An Optimistic Perspective on the Proliferation of Human Rights Monitoring Bodies in Africa

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1. Introduction

The African Human Rights System was born in the context of the Organisation for African Unity (OAU)[1] – later replaced by the African Union (AU)[2] – when its Member States adopted the African Charter on Human and Peoples' Rights (henceforth: African Charter), namely the instrument that both defines the human rights to be protected and establishes the African Commission on Human and Peoples' Rights (henceforth: African Commission) as the monitoring body.[3]

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[1] In 1963, the African States stipulated the Addis Ababa Charter and created the OAU for purposes of decolonisation, self-determination, economic development, struggle against the apartheid regimes, and settlement of border disputes. The OAU acted according to the principle of non-interference in the domestic affairs of Member States, which at that time was considered dogmatic. As a consequence, the OAU initially rejected the possibility to create a regional human rights system in Africa. As observed in the following paragraph, such perspective changed at the end of the Seventies. For detailed studies about the OAU, see B. BOUTROS-GHALI, *L'Organisation de l'Unité africaine*, Paris, 1969; G. NESI, "O.A.U. (Organisation of African Unity)", in *Digesto delle discipline pubblicistiche*, Torino, 1995, vol. X, p. 218 ff.; G.J. NALDI, *The Organisation of African Unity. An Analysis of Its Role*, London/New York, 1999.

[2] The AU Constitutive Act was signed on 11 July 2000 in Lomé and entered into force on 21 May 2001. Nowadays, all African States are AU Members. Arts. 3 and 4 of the Lomé Act enumerate the aims and principles inspiring the actions of the AU. Contrary to the OAU, the AU attributes great importance to international peace and security, the rule of law, good governance, democracy and human rights. About the AU, it is worth remembering G. MVELLE, *L'Union africaine. Fondements, organes, programmes et actions*, Paris, 2007; A. YUSUF, F. OUGUERGOUZ (eds), *The African Union: Legal and Institutional Framework. A Manual on the Pan-African Organization*, Leiden, 2012; K.D. MAGLIVERAS, G.J. NALDI, *The African Union (AU)*, Alphen aan den Rijn, 2014. On the transition from the OAU to the AU, see J.D. RECHNER, "From the OAU to the AU: A Normative Shift with Implications for Peacekeeping and Conflict Management, or Just a Name Change?", in *Vanderbilt Journal of Transnational Law* 2006, p. 543 ff.

[3] The African Charter was adopted during the Eighteenth OAU Assembly of Heads of State and Government, which took place in Nairobi on 27 June 1981. The African Charter entered into force on 21 October 1986. At present, almost all African States have ratified the African Charter, the only exception being the Kingdom of Morocco. The latter has never ratified the African Charter as a protest against the participation of the Arab Saharawi Democratic Republic in this treaty. However, on 31 January 2017, Morocco entered the AU. It means that Morocco will probably ratify the African Charter soon. For a comment, see A. ILLUECA, S. KITHARIDIS, "The Impact of Mo-

However, the African Commission is not the only monitoring body any longer. At a continental level, the African Court on Human and Peoples' Rights (henceforth: African Court) now flanks the African Commission, while at a sub-regional level some jurisdictional organs belonging to the African Sub-Regional Economic Communities have progressively extended their competence to the disputes concerning the interpretation and implementation of the African Charter.

Some problems are supposed to arise from the coexistence of so many human rights monitoring bodies in Africa, in absence of coordination. On the one hand, the relevant provisions included in the African Court Protocol and in the procedural rules of both the African Commission and the African Court govern the relationship between these two continental bodies. On the other, as illustrated in the following pages, there are no provisions coordinating them with the sub-regional jurisdictional organs. Indeed, the effective need to regulate the coexistence of the continental and the sub-regional monitoring bodies mostly depends on the assessment of the general judicial landscape where they are situated, namely the proliferation of international tribunals.[4] In this paper, my aim is to contribute to demonstrating that, if you look at the proliferation of international tribunals as a positive phenomenon, the said need decreases or disappears.

First of all, I will set the scene with an overview of the African Charter. Then, I will introduce the continental human rights monitoring bodies, namely the African Commission and the African Court. Thereafter, I will focus on the development of the human rights competence of the three most representative sub-regional jurisdictional organs: the Tribunal of the Southern African Development Community (SADC), the Court of Justice of the East African Community (EAC) and the Court of Justice of the Economic Community of Western African States (ECOWAS). After ascertaining the lack of provisions governing the relationships between the continental and the sub-regional human rights monitoring bodies, the next pages will be dedicated to the search for coordination among those bodies and to the solutions suggested by the main legal scholars. The last paragraph will then scrutinise the effective need of such coordination in light of an optimistic perspective on the general phenomenon of proliferation of international tribunals.

rocco's Admission to the African Union on the Dispute over the Western Sahara", in *Opinio Juris*, 10 March 2017, available at www.opiniojuris.org.

[4] The proliferation of international tribunals is connected to the fragmentation of international law. Many scholars have examined both topics. Even the UN International Law Commission charged a Study Group, chaired by Marti Koskenniemi, to analyse in depth the problems arising from the fragmentation of international law and thus from the proliferation of international tribunals: see *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, Finalised by Martti Koskenniemi*, UN Doc. A/CN.4/L.682, 13 April 2006. For an insightful comment on the just mentioned report see B. CONFORTI, "Unité et fragmentation du droit international: 'glissez, mortels, n'appuyez pas!'", in *Revue générale de droit international public* 2007, p. 5 ff. For references to the most important bibliography about the proliferation of international tribunals, see the authors mentioned in paras. 5-7 of this essay.

2. The African Charter as the Main Human Rights Treaty in Africa

The African Charter plays an important role at the background of the proliferation of human rights monitoring bodies in Africa. As a matter of fact, the African Charter is the reference point for these bodies, since it contains the catalogue of the 'fundamental' human rights to be guaranteed at a regional level.[5] Therefore, it is worth having a glance at this treaty.

The African Charter was being negotiated when a new human rights awareness appeared in the International Community.[6] In Africa, the culmination of continental decolonisation and the collapse of the most oppressive regimes amplified such awareness.[7] Furthermore, the 'young' African States were looking for a sort of legitimacy in the international arena. Nonetheless, that does not entirely explain the sudden proposal to stipulate a regional human rights treaty, emerged in 1979 and soon implemented. It is not a mere historical coincidence that during the administration of President Jimmy Carter (1977-1981) the US linked their development cooperation policy to human rights.[8] In the same period, the European Communities adopted a similar strategy concerning ACP (African, Caribbean and Pacific) Countries. Then, in the Eighties, the European Institutions discussed the possibility to definitively correlate the European development cooperation policy with human rights, democracy and the rule of law through a conditionality clause added in the development agreements stipulated with the ACP Countries.[9] Such situation plausibly persuaded many African States to rapidly

[5] Beyond the African Charter, other human rights treaties have been adopted in Africa. They do not have a general scope but deal with specific rights or vulnerable groups. See G. PASCALE, *La tutela internazionale dei diritti dell'uomo nel continente africano*, Napoli, 2017, p. 83 ff.

[6] During the second half of the Seventies, the signing of the Helsinki Final Act (1975) and the entry into force of the two UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (1976) created a general *consensus* about the importance of human rights in interstate relations. Then, at a regional level, it is worth remembering the entry into force of the American Convention on Human Rights (1978).

[7] The Portuguese Colonial Empire was the last one still alive in Africa in the Seventies. After its collapse, Angola, Guinea Bissau, Mozambique and Sao Tomé and Principe were born. The oppressive regimes I am referring to are those of Idi Amin Dada in Uganda, Jean Bedel Bokassa in the Central African Empire and Macias Nguéma in Equatorial Guinea.

[8] In other words, the US required the African States to respect human rights in return for the aids received. See S.B. COHEN, "Conditioning U.S. Security Assistance on Human Rights Practices", in *American Journal of International Law* 1982, p. 246 ff., and H. HARTMANN, "US Human Rights Policy under Carter and Reagan, 1977-1981", in *Human Rights Quarterly* 2001, p. 402 ff.

[9] Indeed, such debate arose after that, in 1977-1979, the European Communities had suspended the development aids previously granted to Uganda because of its responsibility for gross human rights violations and had declared in the aftermath that the same policy would be applied in the future in similar circumstances. For general overviews, see J. RIDEAU, "Le rôle de l'Union européenne en matière de protection de droits de l'homme", in *Recueil des cours de l'Academie de*

stipulate and ratify the African Charter. In so doing, the African States continued to receive development aids by the European Communities, the UN, the US and some NGOs. Hence, it is now clear that they stipulated the African Charter above all to safeguard their interests, that is to say to make themselves sure of the continuity of the donations coming from abroad. As a consequence, the new human rights awareness only had a complementary function in the birth of the African human rights system.

The catalogue of human rights contained in the first chapter of the African Charter gives further evidence of the protection accorded by the African States to their own interests. Such catalogue is innovative in so far as it fulfils a sort of 'culturalisation' of human rights and confers great importance upon African traditional values.[10] However, not only the individuals, but above all the African States benefit from that. For instance, many of them interpret Art. 4 of the African Charter, proclaiming the right to life, as admitting the application of the death penalty according to African traditional legal culture.[11] Then, the African Charter does not enshrine some human rights, like the parity between men and women as well as the liberty to change religion, in order to protect the religious values of the Northern Islamic States, qualified as cultural values.[12] Moreover, the provi-

droit international de l'Haye 1997, vol. 265, p. 9 ff., p. 380 ff.; B. SIMMA, J.B. ASCHENBRENNER, C. SCHULTE, "Human Rights Considerations in the Development Cooperation Activities of the EC", in *The EU and Human Rights*, P. ALSTON (ed.), Oxford, 1999, p. 571 ff.; E. FIERRO, *The EU's Approach to Human Rights Conditionality in Practice*, The Hague/London/New York, 2003, p. 41 ff.; A.P. PILLITU, *La tutela dei diritti dell'uomo e dei principî democratici nelle relazioni della Comunità e dell'Unione europea con gli Stati ACP*, Torino, 2003, p. 50 ff.; L. BARTELS, *Human Rights Conditionality in the EU's International Agreements*, Oxford, 2005, pp. 1-2, 7-15; D. D'HOLLANDER, A. MARX, J. WOUTERS, "Integrating Human Rights in EU Development Policy: Achievements and Challenges", in *European Yearbook on Human Rights* 2014, vol. XIV, p. 255 ff.

