

# The African Court of Justice

*Konstantinos D. Magliveras\*/Gino J. Naldi\*\**

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## Introduction

In September 1999, African leaders met in Libya to discuss the future direction of the Organization of African Unity (OAU). They adopted the Sirte Declaration which sought, *inter alia*, to address in an effective manner the new social, political and economic realities in Africa, and to revitalize the pan-African organization so as to enhance its role in meeting the needs of the peoples of the Continent.<sup>1</sup>

The primary significance of the Sirte Declaration lies, however, in the fact that these aims were not to be realized within the context of the OAU. On the contrary, it was resolved to establish a new organization to replace the discredited OAU, to be called the African Union (AU).<sup>2</sup> Thus, the Sirte Declaration recognized that the OAU, as originally conceived in the early 1960s, could no longer serve the needs and aspirations of the Continent and it was decided to replace it with a more dynamic organization, capable, on the one hand, of safeguarding the OAU's achievements and, on the other hand, promoting Africa's role in the 21<sup>st</sup> century.

The Constitutive Act of the African Union was adopted by the 36<sup>th</sup> Ordinary Assembly Session of the OAU, meeting in Lomé, Togo in July 2000.<sup>3</sup> The African States lost little time in seeking to set up the new organization; the establishment of the AU was declared by the 5<sup>th</sup> Extraordinary Assembly Session of the OAU,

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\* Assistant Professor of Law, University of the Aegean.

\*\* Senior Lecturer in Law, University of East Anglia.

<sup>1</sup> Sirte Declaration of 9 September 1999, OAU Doc. EAHG//Decl. (IV) Rev.1, reproduced in: 11 RADIC (1999), 803.

<sup>2</sup> *Ibid.*, para. 8(1).

<sup>3</sup> The Constitutive Act is available at the AU's website, <[www.africa-union.org](http://www.africa-union.org)>. Also reproduced in: 12 RADIC (2000), 629. For analysis, see K. Magliveras/G. Naldi, *The African Union – A New Dawn for Africa?*, 51 ICLQ (2002), 415; C. Packer/D. Rukare, *The New African Union and Its Constitutive Act*, 96 AJIL (2002), 365.

meeting once again in Sirte on 2 March 2001.<sup>4</sup> The Constitutive Act itself entered into force on 26 May 2001.<sup>5</sup> The official launch of the AU was effected in July 2002 in Durban, South Africa.<sup>6</sup>

In establishing the AU, African leaders did not seek to set up an organization that was going to be a mere continuation of the OAU by another name. In the words of the OAU Secretary-General: “[The African leaders] certainly had in mind an organization that would provide a framework for enhanced cohesion, cooperation, integration and strengthened capacity to deal with the crises that face the African continent today.”<sup>7</sup> At Durban African statesmen pledged their commitment to the aims and objectives of the AU.<sup>8</sup>

One of the features that distinguishes the AU from its predecessor the OAU is the fact that the AU makes provision for a Court of Justice for the adjudication of inter-African disputes. The establishment of the Court of Justice (hereafter AU Court) in Article 18 of the Constitutive Act as the principal judicial organ of the AU<sup>9</sup> signals a welcome departure from the OAU which never gave form to such a body.<sup>10</sup> The Constitutive Act itself provides no details on the crucial issues of the AU Court’s composition and functions but leaves these matters to be determined by a future Protocol. The only indication given as to the AU Court’s competences is Article 26 stipulating that it shall be seized of matters of interpretation arising from the Constitutive Act’s application or implementation. The Protocol of the Court of Justice of the African Union was duly adopted on 11 July 2003 by the 2<sup>nd</sup> Ordinary Assembly Session<sup>11</sup> but has not yet entered into force.<sup>12</sup> By September

<sup>4</sup> Decision on the African Union, OAU Doc. EAHG/Dec.1 (V).

<sup>5</sup> Article 28 of the Constitutive Act stipulates that it would enter into force 30 days following the deposit of the instruments of ratification by at least two-thirds of OAU Members (i.e. by 36 states). On 26 April 2001, Nigeria became the 36<sup>th</sup> Member State to deposit its instrument of ratification and, consequently, the Constitutive Act came into force on 26 May 2001.

<sup>6</sup> Durban Declaration in Tribute to the Organization of African Unity and on the Occasion of the Launching of the African Union, AU Doc. ASS/AU/Decl.2 (I), reproduced in: 41 ILM (2002), 1029. Article 33 of the Constitutive Act specifies that the AU would replace the OAU after a transitional period of one year.

<sup>7</sup> See Report of the Secretary General on the Implementation of the Sirte Decision on the African Union, OAU Doc. CM/2210 (LXXIV), para. 26 at 10.

<sup>8</sup> See paras. 14 and 15 of the Durban Declaration in Tribute to the Organization of African Unity and on the Occasion of the Launching of the African Union, *supra* note 6.

<sup>9</sup> The Court is also listed as one of the principal organs of the AU, see Article 5(1) of the Constitutive Act.

<sup>10</sup> Although calls for a court with general jurisdiction had been made, see C.M. Peter, *The Proposed African Court of Justice – Jurisprudential, Procedural, Enforcement Problems and Beyond*, 1 East African Journal of Peace and Human Rights (1993), 117. However, provision for other courts, such as the African Court of Human and Peoples’ Rights and the AEC Court, was eventually made.

