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# AN AFRICAN HUMAN RIGHTS COURT AND AN AFRICAN UNION COURT: A NEEDFUL DUALITY OR A NEEDLESS DUPLICATION?

*Nsongurua J. Udombana\**

*“Entia non sunt multiplicanda praeter necessitatem”<sup>1</sup>*

## I. INTRODUCTION

In recent years, the international community has witnessed an avalanche of international dispute settlement mechanisms, which Cesare Romano referred to as “the international judiciary.”<sup>2</sup> It is the consequence of a “tumultuous amplification of the number and ambit of institutions consecrated to ensure compliance with international legal obligations and settlement of disputes arising therefrom.”<sup>3</sup> Some of these mechanisms are permanent in nature while others are ad hoc; some exercise full judicial powers, while others are quasi-judicial and administrative.<sup>4</sup> This state of affairs would have been inconceivable fifty

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1. “Entities should not be multiplied unnecessarily.” Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT’L L. & POL. 709 (1999) (quoting William of Ockham).

2. *Id.* at 711 n.7 (defining the phrase to mean “those judicial bodies that have been created to administer international justice, without implying the existence of any degree of coordination among them”).

3. *Id.* at 710. Romano also argues that the “‘international judicial law and organization’ can and should be studied as a discipline in its own right, without the need to be subsumed under the general category of ‘Peaceful Settlement of International Disputes.’” *Id.* at 711.

4. For the criteria characterizing an international court, tribunal or body, see generally, Christian Tomuschat, *International Courts and Tribunals with Regionally Restricted and/or Specialized Jurisdiction*, in JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES: INTERNATIONAL COURT OF JUSTICE,

or so years ago — because at that time the “main concern of international law was to convince states of the attractiveness and usefulness of third-party dispute settlement.”<sup>5</sup> Although international arbitration had been in existence — long before modern international courts — very few judicial institutions with universal jurisdiction existed at the international level in the 1950s and 60s. Among these were the International Court of Justice (“ICJ”), the European Court of Justice, and the European Court of Human Rights. In the 70s, the Inter-American Court of Human Rights was established.

Today, however, the landscape has changed, with new judicial institutions springing up throughout the world. These new institutions include the International Tribunal for the Law of the Sea, the World Trade Organization (“WTO”) Dispute Settlement System, and, most recently, the International Criminal Court (“ICC”). Earlier institutions have also been strengthened and, in some cases, restructured or reformed for optimal performance.

At the first glance, the proliferation of international tribunals seems to give a reason for cheer, because it indicates the success of peaceful settlement of international disputes — a development that the Charter of the United Nations (“UN”) particularly encourages.<sup>6</sup> Peaceful settlement of international disputes

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OTHER COURTS AND TRIBUNALS, ARBITRATION AND CONCILIATION: AN INTERNATIONAL SYMPOSIUM 285 (1974). According to Tomuschat, an international body must meet five criteria. First, it must be permanent, which is to say that its existence must be independent from the vicissitudes of a given case. Second, an international legal instrument must have established it. Third, in deciding the cases submitted to them, they must resort to international law. Fourth, they must decide those cases on the basis of rules of procedure that pre-exist the case and usually cannot be modified by the parties. Lastly, the outcome of the process must be legally binding. *Id.* at 293–312.

5. Karin Oellers-Frahm, *Multiplication of International Courts and Tribunals and Conflicting Jurisdiction — Problems and Possible Solutions*, in 5 MAX PLANCK Y.B. OF UNITED NATIONS LAW 67, 69 (Jochen A. Frowein & Rudiger Wolfrum eds., 2001). See also generally Hermann Mosler et al., *Chapter XIV: The International Court of Justice*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 973 (Bruno Simma ed., 1994) (for the efforts within the framework of the United Nations (“UN”) towards the pacific settlement of international disputes).

6. See U.N. CHARTER arts. 2, paras. 3–4, 33. The ICJ has confirmed that Article 2, Paragraph 4 of the UN Charter is a rule of customary law applying to all states: “All Members shall refrain in their international relations from

by judicial recourse helps parties to clarify their positions. Often, they are led “to reduce and transform their sometimes overstated political assertions into factual and legal claims.”<sup>7</sup> The judicial route also moderate tensions and lead to a better and fuller understanding of opposing claims and, in some cases, the resumption of political negotiations even before a court renders judgment.<sup>8</sup> Surprisingly, however, the multiplication of international tribunals has generated heated debates in recent years.<sup>9</sup> Some scholars have expressed the fear that the proliferation of tribunals will result in “the fragmentation of the international legal system or, at least, [in] the fragmentation of the interpretation of its norms.”<sup>10</sup> Such proliferation also raises the risk of “forum shopping” — the practice of parties competing for courts — with the overlapping of jurisdictions that could jeopardize both the unity of international law and its role in inter-State relations across the world.

Others, however, believe that there is no cause for alarm and that wine can vary with every valley and every vineyard. Indeed, proponents of multiplicity adduce many reasons to justify their belief that the variety of third-party dispute settlement

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the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, at 99-101 (June 27) [hereinafter *Nicaragua Case*].

7. Address by the Honorable Stephen M. Schwebel, Judge to the General Assembly of the United Nations, President of the International Court of Justice (Oct. 27, 1998), available at <http://www.lawschool.cornell.edu/library/cijwww/icjwww/ipresscom/SPEECHES/iSpeechPresidentGA98.htm> [hereinafter *Schwebel Address*].

8. See *id.*

9. For the debate, see generally *Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution: Proceedings of a Forum Co-Sponsored by the American Society of International Law and the Graduate Institute of Int'l Studies*, 9 ASIL BULLETIN (L. Boisson de Chazournes ed., Nov. 1995); Gilbert Guillaume, *The Future of International Judicial Institutions*, 44 INT'L & COMP. L.Q. 848 (1995); Gerhard Hafner, *Should One Fear the Proliferation of Mechanisms for the Peaceful Settlement of Disputes?*, in *THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES: UNIVERSAL AND EUROPEAN PERSPECTIVES* 25 (Lucius Cafilisch ed., 1998).

10. Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 791, 792 (1999).

vehicles for states is generally desirable.<sup>11</sup> The justifications include the desire by states and non-state actors for “secrecy, control over the membership of the forum, panels with special expertise or perceived regional sensitivities, preclusion of third state intervention, and forums that can resolve disputes in which non-state entities may appear as parties.”<sup>12</sup> According to proponents, the strength of the multiplicity of international tribunals has the benefit of permitting “a degree of experimentation and exploration, which can lead to improvements in international law.”<sup>13</sup> Multiplicity of international tribunals also reflects the vitality and complexity of international life and, therefore, should be welcomed — so long as their jurisdictions do not duplicate each other. Ultimately, such tribunals will contribute significantly to the peaceful and just settlement of international disputes.<sup>14</sup>

Recent events in Africa tend to show that African leaders have been greatly impressed by the proliferation of courts and tribunals. They are preparing to set up two supra-national judicial institutions for the continent, in addition to several other sub-regional judicial institutions that have sprung up in recent years. These sub-regional tribunals include a court set up to interpret the Treaty Establishing the Southern African Development Community (“SADC”)<sup>15</sup> and the Community Court of

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11. See, e.g., Hugh Thirlway, *The Proliferation of International Judicial Organs and the Formation of International Law*, in INTERNATIONAL LAW AND THE HAGUE'S 750TH ANNIVERSARY 433 (Wybo P. Heere ed., 1999) (taking an optimistic view on international organs and international law). See also Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697, 698 (1999) [hereinafter Charney, *Impact of International Courts*] (focusing on the relationship between the International Court of Justice and other permanent and *ad hoc* tribunals that have shared the responsibility of hearing cases turning on aspects of international law). See also Jonathan Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS 101 (1998).

12. Charney, *Impact of International Courts*, *supra* note 11, at 698.

13. *Id.* at 700.

14. See Schwebel Address, *supra* note 7.

15. Treaty Establishing the Southern African Development Community, Aug. 17, 1992, 32 I.L.M. 116 (1993) [hereinafter SADC Treaty].

Justice established pursuant to a protocol<sup>16</sup> adopted by member states of the Economic Community of West African States (“ECOWAS”).<sup>17</sup> On June 9, 1998, at its Thirty-fourth Ordinary Session held in Ouagadougou, Burkina Faso, the Assembly of Heads of State and Government of the now-defunct Organization of African Unity<sup>18</sup> (“OAU”) adopted a Protocol (“Human Rights Protocol” or “Protocol”)<sup>19</sup> to the African Charter on Human and Peoples’ Rights (“African Charter”)<sup>20</sup> on the Establishment of the African Court on Human and Peoples’ Rights (“African Human Rights Court” or “Human Rights Court”). This Protocol establishes a Human Rights Court to complement the protective mandate of the African Commission on Human and Peo-

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16. For the Protocol Establishing the Community Court of Justice, see Treaty Establishing the African Economic Community, arts. 18–20, 30 I.L.M. 1241 (1991).

17. See Treaty of the Economic Community of West African States (ECOWAS), May 28, 1975, 14 I.L.M. 1200 (1975) (original ECOWAS Treaty, superceded by 1993 treaty); Economic Community of West African States (ECOWAS): Revised Treaty, July 24, 1993, 35 I.L.M. 660 (1996) [hereinafter Revised ECOWAS Treaty] (striving to accelerate the economic union of West Africa through effective economic cooperation and integration).

18. The OAU ceased to function as a continental international organization on July 9, 2002, when the African Union (*see infra*) was inaugurated in Durban, South Africa. The occasion witnessed, simultaneously, the last (thirty-eighth) ordinary session of the OAU and the first ordinary session of the African Union.

19. See Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, OAU Doc. OAU/LEG/MIN/AFCHPR/PROT (III), available at <http://www.dfa.gov.za/for-relations/multilateral/treaties/court.htm> [hereinafter Human Rights Protocol].

20. African Charter on Human and Peoples’ Rights, June 27, 1981, OAU Doc. OAU/CAB/LEG/67/3/Rev.5, reprinted in 21 I.L.M. 58 (1982) [hereinafter African Charter]. For literature, see generally, U. O. UMOZURIKE, *The African Charter on Human and Peoples’ Rights*, 77 AM. J. INT’L. L. 902 (1997); Makau Mutau, *The African Human Rights System in a Comparative Perspective*, 3 REV. AFR. COMM’N ON HUM. & PEOPLES’ RTS. 5 (1993); Obinna Okere, *The Protection of Human Rights in Africa and the African Charter on Human and Peoples’ Rights: A Comparative Analysis with the European and American Systems*, 6 HUM. RTS. Q. 141 (1984); U. Oji Umzurike, *The African Charter on Human and Peoples’ Rights*, 77 AM. J. INT’L. L. 902 (1983); and Richard Gittleman, *The African Charter on Human and Peoples’ Rights: A Legal Analysis*, 22 VA. J. INT’L L. 667 (1982).

ples' Rights<sup>21</sup> and defines the organization, jurisdiction, and functioning of the Court.<sup>22</sup>

In addition, on July 11, 2000, at its Thirty-sixth Ordinary Session held in Lome, Togo, the OAU adopted the Constitutive Act of the African Union ("AU")<sup>23</sup> to replace the Charter of the [OAU]<sup>24</sup> and to strengthen the African Economic Community ("AEC") Treaty.<sup>25</sup> The Act, which entered into force on May 26, 2001, provides for an African Court of Justice ("AU Court") among several other organs of the Union.<sup>26</sup> Unlike the Protocol to the African Charter, the AU Act does not define the composition, mandate, and functioning of the AU Court. It merely pro-

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21. See Human Rights Protocol, *supra* note 19, art. 2 (providing that "[t]he Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission on Human and Peoples' Rights . . . conferred upon it by the African Charter on Human and Peoples' Rights").

22. For commentary on the Protocol, see generally Nsongurua J. Udombana, *Toward the African Court on Human and Peoples' Rights: Better Late Than Never*, 3 YALE HUM. RTS. & DEV. L.J. 45 (2000) [hereinafter Udombana, *Better Late Than Never*]; Gino J. Naldi & Konstantinos D. Magliveras, *Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights*, 16 NETH. Q. HUM. RTS. 431 (1998) (analyzing the Protocol's provisions and drawing comparisons with other regional human rights judicial organs); Andre Stimmet, Comment, *A Future African Court on Human and Peoples' Rights and Domestic Human Rights Norms*, 23 S. AFR. Y.B. INT'L L. 233 (1998); John Mubangizi & Adreas O'Shea, *An African Court on Human and Peoples' Rights*, 24 S. AFR. Y.B. INT'L L. 256 (1999); Makau Mutua, *The African Human Rights Court: A Two-Legged Stool?*, 21 HUM. RTS. Q. 342 (1999).

23. See CONSTITUTIVE ACT OF THE AFRICAN UNION, July 11, 2002, at <http://www.dfa.gov.za/for-relations/multilateral/treaties/auact.htm> [hereinafter AU ACT].

24. *Id.* art. 33(1) (stating that the OAU Charter would remain operational for a transitional period).

25. See Treaty Establishing the African Economic Community, June 3, 1991, 30 I.L.M. 1241 (entered into force May 11, 1994) [hereinafter AEC Treaty] (providing for the establishment of an African Economic Community, through a gradual process that would be achieved by coordination, harmonization and progressive integration of the activities of existing and future regional economic communities).

26. See AU ACT, *supra* note 23, art. 5(1) (listing nine organs of the AU, including the Assembly of the Union, the Executive Council, the Pan-African Parliament, the Court of Justice, the Commission, the Permanent Representatives Council, the Specialised Technical Committees, the Economic, Social and Cultural Council, and the Financial Institutions). The Act, however, gives the Assembly the power to establish any other organ of the Union. *Id.* art. 5(2).

vides that those matters shall be dealt with in a separate, future protocol,<sup>27</sup> which has yet to be adopted.

This Article examines the developments of African international judicial institutions and discusses whether the proposal for two continental courts is a necessary duality or a needless duplication. Can the AU sustain all the institutions it has created, including the courts, or is it trying to run before walking? Put differently, is it really impracticable for a single court to interpret and apply all the relevant instruments adopted by the OAU/AU, including the African Charter and the AU Act? Did the continent's leaders think through the implications of two courts, or were they simply fascinated and carried away by the European experiences? The author disagrees with the current approach taken by the AU leaders and insists that no new international court should be created without first ascertaining if the existing institutions could better perform their duties.

Part II provides the background by looking at the history of international dispute settlements in Africa in a global comparative context. Part III highlights the normative structure of the proposed African Human Rights Court and the African Union Court (AU Court) by analyzing the enabling protocol and related instruments. Part IV examines the arguments for and against having both courts in light of African realities and peculiarities. The European experience will be brought to bear in the debate. Part V concludes by recapitulating the discourse and providing some feasible recommendations.

## II. DISPUTE SETTLEMENTS IN A COLLECTIVE AFRICA IN A GLOBAL CONTEXT

### *A. Attempts, Not Deeds*

The creation of permanent international courts for dispute settlement in a collective Africa is a novelty. It is largely a development of the last decade of the twentieth century. Indeed, the first time in AU history that a reference was made to a "court" as a mechanism for dispute settlement in Africa was in

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27. *Id.* art. 18.



relation to the 1991 AEC Treaty.<sup>28</sup> Traditionally, African leaders have always favored the use of quasi-judicial commissions (two such commissions will be briefly noted below), rather than a court with full judicial powers. The reason for this anti-court approach stems partly from the nature of African customary law<sup>29</sup> and long-time dispute settlement practice. Traditional African dispute settlement places a premium on improving relations between the parties on the basis of equity, good conscience, and fair play, rather than on strict legality. The African system “is one of forgiveness, conciliation and open truth, not legal friction or technicality.”<sup>30</sup> African procedures favor consensus and amicable dispute settlement, frowning upon the adversarial and adjudicative procedures common to Western legal systems.<sup>31</sup>

Another reason for the delayed emergence of courts in a collective Africa is that the emerging African states were reluctant to relinquish their hard won independence and sovereignty to any form of supra-national entity. This reluctance also explained why the OAU Charter stresses full respect for state sovereignty.<sup>32</sup> The OAU was in fact born “in a context of nearly

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28. See AEC Treaty, *supra* note 25, arts. 7, 18; Chris M. Peter, *The Proposed African Court of Justice — Jurisprudential, Procedural, Enforcement Problems and Beyond*, 1 E. AFR. J. PEACE & HUM. RTS. 117, 118 (1993).