[10] In the fourth paragraph of the preamble to the African Charter, the African States underline the virtues of their historical tradition and the values of African civilisation, which inspire their concept of human rights. Thus R. ORRÙ, "Il sistema regionale africano dei diritti: prolegomeni a una vicenda evolutiva nel segno della complessità multilivello", in *Diritto costituzionale transazionale*, L. MEZZETTI, C. PIZZOLO (a cura di), Bologna, 2013, p. 193 ff., p. 207, writes that the African Charter 'venerates' the African traditional culture. About the same topic, see more extensively F. LENZERINI, "The African System for the Protection of Human and Peoples' Rights: Pan-Africanism, Solidarity and Rights", in *Law, Politics and Rights. Essays in Memory of Kader Asmal*, T. MALUWA (ed.), Leiden/Boston, 2014, p. 13 ff., mainly pp. 31-33. For insightful studies on the general phenomenon of the 'culturalisation' of international human rights law, see M. IOVANE, "The Universality of Human Rights and the International Protection of Cultural Diversity: Some Theoretical and Practical Considerations", in *International Journal of Minority and Group Rights* 2007, p. 231 ff., and F. LENZERINI, *The Culturalization of Human Rights Law*, Oxford, 2014.

[11] Indeed, Art. 4 states that no one may be *arbitrarily* deprived of life. The death penalty is applicable in many African States: see A.K. ABEBE, "Abdication of Responsibility or Justifiable Fear of Illegitimacy – The Death Penalty, Gay Rights and the Role of Public Opinion in Judicial Determinations in Africa", in *American Journal of Comparative Law* 2012, p. 603 ff., p. 613 ff.

[12] For comments, see R.M.K. KOUDÉ, "La liberté de religion et les garanties de protection dans le système africain des droits de l'homme et des peuples", in *Revue trimestrielle des droits de*

sions dedicated to the social and cultural rights 'oblige' the African States to protect the 'primacy' of the traditional values at stake.[13] Eventually, the African Charter contributes to proving that the 'culturalisation' of human rights reaches ambiguous outcomes when it is implemented in precarious contexts and if it is brought beyond certain limits.[14]

Again, the catalogue of human rights included in the African Charter is innovative, as it jointly proclaims civil and political rights (first generation of human rights) and economic, social and cultural rights (second generation of human rights).[15] Furthermore, such catalogue recognises the social importance of peoples' in Africa and includes even peoples' rights (third generation of human rights). Indeed, in the African human rights discourse the community is indispensable for the individual, so the former prevails over the latter. As a result, individuals can enjoy their human rights only if peoples' rights are respected and implemented.[16]

Anyway, in the African Charter a definition of the notion of 'peoples' is missing.[17] The African States take advantage from such omission. First of all, the en-

l'homme 2014, p. 819 ff., who underlines that the protection of the religious values was useful to promote the ratification of the African Charter by the African Islamic Countries.

[13] For instance, Art. 17 provides that individuals shall benefit from the right to education (para. 1) and take part in the cultural life of their community (para. 2), but then it adds that States Parties have the duty to promote and protect the traditional values (para. 3). Similarly, according to Art. 18, the State shall take care of the physical and moral health of the family (para. 1), but then it shall assist the family as it is the custodian of traditional values (para. 2).

[14] For in-depth analysis, see M. BENCHIKH, "Sous-dévelopment et spécificité culturelle dans la justification de l'État autoritaire", in *Annuaire de l'Afrique du Nord*, vol. XXXII, 1995, p. 51 ff., and ID., "Souveraineté des États, droits de peuples à l'auto-détermination et droits humains", in *L'homme dans la société internationale. Mélanges en hommage au Professeur Paul Tavernier*, J.F. AKANDJI-KOMBÉ (sous la direction de), Bruxelles, 2013, p. 3 ff.

[15] It is known that, with very limited exceptions, both the European Convention on Human Rights and the American Convention on Human Rights do not proclaim economic, social and cultural rights. Two *ad hoc* treaties (respectively, the European Social Charter, adopted in 1961 and reformed in 1996, and the San Salvador Protocol, adopted in 1988) enshrine the second generation of human rights and institute the pertaining monitoring organs.

[16] See the fifth paragraph of the preamble to the African Charter. Also see J. SUMMERS, *Peoples and International Law*, Leiden, 2013, p. 368 ff., and A. YUSUF, "The Progressive Development of Peoples' Rights in the African Charter and in the Case Law of the African Commission on Human and Peoples' Rights", in *International Law for Common Goods. Normative Perspectives on Human Rights, Culture and Nature*, F. LENZERINI, A. F. VRDOLJAK (eds), Oxford/Portland, 2014, p. 41 ff., mainly pp. 41-42.

[17] The African Commission confirmed that the African States deliberately avoided to clarify the notion of 'peoples' in the African Charter because of the tragic history of racial and ethnic bigotry demonstrated by the dominant groups during the colonial and apartheid rule: see *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v. The Sudan*, Communications no. 279/03 and 296/05, Report of 29 May 2009, paras. 221-222. So, as observed by F. OUGUERGOUZ, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, The Hague, 2003, p. 211, the term 'peoples', as used in the African Charter, is a 'chameleon-like term' that varies in nature according to the right it refers to.

forcement of peoples' rights is not possible if the ultimate beneficiaries of such rights are not exactly known. What is more, the African States could interpret peoples' rights in order to justify some isolated human rights violations, otherwise contrasting with the African Charter. Some scholars have tried to give a definition of the notion of 'peoples' in the African Charter.[18] The African Commission has intervened in the question too.[19] In particular, in the report issued in the case *Legal Resources Foundation*, it asserted that peoples are human groups made up of individuals with the same social and cultural features, such as common ancestry, ethnic origin, language or cultural habits.[20] However, this definition does not correspond to the one emerging from the periodic reports that the African States send to the African Commission according to Art. 62 of the African Charter.[21] As a matter of fact, many African States identify the 'peoples' with their whole national population.[22] The main consequence is that the ultimate beneficiaries of peoples' rights, namely the whole national populations, overlap the entities which have to implement peoples' rights, namely the States.

Even the structural frame of the African Charter discloses the intention of the African States to safeguard their own interests. Suffice it to have a look at the rules dealing with the exclusion, suspension and limitation of the effects of the human rights to be protected. Firstly, the African States appended a very scarce

[18] See S. K.N. BLAY, "Changing African Perspectives on the Right to Self-Determination in the Wake of the Banjul Charter on Human and Peoples' Rights", in *Journal of African Law* 1985, p. 147 ff., pp. 158-159; R.N. KIWANUKA, "The Meaning of 'People' in the African Charter on Human and Peoples' Rights", in *American Journal of International Law* 1988, p. 80 ff., p. 97; M. MUBIALA, *Le système régional africain de protection des droits de l'homme*, Bruxelles, 2005, p. 36; S.A. DERSSO, "The Jurisprudence of the African Commission on Human and Peoples' Rights with Respect to Peoples' Rights", in *African Human Rights Law Journal* 2006, p. 358 ff., p. 362; A. YUSUF, "The Progressive Development", cit., pp. 45-46.

[19] See *Congrès du Peuple Katangais v. Zaïre*, Communication no. 75/1992, Report of 22 March 1995, paras. 3-6; *Malawi Africa Association, Amnesty International, Sarr Diop, Union Interafricaine des Droits de l'Homme et RADDH, Collectif des Veuves et Ayants-Droit, Association Mauritanienne des Droits de l'Homme v. Mauritanie*, Communications no. 54/91, 61/91, 96/93, 98/93, 164/97, 196/97 and 210/98, Report of 11 May 2000, paras. 140-142; *Kevin Mgwanga Gunme and Others v. Cameroon*, Communication no. 266/03, Report of 27 May 2009, para. 179; *Centre for Minority Rights Development and Minority Rights Group (on Behalf of Endorois Welfare Council) v. Kenya*, Communication no. 276/03, Report of 29 November 2009, para. 162.

[20] See *Legal Resources Foundation v. Zambia*, Communication no. 211/1998, Report of 7 May 2001, para. 73. Such interpretation is consistent with the UNESCO Declaration *New Reflections on the Concept of Peoples' Rights*, elaborated during the International Meeting of Experts on Peoples' Rights, held in Paris in November 1989, available in *Human Rights Law Journal* 1990, pp. 446-447.

[21] Art. 62 of the African Charter provides that every two years the States Parties shall submit a report on the measures taken to give effect to the African Charter in their domestic orders.

[22] See the first Report of South Africa, 1998, pp. 88-89; the first Report of Burkina Faso, 2003, p. 68; the fourth-ninth Reports of Tunisia, 2006, p. 106; the first-fourth Reports of Ethiopia, 2008, pp. 120-123; the third Report of Nigeria, 2008, p. 80; the ninth-tenth Reports of Rwanda, 2009, p. 63; the second Report of Burundi, 2010, p. 48; the fourth-fifth Reports of The Sudan, 2012, pp. 50-51. All the reports are available at the website of the African Commission, www.achpr.org.

number of reservations to the African Charter.[23] Secondly, they did not incorporate a derogation clause to be invoked in emergency situations in the African Charter.[24] In this regard, the African Commission clearly declared that «[t]he African Charter, unlike other human rights instruments, does not allow for States Parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter».[25] All that does not entail that the African States can never exclude or suspend the effects of the human rights enshrined in the African Charter. They can apply the many claw-back clauses disseminated in the African Charter. In principle, a claw-back clause should only regulate the limitation of the domestic effects of the specific human right it is referred to.[26] However, due to their broad formulation,[27] the claw-back clauses contained in the African Charter also allow the African States to reach very similar consequences to those deriving from the application of a reservation or a derogation clause.

3. The Continental Human Rights Monitoring Bodies

[23] Only Egypt, South Africa and Zambia appended reservations to the African Charter. These reservations can be read at the website of the African Commission.

[24] A derogation clause is present in the main human rights treaties: see Art. 15 of the European Convention on Human Rights, Art. 27 of the American Convention on Human Rights and Art. 4 of the UN Covenant on Civil and Political Rights. On the absence of a similar clause in the African Charter, see M. DIOP, "The African Charter on Human and Peoples' Rights and the Inviolability of the Fundamental Rights", in *Droit intangibles et états d'exception*, D. PRÉMONT, C. STENERSEN, C. OSEREDCZUK (sous la direction de), Bruxelles, 1996, p. 421 ff., and L. SERMET, "The Absence of a Derogation Clause from the African Charter on Human and Peoples' Rights. A Critical Discussion", in *African Human Rights Law Journal* 2007, p. 142 ff.

