter does not apply to the African Human Rights Court. As Nmehielle notes, the absence of this restriction presupposes that there would be greater publicity around cases coming before the African Court.[74] The robust press coverage given to human rights cases brought before the ECOWAS Court of Justice (ECCJ) in Abuja, Nigeria, supports Nmehielle's view. The advantages in such publicity include increased public confidence and the potential for shaming states to act in favour of human rights.[75] These are improvements that the judicial organs bring to the system. It may be noted that confidentiality in the procedure of the African Child Right Committee may be desirable in the interest of the child.[76] However, the possibility of a private hearing also exists under the Court's procedure.[77]

An additional advantage that comes with adjudication before the African Human Rights Court is the wider scope of instruments applicable before the Court. While it has to be conceded that potential exists for jurisdictional conflict with treaty bodies established under various treaties applicable before the Court, in the absence of

[70] Art. 30 of the African Court Protocol.

[71] By Art. 31 of the African Court Protocol, the Court is required to include in its annual reports to the AU Assembly a list of states that have failed to comply with its judgments and orders. There is expectation that this provision holds a promise that the political organs will take some action strongly to persuade states to comply.

[72] The experiences of the sub-regional courts in relation to the refusals of the Gambia (in the ECOWAS regime) and Zimbabwe (in SADC) to comply with decisions of those courts are instructive. See Ebobrah, 'Human Rights Developments in Sub-regional Courts in Africa during 2008', 9 *A Hmn Rts LJ* (2009) 312.

[73] Udombana, *supra* note 51, at 94–95.

[74] Nmehielle, *supra* note 6, at 40.

[75] As Pasqualucci, *supra* note 11, at 349 notes, 'a mere summons to appear before an international court has been shown to have a chilling effect on human rights abuses within the summoned state'.

[76] See Art. 44(2) of the African Children Charter.

[77] See Art. 43(2) of the interim rules of the African Court.

a global human rights court the prospects of binding judgments arising from those instruments is a peculiar advantage that the Court brings. This is clearly a positive complement to the existing procedures.

Linked to the improved remedial regime of the judicial organs, another factor that favours a complementary role for the Court in the adjudicatory process is the 'compulsory' nature of its interim orders. Building on its express powers to adopt provisional measures, the Court has used its rules of procedure to indicate the 'bindingness' of its provisional measures. Thus, the rules use such terms as 'prescribe' and 'order' when they refer to interim measures that it adopts. This is clearly another improvement that the Court has brought into the procedures of the system.

In terms of the advisory jurisdiction that it shares with the quasi-judicial bodies, the African Human Rights Court also holds certain advantages that presuppose a positive complementary character. Nmehielle has taken the view that pronouncement by a court is essential 'for the articulation of international legal principles'.[78] Sepúlveda reinforces this position with the assertion that 'opinions of the Court are to be considered as positive development of law in the field of human rights'.[79] While by their very nature advisory opinions are non-binding interpretations of the law, they have far reaching effects when they emerge from a judicial institution that demands and receives the respect of states and their national courts. Thus, arguably, the potential for national authorities, especially national courts, to pay the deserved attention to advisory opinions emerging from the African Human Rights Courts is likely to be higher.[80] In relation to the Inter-American system, Sepúlveda considers the field of advisory opinion to be an area in which the Inter-American Court of Human Rights is able to offer 'valuable juridical assistance' to the Inter-American Commission on Human Rights.[81] With its potential to produce more authoritative interpretations of the African Charter, complementarity arguably favours a more active role for the Court.

While the comparative advantage brought by the Court into the system demonstrates that it can play a reinforcing complementary role with regard to adjudication, such an advantage is arguably lacking in relation to the auxiliary function of amicable settlement. Perhaps the Court itself is conscious of this fact as it tones down its position in relation to amicable settlement in its rules. Although Article 9 of the African Court Protocol states that the Court 'may try to reach an amicable settlement' the rules only make reference to the Court's competence to 'promote' amicable settlement.[82] Apparently, while the Court creates room for amicable settlement to occur under its auspices, it does not appear to envisage any role for its judges in the process. If one takes a close look at the Rules of the African Court, it will be noticed that in Rule

[78] Nmehielle, *supra* note 6, at 39.

[79] Sepúlveda, *supra* note 10, at 84.

