

From 'puzzling' to comprehensible and efficient: Reform proposals to the African human rights framework through a 'system' lens

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Summary: *Forty years after the adoption of the African Charter on Human and Peoples' Rights, the African architecture for the promotion and protection of human rights in Africa has been enriched both at the normative and institutional levels. This enrichment has led in legal analyses both to the affirmation of the existence of an 'African human rights system', on the one hand and, on the other, to the criticism of an unnecessarily complex and not always efficient mechanism. After highlighting the specific logic of the emerging African system, this article indicates the avenues for institutional and methodological reform that should lead to the construction of a truly coherent, effective and efficient African human rights system.*

Key words: *African human rights system; coherence; African Union reform; complementarity; interaction*

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1 Preliminary remarks: are we really facing a system?

The 'systemic' reading and analysis of the African human rights protection machinery is now commonplace in the legal literature. A search for the terms 'African human rights system' in any search engine will bring up a long list of works and books that contain the terms in their titles. However, this systemic reading of the African human rights architecture has emerged without any consideration of the reality of the emergence of a 'system' for the protection and promotion of human rights at the African level.¹ There are two main reasons for this. First, the *rapprochement* of the African apparatus with its predecessors on the European and American continents: as these have been understood and analysed as 'systems', it seemed obvious that the architecture set up around the African Charter on Human and Peoples' Rights (African Charter) could itself only be a 'system'. The second, more general reason undoubtedly is the ease of language decried by Combacau. He points out that the word 'system' is one of these dubious verbal utensils that fashion introduces at close intervals into the frivolous world of the humanities and social sciences.² In the sphere of law, in particular, the word has been used carelessly by guileless authors to cover anything: an institution, a device, a loose bundle of rules and bodies or, more generally, anything slightly composite and still unnamed to which a less trivial qualification must be found.³

It seems to me, therefore, before looking at the coherence and reform of the system, that we should ask ourselves, at the very least, about the existence of an African 'system'. Does the reading of the African mechanism for the promotion and protection of human and peoples' rights as a 'system' result from a simple fashion trend, from a rapid qualification lack of better? If the 'system' seems 'puzzling', is it not because we are trying to bring it into a framework for which it was not designed? As we all know, beauty lies in the eye of the beholder ... Indeed, the 'African system' seems to have always suffered from comparison to its disadvantage with other regional systems of protection of human rights. As was pointed out 20 years ago, but this is still true today, '[n]o regional human rights system

1 See AD Olinga 'L'émergence progressive d'un système africain de garantie des droits de l'homme et des peuples' in AD Olinga (ed) *La protection internationale des droits de l'homme en Afrique. Dynamique, enjeux et perspectives trente ans après l'adoption de la Charte africaine des droits de l'homme et des peuples* (2012) 13-14.

2 J Combacau *Le droit international: bric-à-brac ou système?* (1986) 31 *Archives de philosophie du droit* 85.

3 As above.

attracts as much suspicion, even disdain, as the African regional system'.⁴ The African apparatus and the machinery for the protection of human and peoples' rights thus are rarely analysed and assessed on their own merits, but always in a comparative approach, with models considered as representations of an ideal to be achieved.⁵ Of course, such comparison might be deemed unfair, considering that the African Charter was drafted to take account of the unique African culture and legal philosophy and, hence, was directed towards addressing particular African needs and concerns.⁶ It seems to me, therefore, that while this approach may be satisfactory from a theoretical point of view for the designation of an ideal framework for the protection of human rights, it may lack operational interest in that it refuses to take into account the philosophy of the architecture put in place. Before making suggestions on how to improve the system, one should first make sure that it exists and, second, identify the springs on which it is built.

A system has been defined as a set of which the elements do not aggregate at random but constitute an 'order' in that they are linked to one another and to the set itself by such links that one cannot consider one of these elements isolated from its surroundings without analysing it falsely.⁷ Based on this definition by Combacau, Olinga proposes four elements indicating that we are dealing with a regional system of human rights protection: a normative statement of the material rights to be guaranteed; an institutional architecture specially dedicated to the protection of norms at the regional level; a coherent articulation of the normative elements between them and the elements of the institutional framework between them; and the capacity of the institutional framework dedicated to the regional guarantee of rights to act in a controlled dual movement of autonomy and complementarity with the other international mechanisms for guaranteeing rights.⁸ If the first two elements are found in the African human rights protection architecture, that is, a statement of guaranteed rights and the establishment of institutions

4 CA Odinkalu 'The role of case and complaints procedures in the reform of the African regional human rights system' (2001) 1 *African Human Rights Law Journal* 229.

5 See the excellent analysis on that sense of OC Okafor *The African human rights system. Activist forces and international institutions* (2007). See also AB Fall 'La Charte africaine des droits de l'homme et des peuples: entre universalisme et régionalisme' (2009) 2 *Pouvoirs* 77; M Mutua 'The African human rights system. A critical evaluation' prepared for United Nations development Programme, Human Development Report (2000).

6 JC Mubangizi 'Some reflections on recent and current trends in the promotion and protection of human rights in Africa: The pains and the gains' (2006) 6 *African Human Rights Law Journal* 148.

7 Combacau (n 2) 86.

8 Olinga (n 1) 16.

dedicated to the protection, it must, however, be recognised that we are far from a rigorous coherence of the whole, which would make it impossible to remove one piece without seeing the whole edifice crumble.

If one can only ascertain the point of view that 'la Charte africaine constitue aujourd'hui le pilier d'un véritable système régional de protection des droits de la personne',⁹ it must also be admitted that the philosophy and logic of developing a 'system' as defined above was not part of the original intentions of the designers of the African Charter. What we call 'African system', which today goes well beyond the Charter to include other legal instruments both at the continental level and at the level of regional economic communities (RECs), has not been the subject of a particular original elaboration as a system. There has, therefore, been no logic, no initial guideline, no upstream coherence, no rational project to build a system or strategy for the realisation of human and peoples' rights in Africa.¹⁰ Its elaboration and construction have been carried out gradually under the influence of various factors: needs of African peoples; political or democratic changes at the internal level of states; multifaceted pressures from the international environment; Africa's need to be part of the dynamic of the emergence of an international order of civility, of a common heritage of shared values within the community of nations. The result is a twofold phenomenon: on the one hand, significant densification of normative instruments protecting human rights and, on the other hand, diversification of institutional tools (national, regional and continental) responsible for the realisation or preservation of these rights. This exuberance and diversity create a new environment, which creates a need for order, a need for coherence and a better articulation of things in order to be more effective in respecting the dignity of the women and men who live in Africa. If the African Charter was 'the best that could be achieved' at the time, times have changed and today more should and can be achieved.¹¹

It is in this context of the gradual emergence of an African system for the protection of human rights that this reflection is intended to take place. While the contribution builds on existing knowledge and reform ideas, it imagines and proceeds from a 'systemic' thinking about the African human rights framework. Such a 'helicopter view'

9 M Kamto 'Introduction générale' in M Kamto (ed) *La Charte africaine des droits de l'homme et des peuples et le protocole y relatif portant création de la Cour africaine des droits de l'homme. Commentaire article par article* (2011) 2.

10 Olinga (n 1) 14-15.

11 C Heyns 'The African regional human rights system: In need of reform' (2001) 1 *African Human Rights Law Journal* 157.

of the design, interrelations and workings of the framework is long overdue, in view of the struggles and challenges it has been facing.