[25] See *Commission Nationale des Droits de l'Homme et des Libertés v. Tchad*, Communication no. 74/92, Report of 11 October 1995, para. 21. The Commission confirmed such position in many following reports. Indeed, the absence of a derogation clause in the African Charter gives another example of the attempt of the African States to defend their own interests. In a nutshell, since a derogation clause is missing in the African Charter, in circumstances of public emergency the African States are free to act without any condition, even suspending the core rights codified in the African Charter. For specifications, see G. PASCALE, *La tutela internazionale*, cit., p. 118 ff.

[26] The distinction between the derogation clause and the claw-back clauses is highlighted by R. HIGGINS, "Derogations under Human Rights Treaties", in *British Yearbook of International Law* 1976-1977, vol. XLVIII, p. 281 ff. Also see I. VIARENGO, "Deroghe e restrizioni alla tutela dei diritti umani nei sistemi internazionali di garanzia", in *Rivista di diritto internazionale* 2005, p. 955 ff.

[27] Examples of the broad formulation of the claw-back clauses in the African Charter are given by Art. 6, which protects the right to liberty and personal security «except for reasons and conditions previously laid down by law», and by Art. 9, para. 2, which provides that individuals shall have the right to express and disseminate their opinions «within the law». According to M. HANSUNGULE, "The African Charter on Human and Peoples' Rights", in *The African Union: Legal and Institutional Framework*, cit., p. 417 ff., p. 424, these claw-back clauses are so broad as to leave nothing but a 'mere skeleton' of the right to be protected.

In order to focus on the proliferation of human rights monitoring bodies in Africa and on the effective need of coordination among them, it is necessary to preliminary dwell on the general peculiarities of such bodies. To this end, the current paragraph is dedicated to the continental human rights bodies, while the following will deal with the sub-regional human rights bodies.

The human rights monitoring mechanism created in Africa at a continental level draws inspiration from that previously operating in the European Human Rights System and from that still existing in the Inter-American Human Rights System. It is made up of an international 'quasi-jurisdictional' organ, the African Commission,[28] and an international jurisdictional organ, the African Court.

The second part of the African Charter directly deals with the African Commission, which took office in 1987 and consists of eleven members, who shall act in their personal capacity. The African Commission examines the periodical reports submitted by the States Parties to the African Charter about the domestic implementation of human rights. It also receives communications from States, individuals and NGOs denouncing any alleged violation of the African Charter.

The African Court has been created with the Protocol adopted in Ouagadougou in 1998 and come into force in 2004.[29] It is composed of eleven judges, exercises a human rights action which is complementary to that of the African Commission, and may adopt judgments and binding decisions. A new Protocol, adopted in Sharm el-Sheik in 2008, shall merge the African Court with the AU Court of Justice.[30]

3.1. The African Commission

The ultimate aim of every human rights system is the enjoyment of human rights by human beings. In order to correctly and properly achieve such ultimate aim, the

[28] On the qualification of the African Commission as a 'quasi-jurisdictional' organ, see G.J. NALDI, "The African Union and the Regional Human Rights System", in *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2006*, M. EVANS, R. MURRAY (eds), Cambridge/New York, 2008, p. 20 ff., p. 35; M. KAMARA, "La promotion et la protection des droits fondamentaux dans le cadre de la Charte africaine des droits de l'homme et des peoples et du Protocole facultative additionnel de juin 1998", in *Revue trimestrielle des droits de l'homme* 2005, p. 709 ff., p. 713; L. PINESCHI, "Diritti umani (protezione internazionale dei)", in *Enciclopedia del diritto – Annali* 2012, vol. V, Milano, p. 558 ff., p. 593.

[29] The Protocol has been currently ratified by thirty AU Member States and signed by fifty-two out of fifty-five (Cape Verde, Eritrea and Morocco have never signed).

[30] The aim of the Sharm el-Sheikh Protocol would be to create a unique African Court of Justice and Human Rights made up of two Sections: the first one competent for AU general affairs and the second one in charge of human rights issues. Another Amendment Protocol, adopted in Malabo in 2014, shall further extend the competence of the merged African Court inasmuch as it adds a third Section mandated to deal with international criminal law. At present, the Sharm el-Sheikh Protocol has received only six ratifications (Benin, Burkina Faso, Congo-Brazzaville, Liberia, Libya and Mali), a number which is far from the fifteen requested for its entry into force. So, it is very unlikely that the Sharm el-Sheikh Protocol and the Malabo Amendment Protocol will enter into force soon. For more information, see G. PASCALE, *La tutela internazionale*, cit., chapter 4.

States should be ready to correctly and properly enforce each act delivered by the monitoring bodies created thereto. That is not the case of the African States with respect to the acts of the African Commission. It is not by chance that the African Commission is described as «a toothless bulldog that barks but cannot bite».[31]

This metaphor is appropriate above all as concerns the outcomes of the communications that individuals and NGOs bring before the African Commission.[32] Indeed, if the African Commission finds a human rights violation, it can only issue a non-binding report addressing recommendations to the responsible State. Furthermore, the reports of the African Commission are confidential, since their publication is to be authorised by the AU Conference, namely by all the African States including the State allegedly responsible.[33] In addition, a weak mechanism supervises the domestic implementation of such reports.[34] Similar problems affect the orders for provisional measures delivered by the African Commission.[35] As a consequence, the African States maintain a certain freedom with regard to the enforcement of the acts of the African Commission relating to individual communications. In general terms, the more intrusive these acts are, the less willing to implement them the affected States are.[36]

[31] See N.J. UDOMBANA, "Towards the African Court on Human and Peoples' Rights: Better Late Than Never", in *Yale Human Rights & Development Law Journal* 2000, p. 45 ff., p. 64.

[32] Contrary to the European Court on Human Rights, the African Commission requires no coincidence between the author of the communication and the victim of the alleged violation. That encourages NGOs to file communications. See C.A. ODINKALU, C. CHRISTENSEN, "The African Commission on Human and Peoples' Rights: The Development of Its Non-State Communication Procedures", in *Human Rights Quarterly* 1998, p. 235 ff., and I. ÖSTERDAHL, *Implementing Human Rights in Africa. The African Commission on Human and Peoples' Rights and Individual Communications*, Uppsala, 2002, pp. 95 ff.

[33] About the reports following the individual communications, see I. ÖSTERDAHL, *Implementing Human Rights*, cit., p. 131 ff.; G. BEKKER, "The African Commission on Human and Peoples' Rights and Remedies for Human Rights Violations", in *Human Rights Law Review* 2013, p. 499 ff.; R. MURRAY, "Decisions by the African Commission on Individual Communications under the African Charter on Human and Peoples' Rights", in *International & Comparative Law Quarterly* 2007, p. 412 ff.; F. VILJOEN, L. LOUW, "The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation", in *Journal of African Law* 2004, p. 1 ff.

[34] According to Art. 112 of its procedural rules, the African Commission may invite the concerned State to submit information on the measures taken in response to a recommendation. If the African Commission ascertains that its recommendation has not been eventually implemented, it shall draw the attention of the AU Sub-Committee on the Implementation of AU decisions. However, the Sub-Committee has never been instituted.

[35] With regard to the orders for provisional measures of the African Commission, see G.J. NALDI, "Interim Measures of Protection in the African System for the Protection of Human and Peoples' Rights", in *African Human Rights Law Journal* 2002, 1 ff.; J.F. FLAUSS, "Notule sur les mesures provisoires devant la Commission africaine des droits de l'homme et des peoples", in *Revue trimestrielle des droits de l'homme* 2003, p. 923 ff.; A. SACCUCCI, *Le misure provvisorie nella protezione internazionale dei diritti umani*, Torino, 2006, pp. 64-72.

[36] On the problems arising from the domestic implementation of the recommendations of the African Commission, see R. MURRAY, D. LONG, *The Implementation of the Findings of the African Commission on Human and Peoples' Rights*, Cambridge, 2015. Also see G.M. WACHIRA, A. AYINLA,

The African Commission can also receive interstate communications.[37] As a matter of principle, each State Party to the African Charter should have a general interest to bring a communication against another State Party that has allegedly committed human rights violations. However, the African States do not usually care about that.[38] Only four interstate communications have been introduced as of yet, and only one has been eventually examined by the African Commission. Moreover, in that case the claimant did not bring the communication because of the general interest to protect human rights, but in order to defend its territorial sovereignty and its nationals, namely its own interests.[39]

Two further elements make the weakness of the African Commission even more evident. Firstly, many African States do not duly comply with Art. 62 of the African Charter, which provides that every two years they must transmit to the African Commission a report concerning the domestic implementation of the African Charter. In particular, the reports often contain unhelpful information, are rarely biannual and do not usually abide by the procedural rules.[40] Secondly, the African States do not approve the practice of the African Commission to deliver country-specific resolutions on its own initiative. They have often objected through official statements of the AU Conference, although the country-specific resolutions were addressed to States where gross human rights violations had taken place.[41]

"Twenty Years of Elusive Enforcement of the Recommendations of the African Commission on Human and Peoples' Rights: A Possible Remedy", in *African Human Rights Law Journal* 2006, p. 465 ff., and F. VILJOEN, L. LOUW, "State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004", in *American Journal of International Law* 2007, p. 1 ff. Then, see the documents *From Judgment to Justice. Implementing International and Regional Human Rights Decisions* and *From Rights to Remedies. Structures and Strategies for Implementing International Human Rights Decisions*, published respectively in 2010 and in 2013 by Open Society Justice Initiative at www.opensocietyfoundations.org.

[37] According to Arts. 47-49 of the African Charter, each State Party may denounce another State Party for alleged human rights violations and thus institute a communication-negotiation (which entails direct diplomatic contacts between the two States, without any interference from the African Commission) or a communication-complaint (which envisages proceedings before the African Commission). A communication-negotiation has never been submitted as of yet.

[38] Even in the other main human rights systems, the States Parties rarely bring interstate claims: see P. DE SENA, "Diritti dell'uomo", *Dizionario di diritto pubblico*, in S. CASSESE (a cura di), Milano, 2006, vol. III, p. 1868 ff., pp. 1876-1877.

[39] See *Democratic Republic of The Congo v. Burundi, Rwanda and Uganda*, Communication no. 227/99, Report of 29 May 2003.