[80] Matua, *supra* note 53, at 362, e.g., holds the opinion that 'individual courts in [O]AU member states should look to the African Human Rights Court for direction in the development and application of human rights law'.

[81] Sepúlveda, *supra* note 10, at 83.

[82] See Rule 26(1)(c) of the Interim Rules of the African Human Rights Court.

56(3), the Court has taken the position that it may decide to proceed with a case before it, notwithstanding notice of an attempt at amicable settlement in such a case. Arguably, if the Court is the initiator of such a process, it cannot turn round to ignore the process. As harsh as the rule may appear, almost giving the impression that the Court is against such friendly efforts, situations where such a position is necessary can be envisaged. For example, where a violating practice by a state party is widespread and the state tries to 'settle' nominal applicants before the Court in order to stifle further publicity, it may be more advantageous for the Court to proceed with the case.

Further, by Rule 57(2) of the Rules of the Court, negotiations aimed at amicable settlement ought to be confidential, and would be without prejudice to observations in proceedings before the Court. Moreover, the contents of negotiations in the settlement process cannot be mentioned or referred to in proceedings before the Court. If the judges are to be involved in the settlement process, this may not be possible. Additionally, it is clearly undesirable that the same set of people should be mediators or arbitrators on the one hand, and still be adjudicators on the other hand. Consequently, the potential that the Court can or would add value to the process of amicable settlement is almost non-existent. Thus, it is difficult to see how the Court can positively complement such a process.

Having analysed the functions that the judicial organs of the African human rights system are primed to undertake in furtherance of complementarity, there remains the question of expectations that courts are not likely to meet. The main concern here is whether adjudication by individuals before international courts is sufficient to address pertinent structural human rights issues and promote a culture of respect for human rights in the continent. Although the value of the judicial or quasi-judicial individual litigation procedure has never been in doubt as an instrument for the protection of rights, there are clear limits to its utility. In this regard, it has to be emphasized that international courts lack the ability to address all cases of alleged injustice that occur in the continent. Accordingly, almost similarly to the ICC's complementarity regime, it is the national courts that bear the primary responsibility for the judicial protection of rights. Thus, save in cases where national legal systems have failed to guarantee relief or where a novel matter with far reaching consequences is in issue, the complementary value of the regional courts would be little.

In relation to widespread or serious and massive violations, the impact of litigation by a few applicants may not create the opportunity for the system to address the issues. In such cases, the complementary value of the courts is diminished. Similarly, the potential for proactive action to avoid the worsening of a state's human rights record cannot be realized through the litigation process. The payment of compensation to one or more applicants does not guarantee that the human rights records of a state will improve. In the European context, Clapham has noted, for example, that the overall aim of the ECHR mechanism was to 'serve as an early-warning devise exposing signs of future extremism either from the left or the right'.[83] This was a role that the 'legal complaint mechanism with the European Court of Human Rights at its core'

[83] Clapham, *supra* note 5, at 315.

could not play.[84] The backward looking legal complaint procedure, while relevant for the provision of reparations in the event of prior violation, needs to be matched with a forward looking protective procedure. It is this forward looking procedure that litigation before the African courts will not be able to guarantee, thereby limiting their complementary value in this regard.

A final point to be noted on the handicap of the international litigation process relates to the attitude of most states in the developing world. As Pasqualucci notes, 'some third world states are still governed by the rule of man rather than the rule of law'.[85] States in this category are never eager to comply with judicial decisions, whether such decisions are of domestic or international flavour. In such conditions, to insist on the strict application and use of the judicial process 'can only undermine the legitimacy of the entire system: to introduce judicial review under such conditions might do more harm than good . . . to international law'.[86] Considering the challenge that some African states have with regard to compliance with court decisions, the complementary value of the courts in the protection of human rights would not be much. Overall, the functions that the courts should take on in their complementary role must be in those areas where there is abundant comparative advantage over the quasi-judicial mechanisms.

2 Quasi-judicial Bodies:[87] More than Just Residual Functions

In the absence of an ICC-type complementarity that gives them priority in the adjudicatory process, it has to be considered whether quasi-judicial bodies should become redundant or simply play the role of 'less-fortunate cousins' with only residual functions. Although the individual complaints mechanism is not currently a major activity of the African Child Right Committee, like the African Commission, the African Committee has the potential to expand its work in this area. The challenge is to answer the question whether it is beneficial under the complementarity regime for these bodies to hold on to their complaint procedures, or if they should focus on other protective and/or promotional activities. Better still, is there scope for a combination of adjudicatory and other protective activities in a manner beneficial from a complementary perspective?