<sup>11</sup> Decision on the Protocol of the Court of Justice of the African Union, AU. Doc. Assembly/AU/Dec.25 (II), based on the recommendations made by the Executive Council, Decision on the Draft Protocol of the Court of Justice, AU Doc. Dec.EX/CL/58 (III). The text of the Protocol is available at: <[www.africa-union.org](http://www.africa-union.org)>. The Assembly is the supreme organ of the AU and is composed of all Heads of States or Government, Article 6(2) of the Constitutive Act, whereas the Executive Council is composed of the Ministers of Foreign Affairs, Article 10 of the Constitutive Act. Its main

2005 it had been signed by 36 Member States but ratified by only eight.<sup>13</sup> During the drafting of the Protocol, there was some debate as to whether the AU Court should be modeled on the European Court of Justice (ECJ). In particular, whether it should have the competence to rule on the conformity of national legislation or other State acts with the Constitutive Act and whether any rights of audience should be conferred upon private parties whose interests are affected by AU decisions. However, an initial observation would be that the Protocol's substantive clauses have been heavily influenced by, or are a mere repetition of, the provisions of the Statute of the International Court of Justice (ICJ). The present article analyses the Protocol of the AU Court and draws comparisons with the roles of the ICJ and the ECJ where appropriate.

## The Establishment of the Court

The AU makes plain its break with the past by considering that the AU Court has an essential role to play in helping achieve its objectives. The AU Court is thereby constituted<sup>14</sup> as the principal judicial organ of the AU.<sup>15</sup> This fact immediately raises the question as to the AU Court's relationship with other courts envisaged by the OAU and inherited by the AU.

First of all, there is the Court of Justice of the African Economic Community (AEC).<sup>16</sup> The AEC was intended to pioneer economic integration in Africa and was founded as an integral part of the OAU.<sup>17</sup> It bears some similarities with the EC Treaty, making provision for the progressive establishment of a customs union and the free movement of persons for example, but in an embryonic form. The

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task is to co-ordinate and take decisions on policies in areas of common interest to the Member States, Article 13(1) of the Constitutive Act. See further, K. Magliveras/G. Naldi, *The African Union and the Predecessor Organization of African Unity*, The Hague 2004, 76-79.

<sup>12</sup> The Protocol requires 15 ratifications to come into force, see Article 60 of the Protocol.

<sup>13</sup> Comoros, Lesotho, Libya, Mali, Mozambique, Mauritius, Rwanda and South Africa.

<sup>14</sup> Article 2(1) of the Protocol. See also Article 18 of the Constitutive Act. According to Article 47(1) of the Protocol the seat of the Court is to be determined by the Assembly from among States Parties. It appears that the Court will be based in East Africa, *Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union*, AU. Doc. Assembly/AU/Dec.83 (V), para. 4.

<sup>15</sup> Article 2(2) of the Protocol. The languages of the AU Court are those of the AU, *ibid.*, Article 50. See Article 25 of the Constitutive Act.

<sup>16</sup> See Article 18(1) of the Treaty Establishing the African Economic Community 1991, available at: <[www.africa-union.org](http://www.africa-union.org)>, reproduced in: 30 ILM (1991), 1241. The Treaty entered into force in 1994. For analysis, see N.L. Lumu, *De la Nature de la Communauté Economique Africaine*, 8 RADIC (1996), 51; G. Naldi/K. Magliveras, *The African Economic Community: Emancipation for African States or Yet Another Glorious Failure?*, 24 North Carolina Journal of International Law and Commercial Regulation (1999), 601.

<sup>17</sup> Articles 98(1) and 99 of the Treaty Establishing the African Economic Community.

OAU and the AEC were later effectively amalgamated.<sup>18</sup> The Court of Justice of the AEC was assigned the task of ensuring adherence to the law in the interpretation and application of the AEC Treaty and deciding on disputes submitted to it under the AEC Treaty.<sup>19</sup> Its jurisdiction extended over actions brought by a Member State or the Assembly on grounds of a violation of the AEC Treaty or of a legislative measure, or on grounds of lack of competence or abuse of powers by an OAU/AU organ or a Member State.<sup>20</sup> The similarity with the EC Treaty is obvious.<sup>21</sup> The statute and procedures of the Court of Justice were to be decided by a subsequent protocol<sup>22</sup> but before this could take place and the Court of Justice duly constituted the AU replaced the OAU and the role and functions of the Court of Justice were absorbed by the AU Court.<sup>23</sup> This step can be defended as a logical measure to rationalize the institutional framework of the AU and protect it from becoming unwieldy and costly. There appears to be no good reason at this stage of the AU's life to set up a court structure with a relationship similar to that of the ECJ and the Court of First Instance (CFI).<sup>24</sup>

However, the decision of the AU Assembly in July 2004 to integrate the AU Court with the African Court of Human and Peoples' Rights has given rise to considerable, and justified, controversy.<sup>25</sup> Thus Amnesty International has criticized the decision as undermining an effective and functioning African Court of Human and Peoples' Rights.<sup>26</sup> The African Court of Human and Peoples' Rights was set up with the express purpose of protecting and enforcing human rights in Africa

<sup>18</sup> C. Heyns/E. Baimu/M. Killander, *The African Union*, 46 *German Yearbook of International Law* (2003), 252 at 263.

<sup>19</sup> Article 18(2) of the Treaty Establishing the African Economic Community. See further, Naldi/Magliveras, *supra* note 16, 610-615.

<sup>20</sup> *Ibid.*, Article 18(3)(a).

<sup>21</sup> Cf., e.g., Article 230(2) EC Treaty.

<sup>22</sup> Article 20 of the Treaty Establishing the African Economic Community.

<sup>23</sup> F. Viljoen/E. Baimu, *Courts for Africa: Considering the Co-Existence of the African Court on Human and Peoples' Rights and the African Court of Justice*, 22 *Netherlands Quarterly of Human Rights* (2004), 241 at 244.

<sup>24</sup> See generally, L.N. Brown/T. Kennedy, *The Court of Justice of the European Communities*, 5<sup>th</sup> ed., London 2000.