[40] See G.W. MUGWANYA, "Examination of State Reports by the African Commission: A Critical Appraisal", in *African Human Rights Law Journal* 2001, p. 268 ff., and T.S. BULTO, "Beyond the Promises: Resuscitating the State Reporting Procedure under the African Charter on Human and Peoples' Rights", in *Buffalo Human Rights Law Review* 2006, p. 57 ff. For a more recent and more optimistic view, see L. PINESCHI, *Diritti umani*, cit., p. 593.

[41] The AU Conference objected against a country-specific resolution for the first time during its session held in January 2006. It did not approve the resolutions of the African Commission condemning the human rights violations perpetrated in Eritrea, Ethiopia, The Sudan, Uganda and Zimbabwe. The AU Conference stated that the African Commission should have informed the mentioned States before delivering the resolutions. See decision no. 101, of 24 January 2006, para. 1.

It is now clear that the scarce effectiveness of the action of the African Commission depends on the African States. Even though the African Commission has recently tried to go beyond such limits,[42] it is a matter of fact that the African States do not encourage its action and rarely implement its acts. Should any renewal of the African Commission be supported by the African States, it would be successful. Otherwise, any attempt to duly protect human rights would not go beyond the borders of the African Commission itself.

3.2. The African Court

As an international jurisdictional organ enabled to issue judgments and binding decisions, the African Court should reinforce the continental human rights monitoring mechanism. In particular, it should complement the African Commission. However, between the concrete outcomes of the African Commission and those of the African Court there are actually few differences. In a nutshell, the 'jurisdictionalisation' of the continental monitoring mechanism has not improved the protection of human rights in Africa. In order to give evidence of that, suffice it to refer to the *ratione personae* competence of the African Court and to the domestic implementation of its binding acts.

Art. 5 of the Ouagadougou Protocol governs the *ratione personae* competence of the African Court. The 'filter' claimants (African Commission and States Parties to the Protocol) can turn to the African Court just for cases pertaining to communications already brought before the African Commission. As of yet, only the African Commission itself has deferred three cases to the African Court.[43] The 'direct' claimants (African intergovernmental organisations and States Parties to the Protocol whose nationals have suffered human rights violations perpetrated by other States parties) can act without any limit before the African Court.[44] However, they have never brought a claim so far. The States Parties to

[42] For instance, the African Commission is trying to eliminate the politicisation often featuring its bench. Then, in 2010, it reformed its procedural rules in order to reduce its dependence on the AU Conference. Moreover, even if Art. 58 of the African Charter provides that the African Commission could admit only communications pertaining to serious and massive human rights violations, it examines even cases of isolated violations (for this approach, see *Sir Dawda K. Jawara v. The Gambia*, Communications no. 147/95 and 149/96, Report of 11 May 2000, paras. 41-42).

[43] The African Commission deferred to the African Court the case concerning the human rights violations perpetrated in Libya in 2011. The claim was eventually removed from the register due to the evolution of the situation in Libya (*African Commission on Human and Peoples' Rights v. Socialist Peoples' Libyan Arab Great Jamahirya*, application no. 004/11, decision of 25 March 2013). Then, the African Commission sent to the African Court the cases pertaining to the eviction of the Ogiek indigenous peoples from the Mau Forest in Kenya (*African Commission on Human and Peoples' Rights v. Kenya*, application no. 006/12, judgment of 26 May 2017) and to Saif al-Islam Khadafy, arrested and sentenced to death by an insurrectional Libyan tribunal (*African Commission on Human and Peoples' Rights v. Libya*, application no. 002/13, judgment of 3 June 2016).

[44] The Protocol underlines the difference between the interest of a State Party acting for the general purpose of protecting human rights and the interest of a State Party whose citizens are victims of the violations perpetrated by another State Party. Only the latter can directly bring a claim

the Protocol accept to appear before the African Court whenever involved in an application introduced by both the 'direct' and the 'filter' claimants.

Individuals and NGOs are 'non-direct' claimants. The African Court can examine their claims provided that the involved State has given its authorisation by means of a prior official declaration.[45] Only eight States currently accept the competence of the African Court for such claims.[46] Combined with the social and economic limits which are intrinsic to the African environment, such situation considerably restricts the workload of the Court. Otherwise, individuals and NGOs would have clearly been the most active claimants before the Court. In the end, that seemingly entails that the African States are ready to institute jurisdictional monitoring bodies as long as their interests are not seriously threatened.

With regard to the domestic implementation of the binding acts of the African Court, little information is available. It is true that, so far, the African Court has passed a limited number of judgments as well as of decisions on reparations and orders for provisional measures.[47] In any case, had the African States enforced the acts of the African Court, their interest would have been to communicate that. So, since the African States have not given updates about the follow-up of such acts, it is likely that they have not implemented them as of yet.[48]

Furthermore, according to Art. 29, para. 2, of the Ouagadougou Protocol, the AU Executive Council is in charge of monitoring the domestic implementation of the acts of the African Court. Since the Executive Council is composed of

before the African Court. So, the Protocol acknowledges both the tendency of States not to introduce interstate claims before international organs and the exception concerning the situations when a direct interest is at stake. For insightful and more extensive comments on such topic, see M.I. PAPA, "Protezione diplomatica, diritti umani e obblighi *erga omnes*", in *Rivista di diritto internazionale* 2008, p. 669 ff., mainly p. 697 ff.

[45] Art. 5, para. 3, of the Protocol provides that the African Court may entitle individuals and NGOs to institute cases directly before it only in accordance with the subsequent Art. 34, para. 6. Such provision specifies that, at the time of the ratification of the Protocol or any time thereafter, the States Parties shall make a declaration accepting the competence of the Court to receive cases under Art. 5, para. 3. Otherwise, the Court will not receive any claim coming from individuals or NGOs.

[46] Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Tanzania and Tunisia. Rwanda has recently withdrawn its previous declaration as a protest against the African Court, that is dealing with a case concerning the violations allegedly suffered by the main political opponent to the Rwandese President. See the press release of the Rwandese Ministry of Justice concerning the withdrawal unilateral act of Rwanda, which was transmitted to the President of the African Court on 3 March 2016, available at www.minijust.gov.rw.

[47] To have a complete panorama of all the acts adopted by the African Court so far, see its official website, www.african-court.org.

[48] By way of illustration, Tanzania has never given official information about the implementation of the first judgment passed by the African Court (*Tanganyika Law Society, The Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. Tanzania*, applications no. 009/11 and 011/11, judgment of 14 June 2013). However, in the context of the following procedure concerning the reparations sought by one victim, Tanzania revealed that its laws conflicting with the African Charter have not been nor will be modified (*Reverend Christopher R. Mtikila v. Tanzania*, application no. 011/11, decision of 13 June 2014, para. 23).

States representatives who decide by *consensus*,[49] it is unlikely that it would adopt sanctions against the States (whose representatives also participate in its meetings) that did not enforce the acts of the African Court.

As it is, contrary to the expectations manifested in the preamble to the Ouagadougou Protocol and in some AU acts,[50] the institution of the African Court has proved not to be the best solution to the problems affecting the continental human rights monitoring mechanism. What is more, it is also doubtful that the African States actually pursued the just mentioned goal while creating the Court.[51]

3.3. Complementarity Between the African Commission and the African Court

The African Court and the African Commission pursue similar aims for the most part. Therefore, they must act coherently with each other and avoid any inconsistency that could threaten the protection of human rights in Africa. For this purpose, according to Art. 2 of the Ouagadougou Protocol and to the procedural rules of both the African Commission and the African Court, complementarity shall govern the relationship between the two organs.[52]

Art. 2 of the Ouagadougou Protocol precisely states that «[t]he Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission […] conferred upon it by the African Charter». Hence, complementarity should operate from the former towards the latter. After all, as just observed, the African Court was officially established in order to reinforce the human rights mandate of the African Commission. Then, Art. 5, para. 1, of the Ouagadougou Protocol declares that the 'direct' claimants can turn to the African Court only if pertinent proceedings have already been instituted before the African Commission. Similarly, Art. 5, para. 3, of the Ouagadougou Protocol admits only NGOs with an advisory status before the African Commission to bring a claim before the African Court.

[49] See Arts. 10-13 of the AU Constitutive Act, dedicated to the AU Executive Council.

[50] See the last Paragraph of the preamble to the Ouagadougou Protocol. Also see OAU Assembly, *The Strengthening of the African Commission on Human and Peoples' Rights and the Establishment of an African Court of Human and Peoples' Rights*, Resolution no. 230 of 15 June 1994, para. 4, and OAU Executive Council, *Measures Taken to Implement Resolution AHG/RES. 230 (XXX) Relating to the Strengthening of the African Commission on Human and Peoples' Rights and the Establishment of an African Court of Human and Peoples' Rights*, Resolution no. 1674 of 5 July 1996, para. 4. The OAU organs adopted many similar acts in the years 1994-1998.

[51] For in-depth analysis on this point, see G. PASCALE, *La tutela internazionale*, cit., p. 215 ff., 305 ff. For similar doubts, see M. MUBIALA, *op. cit.*, p. 93.

[52] For a general overview of the relationship between the African Commission and the African Court, see I.A. BADAWI EL-SHEIKH, "The Future Relationship between the African Court and the African Commission", in *African Human Rights Law Journal* 2002, p. 252 ff.; S.T. EBOBRAH, "Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations", in *European Journal of International Law* 2011, p. 663 ff.; M. MALILA, "Promising Siblings: The African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights", in *East African Journal of Peace and Human Rights* 2011, p. 551 ff.

Nevertheless, some other provisions included in the Ouagadougou Protocol and in the procedural rules of both the African Commission and the African Court indicate that the complementarity between the two organs also works in a reverse sense. In other words, sometimes the action of the African Commission can complement that of the African Court. Art. 6, para. 3, of the Ouagadougou Protocol gives the main example. It provides that the African Court may transfer a case to the African Commission at its own discretion.[53] Moreover, the procedural rules of both organs have recently been harmonised in order to promote a sort of mutual complementarity.[54]

Hence, the relationship between the African Commission and African Court can be better described as based on reciprocity. The African Commission and the African Court are autonomous but interdependent organs belonging to the same human rights system.[55] It means that the African Court is not subordinated to the African Commission. It also entails that the former cannot be qualified as an appellate organ, available for the claimants who are unsatisfied with the reports issued by the latter.[56]

4. The African Sub-Regional Jurisdictional Organs and the Extension of their Competence to Human Rights Disputes

The bodies protecting human rights in Africa at a sub-regional level are placed under the general frame of the African Economic Community (AEC), an intergovernmental organisation instituted in 1991 through the Abuja Treaty.[57] The

[53] Art. 6, para. 3, of the Ouagadougou Protocol was applied for the first time when the African Court transferred to the African Commission an individual claim that the former could not examine because it had been brought against a State not accepting the competence of the African Court for individual claims. See *Soufiane Ababou v. Algeria*, application no 002/11, decision of 16 June 2011. In the following period, the African Court continued to transfer to the African Commission similar individual claims, even though the reason was not explicitly specified. In the last years, however, such practice did not find fertile terrain any longer.