It will serve no purpose to repeat the arguments against the complaints procedure of quasi-judicial institutions in the African system.[88] What is important to consider is the factors, if any, that support continuance of such quasi-judicial communications procedures. As at June 2010, only four states parties to the African Human Rights Court Protocol had made the declaration required in terms of Article 34(6) to grant

[84] *Ibid.*

[85] Pasqualucci, *supra* note 11, at 299.

[86] Klabbers, *supra* note 17, at 157, albeit in relation to the judicial review process under the platform of the UN.

[87] Due to word constraints, the African Child Right Committee will not be analysed separately. Hence, all references to the African Commission should be understood as references to both institutions unless otherwise stated.

[88] See generally Mutua, *supra* note 53.

direct individual access to the Court.[89] The implication is that only 25 states can currently be involved in the Court's inter-state procedure, and only four states can be brought under the individual complaints process of the Court. This position applies to the ACJHR since the Statute retains the declaration requirement.[90] Thus, the quasi-judicial mechanisms provide the only opportunity for adjudicatory redress for the vast majority of African people.[91] The other point to note is the risk of excessive workload once the Court becomes fully utilized. In such a situation, resort to the quasi-judicial mechanisms may provide faster relief than the Court would be able to guarantee. Thus, there is some beneficial complementary value in retaining the communications procedures of the Commission and the Committee without necessarily relegating it to the status of a 'filter'.[92]

As canvassed already, there are limits to the utility of the adjudicatory process in terms of triggering and sustaining positive change in the field of human rights. Hence, the protective mandate of the quasi-judicial bodies cannot be restricted to the communications procedures. In terms of massive and systematic violations, the balance of complementary value tilts more in favour of these bodies than the judicial organs. In the Inter-American context, Rescia and Seitles have noted that 'the main function of the Commission was to deal with the problem of the massive and systematic violations of human rights, rather than to investigate isolated violations'. Accordingly, the aim was to 'document the existence of human rights violations in a country and to place pressure on that government to improve its general human rights record'.[93] This is an aspect of the protective mandate that the Commission and the Committee ought to build on.

The advantage of quasi-judicial mechanisms in relation to massive and serious violations is recognized by the ECCJ in its judgment in *Koroua v. Niger*.[94] Faced with a request by the applicant in that case for an order compelling the state to engage in structural law reform, the ECCJ stated as follows:[95]

> As regards the applicant's first plea-in-law, the Court finds that it does not have the mandate to examine the laws of member states of the Community *in abstrato,* but rather, to ensure the protection of the rights of individuals whenever such individuals are victims of the violation of those rights which are recognized as theirs, and the Court does so by examining concrete case brought before it.

[89] There are 25 states parties to the Protocol, out of 53 states parties to the African Charter. The four that have made the declaration in terms of Art. 34(6) are Burkina Faso, Malawi, Mali, and Tanzania.

[90] Arts 8 and 30 of the Statute of the ACJHR.

[91] See also Viljoen, *supra* note 64, at 437. In the context of the UN, in interpreting events relating to political action after the denial of locus to Liberia and Ethiopia in the *South West Africa* case, Klabbers suggests that the ICJ's position was informed by the need to ensure that non-judicial options for remedy should be available against breaches of international law if the Court cannot intervene due to jurisdictional challenges: Klabbers, *supra* note 17, at 156.

[92] See Dulitzky, *supra* note 63, at 11 in relation to the inter-American Commission's communications procedure. Also see Sepúlveda, *supra* note 10, at 86.

[93] Rescia and Seitles, 'The Development of the Inter-American Human Rights System: A Historical Perspective and a Modern-Day Critique', *NY Law School J Hmn Rts* (1999–2000) 593, at 602.

[94] *Koraou v. Niger* [2008] *African Hmn Rts L Rev* 182 (ECOWAS 2008) (*Koraou* case).

[95] *Ibid.*, at para. 60.

> The Court indicates that other mechanisms are employed in the consideration of cases, such as the checking of the situation in each country, the submission of periodic reports as provided for by certain international instruments, including article 62 of the African Charter on Human and Peoples' Rights . . .