The basic premise is that the drafters of the African Charter had no intention of laying the foundations of the current complex architecture. If a system has thus undoubtedly emerged, it has not been thought of as such, but rather has developed by fits and starts according to historical circumstances and convolutions. The result, therefore, is this heterogeneous assemblage of institutions and norms that can only be called a system from a finalist perspective, that is, to indicate that the machinery instigated by the African Charter must eventually give rise to a genuine system for the protection and promotion of human rights. It thus is a teleological reading that aims at a systemic understanding of the legal architecture of human rights protection in Africa. The key departure point of the contribution thus is that the African human rights framework needs to be (re) imagined as a system, and reformed in view of advancing the relevance, coherence, efficiency and effectiveness of the framework to promote and protect fundamental rights. My approach, therefore, is a reasoning based on the aims of the system under construction, namely, better protection and promotion of human rights on the continent, in the context of a decentralised legal order.¹²

On this point, it is important to underline the difference between the broader African human and peoples' rights system and the narrower African Charter's machinery for its implementation and enforcement. The emerging African system for the protection and promotion of human and peoples' rights incorporates not only the African Charter and the institutions created by it, but also the numerous legal instruments elaborated to complement the Charter, as well as those which, although not explicitly linked to the Charter, nevertheless are aimed at the protection of human and peoples' rights in Africa, elaborated within the continental regional framework and at the level of the RECs.¹³ As the framework of the present reflection focuses specifically on the institutional architecture,¹⁴ it will reflect on the distribution of tasks and roles within the African structure of human and peoples' rights to ensure at the same time the coherence, efficiency and effectiveness of the system, that is, the capacity of the set-up as a whole to achieve the assigned objective

12 On the virtues and interest of such an approach, see JY Chérot 'Le droit dans un ordre juridique faiblement ordonné. Le cas de l'Union Européenne' in *Le dialogue des juges. Mélanges en l'honneur du Président Bruno Genevois* (2008) 9.

13 See in the same vein Odinkalu (n 4) 226-227.

14 See for general studies on this issue KJ Alter *The new terrain of international law: Courts, politics, rights* (2014); Y Shany *Assessing the effectiveness of international courts* (2014).

satisfactorily by making rational use of the available resources both at continental and regional levels within the RECs. Although national institutions (judiciary, national human rights institutions, and so forth) undoubtedly are part of the institutional architecture of the system, they will not be discussed in this article for reasons of space. It will only highlight here the central and primary role they must have for an effective, efficient and efficient promotion and protection of human dignity in Africa.¹⁵ Indeed, the supranational system is only complementary to the national legal systems. The effectiveness of the African human rights system would be weakened if the provisions relating to the rights and freedoms of individuals are not effectively implemented by national institutions. National institutions remain the essential link for the effective protection of human rights and the only 'secular arm' capable of giving life to the African norm of protection. The RECs and continental bodies must, for that reason, not replace but strengthen the protection of human rights and the effectiveness of protection norms at the national level.

In general, the reform suggested in this article will fall within the framework defined by the African human rights strategy, a guiding framework for collective action by African Union (AU), RECs and member states aimed at strengthening the African human rights system. Part 2 of the article will explore the ways and means of ordering the pluralism induced by the superposition of the different supranational legal orders that constitute the RECs and the continental legal order. To this end, particular emphasis will be placed on the role that judges must play within these different legal orders in order to ensure the coherence of the system. Part 4 will focus on the continental level by examining the division of tasks that needs to be made between the different organs and institutions of the AU in order to both rationalise resources and avoid conflicts of competence. The rationalisation of competences is also addressed in part 5, this time between various so-called technical bodies at the continental level. The suggestion is to implement functional specialisation backed by close cooperation in order to ensure the efficiency of the various mechanisms involved in the promotion and protection of human rights on the African continent. Part 6

15 On the issue, see among others JF Flauss & E Lambert-Abdelgawad (eds) *L'application nationale de la Charte africaine des droits de l'homme et des peuples* (2004); SP Zogo Nkada 'Le nouveau constitutionnalisme africain et la garantie des droits socioculturels des citoyens: cas du Cameroun et du Sénégal' (2012) 4 *Revue Française de Droit Constitutionnel* 1-17; F Viljoen 'Application of the African Charter on Human and Peoples' Rights by domestic courts in Africa' (1999) 43 *Journal of African Law* 1-17; EO Ekhatior 'The impact of the African Charter on Human and Peoples' Rights on domestic law: A case study of Nigeria' (2015) 41 *Commonwealth Law Bulletin* 253-270.

will provide concluding remarks on the desired evolution of the emerging system.

2 The necessary articulation between the continental and regional levels: Order pluralism

There is a close relationship between any integration process and human rights: The integration process is a vehicle for the expansion and vector of achievement of human rights, and human rights are a vehicle for regulating the process integration. It undoubtedly is in consideration of this reality that the constitutive acts of practically all the RECs in Africa stipulate their endorsement and attachment to the rule of law and human rights, in general, and to the African Charter, in particular. Indeed, human rights are a common basis for integration processes in Africa.¹⁶ Almost all the constitutive texts of REC organisations incorporate the African Charter as a pillar of community law, and among the fundamental principles guiding the achievement of the community's objectives.¹⁷

Parallel to this integration into the community law of the African Charter as a pillar of the economic integration process, the state parties to the African RECs link economic integration to the existence of a jurisdictional body, undoubtedly inspired by the European model. The institutional architecture of almost all these organisations includes a jurisdictional body as a guarantor of the respect of the legal order deriving from the normative corpus defined by the community. Since human rights and the African Charter are part of this corpus, these jurisdictional bodies have competence, affirmed or implied, in matters of human rights and the application of African norms relating to them.¹⁸ The Economic Community of West African States (ECOWAS) Court of Justice recalled this in 2008:¹⁹

In stating in art 4(g) of the Revised Treaty that ECOWAS Member States declare their adherence to the principles of 'recognition promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights', the

¹⁶ See F Viljoen *International human rights in Africa* (2012) 481-484.

¹⁷ See, eg, art 6(e) of the Common Market for Eastern and Southern Africa (COMESA) Treaty; art 6 of the Treaty establishing the East African Community (EAC); art 1 of the Protocol on Democracy and Governance of the Economic Community of West African States (ECOWAS).

¹⁸ A Koagne Zouapet 'Les instances judiciaires du système africain de protection et de promotion des droits de l'homme' in Olinga (n 1) 128-131. See also ST Eboerah 'Litigating human rights before sub-regional courts in Africa: Prospects and challenges' (2009) 17 *African Journal of International and Comparative Law* 79-101.

¹⁹ *Hadijatou Mani Koraou v The Republic of Niger* ECW/CCJ/JUD/06/08 (ECOWAS Court 2008).

Community legislature simply wanted to integrate this instrument into the law applicable before the ECOWAS Court of Justice.