[54] According to Arts. 8 and 33 of the Ouagadougou Protocol, the African Court shall cooperate with the African Commission in the definition of its procedural rules. Therefore, the two organs elaborated their new procedural rules, applied since 2010, in the context of a series of joint meetings. Art. 29 of the procedural rules of the African Court is dedicated to the complementarity with the African Commission, while the fourth part of the procedural rules of the African Commission concerns the complementarity with the African Court.

[55] For such qualification, see I. ÖSTERDAHL, "The Jurisdiction *Ratione Materiae* of the African Court on Human and Peoples' Rights: A Comparative Critique", in *Review of the African Commission on Human and Peoples' Rights* 1998, p. 132 ff., p. 133.

[56] For different opinions on the qualification of the African Court as an appellate organ of the African Commission, see I.A. BADAWI EL-SHEIKH, *op. cit.*, p. 254, and A. DEL VECCHIO, *I Tribunali internazionali tra globalizzazione e localismi*, Bari, 2009, p. 146.

[57] Only Djibouti, Eritrea, Madagascar, Morocco, Somalia and South Sudan are not AEC Members. About the AEC, see J. SENGHOR, "The Treaty Establishing the African Economic Community: An Introductory Essay", in *African Yearbook of International Law* 1993, vol. I, p. 183 ff.; K.D. MAGLIVERAS, G.J. NALDI, "The African Economic Community: Emancipation for African States or

AEC should evolve according to a two-step process: firstly, the establishment of the Regional Economic Communities (RECs) as areas of economic and commercial integration at a sub-regional level; secondly, the creation of an economic, commercial and monetary union at a continental level. The first phase is now ongoing, and many RECs have already been established. In particular, eight of them are now considered as the AEC 'pillars'.[58]

Some of the treaties instituting the RECs also create sub-regional jurisdictional organs, while others require the States Parties to stipulate specific protocols to this effect.[59] Initially, the sub-regional jurisdictional organs could not examine human rights disputes, since the *ratione materiae* competence attributed to them exclusively concerned the interpretation and application of their respective RECs treaties. However, these treaties contain some references to the African Charter and to human rights. In addition, all sub-regional jurisdictional organs can (or could) receive individual claims. All that soon gave them the opportunity to autonomously extend their material competence to the field of human rights.[60]

The sub-regional jurisdictional organs began to deal with human rights affairs when the African States declared they would negotiate the African Court Protocol. Then, while the entry into force of the Protocol was facing obstacles, the sub-regional jurisdictional organs strengthened their human rights competence, mainly because of their effortless and simple rules and their geographical proximity to the individual applicants. They maintained such human rights competence even immediately after the establishment of the African Court, in consideration of the abovementioned limits of the African Court.[61]

Yet Another Glorious Failure?", in *North Carolina Journal of International Law and Commercial Regulation* 1999, p. 601 ff.; M.M MBENGE, O. ILLY, "The African Economic Community", in *The African Union: Legal and Institutional Framework*, cit., p. 187 ff.

[58] The eight 'pillars' are connected to the AEC through a Protocol signed in 1998, available in *African Journal of International and Comparative Law* 1998, p. 157 ff. On this topic, see R. FRIMPONG-OPPONG, "The African Union, the African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web", in *African Journal of International and Comparative Law* 2010, p. 92 ff. Many RECs currently deal not only with economic and commercial affairs, but also with military and political cooperation. Moreover, the RECs Members very often overlap, creating a confusing scenario: see M. SHERIFF IDDRISU, *The 'Spaghetti-Bowl' of Africa's Economic Integration. A Critique of the African Union's Rationalisation Process*, Saarbrücken, 2012, and P. PENNETTA, "Brevi note su alcune nuove espressioni del regionalismo africano", in *La Comunità internazionale* 2015, p. 577 ff.

[59] For a general overview of the RECs jurisdictional organs, see the essays collected in *L'evoluzione dei sistemi giurisdizionali regionali e influenze comunitarie*, P. PENNETTA (a cura di), Bari, 2010.

[60] After all, the well-known example of the EU had already clarified the tie between the processes of regional economic integration and the jurisdictional protection of human rights. Nevertheless, it will be seen in the following pages that, while the EU jurisdictional organs can exclusively examine the alleged human rights violations related to EU law, the African sub-regional tribunals developed their human rights competence beyond the legal frame underlying the RECs.

[61] For an overview of the phases concerning the development of the human rights competence of the African sub-regional jurisdictional organs, see L.N. MURUNGI, J. GALLINETTI, "The Role of

The African States reacted in different ways to the increasing human rights activism of the sub-regional jurisdictional organs: nowadays, while some of these organs continue to have competence for human rights disputes, others have experienced a dissimilar fate. In the following pages three examples will shed light on the current outcomes of the activism of the African sub-regional jurisdictional organs in the field of human rights.[62]

4.1 The SADC Tribunal

The SADC Tribunal extended its competence to human rights disputes due to a broad interpretation of the preamble and some provisions of the SADC Treaty.[63] On this basis, in the years before 2010, the SADC Tribunal confronted Zimbabwe about the human rights violations suffered by the white minorities living in the Country. In particular, the family-owned Campbell company denounced Zimbabwe before the SADC Tribunal because of the *Land Acquisition Amendment Act*, passed in order to dispossess the white farmers of their properties, and other alleged human rights violations. The situation culminated when the SADC Tribunal confirmed the responsibility of Zimbabwe in its subsequent judgment.[64]

Sub-Regional Courts in the African Human Rights System", in *International Journal of Human Rights* 2010, p. 119 ff. According to some scholars, that is a symbol of the growing human rights awareness of the African States: see S.T. EBOBRAH, "Litigating Human Rights before Sub-Regional Courts in Africa. Prospects and Challenges", in *African Journal of International and Comparative Law* 2009, p. 79 ff., and L. POLI, "La Corte di giustizia dell'ECOWAS: quali prospettive per un concreto miglioramento della tutela dei diritti umani in Africa?", in *Diritti umani e diritto internazionale* 2014, p. 133 ff. For a different opinion, see L. NATHAN, "The Disbanding of the SADC Tribunal: A Cautionary Tale", in *Human Rights Quarterly* 2013, p. 870 ff., and S. SMIS, "The Protection of Human Rights Through the Courts of Regional Economic Communities in Africa", in *Liberae Cogitationes. Liber Amicorum Marc Bossuyt*, A. ALEN, V. JOOSTEN, R. LEYSEN, W. VERRIJDT (eds), Cambridge, 2013, p. 617 ff., mainly pp. 634-635, both underlining that the African States do not often support the human rights activism of the sub-regional jurisdictional organs.

[62] The three African sub-regional jurisdictional organs whose judicial histories are briefly examined here are also chosen as paradigmatic examples by K.J. ALTER, J.T. GATHII, L.R. HELFER, "Backlash against International Courts in West, East and Southern Africa: Causes and Consequences", in *European Journal of International Law* 2016, p. 293 ff. Such essay was commented by K.O. KUFUOR, C.J. TAMS, E. DE WET, in *EJIL Talk!*, August 2016, available at www.ejiltalk.org.

[63] The SADC Treaty was stipulated in 1992 and amended many times afterwards. Art. 16 of this Treaty requires the States Parties to create a Tribunal. The Protocol instituting the SADC Tribunal was stipulated in 2000 and entered into force in 2001. Then, it has been amended several times. The SADC Tribunal extended its competence to human rights disputes on the basis of Art. 4(c), of the SADC Treaty, providing that «SADC and its Member States shall act in accordance with […] human rights, democracy and the rule of law», and Art. 6, para. 2, stating that «SADC and its Member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture or disability». All the SADC documents mentioned hereafter are available at the SADC official website, www.sadc.int.

[64] See *Mike Campbell (PVT) Ltd and Others v. Zimbabwe*, application of 11 October 2007, judgment of 28 November 2008. For comments, see A. DI LIETO, "La discriminazione razziale contro i bianchi in Zimbabwe nella giurisprudenza del Tribunale della Comunità dello sviluppo dell'Africa australe", in *Diritti umani e diritto internazionale* 2009, p. 432 ff.; A. MOYO, "Defending

The Zimbabwean Government soon affirmed to feel bound neither to that specific judgment nor to any other decision concerning human rights matters, given that a human rights mandate had never been conferred upon the SADC Tribunal. Furthermore, some prominent Zimbabwean politicians indirectly threatened the judges of the SADC Tribunal. Basically, Zimbabwe did not appreciate the human rights activism of the SADC Tribunal.[65] In 2010, it eventually persuaded the SADC Summit (the executive organ made up of all Member States) to suspend the activities of the SADC Tribunal.[66]

Later, on 21 August 2014, the SADC Summit adopted a new Protocol instituting a new SADC Tribunal.[67] Since the new SADC Tribunal can examine only interstate claims, it will unlikely deal with human rights disputes again. As a re-

Human Rights and the Rule of Law by the SADC Tribunal: *Campbell* and Beyond", in *African Human Rights Law Journal* 2009, p. 601 ff.; W. SCHOLTZ, G. FERREIRA, "Much Ado about Nothing? The SADC Tribunal's Quest for the Rule of Law Pursuant to Regional Integration", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 2011, p. 331 ff.

[65] In two interviews given in December 2008 to the newspapers *The Zimbabwean* and *The Zimbabwe Times*, Mugabe defined the judgment issued in the *Campbell* case as «an exercise in futility», while the Ministry for Lands qualified the judges of the SADC Tribunal as «day-dreaming». In another interview given to the newspaper *The Namibian* on 28 February 2009, Mugabe underlined that «[t]here is no going back on the land reforms» and that «[s]ome farmers went to the SADC Tribunal in Namibia but that's nonsense, absolute nonsense, no one will follow that [...]. We have courts here in this country that can determine the rights of people. Our land issues are not subject to the SADC Tribunal». Then, on 2 September 2009, the Ministry of Justice published the note *Legal Opinion on Zimbabwe and the Jurisdiction of the SADC Tribunal* (available at www.sadc.int and also published on *The Zimbabwean* and *The Zimbabwe Times*), where he argued that «any decision that the SADC Tribunal may have or may make in future against the Republic of Zimbabwe is null and void». For more details about the reaction of Zimbabwe to the human rights activism of the SADC Tribunal, see O.C. RUPPEL, "The Southern African Development Community and Its Tribunal: Reflections on a Regional Economic Communities' Potential Impact on Human Rights Protection", in *Verfassung und Recht in Übersee* 2009, p. 173 ff., p. 183; L. NATHAN, *op. cit.*, p. 876; J.T. GATHII, "The Under-Appreciated Jurisprudence of Africa's Regional Trade Judiciaries", in *Oregon Review of International Law* 2010, p. 245 ff., mainly pp. 275-278.