<sup>25</sup> Decision on the Seats of the African Union, AU. Doc. Assembly/AU/Dec.45 (III), para. 4, reinforced by Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, AU. Doc. Assembly/AU/Dec.83 (V) in 2005. It should be noted that Executive Council Decision EX/CL/58 (III) of 8 July 2003, which determined that the African Court of Human and Peoples' Rights would remain a separate and distinct institution from the AU Court, was thus overruled. See further, R. Murray, *Human Rights in Africa: From the OAU to the African Union*, Cambridge 2004, 68-69. The view has been expressed that two courts are a luxury that Africa can ill-afford and that it would be preferable to have one, strengthened judicial body, N.J. Udombana, *An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?*, 28 *Brooklyn Journal of International Law* (2003), 811.

<sup>26</sup> African Union: Assembly's decision should not undermine the African Court, available at: <<http://web.amnesty.org/library/print/ENGIOR300202004>>.

and to that end it has both a contentious and advisory jurisdiction.<sup>27</sup> Its remit is far ranging; it is not limited to the African Charter on Human and Peoples' Rights<sup>28</sup> but extends over any relevant human rights instrument ratified by the States concerned.<sup>29</sup> Viljoen and Baimu have made compelling arguments why a proposed merger would not advance the cause of human rights. They point out that the AU Court does not have an express human rights mandate so that human rights issues might not receive the due attention they merit.<sup>30</sup> Particularly problematic in this regard is that the judges of the AU Court do not have to be experts in the field of human rights, unlike the judges of the Human Rights Court.<sup>31</sup> A matter of considerable concern is that of access to the courts since the capacity to submit cases is much broader under the Protocol on the African Court of Human and Peoples' Rights<sup>32</sup> than under the Protocol on the AU Court.<sup>33</sup> Especially worthy of note is the fact that individuals and NGOs have a right of access to the Human Rights Court under Article 5(3) of its Protocol but significantly no express standing under the Protocol on the AU Court.<sup>34</sup> The proposed single court must recognize the *locus standi* of individuals and NGOs on human rights disputes, to do otherwise would be extremely regrettable and would reinforce the criticism of doomsayers that Africa has little regard for human rights. In addition, provision will have to be made for the African Commission on Human and Peoples' Rights to submit cases to the single court. The African Commission has extensive access to the African Court of Human and Peoples' Rights under the Protocol<sup>35</sup> but has no explicit capacity to submit cases to the AU Court.<sup>36</sup>

It could be argued that there is no reason in principle why the AU Court should not be deemed competent to pronounce on human rights issues in the same way

<sup>27</sup> The Protocol on the African Court of Human and Peoples' Rights, available at: <www.africa-union.org>, entered into force in January 2004 and by March 2005 had been ratified by 21 States. See generally, G. Naldi/K. Magliveras, Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights, 16 *Netherlands Quarterly of Human Rights* (1998), 431; N.J. Udombana, Toward the African Court on Human and Peoples' Rights: Better Late than Never, 3 *Yale Human Rights and Development Law Journal* (2000), 45.

<sup>28</sup> Adopted in 1981, available at: <www.africa-union.org>, reproduced in: 21 *ILM* (1982), 58, entered into force in 1986 and ratified by all 53 Member States.

<sup>29</sup> Article 3(1) of the Protocol on the African Court of Human and Peoples' Rights. See Naldi/Magliveras, *supra* note 27, 434-436.

<sup>30</sup> Viljoen/Baimu, *supra* note 23, 254.

<sup>31</sup> Article 11(1) of the Protocol on the African Court of Human and Peoples' Rights. See Naldi/Magliveras, *supra* note 27, 443-446.

<sup>32</sup> See Article 5 of the Protocol on the African Court of Human and Peoples' Rights. See further, Naldi/Magliveras, *supra* note 27, 434-439.

<sup>33</sup> See Article 18 of the Protocol.

<sup>34</sup> See *infra* p. 12.

<sup>35</sup> Article 5(1). See further, Naldi/Magliveras, *supra* note 27, 437.

<sup>36</sup> However, the African Commission may be one of the "other organs of the Union authorised by the Assembly" to submit cases to the AU Court under Article 18(1)(b) of the Protocol. See further, *infra* p. 11.

that the ECJ has assumed this role. The ECJ has developed an EC doctrine of human rights, inspired in large measure by the European Convention on Human Rights.<sup>37</sup> A consequence is that EC measures held incompatible with human rights cannot be upheld.<sup>38</sup> Yet it should be recalled that the ECJ was a tardy convert to human rights, accepting international treaties as a source of human rights in EC law only in 1974.<sup>39</sup> More significantly, the ECJ has indicated that there are limits to its capacity to pass judgment on human rights, being able to do so only if EC law is at stake.<sup>40</sup> It is therefore worth emphasizing that the ECJ is not a human rights court and will only address such issues in the context of EC law. However, such reservations regarding the ECJ's human rights role might not apply to the AU Court as the latter will possess the express power to address free standing human rights problems that the ECJ lacks. Nevertheless, it seems preferable that human rights issues would be better left to a specialist court which would be best qualified to adjudicate upon such matters.<sup>41</sup> As Murray has observed, there is no reason why the two courts cannot co-exist in a relationship similar to that of the ECJ and the European Court of Human Rights.<sup>42</sup>

The wisdom of the decision on the merger of the two courts may also be questioned on practical grounds. The Assembly has decided that the merged court should be governed by a new instrument.<sup>43</sup> This seems reasonable given the criticisms that have been made about the AU Court's current shortcomings in relation to human rights. However, the Assembly further decided that, pending the establishment of the merged court, the Human Rights Court should become operational.<sup>44</sup> We may therefore reasonably expect to have the latter court established but for how long? Is the expense and effort required in setting up this court justified if its life span is limited? Of course, there is no guarantee that even if the instrument creating the merged court were to be adopted in the short term, it would ever enter into force. Would the AU have the political will to kill a human rights court that might have established a strong reputation in the meantime? Other questions arise. Is the Protocol on the Court of Justice dead even before it has been given the chance to come into force? What if the Protocol does attract the neces-

<sup>37</sup> Opinion 2/94 on Accession by the Community to the ECHR (1996) ECR I-1759.