29. African customary law has been distinguished from African customary practices, beliefs or value systems. The former represents a generic system of rigid rules “embedded in judicial decisions and statutes, which have lost the characteristics of dynamism and adaptability which distinguished African custom.” Thandabantu Nhlapo, *Indigenous Law and Gender in South Africa: Taking Human Rights and Cultural Diversity Seriously, 1994–1995* THIRD WORLD LEGAL STUD. 49, 53. African customary practices, beliefs, or value systems are more susceptible to change and are thus more receptive to institutions which have the promise of fostering societal development. See Laurence Juma, *Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes*, 14 ST. THOMAS L. REV. 459, 462–65 (2002) (assessing the relevance of African Customary Law in a plural legal system seeking to uphold human rights principles).

30. A. L. Ciroma, *Time for Soul-Searching*, DAILY TIMES (Nig.), Aug. 23, 1979, at 3.

31. See Udombana, *Better Late Than Never*, *supra* note 22, at 74. See also generally TASLIM OLAWALE ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* (1962).

32. See Charter of the Organization of African Unity, May 25, 1963, art. III(2), 479 U.N.T.S. 69, 74 [hereinafter OAU Charter].

untrammelled state sovereignty, in which heads of states sought sedulously to safeguard the independence so recently won.”<sup>33</sup> This sovereignty principle, together with the non-interference principle — the *reserve domain* — became the identity symbol of the organization. The organization, thus, became a personality club in perpetual mutual adoration.

The reluctance towards modern judicial settlement was manifested at the founding conference of the OAU in 1963. The OAU rejected the draft Charter provision that provided for a Court of Mediation, Conciliation and Arbitration to be set up by means of a separate treaty.<sup>34</sup> Instead, African leaders created an ad hoc body, the “Commission of Mediation, Conciliation and Arbitration,” as a mechanism for the peaceful dispute settlement<sup>35</sup> among Member States to accomplish the purposes of the Charter.<sup>36</sup> The Commission was described as the *raison d’être* of the OAU, given that the “peaceful resolution of conflicts, both large and small, within the established framework of the Organization provides the necessary conditions for orderly progress, not only for the individual Member States but also the entire continent of Africa.”<sup>37</sup> A protocol adopted in 1964 defined the duties and powers of the Commission.<sup>38</sup> Pursuant to the article 32, this protocol became an integral part of the OAU Charter.<sup>39</sup>

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33. Claude E. Welch, Jr., *The African Commission on Human Rights and Peoples’ Rights: A Five-Year Report and Assessment*, 14 HUM. RTS. Q. 43 (1992) (discussing the birth of the OAU and noting that the founders did not focus on human rights policy in the original OAU Charter).

34. See ORGANIZATION OF AFRICAN UNITY, RESOLVING CONFLICTS IN AFRICA: IMPLEMENTATION OPTIONS ¶ 21, at 8 (OAU Information Services Publication, No. 2, 1993).

35. “Disputes” in this context refer not only to justifiable disputes, i.e., matters that raise legal questions and that can be settled by the application of international law, but also to political issues or other extra-legal considerations. See, e.g., *Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.I.C.J. (ser. A) No. 2, at 11–12 (Aug. 30); *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90, ¶¶ 20–22, at 99–100 (June 30).

36. See OAU Charter, *supra* note 32, arts. xix, VII(4).

37. See Dr. Taslim Olawale Elias, *The Commission of Mediation, Conciliation and Arbitration of the Organisation of African Unity*, 40 BRIT. Y.B. INT’L L. 336, 348 (1964). See also Colin Legum, *The Specialised Commissions of the Organisation of African Unity*, 2 J. MOD. AFR. STUD. 587 (1964).

38. See Protocol of the Commission of Mediation, Conciliation and Arbitration, 3 I.L.M. 1116 (1964).

39. There was no provision for a formal adoption of the Protocol. Article 32 of the Protocol merely required the approval of the OAU Assembly for it to

The Commission was not a judicial body, but it provided three modes of settlement: mediation, conciliation and arbitration. This Commission, however, never became operational. Technically, it continued to exist, since its formal abolition required an amendment to the OAU Charter, which was not done. The OAU Secretary-General was, however, mandated to dispense with all the assets of the Commission, and it was subsequently dissolved.<sup>40</sup>

Another opportunity to establish a judicial institution for the settlement of international disputes in Africa beckoned during the adoption of the African Charter in the early 1980s. However, the OAU refused to establish an African Human Rights Court to enforce the rights guaranteed in the African Charter, the same way as it treated the proposal for a Court of Mediation in the 1960s. African leaders disregarded the recommendations of the 1961 Lagos Conference<sup>41</sup> and the repeated proposals and recommendations over the following twenty years, fearing that such a tribunal would threaten their national sovereignty. The OAU instead established an African Human Rights Commission. This Commission was established in 1987, pursuant to article 64(1) of the African Charter<sup>42</sup> "to promote human and peoples' rights and ensure their protection in Africa."<sup>43</sup> It presently remains the only quasi-judicial body at the continental

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become an integral part of the OAU Charter; and this approval was given in at the first Assembly in July 1964.

40. See Council of Ministers, Res. CM/Res.240 (XVI) (on file with author).

41. In 1961, the International Commission of Jurists ("Int'l. C.J") convened scholars from thirty-three countries to discuss enforcement mechanisms for the protection of human rights in the newly independent states of Africa. At the end of the Conference, participants adopted the "Law of Lagos," calling for the establishment of African Convention on human rights and a court to enforce it. Article 4 declared that "in order to give full effect to the Universal Declaration of Human Rights of 1948, this Conference invites the African Governments to study the possibility of adopting an African Convention of Human Rights in such a manner that the *Conclusions* of this Conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory States." Editorial, *From Delhi to Lagos*, 3 J. INT'L COMM. JURISTS 2, 9 (1961).

42. See African Charter, *supra* note 20, art. 64(1) ("After the coming into force of the present Charter, members of the Commission shall be elected in accordance with the relevant Articles of the present Charter.").

43. *Id.* art. 30.

level to implement the rights guaranteed in the African Charter, but no more than those rights. The Commissions' activities include consideration of communications, examination of State reports, on-site missions, inter-session activities of the Commissioners, reports of Special Rapporteurs, conferences, and seminars, etc.<sup>44</sup> More specifically, the Commission receives communications from states<sup>45</sup> or "other communications"<sup>46</sup> from individuals or Non-Governmental Organizations ("NGO"s),<sup>47</sup> which allege any violation of the Charter provisions. Such communications must, however, satisfy certain "conditions laid down by the . . . Charter."<sup>48</sup>

The African Commission has not been able to effectively fulfill its mandate because of certain normative and structural deficiencies.<sup>49</sup> Its decisions and recommendations to African Heads of States and Governments are frequently disregarded. As a report of the African Commission pointed out, "[w]ith the sovereignty of the Assembly of Heads of State and Government and the Charter's non-provision of alternative methods of compensation for victims of Human Rights violations, the said vic-

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44. See *id.* art. 45. See generally Dr. RACHEL MURRAY, THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS AND INTERNATIONAL LAW (2000); EVELYN A. ANKUMAH, THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (1996); Emmanuel Bello, *The Mandate of the African Commission on Human and Peoples' Rights: Article 45 Mandate of the Commission*, 1 AFR. J. INT'L L. 31 (1988).

45. See African Charter, *supra* note 20, arts. 47–49.

46. *Id.* art. 55.

47. Only NGOs with observer status with the Commission have the competence to institute proceedings before it. Any "serious" NGO desiring to have an observer status with the Commission must submit a documented application to the Secretariat of the Commission showing its willingness and capability to work for the realization of the objectives of the African Charter. It must also provide its status, proof of its legal existence, a list of its members, its last financial statement and a statement of its activities. The Commission thereafter designated a rapporteur to study the application and, if all necessary documents have been received, the Commission considers the application during any of its sessions, usually in October and May each year. See *Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organizations Working in the Field of Human Rights with the African Commission on Human and Peoples' Rights*, Afr. Comm'n on Hum. & Peoples' Rts., 25th Ord. Sess., OAU Doc. DOC/OS(XXVI)116 (1999).

48. African Charter, *supra* note 20, art. 45(2).

49. See Udombana, *Better Late Than Never*, *supra* note 22, at 66–73 (discussing the structural and normative deficiencies bedeviling the Commission).

tims find themselves without any remedy.”<sup>50</sup> Such non-compliance constitutes “one of the major factors of the erosion of the Commission’s credibility,”<sup>51</sup> because it undermines the authority of the Commission as an effective institution capable of ensuring the states’ implementation of the rights secured in the African Charter.

### *B. Global Contrasts*

The late arrival of permanent supra-national courts in Africa contrasts with other established global and regional tribunals. This part briefly examines the development at the global level. The Permanent Court of International Justice (“PCIJ”) or the “World Court,” for example, was established under the League of Nations after World War I and began to function in 1922. Its creation was regarded as a decisive path towards the submission of a sovereign state’s activity to the international rule of law.<sup>52</sup> The International Court of Justice (“ICJ”) <sup>53</sup> succeeded the PCIJ after World War II as “substantially a continuation of the earlier body.”<sup>54</sup> It remains the only international court of a universal character with general jurisdiction.<sup>55</sup> It serves “as a fac-

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50. African Commission, *Non-Compliance of State Parties to Adopted Recommendations of the African Commission: A Legal Approach*, ¶ 6, adopted at the 24th Ord. Sess. of the Commission Banjul, The Gambia, Oct. 1998, OAU DOC/OS/50b (XXIV).

51. *Id.* ¶ 2.

52. Dupuy, *supra* note 10, at 791. *See generally* SIR HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* (1933).

53. Established pursuant to the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993 [hereinafter ICJ Statute]. *See generally* SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* (1997).

54. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 548 (1998).

55. The ICJ is fitted both with contentious jurisdiction and advisory jurisdiction. For its contentious jurisdiction, however, States Parties must recognize the compulsory jurisdiction of the Court. *See* ICJ Statute, *supra* note 53, art. 36(2) (“The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes . . . .”) (emphasis added). Where, for example, both states have limited the jurisdiction that they will recognize, the ICJ only has power to decide a case to the extent that both states have agreed to the same sort of matters. *Cf.* *Eastern Carelia (Fin. v. U.S.S.R.)*, 1923 P.C.I.J. (ser. B) No. 5, at 27 (July 23) (“It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other

tor and actor in the maintenance of international peace and security.”<sup>56</sup> That way, the ICJ assists in furthering one of the purposes of the UN, to wit, “to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes which might lead to a breach of the peace.”<sup>57</sup> As of July 2001, 189 States acceded to the ICJ Statute, out of which 63 have recognized its compulsory jurisdiction.<sup>58</sup>

The ICJ has operated concurrently with other ad hoc tribunals, such as the Nuremberg and Tokyo International Military Tribunals<sup>59</sup> and the international criminal tribunals for the Former Yugoslavia<sup>60</sup> and Rwanda.<sup>61</sup> In recent years, however,

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States either to mediation or to arbitration, or to any other kind of pacific settlement.”).

56. See Schwebel Address, *supra* note 7.

57. U.N. CHARTER art. 1, para. 1.

58. See 2000–2001 I.C.J. ANN. REP. pt. I, at 1, available at [http://www.icj-cij.org/icjwww/igeneralinformation/igeninf\\_Annual\\_Reports/iICJ\\_Annual\\_Report\\_2000-2001.PDF](http://www.icj-cij.org/icjwww/igeneralinformation/igeninf_Annual_Reports/iICJ_Annual_Report_2000-2001.PDF) [hereinafter 2000–2001 I.C.J. ANN. REP.] (containing the 2001 Annual Report of activities of the ICJ to the General Assembly of the UN).

59. These two tribunals were established “for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.” Agreement Respecting the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 1, 59 Stat. 1544, 82 U.N.T.S. 280.

60. The International Criminal Tribunal for the former Yugoslavia (ICTY), sitting at the Hague, was established in 1993, pursuant to a Statute of that name. See Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia, U.N. SCOR, U.N. Doc. S/RES/827 (1993), available at <http://www.un.org/icty/legaldoc/lateestleft-e.htm>. It is an *ad hoc* tribunal, with a mandate to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Socialist Federal Republic of Yugoslavia since January 1, 1991. Its Statute defines its jurisdiction and powers. Its *ratione materiae* is limited to grave breaches of the Geneva Conventions of August 12, 1949, *id.* art. 2; violations of the laws or customs of war, *id.* art. 3; genocide, *id.* art. 4; and crimes against humanity, *id.* art. 5. See also MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS 277 (Philip Sands ed., 1999) [hereinafter MANUAL ON INTERNATIONAL COURTS]; Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT’L L. 57 (1999).

61. The International Criminal Tribunal for Rwanda (“ICTR”) was established in 1994 by a UN Security Council resolution under Chapter VII of the

the rate of change from ad hoc to permanent tribunals and courts has increased dramatically. The International Criminal Court ("ICC"), created in Rome on July 17, 1998, is the latest addition.<sup>62</sup> The ICC is a landmark in international judicial cooperation and possibly the greatest step towards a multilateral justice system since the Nuremberg and Tokyo tribunals. As the direct descendant of these tribunals and the more recent tribunals for the Former Yugoslavia and Rwanda, the ICC will prosecute genocide, crimes against humanity, and war crimes,<sup>63</sup> when national justice systems are either unwilling or unable to do so.

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UN Charter. See Statute of the International Criminal Tribunal for Rwanda, U.N. SCOR 50th Sess., U.N. Doc. S/RES/955 (1994), *as amended* by SC Res. 1165. It has as its mandate the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the course of or in relation to the 1994 Rwanda Genocide. In many respects, the ICTR was modeled on the ICTY, with which it maintains significant institutional links. Like its ICTY counterpart, the ICTR Statute defines the jurisdiction and powers of the ICTR. The crimes on which ICTR exercises jurisdiction include genocide, crimes against humanity, violations of the Geneva Convention and the fundamental rules of international humanitarian law, the violation of which entails individual criminal responsibility. See *id.* arts. 2–4. For these crimes, the tribunal exercises concurrent jurisdiction with national courts, although the tribunal has primacy over national courts for this purpose. *Id.* arts. 2–4, 8. See also MANUAL ON INTERNATIONAL COURTS, *supra* note 60, at 287–300; VIRGINIA MORRIS & MICHAEL P. SCHARF, 1–2 THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (1998); Roy S. Lee, *The Rwanda Tribunal*, 9 LEIDEN J. INT'L L. 37 (1996).

62. See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (1998) (entered into force on July 1, 2002) [hereinafter Rome Statute of the I.C.C.]. The Statute was adopted with 120 in favor, 7 against, and 20 abstentions. The U.S. was, sadly, among the states that voted against the Statute, on the ground, *inter alia*, that the Statute is "overreaching" in that it purports to bind non-state parties through the exercise of jurisdiction over their nationals; besides, the U.S. was seeking "an iron-clad veto of jurisdiction over U.S. personnel and officials." See M. P. Scharf, *Results of the Rome Conference for an International Criminal Court*, ASIL INSIGHTS, ¶¶ 1–2 (Aug. 1998), available at <http://www.asil.org/insights/insigh23.htm>. The allegation that the Statute is overreaching has, however, been refuted; indeed, Richard Dicker of Human Rights Watch calls it "a gross mischaracterization." *Id.* The statute permits the I.C.C. to exercise jurisdiction over the nationals of non-States Parties where there is a reasonable basis to believe they have committed the most serious international crimes. *Id.*

63. See Rome Statute of the I.C.C., *supra* note 62, arts. 5–8, for the definition and description of the various crimes covered in the Statute.