[66] The suspension of the SADC Tribunal was deliberated by the Thirtieth SADC Summit on 17 August 2010 (see above all para. 32 of the final communiqué) and confirmed by the extraordinary SADC Summit held on 20 May 2011. In its diplomatic pressure concerning the suspension of the SADC Tribunal, Zimbabwe was strongly supported by Tanzania, whose President, referring to the SADC Tribunal, seemingly declared that «we have created a *monster* that will devour us all»: see A. FØLLESDAL, J.K. SCHAFFER, G. ULFSTEIN, "International Human Rights and the Challenge for Legitimacy", in *The Legitimacy of International Human Rights Regimes*, A. FØLLESDAL, J.K. SCHAFFER, G. ULFSTEIN (eds), Cambridge, 2015, p. 1 ff., p. 9.

[67] The decision to stipulate a new Protocol instituting a new SADC Tribunal was adopted during the Thirty-Second SADC Summit, on 18 August 2012 (see para. 24 of the final communiqué). Then, the new Protocol was approved on 21 August 2014, during the Thirty-Fourth SADC Summit. The new SADC Tribunal will take office after two thirds of the SADC Member States ratify the new Protocol according to its Art. 35. So far, only Zimbabwe has ratified the new Protocol.

sult, quoting two scholars, the SADC Member States 'emasculated' the SADC Tribunal, eradicating the human rights competence it had developed.[68]

4.2. The EAC Court of Justice

As observed, the development of the human rights competence of the African sub-regional jurisdictional organs started as a matter of judicial initiative. Then, in some cases, the African States intervened, eliminating or confirming such competence by means of treaty provisions. Instead, in other cases, these organs still now examine human rights disputes exclusively on the basis of their judicial discretion, thus without a precise treaty competence. The example of the EAC Court of Justice is the most prominent.[69]

Indeed, the AEC Treaty itself requires the Member States to conclude a protocol that officially attributes a human rights mandate to the EAC Court of Justice.[70] The AEC Member States had begun to negotiate such protocol immediately after the entry into force of the AEC Treaty. However, the talks encountered an obstacle in 2007, when the EAC Court of Justice issued its judgment in the *Anyang Nyong'o* affair, declaring that Kenya had violated some political rights enshrined in the African Charter.[71] As well as the SADC Tribunal, the EAC Court of Justice delivered that judgment without an express human rights com-

[68] See K.D. MAGLIVERAS, G.J. NALDI, "The New SADC Tribunal or the Emasculation of an International Tribunal", in *Netherlands International Law Review* 2016, p. 133 ff. For the (non)intervention of the African Commission in the process of 'emasculation' of the SADC Tribunal, see H.J. SARKIN, "A Critique of the Decision of the African Commission on Human and Peoples' Rights Permitting the Demolition of the SADC Tribunal: Politics Versus Economics and Human Rights", in *African Journal of International and Comparative Law* 2016, p. 215 ff. With regard to the evolution of the SADC Tribunal in light of the *Campbell* case and for some general implications affecting international law, see G. PASCALE, "Sulla posizione dell'individuo nel diritto internazionale: il caso *Campbell* e le vicende successive nell'Africa australe", in *Rivista di diritto internazionale* 2015, p. 852 ff. For a critical assessment of the new SADC Tribunal, see E. TINO, "Il diniego di accesso alla giustizia per i soggetti privati nella SADC: alcune considerazioni sul nuovo Protocollo sul Tribunale", in *Diritti umani e diritto internazionale* 2017, p. 477 ff.

[69] The EAC Treaty (signed in 1999) directly created the EAC Court of Justice after it came into force in 2000. The EAC Treaty has been amended twice, in 2006 and in 2007. Now, Chapter Eighth (Artt. 23-47) of the EAC Treaty is entirely dedicated to the EAC Court of Justice. All the documents concerning EAC are available at the EAC official website, www.eac.int. For details about the EAC Court of Justice, see P. VAN DER MEI, "Regional Integration: The Contribution of the Court of Justice of the East African Community", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 2009, p. 403 ff.; J.T. GATHII, "Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy", in *Duke Journal of Comparative and International Law* 2013, p. 249 ff.; T.P. MILEJ, "Human Rights Protection by International Courts – What Role for the East African Court of Justice?", in *African Journal of International and Comparative Law* 2018, p. 108 ff.

[70] See Art. 27, para. 2, of the EAC Treaty.

[71] See *Anyang' Nyong'o and Others v. Kenya*, application of 8 November 2006, judgment of 29 March 2007. In this case, the applicant successfully challenged the Kenyan Government's mode of selecting delegates to the EAC Legislative Assembly.

petence.[72] Along these lines, Kenya protested and caused the interruption of the drafting process of the protocol for a long period. The negotiations have been recently revitalized, but they are progressing with no haste.[73]

Waiting for the EAC Member States to adopt the protocol, the EAC Court of Justice has always continued to deal with human rights disputes. By way of illustration, in the judgment issued in the *Katabazi* affair immediately after the 'Kenyan impasse', on the one hand, it admitted not to have any explicit competence for human rights disputes while, on the other, it added not to consider itself exempt from settling disputes 'also related' to human rights.[74] The EAC Court of Justice did not give more details about such reasoning in the other decisions (also) concerning human rights questions. However, as a matter of fact, in those decisions it ascertained the responsibility of the defendant States for some human rights violations.[75]

4.3. The ECOWAS Court of Justice

The ECOWAS Court of Justice initially extended its competence to the field of human rights on the grounds of the adherence of ECOWAS to the promotion and protection of human rights and of the cooperation required of ECOWAS Member States to realise the objectives of the African Charter (see respectively Art. 4(g), and Art. 56, par. 2, of the ECOWAS Treaty). The ECOWAS Member States did not object and, what is more, in 2005 they attached a Supplementary Protocol to the ECOWAS Treaty, whose Art. 9, para. 4, and Art. 10(d), now explicitly confirm such competence.[76] Nowadays, the ECOWAS Court of Justice exercises a

[72] After all, it does not seem that the preamble and Art. 6(d), of the EAC Treaty («the fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include […] the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights») can be interpreted as conferring a clear human rights mandate upon the EAC Court of Justice.

[73] See J.T. GATHII, "Mission Creep", cit., pp. 268-271, and K.J. ALTER, J.T. GATHII, L.R. HELFER, *op. cit.*, pp. 300-306.

[74] See *Katabazi and Others v. Uganda*, application of 29 August 2007, judgment of 1 November 2007, section on admissibility. For comments, see L.N. MURUNGI, J. GALLINETTI, *op. cit.*, pp. 132-133, and J.T. GATHII, "Mission Creep", cit., pp. 254-256.

[75] As examples, see *Independent Medical Unit v. Kenya and Four Others*, application of 2 July 2010, judgment of 29 June 2011, and *Plaxeda Rugumba v. Secretary General of the East African Community and Rwanda*, application of 8 November 2010, judgment of 1 December 2011.

[76] The ECOWAS Treaty had been signed in 1975. Then, it was revised in 1993. The Protocol on the ECOWAS Court of Justice was stipulated in 1991 and later attached to the new ECOWAS Treaty. It entered into force in 1996. The Supplementary Protocol Amending the Protocol Relating to the ECOWAS Court of Justice was adopted in 2005, after the ECOWAS Court of Justice dealt with human rights in the case *Afolabi Olajide v. Niger*, application no. 01/03, judgment of 27 April 2004. Since then, the ECOWAS Court of Justice has very often examined human rights disputes. A lot of studies about its human rights action have been produced. See, above all, S.T. EBOBRAH, *A Critical Analysis of the Human Rights Mandate of the ECOWAS Community Court of Justice*, Copenhagen, 2009; K.J. ALTER, L.R. HELFER, J.R. MCALLISTER, "A New International Human Rights

very broad human rights mandate: suffice it to say that the exhaustion of domestic remedies is not included among the admissibility conditions for individual claims.[77]

Nevertheless, the ECOWAS Member States are currently examining a draft reform aimed at dismissing the human rights competence of the ECOWAS Court of Justice. The Gambia has suggested this reform in the context of a contrast with the ECOWAS Court of Justice about the domestic implementation of two judgments where the responsibility of The Gambia for human rights violations was declared.[78] Even if such situation turns out to be very similar to those occurred in both the SADC and the EAC frames, the outcome will predictably be different. In general terms, the majority of the ECOWAS Member States does not show an effective proclivity to approve the reform under examination.

The overall impression is that the ECOWAS Governments are trying to increase human rights awareness in Western Africa in order to depict themselves as human rights supporters. One can just consider that five out of eight African States accepting the competence of the African Court for individual and NGOs claims belong to ECOWAS (Benin, Burkina Faso, Côte d'Ivoire, Ghana and Mali). Probably, the aim of the majority of the ECOWAS Member States is to feed the relations with the traditional international donors (EU, UN, Scandinavian States and some NGOs), who take care of human rights. As a matter of fact, China and India (and other new donors who attribute less importance to human rights) do not usually send many development aids to the Western African Countries, since they prefer to invest in other African regions.[79] Therefore, in the end,

Court for West Africa: The ECOWAS Community Court of Justice", in *American Journal of International Law* 2013, p. 737 ff.; L. POLI, *op. cit.*, p. 133 ff. For all the documents concerning ECOWAS that will be mentioned hereafter, see the ECOWAS website, www.ecowas.int.

[77] The ECOWAS Court of Justice clarified many times that the exhaustion of domestic remedies is not an admissibility condition. By way of illustration, see *Essien v. The Gambia and Another*, application no. 05/05, judgment of 29 October 2007, and *Koraou v. Niger*, application no. 08/08, judgment of 27 October 2008. With regard to such peculiarity, the ECOWAS Court of Justice is different from the majority of the international organs dealing with human rights disputes. For comments on the point, see A.O. ENABULELE, "Sailing against the Tide: Exhaustion of Domestic Remedies and the ECOWAS Community Court of Justice", in *Journal of African Law* 2012, p. 268 ff.