<sup>38</sup> See, e.g., *ibid.*; Case 5/88 *Wachauf v. Germany* (1989) ECR 2609.

<sup>39</sup> Case 4/73 *Nold v. Commission* (1974) ECR 491.

<sup>40</sup> See, e.g., C-159/90 *SPUC v. Grogan* (1991) ECR I-4685; Case 12/86 *Demirel v. Stadt Schwabisch Gmund* (1987) ECR 3719; C-299/95 *Kremzow v. Austria* (1997) ECR I-2629.

<sup>41</sup> *Viljoen/Baimu*, *supra* note 23, 255.

<sup>42</sup> Murray, *supra* note 25, 34.

<sup>43</sup> Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, AU. Doc. Assembly/AU/Dec.83 (V), para. 2. A new instrument should avoid the complications associated with amendments. According to the Protocols only State Parties and the respective Courts have the capacity to propose amendments, see Article 35 of the Protocol on the African Court of Human and Peoples' Rights, and Articles 45 and 46 of the Protocol of the AU Court.

<sup>44</sup> *Ibid.* para. 3. It will have been observed that the Protocol on the African Court on Human and Peoples' Rights entered into force in January 2004, *supra* note 27.

sary ratifications to enter into force? What would become of the AU Court pending the ratification of the instrument on the merged court? The AU might still end up with two courts. We may therefore be forced to conclude that this whole matter has not been best managed by the Assembly.

Although the proposed instrument on the merged court is only now receiving attention it has been suggested that the Human Rights Court could be constituted as a special chamber of the AU Court.<sup>45</sup> Alternatively a structure similar to that of the ECJ and the CFI could be established, with the AU Court cast in the role of the ECJ and the African Court of Human and Peoples' Rights in that of the CFI, with appeals lying from the latter to the former on limited grounds of law only.<sup>46</sup>

Another potential problem is that of the overlapping jurisdiction of courts in Africa, which had been raised some years ago.<sup>47</sup> It is therefore a matter of regret that the Protocol of the AU Court did not expressly address this matter. The fact that the AU Court is classified as the principal judicial organ of the AU<sup>48</sup> would suggest that it is the hierarchically superior court but the modalities of the relationship between the AU Court and the African Court of Human and Peoples' Rights should have been worked out beforehand. No such problem would arise with a merged court.

The relationship between the AU Court and the judicial organs of the African regional economic organizations is therefore likely to arise. These include the Court of Justice established by Article 15 of the Revised Treaty of the Economic Community of West African States (ECOWAS),<sup>49</sup> the Court of Justice established under Article 6(e) of the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA)<sup>50</sup> and the Tribunal of the Southern African Development Community (SADC), established by virtue of the Protocol on Tribunals and Rules of Procedure of 7 August 2000. Clearly, there is a need to establish a hierarchy among them in order to ensure consistency and prevent instances of conflicting judgments and, at some future stage, lead to the creation of a common African law. Undoubtedly, this will be one of the first issues that the AU Court will have to address. However, any attempt by the AU Court to place itself at the very top of this judicial apex will most probably have to be justified on the primacy of AU

<sup>45</sup> Udo m b a n a, *supra* note 25, 865. See also the Report of the Meeting of Experts of the First AU Ministerial Conference on Human Rights in Africa, AU Doc. EXP/CONF/HRA/RPT.(II), 6 May, 2003. The Court is authorized to form chambers under Article 56 of the Protocol.

<sup>46</sup> Cf. Article 58 Statute of the ECJ.

<sup>47</sup> Naldi/Magliveras, *supra* note 27, 435-436. Viljoen/Baimu consider the issues at stake in the specific context of the African Court on Human and Peoples' Rights and the African Court of Justice, *supra* note 23, 257-261. As is explained later, the AU Court will have jurisdiction over human rights treaties, including the African Charter on Human and Peoples' Rights under Article 18(1)(b) of its Protocol, while the African Court on Human and Peoples' Rights appears to have jurisdiction over the Constitutive Act, on the basis that it makes reference to human rights, under Article 3(1) of its Protocol.

<sup>48</sup> Article 18 of the Constitutive Act.

<sup>49</sup> Reproduced in: 8 RADIC (1996), 187.

<sup>50</sup> Reproduced in: 33 ILM (1994), 1111.

law not only over the law of the other organizations but also over the domestic legal systems of the AU Member States, which, at the same time, participate in the regional organizations. The case of the European Community offers an important historical precedent. Although the EC Treaty did not make any reference on European Community law ranking higher than Member States' domestic law, this was pronounced in a series of seminal judgments delivered by the ECJ in the early 1960s.<sup>51</sup>

## The Composition of the Court

The Court consists of only eleven judges,<sup>52</sup> who are required to be impartial and independent.<sup>53</sup> The Protocol does not therefore adhere to the principle of one Member one judge. In view of the fact that the AU has fifty-three Member States, the application of this principle would have led to a cumbersome institution. However, it needs to be recalled that this principle applies to the ECJ, with a current membership of twenty-five, although only in the most exceptional cases will it sit in plenary session of at least eleven judges.<sup>54</sup> In the normal course of events Article 16 of the Protocol envisages the full Court sitting,<sup>55</sup> and a quorum of at least seven judges is specified.<sup>56</sup> It appears that the Court will be able to sit in Chamber as passing references are made in this provision but no further details are provided in the Protocol. It is assumed that the Rules of the Court will address this matter.<sup>57</sup>

The judges will serve for six years and may be re-elected for one further period.<sup>58</sup> The President and Vice-President are elected by the Court for a period of three years and are eligible for re-election for one further period.<sup>59</sup> The Protocol does not address the question whether a judge whose term of office has expired will be able to continue hearing a case that had begun and is still pending.