There are also numerous treaty-based bodies established to implement various UN-inspired human rights treaties. These bodies include the Human Rights Committee (“HRC”) charged with the implementation of the International Covenant on Civil and Political Rights,<sup>64</sup> the Committee on the Elimination of Racial Discrimination (“CERD”),<sup>65</sup> the Committee Against Torture (“CAT”),<sup>66</sup> the Committee on the Elimination of All Forms of Discrimination Against Women;<sup>67</sup> and the Committee on the Rights of the Child.<sup>68</sup> Remarkably, these new judicial and quasi-judicial bodies, including those mentioned in the introductory part of this paper, exercise powers and functions that are substantially different from those of the past. For example, most of these bodies grant standing to both state and non-state entities,<sup>69</sup> not only states, as was previously the case. This change is due partly to the expanding concept of the “international community as a whole,” which no longer consists exclusively of states but includes non-state entities towards whom obligations may exist.<sup>70</sup> The phrase now covers such bodies as

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64. See International Covenant on Civil and Political Rights, Dec. 19, 1966, pt. IV, 999 U.N.T.S. 171 [hereinafter ICCPR]. See generally DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* (1994).

65. Established pursuant to the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, art. 18, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

66. Established pursuant to the Convention Against Torture, and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature*, Dec. 10, 1984, art. 17, 1465 U.N.T.S. 85.

67. Established pursuant to the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature*, Dec. 18, 1979, art. 17, 1249 U.N.T.S. 13, 21.

68. Established pursuant to the Convention on the Rights of the Child, *opened for signature*, Nov. 20, 1989, art. 43, 1577 U.N.T.S. 3.

69. See, e.g., Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 2, 999 U.N.T.S. 302 (allowing “individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies [to] submit a written communication to the Committee for consideration”); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, art. 2, 1249 U.N.T.S. 13 (dealing with the competence of the CEDAW Committee to receive and consider complaints from individuals or groups within its jurisdiction).

70. Cf. *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR Int’l L. Comm’n, 56th Sess., Supp. No. 10, at 54, U.N.



the UN, the AU, the EU, and the International Committee of the Red Cross. Indeed, presently judicial bodies that grant standing to non-state entities have outnumbered those with traditional jurisdictions limited to disputes between sovereign states.<sup>71</sup>

### III. BRIEF OVERVIEW OF THE PROPOSED AFRICAN COURTS

This Part surveys the legal framework for the Human Rights Court and the AU Court. The next Part will discuss whether two supra-national courts are needed in contemporary Africa.

#### A. *The African Human Rights Court*

The African Charter originally did not provide for a court. This omission of an international court undermined public confidence in the African human rights system, because without a court it was impossible to compel violating states to conform to international norms and to provide remedies to victims.<sup>72</sup> The lack of a court also presented obstacles to the development of human rights jurisprudence and the necessary publicity.<sup>73</sup> Perceiving these problems, the member states adopted a protocol to the African Charter in 1998 to give teeth and meaning to the rights guaranteed in the Banjul Charter and “any other relevant Human Rights instrument ratified by the States concerned.”<sup>74</sup> According to the Preamble of the Human Rights Pro-

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Doc. A/56/10 (2001) (preferring the phrase “international community as a whole,” instead of simply “international community”). The formulation, however, does not imply that the international community is a legal person, a fallacy exposed by Judge Fitzmaurice in his dissenting opinion in the Namibia advisory opinion case. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 241 (June 21, 1971) (dissenting opinion of Judge Fitzmaurice); James Crawford et al., *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading*, 12 EUR. J. INT'L L. 963, 973 (2001).

71. Oellers-Frahm, *supra* note 5, at 69.

72. See Philip Amoah, *The African Charter on Human and Peoples' Rights: An Effective Weapon for Human Rights?*, 4 AFR. J. INT'L & COMP. L. 226, 237–40 (1992).

73. *Id.*

74. Human Rights Protocol, *supra* note 19, art. 3(1). For an in-depth commentary and analysis on the Protocol establishing the Human Rights Court, see Udombana, *Better Late Than Never*, *supra* note 22.

tocol, the member states were “[f]irmly convinced that the attainment of the objectives of the African Charter on Human and Peoples’ Rights requires the establishment of an African Court on Human and Peoples’ Rights to complement and reinforce the functions of the African Commission on Human and Peoples’ Rights.”<sup>75</sup>

The Protocol thus provides the anatomy of the Human Rights Court. It allows any aggrieved persons, whether state or non-state, to bring complaints before the African Human Rights Court for violations of the African Charter. Complaint procedures before international human rights tribunals serve important functions:

First, as a result of considering such a complaint an individual, whose rights have been violated, may have a remedy against the wrong suffered by him, and the violation could be stopped and/or compensation paid, etc; second, consideration of a complaint may result not only in a remedy for the victim of the violation, whose complaint has been considered, but also in changes to internal legislation and practice; and third, an individual complaint (or more often, a series of complaints) may serve as evidence of systematic and/or massive violations of certain rights in a given country.<sup>76</sup>

According to the Protocol, the Human Rights Court shall consist of eleven judges, who must be nationals of the member states of the OAU.<sup>77</sup> These judges shall be “elected in an individual capacity from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples’ rights.”<sup>78</sup> In addition to having appropriate training or qualifications in law, the judges must also be persons of “high moral character.” This morality requirement supposedly encompasses such elements as

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75. Human Rights Protocol, *supra* note 19, 7th preambular para.

76. Rein Mullerson, *The Efficiency of the Individual Complaint Procedures: The Experience of CCPR, CERD, CAT and ECHR*, in *MONITORING HUMAN RIGHTS IN EUROPE* 25, 27 (Arie Bloed et al. eds., 1993).

77. See Human Rights Protocol, *supra* note 19, art. 11(1); *cf.* ICJ Statute, *supra* note 53, art. 2 (declaring that the Court shall be composed of “independent judges elected regardless of nationality”).

78. Human Rights Protocol, *supra* note 19, art. 11(1).

impartiality, integrity, independence, and competence.<sup>79</sup> Significantly too, the candidates for judges are not to be limited to the holders of judicial appointments; reputable academics or jurists may be appointed. This approach resembles that taken by the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>80</sup> and the ICJ Statute,<sup>81</sup> and is distinguishable from the requirement of the American Convention on Human Rights ("ACHR") that candidates possess qualifications required for appointment to the highest judicial offices.<sup>82</sup>

Similar to the ICJ composition,<sup>83</sup> the judgeship of the African Human Rights Court must provide a balanced representation of the main African regions and of their principal legal traditions.<sup>84</sup> The main regions of the continent include Northern, Eastern, Central, Southern and Western Africa, while the principal legal traditions in Africa encompass traditional or customary law, Islamic law, common law, and civil law. This rule of balanced representation, in practice, will help to ensure a degree of consistency in the allocation of bench seats to nationals of member states. It may also mitigate any foreseeable reluctance on the part of a member state in submitting to the judgments of a court that consisted of uneven representation of legal traditions. Indeed, to function effectively, the Court must ensure the confi-

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79. See NSONGURUA UDOMBANA, *THE AFRICAN REGIONAL HUMAN RIGHTS COURT: MODELING ITS RULES OF PROCEDURE* 38 (2002).

80. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 39(3), 213 U.N.T.S. 221, [hereinafter ECHR] ("The [judges] shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurists of recognised competence.").

81. See ICJ Statute, *supra* note 53, art. 2 (providing that "[t]he Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest offices, or are jurists of recognised competence in international law").

82. See American Convention on Human Rights, Nov. 22, 1969, art. 52(1), 1144 U.N.T.S. 144.

83. The ICJ Statute, *supra* note 53, art. 9, provides that the General Assembly and Security Council are to bear in mind, when proceeding to elect the judges of the ICJ, that in the body as a whole, the representation of the main forms of civilization and of the principal legal systems of the world is assured.

84. See Human Rights Protocol, *supra* note 19, art. 14(2) ("The Assembly shall ensure that in the Court as a whole there is representation of the main regions of Africa and of their principal legal traditions.").

dence of an eligible party to any action in the court's impartiality. Therefore, such party must be satisfied that at least one of the judges in the Court has the necessary education, training and experience allowing him to fully understand the interests and submissions of the region where he comes from.<sup>85</sup>

Article 5 of the Human Rights Protocol deals with what common lawyers call *locus standi*, that is, who has a right to bring a case before the Court. The article entitles the following five categories of claimants to direct access to the Court:

- (a) The Commission;
- (b) The State Party which has lodged a complaint to the Commission;
- (c) The State Party against which the complaint has been lodged at the Commission;
- (d) The State Party whose citizen is a victim of human rights violation;
- (e) African Intergovernmental Organisations.<sup>86</sup>

From the above provisions, the Commission, States and African NGOs will have automatic access to the Court upon a state's ratification of the Protocol.<sup>87</sup> In contrast, the Protocol provides for only optional jurisdiction with respect to individuals and NGOs. It provides that "[t]he Court may entitle relevant Non-Governmental Organisations . . . with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol."<sup>88</sup> Notably, the types of NGOs are circumscribed to those "with

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85. See generally Richard Plende, *Rules of Procedure in the International Court and the European Court*, 2 EUR. J. INT'L L. 1 (1991); Judge Manfred Lachs, *A Few Thoughts on the Independence of Judges of the International Court of Justice*, 25 COLUM. J. TRANSNAT'L L. 593 (1987); Edward Gordon, *Observations on the Independence and Impartiality of the Members of the International Court of Justice*, 2 CONN. J. INT'L L. 397 (1987); Shabtai Rosenne, *Election of Five Members of the ICJ in 1981*, 76 AM. J. INT'L L. 364 (1982); Judge Sir Humphrey Waldock, *The International Court of Justice as Seen from Bar and Bench*, 54 BRIT. Y.B. INT'L L. 1 (1983); Leo Gross, *The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order*, 65 AM. J. INT'L L. 253 (1971).

86. See Human Rights Protocol, *supra* note 19, art. 5(1).

87. *Id.* art. 5(2).

88. *Id.* art. 5(3).

observer status with the Commission.” Thus, the discretion to give individuals and NGOs standing lies jointly with the Court and the target State. On the one hand, the Court has discretion to grant or deny an individual and NGO standing at will. The language of the Protocol is: the *Court may entitle[;]* . . . and, in order for a willing Court to hear a case filed by an individual or NGO, the state must have made an express declaration accepting the Court’s jurisdiction to hear such cases. As Article 34(6) provides:

[A]t the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. *The Court shall not receive any petition under article 5(3) involving a State Party which has not made such a declaration.*<sup>89</sup>

This provision was a compromise in order to induce more African states to adopt the Human Rights Protocol.<sup>90</sup> The provision was aimed at achieving an acceptable balance between genuine enforcement of fundamental rights set forth thereunder and respect for the sovereignty of potential signatory states.<sup>91</sup> Such a cautious compromise, however, was really unnecessary. The drafters facing a noble enterprise ought to have drafted the Protocol in a way that significantly attacks the problems it meant to address. However, the drafters appeared to have been too timid, like a frightened beast shying at its own shadow.

Article 5(3) in conjunction with Article 34(6) of the Protocol has article 25 of the former European Convention on Human Rights (“ECHR”) as its antecedent. Article 25 provides:

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89. *Id.* art. 34(b) (emphasis added).

90. See Udombana, *Better Late Than Never*, *supra* note 22, at 87; Ibrahim Ali Badawi El-Sheikh, *Draft Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of An African Court on Human and Peoples’ Rights: Introductory Note*, 9 AFR. J. INT’L & COMP. L. 943, 947 (1997) (“The question of allowing NGOs and individuals to submit cases to the Court was one of the most complicated issues during the consideration of the Draft Protocol.”).

91. See, e.g., 4 COUNCIL OF EUROPE, COLLECTED EDITION OF THE “TRAVAUX PREPARATOIRES” OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 114 (1977).

The Commission may receive petitions . . . from any person, non-governmental organizations<sup>[92]</sup> or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions.<sup>93</sup>

Yet, when the ECHR was adopted, the idea that individuals should be able to bring human rights complaints against states before an international legal authority was so radical that no human rights instruments obliged member states to automatically accept such a procedure. Time has changed, however, and

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92. The European Commission explained its interpretation of a non-governmental organization in *Ayuntamiento de M v. Spain*, App. No. 15090/89, 68 Eur. Comm'n H.R. Dec. & Rep. 209, 215 (1991). The applicant was the M City Council. It complained, *inter alia*, that it had not had a fair trial (in breach of the ECHR, *supra* note 80, arts. 6, 13) when the domestic Spanish courts prevented it from establishing a drug addicts' rehabilitation centre in a specified district of the city. *Id.* at 213. The Council claimed that it was a 'non-governmental organisation', because the system of administrative decentralisation in Spain meant that the council was independent of (central) Government. *Id.* at 215. The Commission rejected that argument, declaring that the Council was not eligible to make an application under Article 25. The Commission:

[N]otes that local authorities are public law bodies which perform official duties assigned to them by the Constitution and by substantive law. They are therefore quite clearly governmental organisations. . . . In this connection, the Commission reiterates that in international law the expression 'governmental organisation' cannot be held to refer only to the Government or the central organs of the State. Where powers are distributed along decentralised lines, it refers to any national authority which exercises public functions.

*Id.*

93. ECHR, *supra* note 80, art. 25. *Cf.* ICCPR, *supra* note 64, art. 41(1), providing that:

A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

the revised ECHR now gives aggrieved individuals automatic standing.<sup>94</sup> Furthermore, it seems incongruous that individuals have standing to sue their governments before domestic courts but cannot do so before an international tribunal, such as the African Human Right Court.

The African Human Rights Court has both contentious and advisory jurisdictions.<sup>95</sup> Its contentious jurisdiction extends “to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.”<sup>96</sup> Similarly, “[a]t the request of a Member State of the [AU], the [AU], any of its organs, or any African organisation recognised by the [AU], the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to any matter being examined by the Commission.”<sup>97</sup> It is not clear, however, what is meant by “any African organisation recognised by the OAU”. Presumably, it may refer to different sub-regional organizations, such as the ECOWAS.

Notwithstanding the above-discussed shortcomings, the Protocol provides the Human Rights Court with broad advisory jurisdiction, allowing it to engage in a robust and sustained analysis of the meaning of the African Charter and the Human Rights Protocol, as well as the compatibility of domestic legislation and regional initiatives with the human rights norms contained therein. The advisory opinions of the Inter-American Court, for example, have had a significant impact on both pro-

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94. See Protocol No. 11 to the Convention for the Protection of Human Rights, May 11, 1994, arts. 1, 34, Europ. T.S. No. 155, *reprinted in* 33 I.L.M. 943, 943, 962 (1994) [hereinafter Protocol No. 11] (amending Article 24 of the former ECHR).

The Court may receive applications from any person, non-governmental organisations or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the right set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

*Id.*

95. See Human Rights Protocol, *supra* note 19, arts. 3–4.

96. *Id.* art. 3(1).