[78] See *Manneh v. The Gambia*, application no. 04/07, judgment of 5 June 2008, and *Saidykhan v. The Gambia*, application no. 11/07, judgment of 16 December 2010, both concerning tortures suffered by journalists. For comments, see K.J. ALTER, L.R. HELFER, J.R. MCALLISTER, *op. cit.*, pp. 761-765, and K.J. ALTER, J.T. GATHII, L.R. HELFER, *op. cit.*, pp. 296-300.

[79] The economies of the Western African States mostly depend on the donations coming from the EU, the UN, the Scandinavian States and many NGOs. Such dependence has increased after the Ebola crisis broke out in the region in 2014. See D. PRINCE-AGBODJAN, "Accord de partenariat économique entre l'Union Européenne et l'Afrique de l'Ouest: droit international économique, droits humains indivisibles et économie politique", in *African Yearbook of International Law* 2015, vol. XXII, p. 168 ff. On the contrary, in Southern Africa and in other African regions the 'Western' aids are currently considered less prominent, mainly because of the presence of China and India, which do not request a strong respect of human rights, democracy and the rule of law in change of their donations. See the essays collected in F. CHERU, C. OBI (eds), *The Rise of China and India in*

it is likely that the ECOWAS Member States will opt for avoiding any blatant conflict with the ECOWAS Court of Justice on the topic of human rights.

5. Search for Coordination between the African Court and the African Sub-Regional Jurisdictional Organs: The Lack of Relevant Provisions

In the African human rights context, overlapping situations may occur between sub-regional jurisdictional organs and continental monitoring bodies. In some way, such situations have their roots in the well-known proliferation of international tribunals.[80] As observed in the next pages, some scholars assert that it is necessary to find a way to govern such proliferation, that is to say to coordinate the several monitoring bodies existing in the current international legal system. In particular, there should be coordination if the same dispute already settled by an international organ is afterwards assigned to another one. Likewise, coordination should avoid that identical or related proceedings go on at the same time before two or more international bodies.[81] Otherwise, some problems would arise, and the coherence of international law would be threatened.

The human rights treaties instituting international monitoring bodies sometimes prevent potential overlapping situations, making reference to 'coordination rules' inspired by some principles – like *lis pendens* or *res iudicata* – usually applied with similar aims in domestic orders.[82] It seems correct to underline that

Africa: Challenges, Opportunities and Critical Interventions, London, 2010, and in M. BURNAY, J.C. DEFRAIGNE, J. WOUTERS (eds), *China, the European Union and the Developing World: Analysing and Comparing a Triangular Relationship Region by Region*, Cheltenham, 2015, parts IV and VI.

[80] The proliferation of international tribunals has been already introduced above, note 5.

[81] It is well-known that two disputes are identical if their three constitutive elements (*personae*, *petitum* and *causa petendi*) are all identical, and that parallel proceedings arise when an identical dispute is assigned to two or more judges. Such situations are particularly problematic in private international law, namely when the judges dealing with the same dispute belong to different domestic orders (see extensively F. MARONGIU BUONAIUTI, *Litispendenza e connessione internazionale. Strumenti di coordinamento tra giurisdizioni statali in materia civile*, Napoli, 2008). In public international law, it is unlikely that the three elements defining a dispute coincide, so it could very rarely happen that two organs examine the same dispute. Anyway, cases of related proceedings may occur in public international law: two disputes, although not strictly identical, may be very similar (for instance if two out of three constitutive elements correspond). For a dated but illuminating study on this topic, see G. TÉNÉKIDÈS, "L'exception de litispendance devant les organismes internationaux", in *Revue générale de droit international public* 1929, p. 502 ff. Also see K. OELLERS-FRAHM, "Multiplication of International Courts and Tribunals and Conflicting Jurisdictions – Problems and Possible Solutions", in *Max Planck Yearbook of United Nations Law*, vol. V, 2001, p. 67 ff., and A. REINISCH, "The Use and Limits of *Res Iudicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes", in *The Law & Practice of International Courts and Tribunals* 2004, p. 37 ff.

[82] With some differences, both Art. 35, para. 2, of the European Convention on Human Rights and Art. 47(d), of the American Convention on Human Rights state that their respective Courts shall not deal with any application that is substantially the same as a matter that has already been examined or submitted to another procedure of international investigation or settlement. Then, Art. 5, para. 2, of the Optional Protocol attached to the UN International Covenant on Civil and Political Rights de-

such international 'coordination rules' only draw inspiration by the just mentioned domestic principles, whose proper existence in international law is not admissible, mainly because of the lack of hierarchy and systematic organisation among the increasing number of international jurisdictional organs. Moreover, these domestic principles are always fixed within the law, while the international 'coordination rules' are variable, as they are established in treaty norms, and pertain to specific international jurisdictional organs, which are autonomous from each other. With regard to *lis pendens*, in international law it has at most inspired «une règle dictée par des considérations de correction et de courtoisie internationale».[83] Notwithstanding the opinions of some scholars,[84] even *res iudicata* does not seemingly belong to international law. A similar rule may find a place in the agreement that two or more Parties stipulate in order to defer a dispute to an international tribunal. However, if the Parties are not satisfied with the dispute settlement outcomes, they can decide at any moment to conclude a new agreement and submit that same dispute to another organ. That even more demonstrates the absence of a proper *res iudicata* in international law.[85]

Be that as it may, with respect to the search for coordination between the African Court and the African sub-regional jurisdictional organs, first and foremost, the existence of any relevant provision is to be scrutinised.[86]

clares that the UN Human Rights Committee shall not consider any communication unless it has ascertained that the same matter is not being examined under another procedure of international investigation or settlement. For detailed overviews, see A.A. CANÇADO TRINDADE, "Co-Existence and Co-Ordination of Mechanisms of International Protection of Human Rights (at Global and Regional Levels)", in *Recueil des cours de l'Academie de droit international de l'Haye* 1987, vol. 202, p. 9 ff., and F. SALERNO, "Rapporti fra procedimenti concernenti le medesime istanze individuali presso diversi organismi internazionali di tutela dei diritti umani", in *Rivista di diritto internazionale* 1999, p. 363 ff.

[83] See G. TÉNÉKIDÈS, *op. cit.*, p. 526. The majority of contemporary scholars agree that *lis pendens* does not exist in international law: see, *inter alios*, K. OELLERS-FRAHM, *op. cit.*, pp. 77-78; M.I. PAPA, *I rapporti tra la Corte internazionale di giustizia e il Consiglio di sicurezza*, Padova, 2006, p. 149 ff., mainly p. 153; C. FOCARELLI, *International Law as a Social Construct. The Struggle for Global Justice*, Oxford, 2012, p. 329.

[84] Many authors qualify *res iudicata* as a general principle of public international law: see B. CHENG, *General Principles of Law as Applied by International Courts and Tribunals*, London, 1953, p. 336 ff.; A. CASSESE, *Il diritto interno nel processo internazionale*, Padova, 1962, pp. 232-235; V. LOWE, "*Res Judicata* and the Rule of Law in International Arbitration", in *African Journal of International and Comparative Law* 1996, p. 38 ff. Someone else argues that *res iudicata* is provided by customary international law: see A. DEL VECCHIO, *Le parti nel processo internazionale*, Milano, 1975, p. 252 ff., and Y. SHANY, *The Competing Jurisdictions of International Courts and Tribunals*, Oxford, 2003, p. 245. Eventually, according to a softer position, A. REINISCH, *op. cit.*, p. 51 ff., argues that some episodes of the international practice would indicate a general tendency of States to support the application of *res iudicata* by international tribunals, at least in some fields of international law.

[85] On this point, see accurately A. DAVÌ, *L'intervento davanti alla Corte internazionale di giustizia*, Napoli, 1984, pp. 156-157. Also see C. FOCARELLI, *op. cit.*, pp. 329-332, who writes that the international tribunals spontaneously respect a sort of *res iudicata* principle, even if a pertaining international norm lacks.

[86] Henceforth, I will refer to the African Court and not anymore to the African Commission, both for a matter of fluency and because the main coordination problems could arise with regard to

The instruments instituting the African sub-regional jurisdictional organs never regulate their relationship with the African Court. After all, as already said, the stipulating States did not attribute to them any express human rights mandate. Furthermore, the majority of these organs were created when the African Court did not exist yet. Therefore, the statutes of the African sub-regional jurisdictional organs should not be expected to care about coordination with the African Court. From this viewpoint, the ECOWAS Court of Justice represents an exception. It is the only African sub-regional jurisdictional organ with a treaty-based human rights competence. Moreover, the Supplementary Protocol attributing such competence to the ECOWAS Court of Justice was concluded after the African Court Protocol had entered into force. Anyway, a 'coordination rule' lacks even in that instrument.[87]

The African Court Protocol does not contain a proper 'coordination rule' either. However, it vaguely recalls the domestic principle of *res iudicata* among the admissibility criteria for claims brought by individuals and NGOs.[88] In particular, the African Court could not receive any application related to a dispute already settled in conformity with the principles enshrined in the UN Charter, in the AU Constitutive Act or in the African Charter. Although the African Court has never interpreted or implemented this rule, its ambiguity and inaccuracy (mainly when it mentions the UN principles) make it clear that it could be intended even to the detriment of the protection of human rights.[89] Moreover, this rule is not exhaustive, as it concerns only cases already settled within the abovementioned systems and is never applicable to ongoing related proceedings.

6. Solutions to Coordinate the African Court with the African Sub-Regional Jurisdictional Organs in the Light of the Main Legal Doctrine

International comity could be a key to coordinate the African Court with the African sub-regional jurisdictional organs. Currently, international comity is often

the relationship of the sub-regional jurisdictional organs with the African Court, which is an international jurisdictional organ as well.

[87] Therefore, it is not surprising that the ECOWAS Court of Justice lays claim to autonomy from the African Court in the human rights legal discourse. That happened for the first time in *Koraou v. Niger*, cit., paras. 42-43. Then, the ECOWAS Court of Justice confirmed its position in *Hissène Habré v. Senegal*, application no. 07/08, judgment of 18 November 2010; *Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria and Another*, application no. 12/07, judgment of 30 November 2010; *Simone Ehivet and Michel Gbagbo v. Côte d'Ivoire*, application no. 18/11, judgment of 22 February 2013.

[88] Indeed, Art. 6, para. 2, of the Ouagadougou Protocol provides that the African Court shall rule on the admissibility of cases taking into account Art. 56 of the African Charter. In other words, it invokes the admissibility criteria of cases as stated in Art. 56 of the African Charter.