Individuals eligible for election to the Court must be nationals of a State Party and, as tends to be the usual practice, no two judges may be nationals of the same country.<sup>60</sup> Africa's principal legal traditions (most probably civil law, common law,

<sup>51</sup> See Case 26/62 *Van Gend en Loos v. Administratie der Belastingen* (1963) ECR 1, and Case 6/64 *Costa v. ENEL* (1964) ECR 585.

<sup>52</sup> Article 3(1) of the Protocol. The Assembly may review the number of judges, *ibid.*, para. 2.

<sup>53</sup> Article 4 of the Protocol. See further Article 9 of the Protocol on the oath of office and Article 13(1).

<sup>54</sup> See Article 221 Treaty of the European Community.

<sup>55</sup> Article 16(1) of the Protocol.

<sup>56</sup> Article 16(2) of the Protocol. The Protocol does not address the voting procedures for the adoption of decisions by the AU Court, a matter that should be covered by the Rules of Procedure.

<sup>57</sup> See Article 58 of the Protocol.

<sup>58</sup> Article 8(1) of the Protocol. On resignation, see further Article 11(1) of the Protocol.

<sup>59</sup> Article 10(1) of the Protocol.

<sup>60</sup> Article 3(4) of the Protocol. Cf. Article 3(1) Statute of the ICJ.



Roman/Dutch law, Islamic law and customary or traditional law)<sup>61</sup> and regions must be represented on the Court.<sup>62</sup>

The procedure for the election of judges is set out in Articles 5-7 of the Protocol. Each State Party may nominate only one candidate<sup>63</sup> but as Article 3(4) implies, the nominee need not be a national of the nominating country. It is interesting to observe that due consideration must be given to adequate gender representation in the nomination process.<sup>64</sup> This requirement of affirmative action, which reflects the AU's commitment to the promotion of gender equality,<sup>65</sup> has a laudable aim, seeking to increase the representation and participation of women in an area where traditionally they have not been actively represented. It therefore appears to satisfy the requirements of being both objective and reasonable. Judges are to be elected by the Assembly by secret ballot and by a two-thirds majority of Members eligible to vote.<sup>66</sup> Should this majority fail to be achieved, the balloting will continue until all judgeships have been filled.<sup>67</sup> The same procedure will apply in the case of vacancies resulting from death, resignation or removal from office.<sup>68</sup>

As has just been observed above, adequate gender representation is necessary in the nomination process but Article 7(3) of the Protocol goes further in compelling the Assembly to ensure that there is equal gender representation in the election of the judges. The use of the adjective "equal" in this provision rather than that of "adequate" suggests a policy of positive discrimination and, taken literally, it appears to set a minimum numbers rule or quota, that is, it requires that at least five of the eleven judges must be women, thereby predetermining in this particular area

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<sup>61</sup> Article 3(5) of the Protocol. Cf. Article 9 Statute of the ICJ. Candidates must possess the qualifications required for appointment to the highest judicial offices or be jurists of recognized competence in international law.

<sup>62</sup> Article 3(6) of the Protocol, which specifies that each region must be represented by no less than two judges. A judge who replaces another judge whose term of office has not expired must be from the same region, *ibid.*, Article 8(3).

<sup>63</sup> Article 5(2) of the Protocol.

<sup>64</sup> Article 5(3) of the Protocol. Africa appears to be setting a notable precedent in this regard, see also Article 14(3) of the Protocol on the African Court of Human and Peoples' Rights.

<sup>65</sup> See Article 4(1) of the Constitutive Act and Article 3(i) of the Protocol on Amendments to the Constitutive Act of the African Union, available at: <[www.africa-union.org](http://www.africa-union.org)>, not yet in force. See Murray, *supra* note 25, 135-137. Cf. Articles 3(2) and 141(4) of the EC Treaty, and Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Official Journal of the European Communities L 39, 1976, 40, as last amended by Directive 2002/73/EC of 23 September 2002, Official Journal of the European Communities L 269, 10 October 2002, 15.

<sup>66</sup> Article 7(1) of the Protocol.

<sup>67</sup> Article 7(2) of the Protocol.

<sup>68</sup> Article 12(3) of the Protocol. According to Article 12(1) of the Protocol vacancies can arise only in three situations: death; resignation; or removal from office. A judge may be suspended or removed from office only where the other judges have unanimously decided that the judge in question no longer fulfils the requirements of office, a decision that becomes final if endorsed by the Assembly, *ibid.*, Article 11.

the outcome of the nomination process. This gender requirement could therefore attract criticism on the basis that the selection process could give rise to discrimination between candidates on the grounds that they belong to a particular sex. If it is the case that even in areas where they have been underrepresented women are automatically given an “absolute and unconditional priority for appointment” the policy could be open to question.<sup>69</sup> However, the policy will be acceptable provided it is proportionate and an objective assessment is made of all the criteria, neutral, specific to individual candidates.<sup>70</sup>

In *Guido Jacobs v. Belgium* the UN Human Rights Committee held that gender requirements for appointment to the High Court of Justice, designed to encourage women to apply for public service posts where they were underrepresented, was not discriminatory.<sup>71</sup> It stated that, “given the responsibilities of the judiciary, the promotion of an awareness of gender-relevant issues relating to the application of the law, could well be understood as requiring that perspective to be included in a body involved in judicial appointments”.<sup>72</sup> Furthermore, it was not the case that women applicants were less well qualified.<sup>73</sup> The Human Rights Committee therefore concluded that the gender requirements were not disproportionate but were objectively and reasonably justified.

Similar considerations would appear to apply in the present case. Until recent times women were unrepresented on the benches of international tribunals, and today they still remain underrepresented. The AU is therefore seeking a more balanced judiciary in keeping with its worthy objective of promoting gender equality. As has been mentioned earlier, women candidates for the bench must possess the proper qualifications and the expectation must be that suitably qualified candidates will be appointed. And, in light of the observation above by the Human Rights Committee of the importance of developing an awareness of gender-relevant issues, the AU Court will no doubt be confronted with having to interpret and decide upon gender issues at some stage, for example, concerning the Protocol on the Rights of Women.<sup>74</sup>

<sup>69</sup> Case C-450/93 *Kalanke v. Freie Hansestadt Bremen* (1995) ECR I-3051; Case C-407/98 *Abrahamsson v. Fogelqvist* (2000) ECR I-5539.