97. *Id.* art. 4.

protecting human rights in the Americas and on providing needed guidance to domestic courts.<sup>98</sup> These advisory opinions have also enabled some governments to introduce necessary domestic reforms or to abandon legislation that would have breached the American Convention on Human Rights without being compelled to do so by contentious decisions stigmatizing them as violators of human rights. As Thomas Buergenthal puts it, “[c]ertain governments, in particular those of fragile emerging democracies, will find it easier to give effect to an advisory opinion than to comply with a contentious decision in a case they lost.”<sup>99</sup> Additionally, advisory opinions “can provide speedy judicial responses to questions it would take years to determine in contentious proceedings, while avoiding the friction and bitterness judgments in contentious cases are likely to generate in some countries.”<sup>100</sup>

The Human Rights Court is empowered to draft its Rules of Procedure in consultation with the African Commission.<sup>101</sup> The Rules “shall lay down the detailed conditions under which the Court shall consider cases brought before it, bearing in mind the complementarity between the Commission and the Court.”<sup>102</sup> The Human Rights Protocol provides that the Court shall conduct its proceedings in public, although it may also hold in camera hearings in certain cases specified by the Rules of Procedure.<sup>103</sup> A party shall be entitled to representation of his case by a legal representative of his choice. Free legal representation may be provided where justice so requires.<sup>104</sup> This provision will

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98. See, e.g., *Ekmekdjian v. Sofovich*, CSJN 315 Fallos 1492 (1992) (S. Ct. of Argentina) (discussed in Thomas Buergenthal, *International Tribunals and National Courts: The Internationalization of Domestic Adjudication*, in RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG (FESTSCHRIFT FÜR RUDOLF BERNHARDT) 687, 695 (U. Beyerlin et al. eds., 1995).

99. Thomas Buergenthal, *The European and Inter-American Human Rights Courts: Beneficial Interaction*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE 123, 131 (Paul Mahoney et al. eds., 2000) [hereinafter Buergenthal, *Beneficial Interaction*]. See also generally Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1 (1985).

100. Buergenthal, *Beneficial Interaction*, *supra* note 99, at 131.

101. Human Rights Protocol, *supra* note 19, art. 33. See also generally UDOMBANA, *supra* note 79.

102. Human Rights Protocol, *supra* note 19, art. 8.

103. *Id.* art. 10(1).

104. *Id.* art. 10(2).



be particularly necessary in a continent where the majority of the citizens experience humiliating poverty. In Africa, the lack of resources "is not a special circumstance but rather a common occurrence"<sup>105</sup> and the unavailability of legal aid may have affected the accessibility of a remedy. The Commission has, for example, stressed that "the lack of legal aid in Africa precludes the majority of the African population from asserting their human rights."<sup>106</sup>

The decisions of the Human Rights Court will be final and binding on the parties. However, the court will have the power to review its decisions in light of new evidence under conditions to be set out in the Rules of Procedure.<sup>107</sup> Unlike the African Commission, which merely makes recommendations to the Assembly of Heads of States and Government of the continental body,<sup>108</sup> the Human Rights Court will have the power to issue binding decisions and to order compensation or reparations. The Executive Council (former Council of Ministers) of the AU, will assist in monitoring the implementation of the court's decisions.<sup>109</sup> This approach is in accord with international law and practice. The binding nature of the decisions rendered by international judicial bodies, however, does not equal to effective enforcement of such decisions, which is a function to be carried out by executive bodies. Thus, enforcing court decisions is a political, rather than a judicial duty.<sup>110</sup>

The good news is that, with limited exceptions, states generally comply with international court judgments. State Parties to

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105. ANKUMAH, *supra* note 44, at 70. See also Andrew S. Butler, *Legal Aid Before Human Rights Treaty Monitoring Bodies*, 49 INT'L & COMP. L.Q. 360, 361 (2000).

106. African Commission on Human and Peoples' Rights, *Conclusions and Recommendations of the Seminar on the National Implementation of the African Charter on Human and Peoples' Rights in the Internal Legal Systems in Africa*, in 6 ANNUAL ACTIVITY REPORT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, Annex VIII, ¶ 6(c) (1993) (recommending that "the question of legal aid and recourse procedures should be accorded greater attention in the work of the African Commission and that States and NGOs should take the initiative to promote the establishment of legal aid services").

107. Human Rights Protocol, *supra* note 19, art. 28(2)–(3).

108. See African Charter, *supra* note 20, art. 58(2).

109. Human Rights Protocol, *supra* note 19, art. 29(2). Similarly, the Council of Ministers is entrusted with supervision of the execution of decisions of the E.Ct.H.R. See ECHR, *supra* note 80, art. 54.

110. See Romano, *supra* note 1, at 714 n.25.

the ECHR, for example, have increasingly complied with judgments of the E.Ct.H.R.<sup>111</sup> Most international organizations also make the execution of such judgments possible by providing for some form of sanctions. For example, the UN Charter provides that where a party fails to obey the judgment of the ICJ, the aggrieved party may apply to the Security Council, “which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.”<sup>112</sup> It is hoped that African States, like their European counterparts, will adopt positive attitudes towards the judgment of the African Human Rights Court or, for that matter, any continental court.

### *B. The African Union Court*

#### 1. Establishment and Organization of the Court

As indicated earlier, the AU Act has not defined the structure and mandate of the AU Court. It is, therefore, not yet clear what the Court’ anatomy will be, as a separate protocol is expected to provide further and better particulars, to use the language of trial lawyers. Significantly, the Interim Chairperson of the AU Commission, Amara Essy, has initiated the process for the adoption of a protocol on the Court. Two “brainstorming” meetings have already been held, leading to the elaboration of a Draft Protocol.<sup>113</sup> The Draft Protocol shall form the basis for the discussion that follows. The Court is established to “have a determinative role in the progressive development of African jurisprudence through the judicial process and will make a distinctive contribution to the development of international law.”<sup>114</sup>

Meanwhile, the AU Act provides that the judges of the AU Court shall be appointed and terminated by the Assembly.<sup>115</sup> Under the Draft Protocol, the Court shall consist of seventeen

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111. See generally Rolv Ryssdall, *Opinion: The Coming of Age of the European Convention on Human Rights*, 1 *EUROP. HUM. RTS. L. REV.* 18 (1996) (examining the achievements of the E.Ct.H.R. and the challenges it faces).

112. U.N. CHARTER art. 94, para. 2.

113. See Draft Protocol Relating to the Statute, Composition and Functions of the Court of Justice of the African Union, CAB/LEG/23.20/45/VOL.II (2003) [hereinafter Draft Protocol].

114. *Id.* at pmbl.

115. See AU ACT, *supra* note 23, art. 9(h).

judges, nationals of Member States, provided that no two judges shall be nationals of the same State.<sup>116</sup> This number, arguably, will allow for viability and successful collective functioning of the Court. Like the Human Rights Protocol, the Draft Protocol provides that the appointment of the Judges must reflect the principal legal systems of Africa; and for this purpose, each region of the continent — that is Northern, Eastern, Central, Southern, and Western Africa — “shall be represented by no less than two (2) Judges.”<sup>117</sup> Like earlier noted, this broad composition will give State Parties sufficient confidence to resort to the Court.

The Draft Protocol spells out the qualifications for appointment, which is not different from those of similar international tribunals. It provides that “[t]he Court shall be composed of impartial and independent Judges elected from among persons of high moral character, who possesses the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurists of recognized competence in international law.”<sup>118</sup> This formula, which is similar to the provision in the ICJ Statute<sup>119</sup> and the Revised ECOWAS Treaty,<sup>120</sup> “takes in professors, professional lawyers, and civil servant appointees.”<sup>121</sup> And in order to avoid any conflict of interest, the Draft Protocol provides that a Judge of the Court shall not exercise any political or administrative function, or engage in other occupation of a professional nature.<sup>122</sup>

The Judges shall be elected for a seven-year period, subject to re-election once.<sup>123</sup> The Draft Protocol, like the Human Rights Protocol, staggers their appointment in order “to ensure a

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116. See Draft Protocol, *supra* note 113, art. 3(1).

117. *Id.* art. 3(2).

118. *Id.* art. 3(3).

119. See ICJ Statute, *supra* note 53, art. 2 (“The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest offices, or are jurisconsults of recognized competence in international law.”).

120. See Revised ECOWAS Treaty, *supra* note 17, art. 20.

121. BROWNIE, *supra* note 54, at 712.

122. Draft Protocol, *supra* note 113, art. 13(1). *Cf.* ICJ Statute, *supra* note 53, art. 16(1).

123. See *id.* art. 6(1).

measure of continuity of membership of the Court.”<sup>124</sup> Consequently, “[t]he term of five (5) Judges elected at the first election shall expire at the end of five (5) years and the other Judges shall serve the full term.”<sup>125</sup> The Draft Protocol also provides for “adequate gender representation” in the election of the Judges,<sup>126</sup> similar to the provision in Article 14(3) of the Human Rights Protocol. The empowerment of women, which has been a crusade of the human/women rights movements for years, appears to be yielding some dividends in some areas, though much remains to be done in many others.

The Draft Protocol guarantees the independence of the Judges of the Court; such independence “shall be fully ensured in accordance with international law and, in particular, the United Nations Basic Principles on the Independence of the Judges [(“Basic Principles”).”<sup>127</sup> The Basic Principles were formulated, *inter alia*, because of the need to consider “the role of the judges in relation to the system of justice and to the importance of their selection, training and conduct.”<sup>128</sup> Consequently, it is vitally important that appointments to the AU Court should be carried out with the utmost circumspection because the way in which the judges are selected could make or mar the Court’s performance. Indeed, the Basic Principles provide that “[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives.”<sup>129</sup> Allied to the provision on the independence of Judges is the condition for their

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124. UDOMBANA, *supra* note 79, at 40.

125. Draft Protocol, *supra* note 113, art. 6(1). Immediately after the first election, the Chairperson of the AU Assembly is required to draw lots to determine Judges who will cease to function after the expiration of the initial five years. *See id.* art. 6(2). *Cf.* Human Rights Protocol, *supra* note 19, art. 15.

126. Draft Protocol, *supra* note 113, art. 5(2).

127. *Id.* art. 11(1). *Cf.* Human Rights Protocol, *supra* note 19, art. 17(1).

128. Basic Principles on the Independence of the Judiciary, adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from Aug. 26 to Sept. 6 1985, pmb., UN Doc. A/CONF.121/22Rev. 1 at 59 (1985) [hereinafter Basic Principles]. Principle 4 provides, *inter alia*, that “There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision.” *Id.* Principle 4. Similarly, “[i]t is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.” *Id.* Principle 7.

129. *Id.* Principle 10.

removal. Thus, the Draft Protocol provides that “[a] Judge of the Court shall not be suspended or removed from office unless in the unanimous recommendation of the other Judges, he or she no longer fulfils the requisite conditions to be a Judge.”<sup>130</sup> Similar provision is made in the Human Rights Protocol.<sup>131</sup> Meanwhile, Judges engaged in the business of the AU Court, like those of the Human Rights Court, are given diplomatic privileges and immunities.<sup>132</sup>

## 2. Jurisdiction of the Court

The AU Act did not clearly define the jurisdiction of the AU Court, other than the terse provision on jurisdiction *rationae materiae*, to the effect that that the court “shall be seized with matters of interpretation arising from the application or implementation of this Act.”<sup>133</sup> The Court shall also interpret the Protocol to the AEC Treaty on establishing the Pan-African Parliament (“PAP”), which was adopted by the OAU Assembly on March 2, 2001, at its Fifth Extraordinary Summit in Sirte, Libya.<sup>134</sup> Pending the Court’s establishment, interpretative matters over both the AU Act and the PAP Protocol shall be submitted to the AU Assembly, “which shall decide [these matters] by a two-thirds majority.”<sup>135</sup> It is not clear, however, how

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130. Draft Protocol, *supra* note 113, art. 10(1). *Cf.* ICJ Statute, *supra* note 53, art. 18(1). *See also* Basic Principles, *supra* note 128, Principle 19 (providing that “[a]ll disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct”).

131. *See* Human Rights Protocol, *supra* note 19, art. 18.

132. *See* Draft Protocol, *supra* note 113, art. 12. *Cf.* Human Rights Protocol, *supra* note 19, art. 17(3).

133. AU ACT, *supra* note 23, art. 26. *Cf.* TREATY: TREATY ON EUROPEAN UNION, Feb. 7, 1992, 1992 O.J. (C 191) 1, 1 C.M.L.R. 573 (1992), art. 220 (on the ECJ duties) [hereinafter TEU].

134. *See* Protocol to the Treaty Establishing the African Economic Community (“AEC”) Relating to the Pan-African Parliament, Mar. 2, 2001, art. 20, at [http://www.au2002.gov.za/docs/key\\_oau/papprot.htm](http://www.au2002.gov.za/docs/key_oau/papprot.htm) [hereinafter PAP Protocol]. Twenty-one Member States have so far signed the Protocol while three countries have ratified it. *See* Dep’t of Foreign Affairs, Republic of South Africa, *Transition from the OAU to the African Union*, at [http://www.au2002.gov.za/docs/background/oau\\_to\\_au.html](http://www.au2002.gov.za/docs/background/oau_to_au.html) (last visited Aug. 11, 2002). The Protocol will enter into force after the deposit of the instruments of ratification by a simple majority of the member states. PAP Protocol, *supra*, art. 22.

135. AU ACT, *supra* note 23, art. 26; PAP Protocol, *supra* note 134, art. 20.

the Assembly — composed predominantly of political leaders — would objectively interpret or even overturn their own decisions.

The Draft Protocol, however, vests the AU Court with both contentious and advisory jurisdiction.

a. Contentious Jurisdiction and Procedure

The Draft Protocol covers not only the jurisdiction *rationae materiae*<sup>136</sup> but also *rationae personiae*. For example, the Court shall have jurisdiction in all legal disputes concerning the interpretation of a treaty; questions of international law; the existence of any act that would constitute a breach of an international obligation, if established; and the nature or extent of the reparation to be made for the breach of an international obligation.<sup>137</sup> This is without prejudice to the right of the AU Assembly to “confer on the Court power to assume jurisdiction over any dispute other than those referred to in [the Protocol].” This savings clause leaves the mandate of the court wide open to adjudicate any matter.<sup>138</sup>

As regards jurisdiction *rationae personiae*, the Draft Protocol provides that all Member States of the AU “are *ipso facto* parties to the Statute of the Court,”<sup>139</sup> though a non-member State may also access the Court “on conditions to be determined by the Assembly in each case.”<sup>140</sup> The Draft Protocol, in line with “the changing structure of international law,”<sup>141</sup> gives the right of standing to a staff member of the AU. Thus, where a staff of the Union is adjudged by an internal administrative tribunal “to be in breach of his or her obligation not to seek or receive instructions from any government or from any government or from any other authority external to the Union,” such a staff “shall have a right to appeal to the Court.”<sup>142</sup>

There is a very close connection, in terms of the functions, between the AU Court and the AEC Court of Justice (“AEC

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136. See Draft Protocol, *supra* note 113, art. 20(1)

137. *Id.* art. 20(1). Cf. ICJ Statute, *supra* note 53, art. 36.

138. See Peter, *supra* note 28, at 120.

139. Draft Protocol, *supra* note 113, art. 18(1).

140. *Id.* art. 18(2).

141. See *passim* WOLFGANG FRIEDMAN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964).

142. Draft Protocol, *supra* note 113, art. 18(3).

Court”), provided for in the AEC Treaty but not yet established. Indeed, the AEC Treaty provides certain detailed information on its proposed Court, which allows some analysis and comparison with the AU Court. Like the AU Act, the AEC Treaty establishes an AEC Court to interpret its provisions.<sup>143</sup> Again, like the AU Act, the AEC Treaty provides that the statutes, membership, procedure and other matters relating to the AEC Court shall be determined by the Assembly of the AEC in a protocol relating to the Court.<sup>144</sup>

The AEC Court has “a very limited mandate” and is “entrusted with three basic tasks.”<sup>145</sup> First, the Court will ensure adherence to law by interpreting and applying the AEC Treaty.<sup>146</sup> Thus, failing an amicable settlement, parties to a “dispute regarding the interpretation of the application of the provisions of [the AEC] Treaty” may refer the matter to the Court.<sup>147</sup> Second, the Court will provide advisory opinions requested by either the Assembly of Heads of State and Government or the Council of Ministers (now the Executive Council).<sup>148</sup> Third, it will adjudicate disputes submitted to it pursuant to the AEC Treaty provisions. Thus, the Court shall entertain “actions brought by a Member State or the Assembly on grounds of the violation of the provisions of this Treaty, or of a decision or a regulation or on grounds of lack of competence or abuse of powers by an organ, an authority or a Member State . . . .”<sup>149</sup> The Assembly may also refer any dispute concerning the AEC Protocol on Regional Economic Communities (“REC”) to the Court as a “last resort.”<sup>150</sup>

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143. See AEC Treaty, *supra* note 25, art. 18(1).