[89] For a very similar opinion, see F. OUGUERGOUZ, "Article 56", in *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*, M. KAMTO (sous la direction de), Bruxelles, 2011, p. 1024 ff., pp. 1044-1050.

invoked as a solution when it is not possible to otherwise organise the relationship between two or more international organs. It envisages that each organ should give due consideration to proceedings that are ongoing or to cases that have been already settled before other organs. In particular, an author argues that international comity is intrinsic to the relationships among international organs, thus qualifying it as fixed by an international customary norm. According to this scholar, the international organs are only formally autonomous from each other, being concretely integrated in a context of 'intra-systemic interaction' and basically applying the same international norms.[90] Indeed, such hypothesis does not seem to have any effective legal basis and does not rely on clear legal parameters. As a matter of fact international comity would resultantly be at the complete discretion of the international judges.

Some solutions *de iure condendo* are also proposed. With specific regard to the African human rights context, an author suggests getting inspiration by the system of reference for preliminary rulings existing in the EU order. According to such idea, the RECs should refer to the African Court for an advisory opinion when human rights questions emerge in the disputes submitted to their jurisdictional organs. Art. 4, para. 1, of the Ouagadougou Protocol could turn useful, since it admits the possibility that an African intergovernmental organisation recognised by the AU may ask the African Court to deliver an advisory opinion on any legal matter relating to the African Charter or to any other human rights instruments.[91] However, the troubled African environment and the rivalries frequently existing among the States belonging to the same REC (whose unanimity is often necessary in order to let the REC ask the African Court for an advisory opinion) make it difficult to achieve such proposal in the near future.

The legal doctrine recommends some other solutions *de iure condendo* that, notwithstanding their general scope, could be applied even to coordinate the relationships among the African Court and the African sub-regional jurisdictional organs. An author advocates the codification of an obligation of international tribunals to know their reciprocal case-law.[92] Another author recommends the institution of a mechanism of information among international tribunals and the organisation of periodical meetings among international judges.[93] Moreover, a scholar expressly invites the UN General Assembly to create a subsidiary organ in charge of studying and managing the relationships among international juris-

[90] See Y. SHANY, *op. cit.*, p. 283 ff.

[91] See M. MUBIALA, *op. cit.*, p. 102. This proposal is shared by M.A. NAMOUNTOUGOU, "La saisine du juge international africain des droits de l'homme", in *Revue trimestrielle des droits de l'homme* 2011, p. 261 ff., mainly p. 279.

[92] See T. BUERGENTHAL, "Proliferation of International Courts and Tribunals: Is It Good or Bad?", in *Leiden Journal of International Law* 2001, p. 267 ff., in particular p. 274.

[93] These are the conclusive recommendation expressed by Y. KERBRAT, "Conclusion générale", in Forum Shopping *et concurrence des procédures contentieuses internationales*, Y. KERBRAT (sous la direction de), Bruxelles, 2011, p. 299 ff.

dictional and 'quasi-jurisdictional' organs.[94] Furthermore, an interesting proposal concerns the establishment of a hierarchy in the international judicial landscape attributing an apical position to the International Court of Justice. According to such proposal, every international jurisdictional organ could (or should) apply – directly or through the UN organs – before the International Court of Justice for an advisory opinion in order to resolve any coordination problem with other international jurisdictional organs.[95] Someone also suggests conferring upon the International Court of Justice an express referral jurisdiction.[96] One can agree or not with such solutions. In any case, they have never been implemented as of yet, nor will they probably be.

7. Relationships Between the African Court and the African Sub-Regional Jurisdictional Organs: The Proliferation of International Tribunals from an Optimistic Perspective

As underlined, the idea that the action of the African Court should be coordinated with that of the African sub-regional jurisdictional organs mostly depends on the pessimistic opinion shared by some scholars about the proliferation of international tribunals. Such phenomenon is qualified as the cause of many problems in contemporary international law. Above all, some authors argue that the existence of several international monitoring bodies fosters the subsequent phenomenon of forum shopping. They also highlight the risks deriving from conflicting dispute settlement outcomes, which in turn entail conflicting interpretations of the same international norms. All that would threaten the general coherence of the international legal system.[97]

However, the international law doctrine does not look at the proliferation of international tribunals from a univocal perspective. Some authors assert that such proliferation (which should be better called 'multiplication')[98] does not lead to

[94] See M. BENNOUNA, "How to Cope with the Proliferation of International Courts and Coordinate Their Action", in *Realizing Utopia. The Future of International Law*, A. CASSESE (ed.), Oxford, 2012, p. 287 ff., in particular p. 293.

[95] See the speech delivered on 26 October 1999 by Stephen M. Schwebel, former President of the International Court of Justice, before the UN General Assembly, available in *Cour International de Justice – Annuaire* 1999-2000, p. 297 ff. For an accurate examination of this proposal, see M.I. PAPA, *I rapporti*, cit., pp. 92-93, 480-482, and the bibliography there quoted.

[96] See A. CASSESE, "The International Court of Justice: It Is High Time to Restyle the Respected Old Lady", in *Realizing Utopia*, cit., p. 239 ff., mainly pp. 245-246.

[97] For a pessimistic assessment of the proliferation of international tribunals, see for instance G. HAFNER, "Pros and Cons Ensuing from Fragmentation of International Law", in *Michigan Journal of International Law* 2004, p. 849 ff., and W.T. WORSTER, "Competition and Comity in the Fragmentation of International Law", in *Brooklyn Journal of International Law* 2008, p. 119 ff.

[98] The scholars who share a positive opinion about the existence of several tribunals in the international scenario prefer to use the term 'multiplication' instead of 'proliferation'. According to S. KARAGIANNIS, "La multiplication des juridictions internationales. Un système anarchique?", in *La juridictionnalisation du droit international*, Société française pour le droit international (sous la di-

disadvantageous effects. This conclusion seems more persuasive than the previous one. First of all, the phenomenon of forum shopping is not a real problem: in international law, the jurisdictional function is based on the parties' will, so it is clear that in any case the Parties can choose the judge who will settle their disputes. Then, the practice reveals few circumstances of overlapping situations between two international organs. In addition, such circumstances have triggered the debate about the interpretation of the international norms at stake. Given that in the context of this debate each international organ has taken in due consideration the case-law of the other, a sort of 'fertilisation' has eventually come out.[99] Basically, the multiplication of international tribunals promotes the evolution and the 'vitality' of international law.[100]

This conclusion seems even more correct with respect to international human rights law.[101] The proliferation of human rights monitoring bodies in Africa is paradigmatic to this effect. By way of illustration, had not the ECOWAS Court of Justice existed and/or spontaneously extended its material competence, the development of international human rights law in Western Africa would have been prevented. More precisely, while the African Court has to abide by the limits dictated by all the African States, on the contrary the ECOWAS Court of Justice and some other sub-regional jurisdictional organs are free to act without strict conditions. In a nutshell, the proliferation of international tribunals has led to a protection of human rights that in Western Africa and in some other African regions is stronger than that guaranteed according to the continental standard. That happened mainly because some African States are more human rights 'friendly' than others, thus without any coordination between the African Court

rection de), Paris, 2003, p. 7 ff., p. 13, «dans la langue française contemporaine, le terme de prolifération a pris une connotation nettement péjorative».

[99] About the topic of 'fertilisation' among international tribunals, recently see A.A. CANÇADO TRINDADE, "Contemporary International Tribunals: Jurisprudential Cross Fertilization in Their Common Mission of Realization of Justice", in *The Global Community* 2017, p. 217 ff. With specific regard to 'fertilisation' between two human rights courts, see A. DI STASI, "The Inter-American Court of Human Rights and the European Court of Human Rights: Towards a Cross Fertilization?", in *Ordine internazionale e diritti umani* 2014, p. 97 ff.

[100] For an insightful positive assessment of the topic of the proliferation of international tribunals, see B. CONFORTI, "Il diritto internazionale che cresce: la moltiplicazione dei tribunali internazionali", in *Studi in onore di Vincenzo Starace*, Napoli, 2008, vol. I, p. 143 ff.; ID., "Unité et fragmentation du droit international", cit., p. 5 ff. Also see J.I. CHARNEY, "Is International Law Threatened by Multiple International Tribunals?", in *Recueil des cours de l'Academie de droit international de l'Haye* 1998, vol. 271, p. 347 ff.; T. BUERGENTHAL, *op. cit.*, p. 272 ff.; C. FOCARELLI, *op. cit.*, p. 328. Subject to some specifications, a very similar assessment is also suggested by R. HIGGINS, "A Babel of Judicial Voices? Ruminations from the Bench", in *International & Comparative Law Quarterly* 2006, p. 797 ff.

[101] See extensively R.B. LILLICH, "Towards the Harmonization of International Human Rights Law", in *Recht zwischen Umbruch und Bewahrung. Festschrift für Rudolf Bernhardt*, U. BEYERLIN (Hrsg.), Berlin/Heidelberg, 1995, p. 453 ff. For a similar perspective, also see L. PINESCHI, *Diritti umani*, cit., p. 600 ff.

and the ECOWAS Court of Justice or other African sub-regional jurisdictional organs. Hence, the necessity to find a coordination appears now overestimated.

ABSTRACT. An Optimistic Perspective on the Proliferation of Human Rights Monitoring Bodies in Africa

Many human rights monitoring bodies coexist in Africa. At a continental level the African Court flanks the African Commission, while at a sub-regional level some jurisdictional organs belonging to the Sub-Regional Economic Communities have progressively extended their competence to human rights disputes. Whether a coordination among these bodies is effectively needed mostly depends on the evaluation of the proliferation of international tribunals from a broader perspective. In this paper, my aim is to contribute to demonstrating that, if one regards the proliferation of international tribunals as a positive phenomenon, the said need decreases or disappears. For these purposes, first of all, I introduce the African Commission and the African Court. Thereafter, I focus on the development of the human rights competence of the three most representative sub-regional jurisdictional organs (the SADC Tribunal, the EAC Court of Justice and the ECOWAS Court of Justice). After ascertaining the lack of provisions governing the relationships between these organs, I dwell on the methods of coordination proposed by some scholars. In the last paragraph, I suggest that such coordination is not actually necessary.

Keywords: proliferation of international tribunals; overlapping jurisdictions; coordination rules among international courts and tribunals; African human rights system; African Court on Human and Peoples' Rights; African sub-regional jurisdictional organs.