<sup>70</sup> Case C-409/95 *Marschall v. Land Nordrhein-Westfalen* (1997) ECR I-6363; Case C-158/97 *Badeck v. Landesanwalt beim Staatsgerichtshof des Landes Hessen* (1999) ECR I-1875. Craig/de Búrca therefore write that “in order for acceptable positive-action measures such as job qualification criteria which indirectly favour the underrepresented sex ... to be compatible with EC law, they must first genuinely be designed to reduce *de facto* inequalities and compensate for career disadvantages, and secondly they must be based on transparent and objective criteria which can be reviewed”, P. Craig / G. de Búrca, *EU Law: Text, Cases and Materials*, 3<sup>rd</sup> ed., Oxford 2003, 894.

<sup>71</sup> Case No. 943/2000, UN GAOR A/59/40, Vol. II, annex IX, sect. S (7 July 2004).

<sup>72</sup> *Ibid.*, para. 9.4.

<sup>73</sup> *Ibid.*, para. 9.5.

<sup>74</sup> Adopted in 2003, not yet in force. The text of the Protocol is available at: <[www.africa.union.org](http://www.africa.union.org)>. The Protocol asserts a variety of substantive rights and may be considered as comprehensive and progressive in many respects, see Magliveras/Naldi, *supra* note 11, 140-142; Murray, *supra* note 25, 151-152.

## Eligibility to Submit Cases to the AU Court – Competencies

The crucial issue of who is eligible to submit cases to the AU Court is laid down in Article 18 of the Protocol. Four categories are envisaged: all contracting parties to the Protocol; the Assembly, the Parliament<sup>75</sup> and any other AU organ authorized by the Assembly; the Commission<sup>76</sup> or Commission employees, but solely in the context of a labour dispute between them and in accordance with the relevant stipulations in the Staff Rules and Regulations; and “Third Parties” under conditions to be determined by the Assembly and with the consent of the contracting party concerned. Who exactly is eligible under the fourth category is not straightforward as the Protocol does not offer a definition of the term “Third Parties”.

From the wording of the first indent of Article 18(3) it is clear that the term “Third Parties” does not refer to non-AU Member States, as these are not allowed to submit cases to the Court. On the other hand, it could reasonably be interpreted as meaning AU Members that are not contracting parties to the Protocol. Credence to this argument is offered by the corresponding provision in the Statute of the ICJ, Article 35(2), which stipulates that the ICJ shall be open to “other states” subject to the conditions set out by the Security Council, while such conditions should not place litigant parties in a position of inequality before the ICJ.<sup>77</sup> The second paragraph of Article 18 repeats that, subject to special provisions contained in treaties in force, the relevant conditions for “Third Parties” accessing the AU Court shall be laid down by the Assembly and it then goes on to repeat verbatim the prohibition of inequality of parties stipulated in Article 35(2) of the Statute of the ICJ. However, the second indent of Article 18(3) proves that this is an erroneous supposition, as it provides that the AU Court has no jurisdiction to deal with disputes involving Members that have not ratified the Protocol. Although there are other passages in the Protocol where the term “Third Parties” appears (e.g. Article

<sup>75</sup> According to Article 2(2) of the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament 2001, available at: <[www.africa-union.org](http://www.africa-union.org)>, which entered into force on 27 November 2003, the role of the Pan-African Parliament is to represent the peoples of Africa, and in accordance with Article 17(1) of the Constitutive Act, to ensure the full participation of African peoples in the development and economic integration of the Continent. It is important to note that the Pan-African Parliament’s powers are for the time being consultative and advisory rather than legislative although it is expected that it will evolve full legislative powers, Articles 2(3) and 11 of the Protocol Relating to the Pan-African Parliament. See further, Magliveras / Naldi, *supra* note 11, 80-85, and K. Magliveras / G. Naldi, The Pan-African Parliament of the African Union: An Overview, 3 South African Human Rights Law Journal (2003), 222.

<sup>76</sup> The Commission, composed of a Chairperson and Commissioners, is the Secretariat of the AU, Article 20(1) of the Constitutive Act. See further, Magliveras / Naldi, *supra* note 11, 90-91.

<sup>77</sup> Although J. G. Merrills, *International Dispute Settlement*, 3<sup>rd</sup> ed., Cambridge 1998, 222, argues that Article 35(2) covers only non-Member States, it is submitted that it could also cover those contracting parties to the Statute of the ICJ that have not made an Article 36 Declaration. This conclusion is based on the premise that, pursuant to Article 93(2) of the UN Charter, non-Member States may accede to the Statute on conditions to be determined on a case-to-case basis by the General Assembly upon the Security Council’s recommendation. However, even such contracting parties need to make an Article 36 Declaration recognizing the ICJ’s jurisdiction as *ipso jure* compulsory.

21(3) dealing with the submission of disputes), they do not shed any light on the proper construction of the term.

An alternative suggestion might be that it is intended to refer to natural and/or legal persons domiciled/established in the territory of a contracting party, and perhaps to national courts as well, in which case the AU Court would exercise a function akin to the preliminary references jurisdiction exercised by the ECJ.<sup>78</sup> If this argument were to hold, it would make sense that Article 18(1) requires the consent of the contracting party concerned, since the latter, exercising its sovereign rights, may wish to restrict or even to negate this possibility. Another entity that might satisfy this definition, and which has been mentioned above, is the African Commission on Human and Peoples' Rights.