144. *Id.* art. 20.

145. Peter, *supra* note 28, at 119.

146. See AEC Treaty, *supra* note 25, art. 18(2).

147. *Id.* art. 87(1).

148. *Id.* art. 18(3)(b).

149. *Id.* art. 18(3)(a). *Cf.* TEU, *supra* note 133, art. 170 (providing that “[a] Member State which considers that another Member State has failed to fulfill an obligation under this Treaty may bring the matter before the Court of Justice”). The TEU, however, provides that a Member State must first take a matter to the Commission, before proceeding to the ECJ. *Id.*

150. See Protocol on the Relationship Between the African Economic Community and the Regional Economic Communities, Feb. 25, 1998, art. 30, reprinted in 10 AFR. J. INT'L & COMP. L. 157 (1998).

It remains to add that, in view of the apparent conflict between the AEC Treaty and the AU Act,<sup>151</sup> the AEC Court will be subsumed in the AU Court. This interpretation is fortified by the fact that the AU Act establishes the AU “in conformity with the ultimate objectives of the Charter of [the OAU] and the provisions of the Treaty Establishing the African Economic Community.”<sup>152</sup> The AU Act did not abrogate the AEC Treaty but only abrogated the OAU Charter.<sup>153</sup> In fact, through its Sirte initiative of 2001 the AU intended to speed up the economic integration process that the AEC Treaty started.

*Mutatis mutandis*, Article 19 of the Draft Protocol reproduces the provisions of the AEC Treaty on the functions of the Court. However, unlike the AEC Treaty, the Draft Protocol is silent on amicable settlement of disputes by Member States. The AEC Treaty, on its part, encourages parties to seek amicable solutions before bringing their claims to the Court. This preference for settlement, as noted earlier, is a hallmark of traditional African jurisprudence.<sup>154</sup> However, like the AEC Treaty, the Draft Protocol provides that the AU Court shall “ensure the adherence to law in the interpretation and application of the Constitutive Act.”<sup>155</sup> The phrase “the interpretation and application of” — which refers to “two distinct terms relating to two distinct operations”<sup>156</sup> — has been given a broad interpretation to cover any dispute between states concerning the responsibility of one

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151. See AU ACT, *supra* note 23, art. 33(2) (“The provisions of this Act shall take precedence over and supersede any inconsistent or contrary provisions of the Treaty establishing the African Economic Community.”).

152. Sirte Declaration, Org. Afr. Unity, Assembly of Heads of State, 4th Extraordinary Sess., ¶ 8(i), EAHG/Draft/Decl. (IV) Rev.1, *available at* [http://www.au2002.gov.za/docs/key\\_oau/sirte.htm](http://www.au2002.gov.za/docs/key_oau/sirte.htm). Cf. AU ACT, *supra* note 23, pmbl., ¶ 6 (being “[c]onvinced of the need to accelerate the process of implementing the Treaty establishing the African Economic Community in order to promote the socio-economic development of Africa”).

153. See AU ACT, *supra* note 23, art. 33(1).

154. See AEC Treaty, *supra* note 25, art. 87(1). Cf. SADC Treaty, *supra* note 15, art. 32 (providing that disputes arising from the interpretation and application of the SADC Treaty should be settled in a friendly manner. Only if an amicable attempt fails, should the dispute be referred to the SADC Tribunal.).

155. Draft Protocol, *supra* note 113, art. 19(1). Cf. AEC Treaty, *supra* note 25, art. 18(2).

156. SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES, 1945–1986, at 224 (1989) [hereinafter ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES].



of them for an alleged breach of an international obligation, whatever the origin of such an obligation.<sup>157</sup> The *Nicaragua Case* was the “first significant judicial pronouncement [of the ICJ] regarding the meaning of ‘application.’”<sup>158</sup> In that case, the Court maintained that the appraisal of conduct in the light of the relevant principles of the treaty pertains to the application of the law rather than to its interpretation; and this must be undertaken in the context of the general evaluation of the facts which are established in relation to the applicable law.<sup>159</sup>

Finally, the AU Assembly is empowered to “confer on the Court power to assume jurisdiction over any dispute other than those referred to in [the Protocol].”<sup>160</sup> This implies that the Assembly may refer to the Court disputes between natural or legal persons. Indeed, as the European experience has indicated, natural and legal persons have proved to be effective guardians of the European Community legal order and have contributed significantly to the evolution of the EC law.<sup>161</sup> Similarly, the future AU Court should also be accessible to individuals. As a court for the African Union with all its ambitious goals, the AU Court must be able to protect the “state of law.” It is, therefore, vitally important that individuals are able to appeal “directly to the Court against an act of one of the institutions of the Union that infringes [on] their basic rights.”<sup>162</sup>

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157. See, e.g., *Mavrommatis Palestine Concessions (Greece v. U.S.)*, 1924 P.C.I.J. (ser. A) No. 2, at 16, 29 (Aug. 30); *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1984 I.C.J. 392, ¶¶ 81, 83, at 427–28 (Nov. 26); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia)*, 1996 I.C.J. 595, ¶¶ 30–32, at 615–17 (July 11); *Oil Platforms (Iran v. U.S.)*, 1996 I.C.J. 803, ¶ 51, at 820 (Dec. 12); *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.)*, 1998 I.C.J. 115, ¶¶ 23–24, at 123 (Feb. 27).

158. ROSENNE, *DEVELOPMENTS IN THE LAW OF TREATIES*, *supra* note 156, at 224.

159. See *Nicaragua Case*, *supra* note 6, ¶ 225, at 117.

160. Draft Protocol, *supra* note 113, art. 20(2). Cf. AEC Treaty, *supra* note 25, art. 18(4).

161. See, e.g., Christopher Harding, *The Private Interest in Challenging Community Action*, 5 EUR. L. REV. 354, 357 (1980); Carol Harlow, *Towards a Theory of Access for the European Court of Justice*, 12 Y.B. EUR. L. 357 (1992).

162. See, e.g., Leo Tindemans, *L' Union Europeenne*, Bulletin des Communites Europeennes (Supp. 1/76, 1976).

The Draft Protocol spells out the procedure to be followed in contentious cases; and it consists of two parts: written and oral.<sup>163</sup> Unlike most domestic legal systems, written pleadings submitted to international tribunals usually contain a very full statement both of the facts considered relevant by the party and the arguments as to the law. Documentary evidence is also usually annexed. It is not surprising, therefore, that the Draft Protocol provides that written proceedings “shall consist of communication to the parties and to the institutions of the Union whose decisions are in dispute, of applications, statements of the case, defenses and observations and of replies if any, as well as all papers and documents in support, or of certified copies.”<sup>164</sup> The oral proceedings, on the other hand, “shall, if necessary, consist of hearing by the Court of witnesses, experts, agents, counsel and advocates.”<sup>165</sup>

Except for proceedings in arbitration cases, which “are almost invariably conducted in private,”<sup>166</sup> oral proceedings of most courts or tribunals are heard in public. Thus, the Draft Protocol provides that hearings shall be in public, unless the Court decides otherwise or the parties demand that the public be not admitted.<sup>167</sup>

The Draft Protocol empowers the AU Court to indicate, “if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of the parties.”<sup>168</sup> Notice of such measures must be given to the parties and to the Chairperson of the Commission.<sup>169</sup> Interim

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163. Draft Protocol, *supra* note 113, art. 25(1). *Cf.* ICJ Statute, *supra* note 53, art. 43(1).

164. Draft Protocol, *supra* note 113, art. 25(2). *Cf.* ICJ Statute, *supra* note 53, art. 43(2).

165. Draft Protocol, *supra* note 113, art. 25(5).

166. H. W. A. Thirlway, *Procedure of International Courts and Tribunals*, in III ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1129 (Rudolf Bernhardt ed., 2000) (arguing, however, that there seems to be no reason why arbitration cases should not be in public if the parties so wish, citing the 1977 *Beagle Channel Arbitration (Argentina v. Chile)*, where the tribunal held a public inaugural hearings).

167. Draft Protocol, *supra* note 113, art. 27. *Cf.* ICJ Statute, *supra* note 53, art. 46.

168. Draft Protocol, *supra* note 113, art. 23(1). *Cf.* ICJ Statute, *supra* note 53, art. 41.

169. Draft Protocol, *supra* note 113, art. 23(2).

measures are adjuncts of the judicial process and “reflect the perennial judicial concern for effective decision-making.”<sup>170</sup> They may be mandatory in nature; they may be injunctive or restraining.<sup>171</sup> Either way, they rest on “the wide and universal recognition of the enjoining powers of courts as an inherent part of their jurisdiction.”<sup>172</sup> They serve to prevent a party to a dispute from prejudicing the final outcome of the process *de facto* by an arbitrary act before a judgment has been reached, thereby rendering ineffective any judgment of a tribunal. Indeed, interim measures “are of the utmost importance in any judicial proceeding, because without this instrument, the final outcome, that is, the judgment, would lack any efficacy or such efficacy would be very limited, in addition to the serious or irreversible injury the parties might suffer.”<sup>173</sup>

All decisions of the AU Court shall be by a simple majority; and, in the event of equality of votes, the President or presiding Judge shall have a casting vote.<sup>174</sup> However, separate or dissenting opinions are permitted.<sup>175</sup> Like that of the Human Rights Court and, indeed, the AEC Court, the judgment of the AU Court “shall be final and without appeal.”<sup>176</sup> It shall, however, have no binding force “except between the parties and in respect of that particular case.”<sup>177</sup> The implication of this provision, which restates Article 59 of the ICJ Statute, is that the doctrine of judicial precedent will have a narrower application in the legal system of the AU than it has in municipal (common) law. There is an exception though; decisions on the interpreta-

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170. Peter Goldsworth, *Interim Measures of Protection in the International Court of Justice*, 68 A.J.I.L. 258, 258 (1974).

171. See United States Diplomatic and Consular Staff in Terhan Case, Provisional Measures, 1979 I.C.J. 7 (Dec. 15).

172. Separate Opinion of Judge Weeramantry, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures (Bosnia and Herzegovina v. Yugoslavia) (Serbia and Montenegro)*, Order of Sept. 13, 1993 ICJ REP. 325, 379.

173. Héctor Fix-Zamudio, *The European and the Inter-American Courts of Human Rights: A Brief Comparison*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE 507, 519 (Paul Mahoney ed., 2000).

174. Draft Protocol, *supra* note 113, art. 35. Cf. ICJ Statute, *supra* note 53, art. 55.

175. Draft Protocol, *supra* note 113, art. 37.

176. *Id.* art. 38. Cf. Human Rights Protocol, *supra* note 19, 28(1); AEC Treaty, *supra* note 25, art. 87(2).

177. Draft Protocol, *supra* note 113, art. 39.

tion and application of the Constitutive Act shall be binding on Member States and organs of the AU.<sup>178</sup> The Draft Protocol provides that in the event of disputes as to the meaning or scope of a judgment, the Court shall construe it at the request of any party.<sup>179</sup> The jurisprudence of the ICJ shows that “[t]his is rarely done, since the principle is that there should be an end to litigation and that judgments should not be freely expected to be modified except for good cause and also for the purpose of putting its meaning or scope beyond all doubt.”<sup>180</sup>

Like the ICJ and the Human Rights Court, the AU Court will have the power to revise its own judgment in light of new evidence. Such “new evidence,” however, must be “of such nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision [and] provided that such ignorance was not due to negligence.”<sup>181</sup> The application for revision should be made within six months of the discovery of the new fact.<sup>182</sup> Before proceeding with revision, the Court shall make a judgment “expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the revision admissible on this ground.”<sup>183</sup> Furthermore, in admitting proceedings in revision, “[t]he Court may require prior compliance with the terms of the judgment.”<sup>184</sup>

The Draft Protocol allows a Member State to apply for permission to intervene in a case before the AU Court should such a member “consider that it has an interest of a legal nature,

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178. See *id.* art. 40. Cf. AEC Treaty, *supra* note 25, art. 19 (providing that the judgment of the AEC Court is binding on the AEC member states and organs).

179. See *id.* art. 41. Cf. ICJ Statute, *supra* note 53, art. 60.

180. TASLIM OLAWALE ELIAS, UNITED NATIONS CHARTER AND THE WORLD COURT 120 (1989) [hereinafter ELIAS, UNITED NATIONS CHARTER AND THE WORLD COURT].

181. Draft Protocol, *supra* note 113, art. 42(1). Cf. ICJ Statute, *supra* note 53, art. 61; Human Rights Protocol, *supra* note 19, art. 28(3); Statute of the Court of Justice of the European Community, art. 40, 298 U.N.T.S. 147 (as amended by Council Decision 88/591, 1989 O.J. (C 215) 1) [hereinafter ECJ Statute]; Court of Justice, Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991, art. 102, 1991 O.J. (L 176) 7 [hereinafter ECJ Rules of Procedure].

182. Draft Protocol, *supra* note 113, art. 42(4).

183. *Id.* art. 42(2).

184. *Id.* art. 42(2)

which may be affected by the decision in the case.”<sup>185</sup> Generally, what is an interest of a legal nature is a matter of law and fact<sup>186</sup> that has to be decided after the abduction of proof that the alleged legal interest is truly involved.<sup>187</sup>

#### b. Advisory Jurisdiction and Procedure

The AU Court is fitted with advisory jurisdiction “on any legal question.”<sup>188</sup> The category of legal persons entitled to request the advisory opinion of the Court is elastic. It includes the Assembly and such other organs and specialized agencies of the AU, if authorized by the Assembly to make such request “regarding interpretation of the Constitutive Act or any decision or regulation enacted under the Act.”<sup>189</sup> These other “family” members include the Executive Council, the Pan-African Parliament, the ECOSOC, the Commission, any of the Financial Institutions or any other organ of the Union.<sup>190</sup> As earlier noted, advisory opinions can only be sought on legal questions, whether “concrete or abstract.”<sup>191</sup> However, it is no objection to the giving of such opinion “that the questions submitted to the Court for advice involve issues of fact, provided that the questions remain nonetheless *essentially* legal questions.”<sup>192</sup> Furthermore, the questions put to the Court may involve identification of the factual and legal background; and the legal questions

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185. *Id.* art. 43. *Cf.* ICJ Statute, *supra* note 53, art. 62.

186. For an explanation of the phrase “an interest of a legal nature,” see the separate opinion of Judge Oda in the *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, Application to Intervene, Judgment, 1990 I.C.J. 92, 137 (Sept. 13), which was the first time that an intervention under Article 62 of the ICJ Statute was permitted.

187. *See, e.g.,* Libya-Malta Continental Shelf Case, 1985 I.C.J. 33 (June 3) (in which the ICJ, in 1984, refused the request by Italy to intervene in the maritime dispute because, according to the Court, Italy did not show any interest of a legal nature that should enable it to intervene in the dispute).

188. Draft Protocol, *supra* note 113, art. 46(1).

189. *Id.*

190. *Id.* arts. 19(2)(b), 46(1). *Cf.* ICJ Statute, *supra* note 53, art. 65(1); Human Rights Protocol, *supra* note 19, art. 4(1).

191. IVAN ANTHONY SHEARER, *STARKE'S INTERNATIONAL LAW* 460 (1994).

192. *Id.* at n.10 (citing Advisory Opinion on the Western Sahara, 1975 I.C.J. 12 (Oct. 16)).