Indeed, even though the envisaged human rights are yet to be conferred on the East African Court of Justice (EACJ), this Court had engaged in a creative judicial practice to adjudicate on matters touching on human rights.²⁰ In the case of the *Democratic Party*, the EACJ explicitly held that it has jurisdiction to interpret the African Charter in the context of the EAC Treaty. According to the EACJ Appellate Division, articles 6(d) and 7(2) of the Treaty endow the Court to apply the provisions of the African Charter, the Vienna Convention, or any other applicable international instrument, to guarantee the partner states' adherence to the provisions of the Treaty, and provisions of other international instruments to which the Treaty refers. The role of the Court is to determine the partner states' adherence to, observance of, and/or compliance with the Treaty provisions as well as the provisions of any other international instruments incorporated in the Treaty, whether directly as in article 6(d), or indirectly as in article 7(2).²¹

The advantage and benefit of granting such powers to the jurisdictions of the RECs cannot be disputed. Ebobrah has made this clear:²²

From the angle of implementation, proximity between states and the possible spill-over effect of conflicts resulting from disregard for human rights provide some motivation for collective implementation of human rights at the sub-regional level. Further, the economic and cultural ties between states in the same sub-region amplify the chances of sanctions for failure to comply with decisions of supervisory bodies commonly established. Similarly, the 'mobilisation of shame' as a tool for implementation is stronger at the sub-regional level where closer political ties exist as against the global system from which states are 'separated by vast geographical and psychological divides' ... Other

20 See among others *James Katabazi & 21 Others v Secretary General of the East African Community and the Attorney General of the Republic of Uganda* (2007); *Honourable Sitenda Sibal v the Secretary General of the EAC, Attorney General of Uganda, Honourable Sam Njumba, and the Electoral Commission of Uganda* (2011); *Plaxeda Rugumba v Secretary General of the EAC and Attorney General of Rwanda* (2012); *Independent Medico Legal Unit v Attorney General of Kenya* (2013); *Omar Awadh & Six Others v Attorney General of Kenya and Attorney General of Uganda* (2013). See the analysis of ST Ebobrah 'Human rights developments in African sub-regional economic communities during 2011' (2012) 12 *African Human Rights Law Journal* 223-253 230-238; MT Taye 'The role of the East African Court of Justice in the advancement of human rights: Reflections on the creation and practice of the Court' (2019) 25 *African Journal of International and Comparative Law* 359-377.

21 *Democratic Party v The Secretary General of the East African Community, The Attorney General of the Republic of Uganda, The Attorney General of the Republic of Kenya, The Attorney General of the Republic of Rwanda and The Attorney General of the Republic of Burundi* [2015] Appeal 1 of 2014.

22 Ebobrah (n 20) 87.

reasons that justify resort to sub-regional courts for the protection of human rights include the comparative cost advantages as compared to the use of African regional mechanisms and the UN mechanisms. Sub-regional courts are closer to applicants in the given sub-region and therefore it is relatively cheaper to access these institutions. It can also be argued that litigation before sub-regional courts is bound to be quicker than litigation at the regional and global level ... Finally, it could be argued that the flexibility of sub-regional courts with respect to their sittings allows indigent and other challenged applicants to enjoy the possibility of accessing the courts as the courts are able to move to different locations within the sub-region.

On the other hand, it should be noted that nothing prohibits the African Court on Human and Peoples' Rights (African Court) from interpreting or applying RECs' human rights instrument such as the ECOWAS Protocol on democracy and governance. Indeed, this instrument makes a clear interdependence link between democracy and human rights, in particular by prescribing respect for human rights and the jurisdictional sanction of human rights.²³ It thus is in line with the African Charter on Democracy, Elections and Governance (African Democracy Charter) and the Resolution of the United Nations (UN) General Assembly on the rule of law at the national and international levels.²⁴ Besides, following article 3(1) of the Ouagadougou Protocol establishing the African Court, the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application not only of the Charter or the Protocol itself but also 'any other relevant human rights instrument ratified by the states concerned'. The African Court, therefore, has jurisdiction to apply any legal instrument to which the state in dispute is a party if, in the Court's opinion, it is a relevant instrument for the protection of human rights, beyond the particular denomination of that instrument. Thus, there is nothing to prevent a litigant before the African Court, as long as the latter has jurisdiction *ratione personae*, from invoking both the African Charter and any legal instrument of a REC, as long as that instrument expressly enshrines human rights.

While there is no doubt that the multiplication of jurisdictional bodies is an asset for the protection of human rights in Africa,²⁵ there also is a real risk of concurrent, divergent or even contradictory

23 Preamble, arts 1 & 32-39 of the Protocol.

24 See Preamble and arts 4, 6, 8 & 10 ACDEG; Resolution adopted by the UN General Assembly on the rule of law at the national and international levels, 6 December 2010, Doc. A/RES/65/32.

25 See A Rachovitsa 'On new "judicial animals": The curious case of an African court with material jurisdiction of a global scope' (2019) 2 *Human Rights Law Review* 255-289.

application and interpretation of the same legal instruments by regional and continental jurisdictions. The cacophony and the danger to the coherence of the system are all the greater in that there is no hierarchy between these different legal orders, and that all of them claim both a certain autonomy and a direct, or even mandatory, effect of their decisions in the internal legal orders of the member states. Beyond the possibility of forum shopping, there is a real risk that the national judge will find himself or herself torn between contradictory solutions indicated by judges from two different economic areas (some states in fact are members of several RECs) or between a community judge and the continental judge. According to Reinold, the absence of an overarching authority almost always produces norm collisions, which in turn undermine legal certainty.²⁶ Therefore, it is necessary to order pluralism, following the now-famous expression of Mireille Delmas-Marty.²⁷

The term 'pluralism' has been used to give an accurate account of the relationship between the legal orders (originally between the internal and community legal orders) taking into account both their independence and their close interweaving. The aim is to describe situations, such as that between the RECs and the continental level in Africa, where non-hierarchical legal orders coexist, but interact with one another without any of the systems denying the independence or normativity of the other; a situation in which the 'network' rather than the hierarchy dominates, and where '*comme on le voit pour les organismes vivants, séparation et intégration des tâches sont coordonnées*'.²⁸ Thus, underlines Brunet, pluralism does not refer to a fixed situation but to a movement of harmonisation of the legal orders tending towards a common law which would not go as far as merging the legal orders. The legal orders are in a relationship of peaceful coexistence: separate, distinct, but linked to one another.²⁹ It is this dynamic of the multiple while remaining one, of diversity within unity, that must guide the construction of the African human rights system.

To achieve this famous *pluralisme ordonné* and to have harmonious system relations, it is necessary both to define the legal framework of the relations between the systems, on the one hand, and, on the other,

26 T Reinold 'When is more more? The proliferation of international courts and their impact on the rule of law in Africa' (2019) 23 *International Journal of Human Rights* 1348.

27 M Delmas-Marty *Le pluralisme ordonné. Les forces imaginantes du droit* (2006) 2.

28 Delmas-Marty (n 27) 29.

29 P Brunet 'Pluralisme des ordres juridique et hiérarchie des normes' in P Brunet & FJ Arena (eds) *Questions contemporaines de théorie analytique du droit* (2011) 54-55.

that the judges adopt an approach and a working methodology in accordance with a system logic: the famous dialogue of the judges.³⁰ On the first aspect, it would undoubtedly be necessary to organise the relations between the various sub-systems of the system under construction, to create an operational synergy in the articulation of the continental and regional levels of the system.³¹ It is unfortunate from this point of view that the Protocol on Relations between the African Economic Community and the RECs³² did not settle possible conflicts of jurisdiction between jurisdictions or divergences in the interpretation of legal norms. At most, article 5 of the said Protocol calls on the RECs to 'take steps to review their treaties to provide an umbilical link to the Community'. This provision could be translated into concrete terms by opening up specific legal remedies to harmonise case law. The first could be the establishment of a mechanism for preliminary references, *renvoi préjudiciel*, enabling regional courts to refer cases to the African Court for interpretation of all or part of a text. Such a procedure has played an important role in the construction of the European legal order. According to the European judge in Luxembourg, this procedure allows in

the special field of judicial cooperation ... which requires the national court and the Court of Justice, both keeping within their respective jurisdiction, and with the aim of ensuring that Community law is applied in a unified manner, to make direct and complementary contributions to the working out of a decision.³³

This preliminary ruling mechanism would thus make it possible for the relationship between the regional courts and the continental court not to be based on a formal or legal mode of subordination since the latter cannot annul the decisions of the former. Moreover, this procedure would also allow regional courts, under certain conditions, to express their dissatisfaction with a previous interpretation or to suggest an interpretation of the text under debate.³⁴ This dialogue is important to stimulate African judicial cooperation, to enable national courts to apply African law correctly, but also to preserve

30 On the issue, see B Bonnet 'Le dialogue des juges, un non concept' in *Les droits de l'homme à la croisée des droits. Mélanges en l'honneur de Frédéric Sudre* (2018) 81-88.