As far as the jurisdiction of the AU Court is concerned, Article 19 of the Protocol stipulates that it covers all disputes and applications which are envisaged in the Act<sup>79</sup> and in the Protocol and relate to the following seven categories of cases:

*The first category.* The interpretation and application of the Act. It should be noted that according to Article 26 of the Constitutive Act, pending the establishment of the AU Court, this competence has been given to the Assembly, which is to decide such issues with a two-thirds majority. However, there is an inconsistency in the wording of Article 19 and Article 26 of the Constitutive Act. Whereas the former refers to "interpretation and application", the latter refers to "interpretation arising from the application or implementation" of the Act. Considering that the latter wording is considerably broader than the former, this inconsistency should be attributed to the drafters' oversight.

*The second category.* The interpretation, application or validity of African Union treaties and all subsidiary legal instruments adopted within the framework of the AU. Although the term "Union treaties" has not been defined in the Protocol, it should be taken to mean not only those treaties and agreements, which have been concluded under the auspices of the AU,<sup>80</sup> but also those under the aegis of the OAU. The latter have become AU treaties on the basis of the Union being the successor Organization to the OAU.<sup>81</sup> Thus, these treaties will include the aforementioned Treaty Establishing the African Economic Community (1991),<sup>82</sup>

<sup>78</sup> See Article 234 of the EC Treaty.

<sup>79</sup> The reference to the Constitutive Act should be regarded as superfluous, since, as already mentioned, the Act fails to give even the most general description of the AU Court's jurisdiction, apart from the competence to interpret the Act pursuant to Article 26.

<sup>80</sup> For example, the Convention on Preventing and Combating Corruption and the Revised Version of the Convention on Conservation of Nature and Natural Resources, both adopted by the Second Ordinary Session of the AU Assembly (Maputo, Mozambique, July 2003), available at: <[www.africa-union.org](http://www.africa-union.org)>.

<sup>81</sup> Although the Constitutive Act does not expressly stipulate that the replacement of the OAU by the AU was a case of succession between international organizations, it has been argued that this follows from the wording of Article 33(1) of the Constitutive Act; see Magliveras/Naldi, *supra* note 11, 61.

<sup>82</sup> Cf. Article 33(2) of the Constitutive Act stipulating that the Act shall take precedence and supersede any inconsistent provisions of the AEC Treaty.

the African Charter on Human and Peoples' Rights (1981), the African Charter on the Rights and Welfare of the Child (1990), the Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (1991), the Convention on the Prevention and Combating of Terrorism (1999), amongst others.<sup>83</sup> The term "Union treaties" should also be deemed to include the Protocols to the Constitutive Act, which have been adopted or will be adopted in the future and relate to the function and competencies of the AU organs.<sup>84</sup> It follows that the Protocol of the Court of Justice should be construed as a "Union treaty".

The meaning of the term "subsidiary legal instruments" should also be clarified, as the Protocol does not offer any definition. Clearly, they are not the Protocols, considering that these form an integral part of the Act, but also not the decisions taken by AU organs, as these are the subject of the fourth category. Thus, it would be up to the AU Court to clarify the term.

The third category. Any question of international law. It is submitted that, although there was good reason for the inclusion of such a category in the Statute of the ICJ,<sup>85</sup> it should not have been included in the Protocol. Indeed, the ICJ, as "the principal judicial organ of the United Nations", the only global political organization since 1945, is uniquely positioned to examine questions of international law and through its (perceived or actual) eminence to act as a guiding force for the judicial organs of regional organizations and, in this manner, avoid the possibility of conflicting judgments. At any rate, the AU Court, as any other institutionalized judicial body, has the right to determine international law questions on a case-to-case basis, in other words as subsidiary or supplementary issues.<sup>86</sup> But the primary responsibility with determining crucial issues of international law should lie with the ICJ. This argument is based on the fears expressed by commentators as regards the multitude of international judicial entities and the ensuing fragmentation in the interpretation and application of international law.<sup>87</sup> Notwithstanding this argument, one cannot overlook the possibility that some of the disputes that might be referred to the AU Court would require it to act with specialized jurisdiction.

<sup>83</sup> The texts of all these treaties are available at: <[www.africa-union.org](http://www.africa-union.org)>.

<sup>84</sup> So far the following Protocols have been adopted: the Protocol relating to the Pan-African Parliament (signed on 2 March 2001, in force since 27 November 2003; see Magliveras/Naldi, *supra* note 75, the Protocol establishing the Peace and Security Council (signed on 9 July 2002, in force since 26 December 2003), and the Protocol of the Court of Justice.

<sup>85</sup> Cf. Article 36(2)(b) of the Statute of the ICJ.

<sup>86</sup> For example, the ECJ does not have a separate jurisdiction to deal with matters of international law but may do so if they derive from an infringement of the EC Treaty; see Brown/Kennedy, *supra* note 24, 112-113.

<sup>87</sup> See, among others, G. Guillaume, The Future of International Judicial Institutions, 44 ICLQ (1995), 848; C.P.R. Romano, The Proliferation of International Judicial Bodies: The Pieces of the Puzzle, 31 New York Journal of International Law and Policy (1999), 709.

The fourth category. All acts, decisions, regulations and directives of the organs of the Union. Although not expressly mentioned, this category should be considered as encompassing the validity, the interpretation and the effects of application of (presumably legally binding) acts. To that extent, this function resembles an action for judicial review.<sup>88</sup> However, it is not clear whether the AU Court could actually annul an act which has been found to be in conflict with Union and/or international law, or would simply pronounce its illegality.<sup>89</sup> To put it otherwise, whether the AU Court's decisions falling into this category are of a declaratory nature or have a moulding effect. Undoubtedly, the answer to this question will have to do with the degree of judicial activism that the AU Court will be prepared to undertake.

The fifth category. All matters specifically provided for in any other agreement/s that contracting parties may conclude among themselves or with the Union and which confer jurisdiction on the AU Court.<sup>90</sup> A prime example is the Non-Aggression and Common Defence Pact of the African Union, which was concluded on 31 January 2005, Article 16 of which stipulates that contracting parties are under the obligation to refer all disputes over its interpretation, implementation and validity to the AU Court.