“may not necessarily correspond precisely to the questions thus submitted to the Court.”<sup>193</sup>

The procedure for advisory opinions is that a written request must be laid before the Court. Such request “shall contain an exact statement of the question upon which the opinion is required and shall be accompanied by all relevant documents likely to be of assistance to the Court.”<sup>194</sup> The Registrar then notifies all Member States “that the Court shall be prepared to accept, within a time limit fixed by the President, written submission or to hear oral submissions relating to the question.”<sup>195</sup> When all written and oral submissions have been made, the Court “shall deliver its advisory opinion in open court, notice having been given to the Member States and the Chairperson of the Commission.”<sup>196</sup>

Undoubtedly, the advisory opinions of the AU Court, like those of the ICJ,<sup>197</sup> will, beside the immediate benefit to the advisee, provide guidance to domestic courts of AU States. It will also enable Member States to introduce necessary domestic reforms or to oppose legislation that would be in breach of the AU Act. Governments also usually “find it easier to give effect to advisory opinion than to comply with a contentious decision in a case they lost.”<sup>198</sup> Furthermore, advisory opinions “can provide speedy judicial responses to questions it would take years to determine in contentious proceedings, while avoiding the friction and bitterness judgments in contentious cases are likely to generate in some countries.”<sup>199</sup>

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193. *Id.* (citing Advisory Opinion on the Interpretation of the Agreement of March 25, 1981 between the WHO and Egypt, 1980 I.C.J. 73 (Dec. 20)).

194. Draft Protocol, *supra* note 113, art. 46(2). *Cf.* ICJ Statute, *supra* note 53, art. 65(2).

195. Draft Protocol, *supra* note 113, art. 47. Note that the ICJ Statute requires the Registrar to notify not only “all states entitled to appear before the Court” but also international organizations considered by the Court to be able to furnish information on the subject. *See* ICJ Statute, *supra* note 53, art. 66.

196. Draft Protocol, *supra* note 113, art. 48. *Cf.* ICJ Statute, *supra* note 53, art. 67.

197. For an example of advisory opinions rendered by the ICJ, see *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 266 (July 8).

198. Buergenthal, *Beneficial Interaction*, *supra* note 99, at 131.

199. *Id.*

### 3. Sources of Law

Writers in international law usually distinguish between the formal sources and the material sources of law. The former are those legal procedures and methods of creation of rules of general application that are legally binding on the addressees. The material sources, on the other hand, provide evidence of the existence of rules, which, when proved, have the status of legally binding rules of general application.<sup>200</sup> The Draft Protocol lists the literary sources of the law that the AU Court “shall have regard to”<sup>201</sup> both in its contentious and advisory jurisdiction.<sup>202</sup> They include the AU Act and treaties expressly recognized by contesting states<sup>203</sup> — sources of mutual obligations of the parties. Another source is international custom, as evidence of a general practice accepted by law.<sup>204</sup> The ICJ describes customary international law as “the generalization of the practice of States.”<sup>205</sup>

Other sources that the Draft Protocol enumerates are general principles of law recognized by African States and teachings of publicists.<sup>206</sup> These provisions represent evidences of the existence of consensus among African States concerning particular rules of practice. Significantly, they are reproductions of Article 38(1) of the ICJ Statute, itself “widely recognised as the most authoritative statement as to the sources of international law.”<sup>207</sup> The list, however, is not exhaustive, as it omits other important contemporary processes of international lawmaking, such as soft laws. Soft laws “are significant in signaling the evolution and establishment of guidelines, which ultimately

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200. See BROWNLIE, *supra* note 54, at 1.

201. See Draft Protocol, *supra* note 113, art. 21.

202. See, e.g., *id.* art. 49 (providing that “[I]n the exercise of its advisory jurisdiction, the Court shall be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable”).

203. See *id.* art. 21(a)–(b).

204. See *id.* art. 21(c).

205. Fisheries Case (United Kingdom v. Norway), 1951 I.C.J. 191 (Dec. 18) (Judge Read).

206. See Draft Protocol, *supra* note 113, art. 21(d)–(e).

207. MALCOLM N. SHAW, INTERNATIONAL LAW 55 (1997) (noting further that Article 38(1) “expresses the universal perception as to the enumeration of sources of international law”).

may be converted into legally binding rules.<sup>208</sup> As a compromise, there should be an exception, similar to Article 38(2) of the ICJ Statute, giving the Court power to decide a case *ex aequo et bono*, if the parties so agree.

#### IV. TWO COURTS OR ONE COURT?

This Part examines arguments for and against two or more supra-national judicial institutions in Africa. Assuming, without prejudice to later conclusions, that the multiplication of courts in a collective Africa is a desirable goal, what are the benefits of such an exercise? On the other hand, is there a cynical notion on the part of African leaders, even if remote, that such an exercise will undermine the authority of these courts and dilute their potential power. What are the interests — official and non-official — of the different African countries on these issues, especially in a continent where political, ideological and cultural considerations remain paramount? This part examines some of these issues.

Subparts A and B address two arguments supporting a two-court regime. The first argument maintains that if two courts could thrive in Europe, they can also succeed in Africa. The second argument contends that multiple courts would speed up the progressive development of international law in Africa through judicial decisions. Subpart C points out the funding problem challenging the two-court system. While this article makes every attempt possible to balance the debate, it does not remain neutral. The thesis of this paper is that Africa does not need two or more courts and that the AU should settle for a single court to interpret all African legal instruments and adjudicate conflicts arising therefrom. Having two courts in Africa will not only present financial difficulty, but will also unnecessarily duplicate efforts and even create potential inconsistency.

##### *A. Arguments Based on the European Experience*

Europe provides a classic example of successful regional experiments in terms of both economic integration and human rights protection. European success has inspired other regions that are grappling with the problems of integration in an age of

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208. *Id.* at 98.



globalization and human rights protection at the regional level. For example, the ACHR and its two judicial institutions, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, were largely structured along the lines of the European experiment.

Europe created the impetus for a permanent regional international court through its adoption of the Treaty of Paris establishing the European Coal and Steel Community ("ECSC").<sup>209</sup> This treaty, established, *inter alia*, an independent court, the Court of Justice, to interpret and enforce its provisions. On March 25, 1957, the Treaties of Rome were adopted to set up the European Economic Community ("EEC") and the European Atomic Energy Community ("EAEC" or "Euratom").<sup>210</sup> These treaties established a framework to give more freedom of action to the Community institutions.<sup>211</sup> The two new communities were also permitted to use the Court of Justice. The EU Treaty<sup>212</sup> has retained as an organ of the EU the Court of Justice, now known as the European Court of Justice ("ECJ").

The ECJ has operated in Europe alongside the European Court of Human Rights ("E.Ct.H.R."). In 1959, pursuant to the European Convention on Human Rights, the Council of Europe<sup>213</sup> set up the E.Ct.H.R. located in Strasbourg, France.<sup>214</sup>

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209. See Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140. The Treaty Establishing the European Coal and Steel Community, which entered into force on July 25, 1952, provided "for the control of the coal and steel industries of the six signatory states by a High Authority, [with] the necessary powers to carry out its mandate." PHILIP RAWORTH, INTRODUCTION TO THE LEGAL SYSTEM OF THE EUROPEAN UNION 2 (2001). This was the first "significant step along the road of European integration." *Id.*

210. See Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11; Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 169. (These treaties entered into force on January 1, 1958).

211. See RAWORTH, *supra* note 138, at 3.

212. See TEU, *supra* note 133, art. 4.

213. The Council of Europe was established in 1949. See Statute of the Council of Europe, May 5, 1949, 87 U.N.T.S. 103. The Council's aim was, and remains, "to achieve a greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress." *Id.* art. 1(a). The Council seeks to pursue this aim "through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative mat-

The establishment of the E.Ct.H.R. was the first step towards a collective enforcement of human rights in Europe. The ECHR created, *inter alia*, a right of individual petition, i.e., a right of individuals and organizations to challenge their governments for human rights violations. Thus, individuals were able to take their cases to the European Commission of Human Rights (established in 1954) and then to the E.Ct.H.R. Until 1998, the Convention mandated individual litigants to pass through the Commission before getting to the Court. However, Protocol 11 to ECHR brought about fundamental changes in the system.<sup>215</sup> The reforms were aimed at resolving several of the system's weaknesses. First, the inability of individuals to petition the Court conflicted with the principle of "equality of arms." Second, the commission was faced with a growing number of applications<sup>216</sup> and with increasingly complex cases. In addition, the system could not function efficiently with thirty-four Contracting States, since it was established to work with ten or twelve Member Countries. Finally, there was the time consideration: by 1993, an average case took more than five years to move through the Convention organs.<sup>217</sup>

Consequently, the European Human Rights Commission was abolished on October 31, 1998 and the old, part-time Court was reorganized to become a permanent, full-time, Court, retaining its name as the E.Ct.H.R. There was, however, a transitional period of one year before the protocol entered into force in order to allow the Commission to dispose of cases that had been declared admissible.<sup>218</sup>

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ters and in the maintenance and further realisation of human rights and fundamental freedoms." *Id.* art. 1(b).

214. See ECHR, *supra* note 80, art. 19(b).

215. See Protocol No. 11, *supra* note 94, art. 34.

216. In 1993, 2,087 cases were registered, as opposed to 404 in 1981. See Françoise Roth & Claudia Martín, *The European System for the Protection of Human Rights: A System in Motion*, at <http://www.wcl.american.edu/hrbrief/v2i2/eurosystem.htm> (last visited May 27, 2003).

217. See *id.*

218. On the European system and its processes, see, e.g., PHILIP LEACH, *TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS* 7 (2000); ALASTAIR MOWBRAY, *CASES AND MATERIALS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 778 (2001); D.J. HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 648 (1995); Henry G. Schermers, *The Eleventh Protocol to the European Convention on Human Rights*, 19 EUR. L. REV. 367, 369 (1994); Ru-

Curiously, the European policy makers deem it desirable to introduce a human rights component into the existing EU structure, which is essentially economic in nature. In December 2000, the EU adopted a Human Rights Charter,<sup>219</sup> which, undoubtedly, raises issues of potential conflict with the E.Ct.H.R. Besides, although the Charter specifies that it is addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity,<sup>220</sup> "it remains unclear what the relationship between subsidiarity and human rights will prove to be in the European Union."<sup>221</sup>

It is not clear which of these developments has influenced African countries in their current designs of African judicial institutions. What is clear is that Africa is currently embarking on economic and political integration. Thus, it appears natural for the AU to emulate the European experience of having a separate human rights court and a court of justice. A seemingly logical, but not necessarily correct, argument maintains that if the experiment has succeeded in Europe, it can also prosper in Africa. This is probably the reason why Africa's integration agenda is closely patterned after the European model. The argument also explains the continent's desire to have both a

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dolf Bernhardt, *Reform of the Control Machinery under the European Convention on Human Rights: Protocol No. 11*, 89 AM. J. INT'L L. 145 (1995).

219. See Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1.

220. *Id.* art. 51. Subsidiarity, in the context of the ECHR, has been explained to mean "a distribution of powers between the supervisory machinery and the national authorities which has necessarily to be weighed in favour of the latter." Ryssdall, *supra* note 111, at 24. Subsidiarity, according to Ryssdall, reflects three basic features:

First, the list of rights and freedoms is not exhaustive, so that the Convention States are free to provide better protection under their law or any other agreement (Article 60). Secondly, the Convention does not impose uniform rules; it lays down standards of conduct and leaves the choice of the means of implementation to the Contracting State. Finally, as the court and Commission have repeatedly stressed, the national authorities are in a better position than the supervisory bodies to strike the right balance between the sometimes conflicting interests of the Community and the protection of the fundamental rights of the individual.

*Id.* at 24-25.

221. Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 A.J.I.L. 38, 39 (2003).

Court of Justice and a Court of Human Rights, in addition to many other institutions. Indeed, converts are sometimes more zealous than those brought up in the faith. However, the issue of establishing an African supra-national judicial system is not so straightforward, and mere emulation of the European experiment may not work in Africa.

To start with, the historical experiences of the two continents are fundamentally different exactly where they are superficially similar. What motivates Africa's current integration endeavor differs from the European motivation. The architects of the European movement sought, by emphasizing common traditions and common interests, "to have the European nations work together rather than just living together or working against one another, as in the past."<sup>222</sup> The movement towards European unification started after World War II and was concentrated mainly in Western Europe.<sup>223</sup> These countries were motivated to unify because of the tragic and costly war, the fear of Nazi Germany, and the apprehension of communist expansion. In contrast, Africa's current movement has more to do with the challenges resulting from globalization than the euphoria of unity. The socio-economic origin of the AU emanated from the desire of African leaders to meet the present challenges of globalization and regional integration. Facing increasing globalization, the leaders saw the need to develop appropriate strategies. This search for an original solution for Africa led to the revision of the OAU's objectives, mandate and mode of functioning, and also caused re-orientation of the strategies addressing the globalization challenge. This search further explains the flood of binding and non-binding instruments that the continent has churned out very recently, including the New Partnership for Africa's Development ("NEPAD").<sup>224</sup>

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222. Christian Kohler, *The Court of Justice of the European Communities and the European Court of Human Rights*, in *SUPRANATIONAL AND CONSTITUTIONAL COURTS IN EUROPE: FUNCTIONS AND SOURCES* 15, 18 (Igor I. Kavass ed., 1992).

223. See *VISIONS OF EUROPEAN UNITY* (Philomena Murray & Paul Rich eds., 1996) (discussing ideas of European unity, from the inter-war period to the present).

224. See *New Partnership for Africa's Development (NEPAD)* (Oct. 2001), at <http://www.dfa.gov.za/events/nepad.pdf> [hereinafter *NEPAD*]. NEPAD is:

In addition, the European political structure is different from that in Africa. In Europe, two courts had to be established to cater for two distinct bodies: one is the Council of Europe, which created the E.Ct.H.R., and the other is the European Union, which established the ECJ. Although all member states of the EU are members of the Council of Europe, the reverse is not the case. There are presently fifteen member states of the EU<sup>225</sup> while the Council of Europe has over forty member states, all of which are now signatories to the ECHR.<sup>226</sup> In contrast, Africa has always had one continental body, the OAU, which metamorphosed into the AU. The signatories to the Human Rights Protocol establishing the Human Rights Court are the same countries that signed the AU Act creating the AU Court. It is very likely that the same parties will adopt and ratify the proposed Protocol on the AU Court. Therefore, the dichotomy of courts' parental bodies does not exist in Africa.

There is still another reason why the European experiment cannot be transported to Africa wholesale. Georges Abi-Saab summarizes the reason in these thoughtful words:

Every legal order has its own frontiers that separate it from other legal orders, because it has a different basis of legiti-

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[A] pledge by African leaders, based on a common vision and a firm and shared conviction, that they have a pressing duty to eradicate poverty and to place their countries, both individually and collectively, on a path of sustainable economic growth and development, and, at the same time, to participate actively in the world economy and body politic.

*Id.* at ¶ 67. See also generally Nsongurua Udombana, *How Should We Then Live? Globalization and the New Partnership for Africa's Development*, 20 B.U. INT'L L.J. 293 (2002) (examining the phenomena of globalization and the challenges of the NEPAD and calling on African countries to consolidate democracy and sound economic management on the continent). The author, in a previous article, also called on the international community to respond positively to Africa's new initiative and for an equitable implementation of normative standards that govern the various aspects of globalization. *Id.* See also Nsongurua J. Udombana, *A Harmony or a Cacophony? The Music of Integration in the African Union Treaty and the New Partnership for Africa's Development*, 13 IND. INT'L & COMP. L. REV. 185 (2002).

225. These countries are Sweden, the United Kingdom, Denmark, Finland, Ireland, the Netherlands, Germany, Belgium, Luxembourg, France, Austria, Portugal, Spain, Italy, and Greece.