Thus, while the Court can only bring succour to applicant(s) before it, the protective potential of the quasi-judicial bodies could be very promising. The African Commission already engages in such non-adjudicatory protective activities. For instance, the rules of the Commission make provision for the use of 'subsidiary mechanisms such as special Rapporteurs, committees and working groups'.[96] The Rules also provide for protective missions.[97] These are tools for the protection of human rights that the Court does not possess. It is hoped that the African Child Right Committee will develop similar or other appropriate protective mechanisms to enhance its usefulness in the complementary relationship.

Another area of protection of human rights in which the quasi-judicial bodies retain a comparative advantage is in relation to amicable settlement of disputes. Considering that the idea of giving room for amicable settlement resonates within the African system, and in view of the fact that the Court is not suited to undertaking that venture, it rests on the Commission and the Committee to take on this role. With the possibility of either validating settlement by Court endorsement or referring unsettled cases to the Court for adjudication, complementarity arguably favours mediatory roles for the quasi-judicial bodies. Not only does this fit with the role envisaged for the African Commission at its inception,[98] it is also already contemplated by the rules of the Commission.[99] In both the European and the Inter-American systems, such attempts at friendly settlements have been undertaken by the relevant commissions.[100]

In relation to the African Charter, one other protective area where the African Commission may jointly exercise competence in a complementarily beneficial manner is in relation to the interpretation of the Charter. This aspect of the Commission's mandate has hardly been put to use even though it has great potential. As both Ndombana and Nmehielle have noted, in the area of social, economic, and cultural rights where challenges of justiciability abound, the African Commission is likely to make more impact. In fact, even if Charter-based socio-economic rights are justiciable before the African Court, the potential difficulties of enforcement favour non-judicial intervention by the Commission. Accordingly, the complementary value tilts in favour of the quasi-judicial bodies in this regard.

Overall, in the distribution of functions and tasks against the operation of complementarity, it is crucial that the emphasis is placed on suitability and comparative advantage above anything else. It is also essential that the relevant institutions do

[96] Rule 23 of the Interim Rules of Procedure of the African Commission.

[97] Rule 60 of the Interim Rules of the African Commission.

[98] Udombana, *supra* note 51, at 74.

[99] Rule 90.

[100] Pasqualucci, *supra* note 11, at 306; Shelton, 'Implementation Procedures of the American Convention on Human Rights', 26 *German Yrbk Int'l L* (1983) 238, at 246.

not shy away from mutual execution of mandates where such is beneficial to the efficiency of the entire system.

B *Relational Dimension of Complementarity in the African System*

The need to define the relationship between the judicial and non-judicial mechanisms for human rights supervision in the African human rights system arises essentially within the ambit of the adjudicatory process. This is because that process is the only one in which both sets of institutions can really operate jointly. Perhaps this accounts for the emphasis that the drafters have placed on requiring the African Human Rights Court and the ACJHR to take complementarity into account in the adoption of their respective rules of procedure.[101] While both provisions appear very simple, there is some recipe for complication in the supposed simplicity. As the experiences in other regional systems indicate, the ideal situation would be for all institutions to consider themselves as 'partners in the same system, embarked in a joint venture',[102] creating room for consistency and coherence in the system.[103] However, because the complementarity provisions are vague and the human factor is ever present, conscious effort is needed to iron out how these institutions should relate.

1 A Relationship of Hierarchy?

One of the thorny aspects of the relationship between the courts and the quasi-judicial bodies relates to the issue of hierarchy. As some commentators have noted, the idea of hierarchy emerges once a two-tier structure is introduced to replace a single-structure system.[104] In the context of complementarity in the African system, the question is whether a relationship of hierarchy is intended. The danger in failing to resolve this issue lies in the risk of allowing tension arising from a struggle for supremacy to affect the smooth functioning of the system. This is not an academic concern, as is demonstrated by the struggle for supremacy and territorialism that occurred in the early years of the Inter-American system.