31 It should be recalled here that as the present reflection only deals with institutional dynamics, I will not address the issue of normative inflation, which also needs to be rationalised as part of the development of a coherent system. On this issue, see Olinga (n 1) 23-26; Ebobrah (n 20) 93-94.

32 Protocol on Relations Between the African Economic Community and the Regional Economic Communities, 25 February 1998.

33 Case 16/65 Schwarze [1965] ECLI:EU:C:1965:117.

34 See S Adam, B Cheynel & F Rolin 'La Cour de justice, acteur multifonctionnel du développement du droit économique de l'Union' (2015) 29 *Revue internationale de droit économique* 513-532. On a critical examination of the issue, see in particular SJ Priso-Essawe 'Un dialogue préjudiciel entre juridictions régionales africaines' in *Les droits de l'homme à la croisée des droits* (n 30) 613-623.

the effectiveness and uniformity of human rights law throughout the continent.

The second possibility would be the establishment of a possibility of requesting an advisory opinion, on the model of Protocol 16 to the European Convention on Human Rights,³⁵ open not only to national courts of African states but also to regional courts. Of course, article 4(1) of the Ouagadougou Protocol establishing the African Court on Human and Peoples' Rights (African Court Protocol) opens the possibility for organisations 'recognised' by the AU) to request the Court's opinion. However, this formulation poses at least two problems.³⁶ On the one hand, it is questionable whether it covers organisations 'not recognised' by the AU as part of the African Economic Community (as the Economic and Monetary Community of Central Africa (CEMAC), West African Economic and Monetary Union (WAEMU)) or technical organisations such as the Organisation for the Harmonisation of Business Law in Africa (OHADA) or the African Intellectual Property Organisation (OAPI). On the other hand, by simply referring to recognised organisations, the provision leaves unclear whether the Community Court may put the question directly to the Arusha judge, or whether it must first go through a mechanism of 'endorsement' of its question by the executive of the Community. This may give rise to some difficulties. That is why I believe it is necessary, in the context of building a coherent African human rights system, to open up this possibility explicitly and clearly to national courts, and all African supranational courts.

To circumvent any reluctance on the part of national and regional courts to use these new legal remedies (references for preliminary rulings and requests for advisory opinions) the continental court could be endowed with a self-referral capacity, an 'appeal in the interest of the law' as found in some legal orders.³⁷ Such self-referral, which should remain exceptional and subject to strict conditions, should enable the continental judge to put an end to the misinterpretation or misapplication of a text or its case law by national supreme courts

35 Protocol 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms. The Protocol allows the highest courts and tribunals of a high contracting party, as specified by the latter, to request the European Court of Human Rights to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.

36 See AP van der Mei 'The advisory jurisdiction of the African Court on Human and Peoples' Rights' (2005) 5 *African Human Rights Law Journal* 27.

37 Such recourse is found in countries with a civilist tradition. The framework for this remedy is developed by French case law. See *Ministre de l'intérieur* [1823] S. 1822-1824. 2. 185; *Ministère de la santé publique et de la population* [1954] Lebon 593; *Ministre d'Etat chargé des DOM-TOM c. Barnabé* [1969] Lebon 143 (Conseil d'Etat).

and regional courts. As a means of 'pure law', the purpose of the appeal in the interest of the law is to allow the final decision not to be considered as a precedent and not to be taken into account in future cases. Given the purpose of this remedy, the sanction for irregularity must remain purely doctrinal and should not in any way influence the situation of the parties to the initial proceedings: The aim is not to transform the continental judge into a judge of cassation of the decisions of regional and national courts, but to enable him to ensure consistency in the interpretation of the standards of the African human rights system. The establishment of such a legal remedy requires the institution within the Court of a kind of public prosecutor's office, a general principle of law preventing a court from seizing itself. The institution of a public prosecutor's office should naturally be imposed within the future African Court of Justice, Human and Peoples' Rights: The latter should initiate prosecutions at least before the chamber in charge of the repression of international crimes. In the meantime, and in the absence of a public prosecutor's office, this 'appeal in the interest of the law' could be devolved to the African Commission.

In addition to these textual reforms and the development of a legal framework conducive to a better articulation between the jurisdictional bodies of the African system, the coherence of the latter depends first of all on the attitude of judges. Like national judges, regional and continental judges must be aware of their membership of this system and the need to preserve the coherence of the whole and the synergy of action of its components. It is a question of overcoming the natural tendency of each legal order to assert itself as sovereign and, in the case of relations between systems, superior to the other.³⁸ Harmonisation, or at least consistency, of legal orders, consists of choices of values, and only judges can carry out this task. As has been pointed out, any application of a text (the judge's primary function) requires interpretation. The choice of a method of interpretation is not dictated by reason but by the aim that one wishes to achieve: Methods of interpretation are not dictated by the texts that judges must apply but by the norms they wish to derive from them; they serve to justify their interpretative choices. To order the pluralism of the African system, the judges (national, community and continental) must adopt a systemic interpretation of the texts.

38 Brunet (n 9) 56; Combacau (n 2) 94. For a critique of the practice of some judges on this point, see A Koagne Zouapet 'L'activisme judiciaire des juridictions supranationales en Afrique. Un essai de systématisation' (2020) 28 *African Journal of International Law* 23.

This should place these institutions in a position to anticipate and respond to unwarranted forum shopping.³⁹ This requires the judges of the RECs to adopt as far as possible, for the interpretation of community texts, and even though no text obliges them to do so, an interpretation in line with that given by the continental jurisdiction of the African Charter and other texts of the African system. In concrete terms, this means choosing the meaning of the text subordinate to the attribution of its purpose, that is, the coherence of the system.

For the REC judge, and of course also for the national judge, this means acculturation in the sense of Bonnet: a transport of ideas resulting from the contact between different and autonomous legal orders with their own logic that can lead to major cultural changes.⁴⁰ This 'acculturation' takes place in four stages. First, the stage of knowledge: The judge must consider the existence of the other legal system. Next, the acceptance stage, that is, the identification of another order that is autonomous, that is different but that will interact with its own legal order; this corresponds, for the judge, to the idea of accepting the notion of interpenetration and integration, the idea that its own legal order can evolve as a result of influences from the other legal order. The third stage is that of understanding the other legal order, which requires not only taking an interest in it but also undertaking an analysis of that order, the norms that stem from it, its own logic to understand that order, the rules that it generates and the impact that it may have on its own legal order. The fourth and last stage is appropriation. Once the other legal system has been identified, its rules understood and mastered, as well as their effects on its integrated legal system, the judge can appropriate these rules and mobilise them autonomously and participate himself or herself in the construction of the rules that are integrated into his or her legal system: he or she becomes an actor of the other legal system, which is also his or her own.⁴¹

This 'acculturation' operation not only concerns national and community judges, but also the continental judge. The latter must be aware that 'legal traditions and the language of law differ across Africa',⁴² and to ensure that its interpretation and application of the law does not, in fact, result in subordinating certain cultural values to others, and in the disappearance of cultural differences. The continental court must then not ignore the lack of a formal hierarchy between the legal orders and must recognise the power

39 See Viljoen (n 16) 451-456.

40 Bonnet (n 30) 87.

41 As above.

42 Viljoen (n 16) 462.

of the community and national courts to suggest an interpretation of the common rules and to adapt these rules to national law using consistent interpretation. Indeed, the dialogue between judges imposes the acceptance by each judge of the identity and singularity of the guarantee of fundamental rights in each legal order while maintaining the coherence of the system. It is a mutual dialogue between judges that induces mutual respect for the fundamental features of their respective legal orders and institutional systems.⁴³ A similar approach should also be observed among AU organs and institutions.