226. These include all countries of the former Western Europe and most countries of the former Eastern Europe.

macy and different mechanisms for creating, applying, and enforcing its rules. In other words, every legal order generates and specifies its rules in different ways, with different results, and these rules and procedures ultimately derive their legitimacy from the fact of belonging to this legal order. It constitutes a *unicum*: an entity held together by its own internal cohesive forces, while remaining separate and distinguishable from other legal orders.<sup>227</sup>

Africa must find its own rhythm and cohesive forces to build its institutions. The AU cannot transplant the European model of integration, including the paraphernalia of courts and other institutions, to Africa and expect it to flourish without carefully tailoring it to the specific needs of the region. Africa does not need multiple courts or institutions in order “to eradicate poverty and to place their countries . . . on a path of sustainable economic growth and development, and, at the same time, to participate actively in the world economy and body politic.”<sup>228</sup> What Africa needs for sustainable development is a good and responsible government, which can be achieved with or without multiplication of institutions including courts. In the nectar and ambrosia of their sunny paradise, African leaders should recognize that the continent’s past and present experiences, including unremitting conflicts, and future expectations do not support two supra-national courts, at least for now.

*B. Arguments Based on the Development of International Law in Africa*

Judicial decisions have long been recognized as a “subsidiary means for the determination of rules of law.”<sup>229</sup> Although strictly speaking, judicial decisions are not formal sources of law, they are sometimes regarded as authoritative evidence of the state of law. A unanimous, or almost unanimous, decision has a role in the progressive development of the law; which is to say that a coherent body of jurisprudence will naturally have important consequences for the law.<sup>230</sup> Therefore, it seems logi-

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227. Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT’L L. & POL. 919, 920 (1999).

228. NEPAD, *supra* note 224, ¶ 1.

229. I.C.J. Statute, *supra* note 52, art. 38(1)(d).

230. See BROWNLIE, *supra* note 54, at 2.

cal to argue that having more courts in the international arena is beneficial to the development of international law.<sup>231</sup> However, the proliferation of international courts and tribunals also has shortcomings. Particularly in a collective Africa, multiple courts might lead to conflicts in jurisdiction and confusion in the doctrinal development of international law. There is a danger that different institutions may give the same rule of law different interpretations in different cases. Charney states on the problem:

Not only may a cacophony of views on the norms of international law undermine the perception that an international legal system exists, but if like cases are not treated alike, the very essence of a normative system of law will be lost. Should this develop, the legitimacy of international law as a whole will be placed at risk.<sup>232</sup>

The President of the ICJ has added his voice to these concerns:

The proliferation of international courts gives rise to a serious risk of conflicting jurisprudence, as the same rule of law might be given different interpretations in different cases . . . . A dialogue among judicial bodies is crucial. The International Court of Justice, the principal judicial organ of the United Nations, stands ready to apply itself to this end if it receives the necessary resources.<sup>233</sup>

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231. Even in the ordinary state of human affairs, it has been said that "[t]wo are better than one, [b]ecause they have a good reward for their labor. For if they fall, one will lift up his companion. But woe to him who is alone when he falls, [f]or he has no one to help him up." *Ecclesiastes* 4:9–10 (New King James).

232. Charney, *Impact of International Courts*, *supra* note 11, at 699. However, his research seem to show that the current system of various tribunals does not appear to disrupt the cohesion of international law, though he also admits that complete uniformity of decisions is impossible:

[I]n those core areas of international law, the different international tribunals of the late twentieth century do share relatively coherent views on those doctrines of international law. Although differences exist, these tribunals are clearly engaged in the same dialectic. The fundamentals of this general international law remain the same regardless of which tribunal decides the case.

*Id.* at 699.

233. President of the ICJ Gilbert Guillaume, Statement to the U.N. General Assembly (Oct. 26, 2000), *available at* <http://www.icj-cij.org/icjwww/ipresscom/>

It is important to stress that opponents of court proliferation have legitimate concerns. There indeed have been incidents of conflicting interpretations of international law by different tribunals in the past. The *Nicaragua* Case decided by the ICJ in 1986<sup>234</sup> and the *Tadic* Case decided by the Appeals Chamber of the ICTY in 1997<sup>235</sup> provide an example. The issue before the Appeals Chamber of the ICTY in the *Tadic* case was whether the armed conflict in Bosnia and Herzegovina between the Bosnian Serbs of Republika Srpska and the central authorities of Bosnia and Herzegovina could be qualified as an international conflict after the Yugoslav National Army had withdrawn from the area. A related question was whether the armed forces of the Bosnian Serbs were to be regarded as armed forces of the Federal Republic of Yugoslavia or of Bosnia and Herzegovina. If they were regarded as the latter, then the conflict was an international one according to the Third Geneva Convention Relative to the Treatment of Prisoners of War of 1949 (“3GC”).<sup>236</sup>

According to the Appeals Chamber, the 3GC requirement concerning the “belonging [of armed forces] to a Party to the conflict”<sup>237</sup> implicitly “refers to a test of control.”<sup>238</sup> To examine the degree of control that defines whether armed forces belong to one or the other party, the Appeals Chamber referred to the concept of control defined by the ICJ in the *Nicaragua* Case. In *Nicaragua* the ICJ concluded that the control exercised by a state over armed forces acting in another state, in this case the Contras of Nicaragua, had to be an “effective control of the military or paramilitary operations in the course of which alleged

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SPEECHES/iSpeechPresident\_Guillaume\_GA55\_2001026.htm, cited in Oellers-Frahm, *supra* note 5, at 68; cf. ICJ Press Communique 99/46, Failure by Member States of the United Nations to Pay Their Dues Transgresses Principles of International Law, President Schwebel tells United Nations General Assembly (Oct. 26, 1999), at [http://www.icj-cij.org/icjwww/ipresscom/ipress1999/ipresscom9946\\_19991026.htm](http://www.icj-cij.org/icjwww/ipresscom/ipress1999/ipresscom9946_19991026.htm) (statement of former President of the ICJ Judge Stephen M. Schwebel).

234. See *Nicaragua Case*, *supra* note 6.

235. See *Tadic Case* (Prosecutor v. Du [Ko Tadic]), 1999 I.C.T.Y. No. IT-94-1-A (July 15), available at <http://www.un.org/icty/tadic/appeal/judgment/tad-aj990715e.pdf> [hereinafter *Tadic Case*].

236. See Geneva Convention Relative to the Treatment of Prisoners of War; Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

237. *Id.* art. 4(2).

238. *Tadic Case*, *supra* note 235, ¶ 95.



violations were committed.”<sup>239</sup> However, in the *Tadic* Case, the Appeals Chamber refused to share the findings of the ICJ. Instead, it went into an exhaustive discussion and a review of the ICJ findings, criticizing the ICJ decision as “not always following a straight line of reasoning” and as “at first sight somewhat unclear.”<sup>240</sup> By so doing, the Appeals Chamber “by far overstepped its judicial function.”<sup>241</sup> As Oellers-Frahm pointed out:

Although it is not only legitimate but even desirable that a court or tribunal in finding its decisions gives regard to decisions of other courts and tribunals on comparable items, the scope of regard given to a decision of another court or tribunal cannot, however, result in a review of that decision but has to be restricted to examining how far that decision may serve as a guideline for the case in hand and whether the circumstances of the case allow its application.<sup>242</sup>

There have been similar conflicting interpretations of international human rights law between the ECJ and E.Ct.H.R.<sup>243</sup> It has even been asserted that many laymen and experts “are frequently confused” between the mandates of the two European courts. Thus,

[I]ndividuals have been known to submit to the Court of Justice of the European Communities applications alleging violations of human rights, and national courts have even been known to request the European Court of Human Rights to give a preliminary ruling on the interpretation of European Community law. Mistakes of this kind can have far graver consequences for those concerned than the errors which are frequently made in addressing the application, most of which give Brussels as their destination — an eminently European

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239. Nicaragua Case, *supra* note 6, ¶ 115, at 65.

240. *Tadic* Case, *supra* note 235, ¶¶ 108, 114.

241. Oellers-Frahm, *supra* note 5, at 79 (maintaining that the function of the Appeals Chamber was to review the judgments of the Trial Chambers of the I.C.T.Y. and I.C.T.R. and not the judgments of the ICJ or any other court or tribunal).

242. *Id.* at 79–80.

243. See, e.g., Rick Lawson, *Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg*, in III THE DYNAMICS OF THE PROTECTION OF HUMAN RIGHTS IN EUROPE: ESSAYS IN HONOUR OF HENRY G. SCHERMERS 219 (1994).

city, but one in which neither of the two "European" courts have their seat.<sup>244</sup>

Therefore, confusion about the two courts still persists in Europe, notwithstanding its advanced communication and information technology, as well as other comparative advantages. This begs the question whether having two courts would not cause even greater confusion to ordinary Africans or even government officials.

International law should develop uniformly in the Africa continent and throughout the international legal community. For Africa, having two courts is likely to create more confusion than benefits. The proposed two courts will probably be given both contentious and advisory jurisdictions to interpret various legal instruments including human rights treaties; thus, there is a real danger that the two bodies might give conflicting interpretations to treaties invoked before them and thus create disparate legal norms. The problem could be compounded by the fact that neither court is envisaged to be superior to the other and, thus, neither can overrule decisions of the other. The resultant confusion would impede, rather than facilitate, the development of human rights jurisprudence in Africa.<sup>245</sup>

### *C. Arguments Based on Funding*

Do African leaders have the political will and material wherewithal to operate two supra-national judicial institutions? Even if it is desirable to have two courts in the continent, can the continent afford them at the moment? These practical considerations must be taken into account in making the choice of having one court or two. Before looking at the financial strength of the AU, it is necessary to identify the basic needs of the proposed two courts. The following discussion concerns mainly with the proposed two judicial bodies, but it will also apply, *mutatis mutandis*, to many other organs expressly or impliedly created under the AU Act.

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244. Kohler, *supra* note 222, at 17.

245. See Nsongurua J. Udombana, *The Institutional Structure of the African Union: A Legal Analysis*, 33 CAL. WEST. INT'L L.J. 69 (2002); Nsongurua J. Udombana, *Can the Leopard Change Its Spots? The African Union Treaty and Human Rights*, 17 AM. UNIV. INT'L L. REV. 1177 (2002).

To start with, each of the proposed courts will require a building to house the court rooms, the judges' chambers, and the offices for secretariats, including the Registrars. These offices must be equipped with furniture and other necessary supplies. Furthermore, in an age of information and technological revolution, the judges and the staff will need Internet-ready computers, telephones, fax machines, and other equipment. The AU will also have to provide accommodation for the judges and their support staff, particularly the senior ones. For judges who will serve on permanent basis, like the President of the African Human Rights Court,<sup>246</sup> as well as the Registrars,<sup>247</sup> permanent accommodations are envisaged. Other judges will possibly have to be accommodated in (potentially more expensive) hotels whenever their services are called for.

In addition to the Registry staff, different courts will also require legal secretaries, known as *attaché*, which have become indispensable to the modern adjudicatory systems.<sup>248</sup> Two *attaché* are currently serving the African Commission. To support the function of two courts more *attaché* will be needed. In this regard, the E.Ct.H.R. Legal Secretariat provides some guidance. In the Registry of the E.Ct.H.R., teams of lawyers are employed, whose functions are, *inter alia*, to administer the cases. In particular, they undertake preliminary research on cases, and draft essential procedural documents, case correspondence, and court decisions to be considered by Judge Rapporteur. Many of these lawyers have in-depth knowledge of the case law of both the European Commission and the E.Ct.H.R. They work closely with the judge or judges to whom they are attached. They also advise the practicing lawyers on case progress or even substantive law and court procedures.<sup>249</sup> The ECJ also has a similar pool of lawyers serving as legal secretariat. The proposed Afri-

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246. See, e.g., Human Rights Protocol, *supra* note 19, art. 21(2) ("The president shall perform judicial functions on a full-time basis and shall reside at the seat of the Court.").

247. See *id.* art. 24(2) ("The office and residence of the Registrar shall be at the place where the Court has its seat.").

248. The closest analogy to legal secretaries in the common law world is the law clerk of the American judicial system, where outstanding law graduates are usually invited to serve for a year or two as personal assistant to a senior judge.

249. See LEACH, *supra* note 218, at 20.

can courts will particularly need legal secretariats given that not all judges will have prior practical experience in international adjudication.

Another major resource the courts will require is a library and documentation center. The library must be stocked with rich legal materials dealing with both African and comparative law. It must also maintain a comprehensive collection of the laws of member states. In addition, there should be facilities for users, such as legal research and photocopying services, and separate similar facilities for the judges of the Courts. Furthermore, like any modern library, the African court library must be equipped with computers with Internet access. Competent librarians will need to be employed. They will also have to be trained in each of the principal legal systems and the courts' languages and regularly exposed to modern information systems. They will further be expected to provide the judges, lawyers, and the legal secretaries with background information on the legal problems presented before the courts.

Next, given the multi-lingual character they promote, the Courts will need teams of qualified linguists to translate court documents. Pleadings and other court processes will need to be translated into the working languages of the courts, which include English, French, Arabic, Portuguese and, maybe, African languages. The court decisions will have to be translated both for inclusion in the annual reports to the Assembly of the AU (as required, for example, by the Protocol to the African Charter<sup>250</sup>), as well as for publication. The court will need interpreters to provide simultaneous translations during oral proceedings and at other court meetings and conferences. Whether these translators and interpreters will serve as permanent staff of the courts or will be hired on an *ad hoc* basis, as is the case with the African Commission, there is no doubt that they will be required.

The foregoing identifies just some, not all, of what the African Courts will require to function properly. Sufficiently financing these needs will be a big problem. Indeed, many supranational

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250. See Human Rights Protocol, *supra* note 19, art. 31 ("The Court shall submit to each regular session of the Assembly, a report on its work during the previous year. The report shall specify, in particular, the cases in which a State has not complied with the Court's judgement.").

institutions in Africa are suffering from chronic financial incapacity and their leaders constantly receive less than adequate resources; like bread in a besieged town, every man gets a little, but no man gets a full meal. The problem is compounded by the fact that African states have routinely defaulted in meeting their financial obligations to the continental body. The AU, for example, has inherited an empty treasury from the OAU and its finances are predictably dry. Many uncompleted projects embarked upon by the OAU dot the continent. It is also unfortunate to note that the AU has no befitting building as its headquarters because the OAU failed to erect one. For thirty-nine years, the OAU operated from a former prison that Emperor Haile Selassie of Ethiopia donated to the body at its founding in 1963. The Secretariat of the AU is also located here. It seems ironic that an organization that was set up to liberate Africa and its peoples from the bitter herbs of colonialism has itself been operating from a former prison! How will the AU manage to provide the proposed two courts with resources when it itself does not have a suitable headquarters?

For more than sixteen years after the inauguration of the African Commission — the existing quasi-judicial institution for the implementation of the African Charter — it is yet to have a permanent building. One is being constructed in a snail speed. Meanwhile, the Commission still operates in a rented apartment in Banjul, the Gambia. In contrast, the E.Ct.H.R. — not to mention the European Council Secretariat — in Strasbourg has “a striking building designed by Sir Richard Rodgers.”<sup>251</sup> Like beggars, many existing OAU/AU institutions constantly carry their bowls to look for crumbs from the table of European institutions in the form of grants. The Council of Ministers of the OAU, now Executive Council of the AU, has repeatedly expressed “serious concern about the increasing arrears of contributions, thus undermining the capacity of the Secretariat to carry out approved programmes and activities.”<sup>252</sup> The AU Assembly at its First Ordinary Session in July 2002 at Durban,

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251. Ryssdall, *supra* note 111, at 20 (noting also that the new building became necessary “because the former home of the Convention institutions was in danger of collapsing under the weight of files”).

252. *Decision on the Report of the Eighteenth Ordinary Session of the Committee on Contributors*, OAU Council of Ministers, 76th Ord. Sess., CM/Dec. 652, ¶ 2 (June 28–July 6, 2002).

South Africa authorized the Interim Commission of the AU “to continue with the process of transferring the assets and liabilities of the OAU to the African Union.”<sup>253</sup> The liabilities that the Interim Commission has assumed from the OAU include huge arrears of contributions totaling \$54.53 million. This debt is owed to the AU by forty-five out of its fifty-four member countries.<sup>254</sup> This financial crisis of the AU does not bode well for the proposed two courts.