Although there is yet to be any public report of such tension within the African human rights system, the length of time it took for the African Human Rights Court and the African Commission to harmonize their respective rules of procedure could well be a sign that such issues have emerged.[105] Naturally, amongst lawyers, the tendency is to consider the court to be superior to any other institution engaged in adjudicatory processes. In fact, a perusal of certain provisions in the Court's Rules suggests that the Court is being held out as a senior partner in the relationship. For example, the provisions in Rule 29(1) relating to documents that the African Commission needs to submit to the Court and the discretion of the Court to hear Commissioners of the

[101] Art. 37(2) African Court Protocol; Art. 38 of the Statute.
[102] Dulitzky, *supra* note 63, at 11.
[103] Cowen, *supra* note 37, at 290.
[104] Leathley, *supra* note 59, at 272.
[105] The two institutions have met several times over the past one to two years to harmonize their rules. No similar meetings have been reported between the Court and the African Child Right Committee.

African Commission in cases before it are suggestive of such a hierarchical relationship. Similarly, Rule 29(2) relating to the competence of the Court to limit the time within which the Commission should send its opinion on an admissibility reference is suggestive of a superior position. Indeed, if Article 2(1) of the Statute is considered, when the African Human Rights Court is merged with the African Court of Justice, the joint ACJHR is expected to be the 'main judicial organ of the African Union'. While clarity of status is important, considering the dangers of unhealthy competition between institutions, it needs to be asked whether hierarchy is necessary in this complementary relationship.

The law of international institutions does not prescribe how they should operate. However, the experiences of other international organizations can provide some guidance. In relation to the UN, it would appear that no relationship of hierarchy exists as between its organs. In his analysis of the ICJ's decision in the *Certain Expenses* case,[106] Klabbers reasons that the ICJ found 'a balance of sorts in the idea that the Charter did not create any hierarchy between the two organs other than that authorising enforcement of action is the sole prerogative of the Security Council'.[107] Klabbers argues further that '[t]he Court found support for its interpretation in what it called the "structure" of the Charter, under which neither organ was subordinate to the other'.[108] A related question of hierarchy in the UN system arose in connection with the General Assembly's termination of South Africa's mandate over South West Africa. Analysing the ICJ's opinion on the implications of the General Assembly's resort to the Security Council for enforcement assistance, Klabbers points out that the Court's response was an indication that hierarchy did not exist. Each organ's involvement 'stemmed from its own powers' and 'it is not a case of one organ telling the other what to do'.[109] Klabbers' overall conclusion in relation to the UN is that 'the various political organs are supposed not so much as to control each other, but to act in concert'.[110]

As persuasive as the opinion above may appear, one cannot run away from the fact that the contexts are different as the analysis relates to political organs. In the judicial context, the ECCJ has declined to attribute a position of superiority to itself in relation to the national courts of ECOWAS member states. According to the ECCJ, it exists in an 'integrated relationship' with the national courts.[111] While this may be closer to the present concerns, there are still differences in context. First, the institutions in question do not exist under the same organizational framework. Secondly, it was not a case of a relationship between judicial and non-judicial organs. This point raises the question whether a relationship of hierarchy need emerge whenever judicial and quasi-judicial organs exist in the same framework.

Granted that there are huge contextual differences between the issue at hand and the analyses above, it has to be stated that there does not appear to be any compelling

[106] *Certain Expenses of the United Nations*, advisory opinion [1962] ICJ Rep 151.
[107] Klabbers, *supra* note 17, at 153.
[108] *Ibid.*
[109] *Ibid.*, at 154.
[110] *Ibid.*, at 162.
[111] See *Ugokwe v. Nigeria*, unreported, Suit No. ECW/CCJ/APP/02/05, at para. 32.

justification for imposing a hierarchy in this relationship of complementarity. Indeed, in view of the differences in mandate and the fact that the institutions are not all judicial, it may be more beneficial to adopt the 'integrated relationship' approach of the ECCJ as between the judicial and quasi-judicial bodies of the African human rights system.

2 Uncertain Role of Quasi-judicial Bodies in the Court's Processes

There is no doubt that the quasi-judicial bodies will have some role in the adjudicatory process of the Court. This could be either at the pre-hearing stage or in the course of hearings before the Court. This aspect of the relationship is one that the institutions in question are likely to cover in the process of harmonizing their rules. Thus, reference will be made to those rules to enhance our understanding of how it has panned out. The point must be made, however, that despite the fact that the African Child Right Committee takes a position equivalent to that of the African Commission in relation to cases brought on the basis of the African Children's Charter before the Court, there is no reference to that Committee in the Court's interim rules.