3 End the operational bottleneck at the continental level

If the issue of human rights was little addressed in the framework of the Organisation of African Unity (OAU), mainly because of the youthfulness of African states focused on the consolidation of their national unity and the nature of the regimes,⁴⁴ it has been integrated as a central issue, a pillar of pan-Africanism in the framework of the AU. Contrasting sharply with the OAU Charter, the AU Constitutive Act provides extensively for human rights in its Preamble, objectives and founding principles. One of the objectives of the AU is the promotion and protection of human and peoples' rights under the African Charter. Six of the 16 guiding principles of the AU refer to human rights either implicitly or explicitly. Article 4(h) of the Constitutive Act enshrines the organisation's commitment to human rights by recognizing the right of the AU to intervene in the event of war crimes, genocide or crimes against humanity in a member state, following a decision of the Assembly of Heads of State and Government.⁴⁵ To reflect this commitment, the AU and its member states have assigned to several organs of the organisation, an explicit or implicit mandate to promote and protect human rights on the continent.

De facto many political organs of the organisation have a human rights mandate: either that the mandate stems from the Constitutive Act of the AU; either it comes out of the texts governing the functioning of the organs or specific instruments adopted in the

43 See L Potvin-Solis 'Le dialogue entre la Cour européenne des droits de l'homme et la Cour de justice de l'union Européenne dans la garantie des droits fondamentaux' in *Les droits de l'homme à la croisée des droits* (n 30) 591-602.

44 See K M'Baye *Les droits de l'homme en Afrique* (2002) 301-302 71-86; Viljoen (n 16) 156-163; F Ouguerouz 'Organisation panafricaine et la question des droits de l'homme: un regard rétrospectif' (2013-2014) 20 *African Yearbook of International Law* 25.

45 See Viljoen (n 16) 164-169.

field of human rights. Indeed, all actors in the African governance architecture (AGA) have a direct or indirect human rights mandate.⁴⁶ The actors of the AGA system are organised in concentric circles: the first level being constituted by institutional actors with a formal governance mandate; the second integrating the main African institutions mandated in the sectoral areas of governance.

The first circle includes the African Union Commission; the African Court; the African Commission; the Pan-African Parliament (PAP); the African Peer Review Mechanism (APRM); the Economic, Social and Cultural Council (ECOSOC); the African Union Advisory Board on Corruption (AUABC); the regional economic communities (RECs); the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee); the Peace and Security Council of the AU (PSC); the Permanent Representatives' Committee of the African Union (PRC); the African Development Bank (AfDB); and any other future or mandated organ by the AU Commission to promote governance, democracy and human rights. The second circle includes the United Nations Economic Commission for Africa (ECA); the African Institute for Economic Development and Planning (IDEP); the African Institute of Governance (AIG); the United Cities and Local Governments of Africa (UCLGA); the United Nations Programme for the Development/Regional Office for Africa (UNDP/ARO); and the Council for the Development of Social Science Research in Africa (CODESRIA).

Through this breakdown of competencies, there is a kind of inter-organic transversality of human rights within the AU. To build a coherent and efficient African human rights system, the mandates of these bodies in the field of human rights and international humanitarian law must be brought into line with one another to make this transversality more readable, effective and efficient in its deployment.

The first orientation is to avoid as much as possible the multiplication of institutional mechanisms and to make optimal and efficient use of existing mechanisms. As proposed by Olinga, a distinction can be made between political institutions, administrative and strictly operational institutions and institutions of a technical nature with judicial or quasi-judicial competence. This would make it possible to avoid, for example, entrusting technical tasks to political-administrative or essentially operational institutions. A

⁴⁶ For a detailed discussion of the human rights competences of some of these bodies, see Viljoen (n 16) 169-204.

counter-example of a practice to be banned is that of article 37 of the Charter for the Cultural Renaissance of Africa, which entrusts the interpretation of the Charter to the Conference of the Heads of State and Government of the AU. Similarly, one may legitimately question the maintenance of the role conferred on the Assembly of Heads of State and Government in cases of serious violations (article 58(1) of the African Charter) after the establishment of the African Court. This role should be removed from this political organ and entrusted exclusively to the African Court and the African Commission working together. Conversely, tasks with a political or diplomatic connotation should not be entrusted to mechanisms with a technical vocation. Thus, the mission of promoting human rights entrusted to technical bodies must be carried out in such a way as not to encroach on the general policy domain of political bodies, or the domain of normative production of states. Broadly speaking, one could have political and administrative mechanisms intervening upstream of the technical mechanisms (for the production of norms) and downstream (for the implementation of technical decisions or defined programmes of action), the technical mechanisms (in particular the courts) being responsible for interpreting and assessing compliance with the principles and rules.⁴⁷

The second orientation would be a clear division of tasks between the organs. The political organs must retain their current powers of general orientation, adoption of norms, general coordination of African human rights policy, operational decision making, follow-up to the decisions of the technical organs, and sanction. The technical bodies should deal with the normative development that will be submitted to the political bodies for adoption, and jurisdictional control/sanction of obligations in the African system according to the scheme proposed below (see point 5 below). It would be useful from this point of view to introduce into the system a principle of subsidiarity, making it possible to distribute institutional roles according to the capacity to carry them out. The search for coherence necessitates, for example, defining clearly the different levels of intervention and the different mandates: production of norms, promotion, protection, monitoring, implementation of rights, up to the possible exercise of the right of intervention enshrined in the AU Constitutive Act. Another key to the distribution of competences could be the distinction between normal and emergencies, peaceful situations and situations of conflict or violence. Whatever the case may be, the same body should not cumulate too many functions

47 Olinga (n 1) 29-30; M Hébié 'L'exécution des décisions de la Cour africaine des droits de l'homme et des peuples' (2017) 121 *Revue Générale de Droit International Public* 689-726 722-724.

at the same time, or perform potentially contradictory functions in their deployment.⁴⁸

Better articulation between the organs also requires the implementation of cooperation frameworks: Existing provisions requiring synergy of action between organs must be effectively implemented and their operational framework clearly defined. The following are some examples: article 58 of the African Charter on the report of the African Commission to the Assembly of Heads of State and Government in case of systematic violations; article 19 of the Protocol Establishing the Peace and Security Council on close cooperation between the PSC and the African Commission; article 8(3) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) on information sharing between the AU Commission and the African Commission; article 45 of the African Democracy Charter on relations between the AU Commission, the African Commission and the African Court of Justice, Human and Peoples' Rights; articles 46(4) and (5) and 57 of the Sharm-El-Sheik Protocol as amended by the Malabo Protocol on the relationship between the AU Assembly and the African Court of Justice and Human Rights. Currently absent from the collaboration framework, the African Peer Review Mechanism (APRM) must be included in the institutional architecture of the AU by defining its articulation with the other institutions of the African human rights system in particular.