Although the AU was formally inaugurated in July 2002, many of its organs are not yet functional, largely due to the lack of funds. Only three organs appear to have been officially commissioned — the Assembly of the AU, the Executive Council, and the Commission. The other organs, including the Pan-African Parliament, the Court of Justice, the Permanent Representatives Council, the Specialized Technical Committees, the Economic, Social and Cultural Council, the Financial Institutions,<sup>255</sup> and the proposed Peace and Security Council<sup>256</sup> are yet to see the light of the day. Even the Commission, which serves as the secretarial arm of the AU, is presently designated as “the Interim Commission,” while the Secretary-General has been designated as “the Interim Chairperson of the Commission and the Assistant Secretaries General shall be acting Commissioners.”<sup>257</sup> This evidences that all is not well with the AU.

Africa must act cautiously in light of the AU’s present reality. Establishing two courts seems overly ambitious given the serious financial challenges of the AU.<sup>258</sup>

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253. *Decision on the Interim Period*, Assembly of the AU, First Ordinary Session, ASS/AU/Dec. 1(1), ¶ 2(ix) (July 2002).

254. For the list of defaulting countries, see Baffour Ankomah, *African Union in Danger of Being Stillborn*, NEW AFR. 16, 20 (2002).

255. See, AU ACT, *supra* note 23, art. 5 (listing of the main organs of the AU).

256. The Peace and Security Council was established pursuant to the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, AU Assembly, 1st Ordinary Sess., July 9, 2002, available at [http://www.au2002.gov.za/docs/summit\\_council/secprot.htm](http://www.au2002.gov.za/docs/summit_council/secprot.htm). This protocol establishes an operational structure “for the effective implementation of the decisions taken in the areas of conflict prevention, peace-making, peace support operations and intervention, as well as peace-building and post-conflict reconstruction.” *Id.* at pmbl., ¶ 17.

257. *Decision on Interim Period*, *supra* note 183, ¶ 2(iv)–(v).

258. Jeremiah’s question to the children of Israel several centuries ago is relevant to Africa’s current situation: “If you have run with the footmen, and

## V. RECOMMENDATIONS

It is significant that five years after the adoption of the Human Rights Protocol to establish an African Human Rights Court only a handful of states — six as at September 2002 — have ratified it. These states include Burkina Faso (December 31, 1998), Mali (October 5, 2000), Senegal (September 29, 1998), Gambia (June 30, 1999), Uganda (February 16, 2001), and South Africa (July 3, 2002).<sup>259</sup> A total of fifteen ratifications are needed for the Protocol to enter into force.<sup>260</sup> It appears that with the adoption of the AU Act, which provides for the establishment of an AU Court of Justice, African leaders do not know what to make of the Human Rights Court. They seem to have boxed themselves into a corner! Wittingly or unwittingly, they also appear to have crushed Africans' rising hope for the timely creation of a Human Rights Court to compliment the weak mandate of the African Commission and to effectively enforce the provisions of the African Charter and other relevant human rights instruments ratified by their governments.

But there is a way out of the dilemma. Actually, the road to the city and the road out of it are usually the same road; it depends on which direction one travels. As this Article has indicated, though multiplication of judicial institutions may in many other cases facilitate the development of international law, having more than one court in a collective Africa is not a sensible decision. Establishing two courts under the current climate of uncertainty would have regrettable consequences, like sending a man to the sea without preparing him for tempests. A realistic approach is for the AU to establish and strengthen one judicial institution, which may be, but not necessarily, the African Human Rights Court, before ever embarking on another. The jurisdiction of the Human Rights Court could be enlarged to cover the interpretation and application of the AU Act and allied instruments. There is an alternative approach, which this Article favors. It is this: The AU should establish the AU Court, not as an arm of the AU but as an

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they have wearied you, [t]hen how can you contend with horses? And if in the land of peace, [i]n which you trusted, they have wearied you, [t]hen how will you do in the flooding of the Jordan?" *Jeremiah* 12:5 (New King James).

259. See AU Doc. CAB/LEG/66.5 (2002).

260. See Human Rights Protocol, *supra* note 19, art. 34(3).

autonomous institution capable of addressing the myriad of problems confronting the continent. The AU Court could have different chambers to deal with different major problems afflicting the continent. Thus, one chamber could be seized with matters of international economic law including economic integration, another with human rights issues, and still others with environment or international criminal law including terrorism, etc. Such divisions of labor would be justifiable because they would create specialization and efficiency.

The chamber system is not really new; it is practiced in the ICJ. The ICJ Statute provides that the Court may, from time to time, form one or more chambers composed of three or more judges as the Court may determine. Such chambers are authorized to deal with particular classes of cases; for example, laces and cases relating to transit and communications.<sup>261</sup> The Court also may, at any time, form a chamber to deal with a particular case, in which case the number of judges to constitute such a chamber will be determined by the Court with the approval of the parties.<sup>262</sup> The ICJ has, in practice, established special chambers to deal with particular cases. In July 1993, for example, the Court created a special Chamber to deal with environmental questions,<sup>263</sup> a subject that has become as topical as human rights.

Happily, the Draft Protocol is designed along the above suggestions. Taking inspiration from Article 26(1) of the ICJ Statute, the Draft Protocol creates "Special Chambers." It provides that "[t]he Court may from time to time form one or more chambers, composed of three or more Judges as the Court may determine, for dealing with particular categories of cases; for example violation of the Constitutive Act; human rights; disputes on budgetary matters; and commercial matters."<sup>264</sup> More significantly, it provides that the African Human Rights Court shall be constituted as a Chamber of the AU Court, upon entry into force of the Protocol to the African Charter or the adoption of the Draft Protocol, "whichever may be sooner."<sup>265</sup>

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261. See ICJ Statute, *supra* note 53, art. 26(1).

262. *Id.* art. 26(2)&(3).

263. See SHAW, *supra* note 207, at 585.

264. Draft Protocol, *supra* note 113, art. 60(1).

265. *Id.* art. 60(2).



The Draft Protocol also allows for other category of chambers to be created annually “[w]ith a view to the speedy dispatch of business.”<sup>266</sup> Such chambers, which shall be composed of five Judges, may, at the request of the parties, “hear and determine cases by summary procedure.”<sup>267</sup> A judgment given by any of these chambers, including those to deal with particular category of cases, “shall be considered as rendered by the Court.”<sup>268</sup> T. O. Elias questions a similar provision in Article 27 of the ICJ Statute.<sup>269</sup> According to this former President of the ICJ, Article 27:

[H]as far-reaching implications for the jurisprudence of the Court, particularly when it is observed that there is no requirement of consultation between the court and the fraction of it constituting the chamber in question. There is no provision for the Court itself to have seen even the draft judgment of any chamber before it is rendered to the Court, nor is there any provision for the Court itself (that is, such other Members of it other than those of the chamber concerned) to have seen the draft or express an opinion.<sup>270</sup>

Elias believes that it is “highly desirable that the chamber should operate as no more than a committee of the whole of the Court, and mainly answerable to it for its judgment.”<sup>271</sup>

Notwithstanding these reservations, it may be said that the chamber system is a welcome development in a collective Africa, in view of the arguments earlier advanced in this Article. Indeed, if States Parties to the AU Act agree on these provisions, then the goal of this Article would have been achieved. Besides, any fear that a single African court will not be able to interpret and apply all the existing and future legal instruments executed by the OAU/AU is unfounded. Compared to the relatively few multilateral treaties so far enacted by the OAU/AU,<sup>272</sup> some 260 bilateral or multilateral treaties provide

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266. *Id.* art. 61.

267. *Id.*

268. *Id.* art. 62.

269. ELIAS, UNITED NATIONS CHARTER AND THE WORLD COURT, *supra* note 180, at 204.

270. *Id.*

271. *Id.*

272. The legally binding instruments adopted under the auspices of the OAU/AU include the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous

for the ICJ to have jurisdiction in the resolution of disputes arising out of their application or interpretation.<sup>273</sup> In addition, states regularly submit special disputes to the ICJ by way of special agreements.<sup>274</sup> The dispute caseload of the ICJ has also increased over the years. In the 1970s, the ICJ had only one or two cases on its docket at any one time; this number varied between 9 and 10 from 1990 to 1997. As of July 31, 2001, the number rose to 22.<sup>275</sup> The subject matters of these cases are also varied. The Court continues to decide classical disputes such as those between neighboring states seeking a determination of their land and maritime boundaries. Currently the ICJ is hearing such territorial dispute cases between Indonesia and Malaysia, and Nicaragua and Honduras. Other cases involve complaints of human rights violation made by states whose nationals suffered injuries in other states. Currently such cases involve Guinea and the Democratic Republic of Congo, and Liechtenstein and Germany.<sup>276</sup>

The ICJ has creatively managed this increasing responsibility by, *inter alia*, taking steps to simplify proceedings, “in particu-

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Wastes within Africa, Jan. 29, 1991, 30 I.L.M. 773, *reprinted in* 1 AFR. Y.B. INT'L L. 268 (1993) (entered into force Apr. 22, 1998); and the AEC Treaty, *supra* note 25. Others are: the African Charter on the Rights and Welfare of the Child, July, 1990, OAU Doc. CAB/LEG/24.9/49, *reprinted in* 18 COMMONWEALTH L. BULL. 1112 (1999); OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45 (entered into force June 20, 1974); African Convention on the Conservation of Nature and Natural Resources, 1968, OAU Doc. CAB/LEG/24.1, *available at* <http://sedac.ciesin.org/entri/texts/african.conv.conserva.1969.html> (entered into force June 16, 1969); the African Charter, *supra* note 20; Human Rights Protocol, *supra* note 19, and the OAU Convention on the Prevention and Combating of Terrorism, AHG/Dec.132 (XXXV), *available at* <http://www.fidh.org/intgouv/ua/rapport/1999/antiterroconvention> (not yet in force).

273. *See* 2000–2001 I.C.J. ANN. REP., *supra* note 58, at 1.

274. *Id.* The ICJ may exercise jurisdiction over a dispute where the parties give consent *ad hoc* by special agreement (*compromis*). The special agreement, however, need not take a particular form; in fact, the ICJ has held that such consent *ad hoc* may arise where the plaintiff state has accepted the jurisdiction by a unilateral application followed by a separate act of consent by the other party, either by a communication to the Court or by taking part in the institution of proceedings. *See* Corfu Channel case (Prelim. Objections), 1948 I.C.J. 27–28 (Apr. 9); BROWNIE, *supra* note 54, at 716–17.

275. 2000–2001 I.C.J. ANN. REP., *supra* note 58, at 2.

276. For these and other examples, see *id.*

lar as regards preliminary objections and counter-claims.”<sup>277</sup> In 1997, the ICJ took various measures “to rationalize the work of the Registry, to make greater use of information technology, to improve its own working methods and to secure greater collaboration from the parties in relation to its procedures.”<sup>278</sup> The ICJ’s approach has shown that it is not the number of courts at the international level that matters but the quality of the court’s output. Size never determines usefulness. The ICJ is small measured by numbers<sup>279</sup> but big in its commitment. The ICJ’s achievement is also made possible by the moral and financial support of its parent body, the UN. Similarly, the AU must be prepared to give such support to its own institutions, including the proposed court(s).

The moral from all of the above is that the human entity is endowed with the intelligence and vision to regulate its conduct and constantly recreate its existence. It is worthwhile to stress once again that in November 1998 the Council of Europe jettisoned the former two-tier institutional structure for the enforcement of the ECHR in favor of a single court. The E.Ct.H.R presently has four sections, and each section is broken into chambers.<sup>280</sup> There is also a Grand Chamber, which determines the merit of cases relinquished to its jurisdiction by the other chambers under article 30 of the ECHR or where it accepts a request for a referral — in effect, a re-hearing — of a case following a judgment by a chamber. The beauty of the European arrangement is that it “allows for a more fluid exercise of the adjudicatory powers of the European Court.”<sup>281</sup>

From a pragmatic perspective, it is better to have one African court that is normatively and structurally strong than having two weak institutions that exist only on paper. The AU should recognize that two African courts are simply not feasible. It

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277. 2000–2001 I.C.J. ANN. REP., *supra* note 58, at 6.

278. *Id.* at 5–6 (citing its earlier report to the General Assembly, in response to GA Res. 52/161 of Dec. 15, 1997). See Report of the ICJ, *supra* note \_\_, Appendix I (during the period Aug. 1 to July 31 1998, the ICJ gave an account of these various measures).

279. The ICJ consists of 15 judges elected for a term of nine years by the UN General Assembly and the Security Council. One third of the Court is, however, renewed every three years. I.C.J. Statute, *supra* note 54, art. 13(1).

280. See Protocol 11, *supra* note 90, art. 1.

281. Fix-Zamudio, *supra* note 173, at 513.

should either urge its member states to ratify the Human Rights Protocol to the African Charter in order to bring the Human Rights Court on board or immediately adopt the Protocol on the AU Court and set the process of ratification in motion. It makes inordinately good sense that one court should give way for the other because a divided house cannot stand. In fact, there are already many sub-regional courts that could compliment and supplement the work of a single African judicial institution.

If the AU rejects the Protocol to the African Charter and opts for one court — the AU Court — then it must incorporate some critical provisions of the Human Rights Protocol into the new Protocol. The relevant provisions will include Articles 3 and 4 on jurisdiction, Article 5 on access to the Court (*locus standi*), excluding the unnecessary and irritating optional clause of Article 34(6),<sup>282</sup> and Article 10 on hearing and representation, particularly on legal aid. Article 17 on the independence of the Court and Article 18 on incompatibility must also be incorporated. In addition, Article 27 on findings and remedies, Article 28 on judgment and Article 30 on execution of judgments must also be included. It will also be necessary to define the relationship between the African Commission and the AU Court. The Commission could be effectively utilized as a filter mechanism for the Court, with respect to human rights matters. It could, for example, handle issues of admissibility, including provisional measures, while the AU Court addresses the merits. Overall, there will be a need to balance efficiency considerations with the due process requirements. Furthermore, African civil societies must be vigilant with the exercise of judicial power to assure compliance of human rights.

## VI. CONCLUSION

Africa, undoubtedly, is in dire need of a court to develop international law, strengthen the rule of law and deal with inter-

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282. The Draft Protocol, unfortunately, retains this provision, providing that the Court, in exercising its functions, “shall have jurisdiction to hear applications from individuals and non-governmental organizations of Member States in accordance with paragraph 3 of Article 5 and paragraph 6 of Article 34 of the Protocol on Human and Peoples’ Rights.” Draft Protocol, *supra* note 113, art. 60(3).

national legal crisis in the continent. This Article, however, argues for one continental judicial institution to fulfill these goals and has adduced some reasons for this position. Even assuming (which this Article constantly denies) that proliferation of judicial institutions is a good thing for a collective Africa, it is submitted that the timing is not ripe. Africa must learn to walk before it runs. Establishing many courts will obviously be great fun; but it should be remembered that there is a bill to pay for it. Indeed, unless the AU streamlines its current over-bloated operational structures, its current efforts at economic and political integration will be a waste of time. The present experiment is like trying to reconstruct a forest out of broken branches and withered leaves. That is not the path to sustainable development, the major goal of the AU enterprise.

The Article has shown the direction that the AU should move towards actualizing its objectives in the AU Act, in particular with regards to the establishment of a judicial institution to administer Africa's legal system. The ultimate decision whether to establish one court or two or multiple courts, of course, rests with the AU Assembly; and it is hoped that, when push comes to shove, the Assembly will make the right choice. However, whichever court the AU chooses to establish, it must act fast to end the anguished anticipation of Africans and the international community. Africans cannot afford the climate of uncertainty regarding what and which judicial institution should and will be created to serve their needs. "Hope differed makes the heart sick, but a longing fulfilled is a tree of life."<sup>283</sup>

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283. *Proverbs 13:12* (NIV).