As far as the pre-hearing stage is concerned, there are three main aspects in which quasi-judicial bodies may be involved. These are where there is a request for provisional measures; the admissibility consideration stage; and, where applicable, at the stage of attempt at amicable settlement. In the view of some commentators, the African Commission should 'play a prominent role as a filter mechanism'[112] or act as a 'screening body'.[113] This is apparently the picture that emerges from the Inter-American system where 'complaints by individuals alleging human rights abuses must first be directed to the Inter-American Commission'.[114] However, it has to be borne in mind that the African Commission and the African Child Right Committee were not established with such 'support' roles in mind. Unlike the Inter-American system where the 'institutional integrity' of the system requires completion of the Commission's procedure as a condition precedent for access to the Court,[115] the African system envisages independence of action for the quasi-judicial bodies. However, the African Court Protocol, as well as the Rules of both the Court and the Commission, envisages a role for the Commission in the admissibility process of cases brought directly by individuals and NGOs before the Court.[116] No similar certainty exists in relation to the Committee, even though it may be desirable for it to play such a role in cases involving the rights of children.

A crucial concern that arises in relation to the involvement of the quasi-judicial bodies relates to the danger of expanding time for the conclusion of cases. If the essence of complementarity is to enhance the efficiency of the system, there need to be compelling reasons to require the Court to solicit the admissibility opinion of the

[112] Naldi and Magliveras, *supra* note 44, at 946.
[113] Buergenthal, *supra* note 63, at 157.
[114] Pasqualucci, *supra* note 11, at 306.
[115] Shelton, *supra* note 100, at 251.
[116] Rule 119 of the Interim Rules of the African Commission; Rule 29 of the Interim Rules of the Court.

Commission, especially if the Court does not consider itself bound to agree with such an opinion. A possible situation in which such opinion could be warranted may be in a case where admissibility can be determined only after verification of the facts. A quasi-judicial body may be better positioned to engage in such a mission, and thereby be better placed to conclude on admissibility. Whatever the case, it is important for the functioning of complementarity that reference to the quasi-judicial bodies should not unduly prolong the process.

In cases directly brought before the Court, the quasi-judicial bodies need not be involved in the request for provisional measures. However, in cases brought before these bodies in which provisional measures are required, it may be easier for them to forward such requests to the Court instead of 'recommending' their own measures. As is evident from the interim rules of both the Commission and the Committee, these bodies have codified their competences in this regard. However, since they are not courts, they can only recommend measures, which states are at liberty to ignore. If states are more likely to comply with the 'orders' of provisional measures from the Court there is very little reason why the urgency of a situation should be compromised by experimenting with 'recommendations'. In fact, if a given situation does not lend itself to diplomacy, this is one way in which the Court can be kept busy pending the liberalization of access or the willingness of states to make the Article 34(6) declaration. This is no different from the position in the Inter-American system.[117]

Ideally, attempts at amicable settlement, where applicable, have to be undertaken before the Court goes into the merits of the case. As previously canvassed, the Court is not suitable for the role of mediation and arbitration if it has to remain a neutral adjudicator. Thus, once the decision is made that a case is suitable for settlement, the quasi-judicial bodies should make their good offices available for that purpose. This is another way in which the complementary relationship can be positively employed at the pre-trial stage.

The main challenge for complementarity at the merits stage relates to the role that a quasi-judicial body that has brought a case before the Court should play. Although there is lack of clarity concerning at what stage cases commenced before the quasi-judicial bodies should be referred to the Court, both the Commission and the Committee have taken the position that cases will be referred after the conclusion of the merits stage and after states have failed to comply.[118] While there is nothing wrong with this approach, it is submitted that cases involving novel and far reaching issues should be referred to the Court immediately after the admissibility stage. Such referral would allow the Court to develop authoritative interpretations to serve as future reference point.

In relation to the role that the quasi-judicial bodies should play at the hearing of cases brought by them before the Court, the other regional systems offer some precedents. Before the ECtHR in the old European system, the European Commission

[117] Pasqualucci, *supra* note 11, at 301.

[118] However, note Rule 118(4) of the Commission's Interim Rules which stipulates that the Commission may seise the Court at any stage of the proceedings.

occupied a position similar to that of the Advocate General in the European Court of Justice. In this role, the Commission is expected to be non-partisan and presents argument in a disinterested manner.[119] In the Inter-American system on the other hand, it would appear that the Commission is the main representative of the victim/applicant even though a victim's lawyer may be granted audience.[120] Considering the mediatory role that the Commission may be required to play from time to time, and in view of all other aspects of the Commission's mandate, it is preferable that the old European model is adopted.