Established within the framework of the New Partnership for Africa's Development (NEPAD), the APRM is a mechanism for evaluating the actions undertaken by African states in four areas of intervention: democracy and political governance; economic governance; corporate governance; and socio-economic development. Whether it concerns political and economic governance or socio-economic development, the assessment includes questions concerning participation in and implementation of international and regional instruments for the promotion and protection of human rights.⁴⁹ One can see the similarity with the reports submitted to the African Commission and the duplication of efforts by states on certain points. However, for the moment, there is a lack of articulation between the APRM and the other mechanisms of the system which would, for example, have allowed an exchange of information between institutions and the saving of resources. It is, therefore, formally and explicitly appropriate, in the interests of rationalisation and coherence

48 See Olinga (n 1) 30-31.

49 H Kembo Takam Gatsing *Le système africain de protection des droits de l'homme. Un système en quête de cohérence* (2014) 111; Mubangizi (n 6) 152-153.

of the system, to establish such a framework for cooperation. It has been suggested that, on the model of the Universal Periodic Review (UPR) mechanism, APRM should take into account the results of the work of other institutions as a basis for its intervention without having to carry out a new evaluation on the same issues.⁵⁰

However, this division of tasks, the articulation of competencies can only produce results if, alongside the technical bodies, the political bodies play their role to the full, and cease to be a trade union defending the vicissitudes of each of its members, and take to heart the true and effective protection of the dignity of the human person in Africa. As Viljoen decried, the Executive Council and other inter-state organs such as the PRC, has increasingly adopted an obstructionist stance particularly towards the African Commission, or in monitoring the implementation of the decisions of the African Court.⁵¹ In this regard, African states and AU organs should bear in mind the resolutely humanist and protective vision of human rights, which they have placed at the heart of the African integration project and the development of their countries. To that end, they must, in particular, provide the technical organs for the promotion and protection of human rights with the necessary means to carry out the missions they have entrusted to them.

4 A specification of the competences of the technical bodies at the regional level: More complementarity and less competition

The African Commission, the main, if not the only, institution for the promotion and protection of human rights in the architecture originally set up by the African Charter, has gradually seen new institutions emerge alongside it, in parallel with the normative development of a system under construction, without necessarily the creating states having ensured that the mandates and missions of all these institutions are consistent. In addition to the African Commission, the African system now includes an African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) created by the eponymous Convention of 11 July 1990, and an African Court on Human and Peoples' Rights (African Court) created by the Ouagadougou Protocol of 9 June 1998. The latter

50 Kembo Takam Gatsing (n 49) 111.

51 Viljoen (n 16) 564. See also RI Maikassou *La Commission africaine des droits de l'homme et des peuples. Un organe de contrôle au service de la Charte africaine* (2013) 233-246 256-270; Review of the African Union *Building a more relevant African Union*, AU (2017) 15-16 32; Heyns (n 11) 163.

will itself be replaced, after numerous reforms, by the African Court of Justice, Human and Peoples' Rights, when the Sharm El-Sheikh Protocol of 1 July 2008, itself amended by the Malabo Protocol of 27 June 2014, enters into force.⁵² Although complementarity has been established as a principle organising the relations between these institutions, the articulation between them remains unclear and many grey areas remain, with real risks of competition, for example, concerning the interpretation of the African Charter, or advisory jurisdiction.⁵³ Effective complementarity, therefore, should be organised and ensured by removing the risks of competition and avoiding duplication of effort. To achieve this, my proposals are based on two axes.

First, the rationalisation of the organs to take into account the scarcity of the AU's resources. As several authors have pointed out, it does not seem necessary to maintain the African Children's Committee next to the African Commission.⁵⁴ My proposal, therefore, is to abolish the former so that the African Commission inherits all its functions in the logic of rationalisation of the organs of the AU:

The proliferation of STAs (specialised technical agencies) requires the AU to develop principles to determine their creation, adoption and funding. STAs that are ineffective and overlap other institutions on the continent should be dissolved. Those that work on similar themes should merge, align their priorities and improve collaboration with AUC departments.⁵⁵

Second, to ensure a functional specialisation already underlined above for the political organs: to entrust specific tasks to the organ that is best suited to fulfil the purposes assigned to the mission. This specialisation also requires, for efficiency, avoiding mixing promotion and protection tasks, while thus preserving the original logic, specific to the African system from its beginnings.⁵⁶ As Kéba M'Baye stated, the promotion of human rights is any action tending to encourage

52 See A Koagne Zouapet 'L'Union Africaine à la recherche de son introuvable juridiction' in L Zang & G Mvelle (eds) *L'Union Africaine quinze ans après* (2017) 279-298.

53 See ST Ebobrah 'Towards a positive application of complementarity in the African human rights system: Issues of functions and relations' (2011) 22 *European Journal of International Law* 663-688; SSZ Yerima 'La Cour et la Commission africaines des droits de l'homme et des peuples: noces constructives ou cohabitation ombrageuse?' (2017) 1 *Annuaire Africain des Droits de l'Homme* 357-385; CVN Kemkeng 'Les complémentarités interinstitutionnelles dans le système africain de protection des droits de l'homme' in Olinga (n 1) 281-310.

54 Ebobrah (n 53) 672; Kembo Takam Gatsing (n 49) 52-53 108-109.

55 Review of the African Union (n 51) 31.

56 S Doumbé-Billé 'La Juridictionnalisation des droits de l'homme en Afrique: «Much ado about nothing»' in JF Akandji-Kombé (ed) *L'homme dans la société internationale. Mélanges en hommage au professeur Paul Tavernier* (2013) 693-706 697-698.

the development of respect for human rights, while protection, conceived as a remedy, aims to restore order when it is disturbed by an act that violates human rights. While promotion is resolutely forward looking, has a mainly preventive role and attempts to prevent human rights violations, protection is more concerned with what has been or is being done and has a curative purpose.⁵⁷ This distinction does not call into question the interdependence between these two essential functions of any human rights system. Consequently, any attempt to establish any hierarchy between them, and hence between the Court and the Commission, should be avoided.⁵⁸ To these bodies with a direct technical mandate to protect and promote human rights on the continent, it seems necessary to me to add the African Union Commission on International Law (AUCIL) which will have an essential role to play in ensuring the normative coherence of the African human rights system under construction.

4.1 Extensive promotion with non-judicial protection mandate for the African Commission

The human rights promotion mandate of the African Commission has been classically defined as comprising study functions, information functions, quasi-legislative functions and cooperation functions in the African human rights system.⁵⁹ The idea proposed is to develop these missions by extending them to all the normative instruments relating to the protection of human rights in Africa (including the African Charter on the Rights and Welfare of the Child (African Children's Charter)) and by strengthening its role in the evaluation of state reports and cases of serious and systematic human rights violations on the continent.

As part of its information mission, the African Commission must be a documentation centre for human rights in Africa. It will, therefore, be responsible for collecting, classifying and preserving all information relating to human rights, in general, and the African human and peoples' rights system, in particular. It should thus encourage and support the work of national human rights institutions in popularising African instruments and the system. On this point, the African Commission could be a space for coordination and exchanges between national institutions, for the definition of common policies and actions, as well as a place for sharing experiences. It would

57 M'Baye (n 44) 88-89.

58 A debate in which, unfortunately, scholars have sometimes become bogged down. See Ebobrah (n 53) 681-682; Zime Yérima (n 53) 369-372.

59 Art 45(1) African Charter.

also remain the forum for African human rights non-governmental organisations (NGOs) to express their views, avoiding any conflict of competence with ECOSOC, of which the field of concern goes beyond the sphere of civil society interested in human rights.

It is the African Commission that should receive the reports of states under the various conventions (centralisation in a single biannual state report for all instruments) and then provide the relevant information to other interested pan-African bodies with its observations where appropriate. This report should also take an assessment of states' compliance with and implementation of the decisions of regional and continental judicial bodies, the implementation of which it should ensure and monitor. It will thus be incumbent upon it to present to the Assembly of Heads of State and Government an annual report on human rights in Africa, summarising all the elements relating to the question and managed by the various African institutions acting in the field of human rights, as well as, where appropriate, country reports according to a pre-established timetable or thematic reports.⁶⁰ It is also up to the African Commission, and not the African Court, as is the current practice, to carry out missions to popularise the Statute of the African Court and encourage its ratification.

As part of its promotional mandate, the African Commission would be responsible for carrying out studies and research directly or by competent persons on issues relating to the African human rights system. The current practice of working groups and committees within the Commission, comprising external experts in addition to the members of the Commission, should be continued.⁶¹ It could also support research programmes in African universities and training institutes, organise or support the organisation of competitions, mock court competitions, create prizes (especially for the media), award distinctions in the field of human rights in Africa.⁶² It would also be incumbent on the Commission to support the initial training of African judges and lawyers on the African system by assisting states in the design of training programmes and then in continuing training through regular seminars. Similarly, it should participate in and support dialogue between the various judges by facilitating the circulation of jurisprudence and organising the annual judicial dialogue.

Article 45(1) of the African Charter gives the African Commission competence 'to formulate and lay down principles and rules aimed

60 Olinga (n 1) 30.

61 See Viljoen (n 16) 377-378.

62 M'Baye (n 44) 258.

at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislations'. Based on this quasi-legislative power, the Commission has elaborated numerous resolutions, directives and guidelines that have enriched and complemented the African Charter.⁶³ It should retain this competence and continue to adopt such instruments and propose model laws based on studies carried out, debates with civil society and national human rights institutions and drawing on the jurisprudence of regional and continental courts. Similarly, it should not hesitate to suggest ideas for conventions or codification in the field of human rights to the AUCIL (see below). The Commission's task must in particular, in that domain, consist to discipline the process of production of African human rights norms: examination of any new normative project; opinion on the appropriateness of its adoption with regard to the existing law; appropriate articulation with the existing instruments.

The African Commission should also continue to carry out protection activities outside the judicial field. While recognising the importance of jurisdictional protection for the effectiveness of the African Charter, one should not lose sight of the importance of non-jurisdictional modes in advancing the cause of human rights so far in Africa. Thus, it should continue to be the operational framework for conciliation and amicable dispute settlement between states for human rights disputes, following article 52 of the African Charter. This conciliation mission should be explicitly extended to disputes between individuals and states when victims request such a procedure and provided that case is not related to serious and systematic violations.⁶⁴ This presupposes *a contrario* to withdraw such a possibility from the African Court, as currently provided for in article 9 of the Ouagadougou Protocol. It seems difficult to me to reconcile such competence with the judicial function of the Court. While the Court may in some cases suggest a friendly settlement in the interests of justice, it is not its role to provide a framework or conduct such a process. This could call into question the neutrality and impartiality of those who, frustrated at having invested themselves in an unsuccessful negotiation or conciliation that they thought was the appropriate solution, must then decide the dispute in law. In both the European and the Inter-American systems, such attempts of any amicable settlement have been undertaken by the relevant commissions.⁶⁵

63 See M Mubiala *Le système régional africain de protection des droits de l'homme* (2005) 63-68.

64 See art 109 of the Rules of Procedure of the African Commission.

65 Ebobrah (n 53) 680.

In its current functioning, in addition to undertaking promotional visits, members of the African Commission also undertake missions in response to specific allegations of human rights violations. These missions may be termed ‘on-site investigative’, ‘protective’, ‘fact-finding’ or ‘high-level missions’.⁶⁶ This practice needs to be institutionalised and organised. It should be automatic in the case of allegations of serious and systematic violations of human rights in a state, with no possibility for that state to evade and oppose it. Indeed, one of the reasons why these missions have been little used in practice by the Commission is the need for the prior consent of the state concerned. In line with the logic that underpinned the inclusion of a right of intervention in the Constitutive Act of the AU, the African system should be able to prevent or rapidly halt potential serious violations of human dignity in Africa, by conducting *in situ* visits or fact-finding missions, and to be able, if necessary, to refer the matter to the Court or another political body (PSC, for example) for appropriate action.

4.2 To the Court, an exclusive mandate of judicial protection at the continental level

The birth of the African Court has been hailed by practitioners, researchers and NGOs alike as a significant step forward in the protection of the human person on the continent and the efficiency of the African human and peoples’ rights system.⁶⁷ It undoubtedly marks a willingness on the part of African states to ensure more effective sanctioning of violations of human dignity in Africa.

After coming close to being a stillborn judicial body, the African Court now is a judicial body in suspension or in transit. The Ouagadougou Protocol creating the Court had just been signed, and even before the Court was set up, African states decided to make the African Court a ‘stillborn’ by merging it with the Court of Justice of the African Union.⁶⁸ On 27 June 2014 an amendment to the Maputo Protocol gave life to the African Court of Justice and Human and Peoples’ Rights (ACJHPR), which thus replaced the African Court of Justice and Human Rights still in gestation. The new court will be required to exercise, in an unprecedented way in international law,

66 Viljoen (n 16) 344; G Baricako ‘La mise en œuvre des décisions de la Commission africaine des droits de l’homme et des peuples par les autorités nationales’ in Flauss & Lambert-Abdelgawad (n 15) 213-216.

67 M’Baye (n 44) 188-189; Koagne Zouapet (n 25) 118; Kembo Takam (n 49) 53-56.

68 Protocol of 1 July 2008 on the Statute of the African Court of Justice and Human Rights adopted in Sharm El-Sheikh.

a heterogeneous range of judicial powers: It will have to be at the same time a classic court for the settlement of inter-state disputes, an international administrative court, a human rights court and an international criminal court, in addition to other powers that may be conferred on it by the regional economic communities and international organisations recognised by the AU.⁶⁹

Much has already been said and written about the broad competencies enjoyed by the current continental jurisdiction both in terms of applicable instruments and powers.⁷⁰ Thus, the African Court is the one of the three regional systems that have the greatest freedom to order all appropriate measures it deems necessary to remedy a violation.⁷¹ An additional advantage that comes with adjudication before the Court is the wider scope of instruments applicable before it. As already noted, article 7 of the Ouagadougou Protocol allows the Court to apply not only the African Charter but also any human rights instrument to which the relevant state is a party. This should thus enable the Court to fill any possible normative gaps in the Charter and enable the efficient protection of human rights on the continent. It is, therefore, a question of ensuring that these advances will not be lost with the institutional developments of the continental jurisdiction. It must always be able to indicate the most appropriate measure for the cessation and reparation of the violations found, and the application of all relevant instruments to the case in question. It should be stressed that the exclusive jurisdiction of the African Court at issue here is an exclusive jurisdiction at the continental level. On the one hand, this means that it does not deprive the courts of the RECs of their human rights jurisdiction where applicable. On the other hand, this exclusivity at the continental level is the logical consequence of what has been suggested above: to remove from the African Commission all quasi-judicial competence, to put an end to the existence of the African Children's Committee, and to remove the competence to interpret the texts attributed in certain instruments to the political organs of the AU.