3 Status of Non-judicial and Quasi-judicial Output before the Court

Another important aspect worthy of consideration in the complementarily relationship is the status of the outputs of the quasi-judicial bodies in proceedings before the Court. In this respect, the admissibility findings, reports of an amicable settlement process, reports of factual investigative processes, and findings on the merit deserve attention. Generally, reports emerging from a fruitful settlement process should easily receive the endorsement of the Court without any complications. Where the settlement attempt is unfruitful, in line with the Rules of the Court itself, details of who said and did what should not be brought before the Court.[121]

The status of admissibility findings by the Commission and the Committee appears to be more problematic. Ordinarily, the Court is not under any obligation to consider itself bound by such findings. The experiences of the other regional systems suggest that, generally, the admissibility finding by a commission was final under the old European system.[122] However, during the dying days of the system, the admissibility decision of the defunct Commission was re-opened.[123] Similarly, in the *Velásquez Rodríguez v. Honduras* case,[124] the Inter-American Court asserted its right to re-open admissibility findings of the Inter-American Commission. Attractive as it may be for the Court to establish itself as an independent institution, the risk of duplication is very real in situations such as this. Hence, it is suggested that, except where there are compelling reasons for the Court to re-open admissibility, favourable admissibility findings of the quasi-judicial bodies should not be re-opened.

With regard to reports of factual investigation, it is unlikely and even undesirable for the Court to undertake an investigative mission. Just as national courts rely on non-judicial bodies to provide evidence for the resolution of cases, the Court has asserted its competence to invite and receive evidence from diverse sources. If the quasi-judicial bodies take on a 'ministerial' role before the Court, the value of their

[119] Pasqualucci, *supra* note 11, at 320 (n. 119).

[120] *Ibid.*, at 320.

[121] Rule 57(2) of the Interim Rules of the Court.

[122] P. van Dijk and G.H.J. van Hoof (eds), *Theory and Practice of the European Court of Human Rights* (1998), at 107.

[123] Ebobrah, 'The Admissibility of Cases before the African Court on Human and Peoples' Rights', 3 *Malawi LJ* (2009) 87, at 106–107.

[124] [1998] Inter-Am Ct HR (Ser C) N04.

factual findings ought to be respected.[125] Under the CoE regime, it has been noted that there is a practice of the ECtHR showing interest in the 'findings-in-fact' of the CPT even though the considered opinion on such facts is not utilized.[126] Thus, in this area, complementarity should work in favour of recognition of the fact-finding role of the quasi-judicial bodies.

The status of the findings on the merits by the quasi-judicial bodies presents some complications. Clearly, there is no guidance in any of the rules on the status of such findings in the Court's determination of cases. In considering this point, it has to be borne in mind that the Court cannot assume an appellate role over quasi-judicial findings on the merits. For example, the findings of administrative and quasi-judicial bodies in municipal law are subjected to review but not appeal. It also has to be borne in mind that, technically, the principles of *lis pendens* and *res judicata* cannot apply to this relationship since one body is a court and the others are not. Thus, the expectations of outcome are not similar and therefore will not fulfil the conditions for these principles to apply. Consequently, despite the risk of duplication, there is no compelling argument against a reconsideration of the case on the merits by the Court. The Court cannot allow itself to be seen as a 'rubber stamp' for a quasi-judicial institution. Indeed, if the intention was merely to create an institution for the enforcement of the Commission's decision, any of the political organs could have better served that purpose. Notwithstanding these arguments, there is no reason why the earlier or previous jurisprudence of these quasi-judicial bodies should not constitute persuasive soft law that can be applied as interpretative aids by the Court.[127]

There appears to be no simple solution to some of the challenges that the complementarity relationship offers. However, insofar as the Court recognizes that the quasi-judicial bodies are not in an inferior position towards it, the resolution of conflicts will be easier.