To ensure exclusive continental jurisdiction of the African Court (whatever its name and structure) for the judicial protection of human rights, the interpretation of the African Charter and other

69 Art 3 of the Malabo Protocol amending the African Court of Justice and Human Rights.

70 See AK Diop 'La Cour africaine des droits de l'homme et des peuples ou le miroir sthénéhalien du système africain de protection des droits de l'homme' (2014) 55 *Les Cahiers de droit* 529-555.

71 Art 27(2) African Court Protocol. See by way of comparison art 41 of the European Convention on Human Rights and art 63(1) of the American Convention on Human Rights.

continental human rights protection instruments requires ensuring the universality of the said jurisdiction. On the one hand, it is necessary to ensure that all African states are parties to the instrument establishing the Court, and, on the other hand, that individuals have access to it. On the first point, accession to the Statute of the continental jurisdiction should be made automatic for any state that is a party to the AU. The Statute of the Court should be made an integral part of the Constitutive Act of the AU, on the model of what exists between the International Court of Justice (ICJ) and the UN,⁷² with the specificity that, unlike the ICJ, an AU member state would not have to later consent to the jurisdiction of the continental jurisdiction. The latter would be automatic as soon as a state is a member state of the AU. The alternative, more flexible solution would be to link the Court's jurisdiction instead to the African Charter. Any state party to the Charter would have to accept the jurisdiction of the Court. The danger of such an option is the risk of denunciation of the Charter by those states reluctant to accept any jurisdictional settlement related to human rights. This is why the first solution seems to me more favourable given both the AU's proclaimed attachment to the ideals of human rights and the greater difficulty that African states would have in leaving the pan-African organisation.

On the second point, the lock that article 34(6) of the Ouagadougou Protocol has so far constituted should be broken. This paragraph makes the Court's jurisdiction *ratione personae* to receive complaints by individuals and NGOs against a state subject to a prior declaration by that state recognising such jurisdiction. This approach dilutes the effectiveness of the continental judicial system and is contrary to the provisions on access to justice in several international human rights instruments, including the African Charter. Such a restriction indeed is a limitation to the protection of human rights in that it limits access to the African Court to those most likely to bring to light the most flagrant violations of human rights. To avoid any clogging of the continental jurisdiction, the complementarity mechanism with national and regional jurisdictions as mentioned above should first be made effective and, second, a filter of complaints should be put in place to reject, after a summary examination, manifestly inadmissible complaints or those for which the Court manifestly is incompetent. My proposal is to establish within the African Court, present or future, one or more chambers composed of three judges each, to play this role.

⁷² See arts 92 & 93 of the Charter of the United Nations.

In this perspective, the African Court will have to develop a jurisprudential policy in harmony with this approach and the system's logic of complementarity: 'The Court can act neither as a forum of first instance nor as the mandatory court of appeal for all cases.'⁷³ The ability of the pan-African jurisdiction to impose itself in the legal landscape will thus depend on its capacity not only to apply the law but also to educate states. It is, therefore, necessary for the Court to engage in a fruitful debate with African states to put an end to the current movement of mistrust manifested by an increased withdrawal of declarations under article 34(6) of the Ouagadougou Protocol.⁷⁴ As Reinold wrote,

[i]nternational courts are 'fragile creatures' whose survival critically depends on their ability to cultivate their legitimacy by striking a middle ground between asserting their autonomy from political interference on the one hand, and anticipating sensitive political implications of their rulings on the other hand, thus avoiding highly contentious cases in early stages of their existence.⁷⁵

4.3 A clear role for the African Union Commission on international law

The African Union Commission on International Law (AUCIL) is an advisory body of the AU whose main objective, on the model of the United Nations International Law Commission, is to carry out activities relating to the progressive development and codification of international law on the continent. According to articles 5 and 6 of its Statute, the AUCIL shall identify and prepare draft legal instruments, conduct studies on subjects not yet regulated by the African human rights system or sufficiently developed through state practice. Similarly, it should be able to formulate precisely and systematise the rules deemed necessary for better protection of human rights based on the concordant practice of states, the jurisprudence of the African system, as well as doctrinal opinions on the improvement of the system.

With the support of the African Commission, the AUCIL should make an exhaustive inventory of existing conventions in the field of human rights at both regional and continental levels and analyse

⁷³ Mutua (n 4) 32.

⁷⁴ See A Koagne Zouapet "'Victim of its commitment ... You, passerby, a tear to the proclaimed virtue": Should the epitaph of the African Court on Human and Peoples' Rights be prepared?' *EJILTalk* (2020), <https://www.ejiltalk.org/victim-of-its-commitment-you-passerby-a-tear-to-the-proclaimed-virtue-should-the-epitaph-of-the-african-court-on-human-and-peoples-rights-be-prepared/> (accessed 20 June 2021).

⁷⁵ Reinold (n 26) 1345.

their various interactions. This approach will make it possible to give clarity to the normative dynamics of the system under construction, and to propose, if not provide, a logical explanation for the choices made; or at least to make the different normative initiatives taken at each level of the African human rights system coherent.⁷⁶ The AUCIL should then be the laboratory for the maturation of norms with a view to their adoption, and an observatory of the changes that may govern the revision of the adopted norms. The Commission should thus substantially support the African Commission on two main points: the preparation of model national laws for the implementation of ratified treaties, taking into account the legal tradition of member states; and cooperation with universities, institutions and other educational and research centres as well as with bar associations and other associations of lawyers to encouraging the teaching, study and dissemination of African human rights law.

5 Concluding remarks: The birth of a system, between Darwinism and Sfumato

The keywords for the existence of a system are known: interaction, articulation, synergy, coherence. On these criteria, it is difficult to affirm the existence of an African system of human and peoples' rights. As has rightly been noted, the endeavour to realise the dignity of the human person living in Africa has been carried out, by force of circumstance and at the whim of political and international circumstances, in a piecemeal, opportunistic and relatively fragmented manner. The interactions between the various secret norms and the various institutional mechanisms have not always been defined in such a way as to allow for systemic readability, in particular through the avoidance of mandate overturning and conflicts of competencies.⁷⁷ The logic that has hitherto guided the African architecture for the promotion and protection of human rights does not, therefore, seem to have been defined in advance in terms of priority actions, but has sought to respond to emergencies as they arise and become objective. This can undoubtedly be seen as system logic: the construction of an architecture that will end up being coherent as a result of slow development and structural constraints. This refers to a kind of 'architectural Darwinism' that will gradually push the institutions of the system, under the unstoppable pressure of social contingencies, to adapt or disappear. Only the most appropriate and efficient elements that meet the needs of

⁷⁶ Kembo Takam (n 49) 74.

⁷⁷ Olinga (n 1) 15.

African societies will then survive to gradually give birth to a coherent African system.

However, this approach seems a little too fatalistic and negative to me. It is possible to build a coherent and effective system more proactively and dynamically by following the key elements indicated above. If the current process of reform and rationalisation within the AU leads to a redefinition of the roles of each actor in a common synergy for the protection of human dignity in Africa, then a real system will emerge. This approach will make it possible to correct the original shortcomings and defects while delicately succeeding in giving the desired shape to the whole. The image that comes to mind is that of *Sfumato*, the painting technique developed by Leonardo da Vinci, the effect of which, obtained by superimposing several extremely delicate layers of paint, gives the contours of the subject an evanescent appearance. Certainly, because of the way it has been gradually constructed, the African system will remain 'unusual', 'strange', 'disconcerting' – but it will also have the charm that its effectiveness and efficiency in the protection of human rights in Africa will confer on it. The Mona Lisa proves it to us every day: Something can at the same time be puzzling, disturbing, mysterious and perfect.