4 Duty of the Court to the Other Institutions

One other relational issue that arises from the Court's rules concerns the duty that the Court owes to the other institutions. By Article 43(5), the Court undertakes to transmit its judgments to the Commission just as it transmits such judgments to member states. A similar duty is not indicated *vis-à-vis* the Committee. Further, both in the African Court's Protocol and in Rule 26(1)(b), the advisory jurisdiction of the Court is limited in relation to matters undergoing examination by the African Commission. This kind of deference is positive as it reinforces complementarity. However, it raises the question whether the same limitation should not apply to matters pending before the African Child Right Committee.

[125] See, e.g., Rescia and Seitles, *supra* note 93, at 607, who suggest that acceptance of the Commission's 'proven facts' by the Court is procedurally economical. However, they also consider such wholesale acceptance of the Commission's finding to be dangerous to the credibility of the Inter-American system.

[126] Kelly, *supra* note 32, at 302.

[127] In this regard see Imbert, *supra* note 26, at 294.

One final point in this regard relates to the provision in Rule 40(7) of the Rules of the Court. That provision, which is a reproduction of Article 56(7) of the African Charter, limits the jurisdiction of the Court in matters previously settled in accordance with the principles of the UN Charter, the AU Constitutive Act, the provisions of the African Charter, and any other AU instruments. While it may appear to be a positive provision, tilting towards *res judicata* and indicating deference to the procedures of other institutions, including the quasi-judicial bodies, it creates certain concerns. For example, it needs to be considered whether there is no conflict between this rule and Article 5 of the Court's Protocol. This is because if the access granted to states in Article 5 of the Protocol is exercised other than while a complaint is still pending before the African Commission, the rule conflicts with that access. The equivalent provision in Article 56(7) of the African Charter is directed at the African Commission and is more useful in the complementary context in that character. If it is applied in the context of the Court, it is likely to defeat the purpose of complementarity. It is also likely to raise the question whether a non-judicial or quasi-judicial settlement is sufficient to extinguish the right to judicial remedy of an alleged victim of a human rights violation. In summary, the provisions containing the duty of the Court in this complementary relationship may need to be revisited.

4 Towards a Positive Application of Complementarity in the System

The main challenge that faces the African human rights community in relation to complementarity is how to ensure that complementarity builds rather than results in negative institutional tension in the system. Hopefully, the discourse in this article has demonstrated that, as used in the African human rights system, complementarity takes a fluid meaning and is not exactly a replica of any other usage of the term. Close as it may be to the understanding of complementarity in the CoE regime, the nature of institutions involved in the relationship often forces a difference in conceptualization. It might have been beneficial if the vagueness of complementarity in the protocols had been addressed in the rules. This article has argued that although they appear to do so, the provisions in the rules have actually not enhanced understanding of the concept in the system. The discourse has also tried to show that in the context of the African human rights system, complementarity could result in specialization and individual action on the one hand, and mutual, cooperative, and supportive action on the other. The challenge is to ensure that complementarity is applied in a positive manner to enhance the efficiency of the system.

The experiences of the other main regional human rights systems have indicated that the challenges associated with a two-tiered structure for human rights protection are daunting. From issues of unnecessary duplication[128] and lengthy procedures,[129]

[128] Rescia and Seitles, *supra* note 93, at 607.

[129] Pasqualucci, *supra* note 11.

to concerns around compartmentalization,[130] commentators have not ceased to find compelling arguments against such two-tiered systems. In the case of the African system, the challenge is even bigger as the system is technically a multi-tiered structure. With such challenges, it is beyond doubt that complementarity needs to be engaged as an instrument to bring order into the system. In order to do this, complementarity in the system has to be understood beyond its descriptive function. The functional and relational dimensions of complementarity in the African human rights system can only be positively exploited if the various institutions in the system are encouraged to focus on their relative comparative abilities. As with Clapham's proposal to the CoE regime,[131] matching the strengths and weaknesses of each institution in this complementary relationship is vital to the task of building a unified fortress for human rights protection in Africa.

If complementarity is to be applied positively in the African system, the main functions of the courts have to be adjudicatory. Ancillary functions such as amicable settlements, fact-finding missions, and on-site investigations need to be performed by the quasi-judicial bodies. While the quasi-judicial bodies may continue to receive and determine communications, this has to be done in a manner that defers to the courts. Essentially, the rules of the various institutions, more than the protocols, should be applied for the purpose of facilitating the positive application of complementarity in the African human rights system.

[130] Imbert, *supra* note 26, at 292.
[131] Clapham, *supra* note 5, at 321.