An associated issue that deserves to be mentioned is the following. During the life of the OAU a number of treaties were adopted either under its auspices or among African States specifying that any questions regarding their interpretation or application would be solved through recourse to the Commission of Mediation, Conciliation and Arbitration, the dispute settlement mechanism of the OAU and the nearest to a judicial organ that it had.<sup>91</sup> The question that arises and which has not been apparently addressed by the AU is whether all references to that Commission could now be deemed to mean the AU Court without necessitating their amendment. Given the continuity that characterizes the OAU-AU relationship and the fact that the AU Commission's Chairperson has assumed the role of depositary from the OAU Secretary General (e.g. in the Refugee Convention), an answer in the affirmative would not be unrealistic.

The sixth category. The existence of any fact, which, if established, would constitute a breach of an obligation, owed to a contacting party or to the Union itself. This is a competence that has also been included in the Statute of the ICJ albeit in a varying form.<sup>92</sup> What might prove to be problematic with this category is the fact that the Constitutive Act has endowed the Assembly with the authority to im-

<sup>88</sup> Cf. Article 230 of the EC Treaty.

<sup>89</sup> Cf. *ibid.*, Article 231.

<sup>90</sup> Cf. Article 37 of the Statute of the ICJ.

<sup>91</sup> See, *inter alia*, the Convention Governing the Specific Aspects of Refugee Problems in Africa (1969), the Act Relating to Navigation and Economic Co-operation between the States of the Niger Basin (1963) and the African Convention on the Conservation of Nature and Natural Resources (1968). Generally, see Magliveras/Naldi, *supra* note 11, 45.

<sup>92</sup> See Article 36(2)(c) of the Statute of the ICJ referring to "a breach of an international obligation".

pose sanctions on recalcitrant Member States in three separate instances. Naturally, it is a *conditio sine qua non* that, for the infliction of sanctions, the breach of obligations by the Member State/s concerned has already been determined. Unfortunately, the drafters of the Protocol did not lay down provisions delineating the respective rights and powers of the Assembly and the Court.

In particular, the first instance for the imposition of sanctions concerns the arrears in contributions owed by Member States to the Union budget. Article 9(1)(f) of the Constitutive Act provides that the Assembly shall adopt the budget of the Union, while Article 23(1) authorizes it to determine the appropriate sanctions to be inflicted on any Member State defaulting in the payment of contributions. It could be argued that whether a Member is in arrears or not is an objective fact that requires no judicial determination. However, were the Member in question to dispute the arrears – this must be expected in view of the wide-ranging sanctions of Article 23(1)<sup>93</sup> – it would probably become a legal issue requiring the Court's determination. And here lies a theoretical conflict, should the Assembly acting under Article 23(1) and the Court acting under Article 19(1)(f) reach opposite decisions. The issue is more complicated in view of Article 9(1)(e) of the Act authorizing the Assembly to ensure compliance by all Member States with the decisions of the Union. Naturally, the inclusion of this provision was considered to be imperative when the Act was drafted in 2000, as at the time the Court had not been established and there was need for the Organization to monitor compliance with its decisions. Indeed, it was even more imperative taking into consideration the worsening record of OAU Member States in complying with decisions including the non-payment of budgetary contributions.<sup>94</sup> However, with the advent of the AU Court the Assembly's ability to determine issues that are primarily legal in nature ought to be diverted to the Court. As this has not been included in the Protocol, it is submitted that it should be implemented by incorporating the necessary transitory provisions in a future Protocol of Amendments to the Act.<sup>95</sup>

The second instance where the Assembly has been authorized to impose sanctions is Article 23(2) of the Constitutive Act, which concerns those Members failing to comply with Union decisions and policies. The Assembly may order the denial of transport and communications links with other Members and any other measures of a political and economic nature that it deems essential. Finally, the third instance is envisaged in Article 30: those governments that have come into power through unconstitutional means shall not be allowed to participate in the Union activities.<sup>96</sup> Even though the wording of Article 30 would suggest that this is

<sup>93</sup> See Magliveras/Naldi, *supra* note 3, 423-424.

<sup>94</sup> In May 2001 arrears in contributions stood at USD 46,623,000 representing 1.7 times the expected contributions, see Magliveras/Naldi, *supra* note 11, 58.

<sup>95</sup> See Article 32 of the Constitutive Act for its amendment and revision.

<sup>96</sup> The theoretical foundation of Article 30 is the Union's objective to promote democratic principles and institutions (Article 3(g) of the Act) and the Union's principle to respect democratic principles, the rule of law and good governance (Article 4(m) of the Act).

an automatic sanction and does not require the prior decision of the Assembly, acting as the highest ranking organ,<sup>97</sup> there is still the legal issue of determining whether the government in question had indeed assumed power in an unconstitutional manner. Undoubtedly, the AU Court should determine this question, for the reason that the judicial organs of international organizations are, at least theoretically, immune from political considerations.

The seventh category. The nature or extent of the reparation to be made for the breach of an obligation.<sup>98</sup> Although not expressly laid down in the Protocol and considering that this category follows from the previous one, it should be accepted that it refers to obligations owed to contracting parties and/or to the Union. In view of the wide-ranging powers enjoyed by the Assembly when it comes to ordering sanctions, which could be seen as a means of reparation for breach of obligations owed to the Union, the question arises whether the AU Court may determine additional reparations to be made. To offer an illustration, in the case of breach of the obligation to pay budgetary contributions timely, could the Court determine that the reparation to be made to the Union could extend to the payment of a pecuniary penalty proportionate to the amount of arrears? This line of thinking reverts us to the previous argument, namely that the respective powers of the Assembly and of the Court ought to be determined in a future amendment of the Constitutive Act.

Finally, the second paragraph of Article 19 of the Protocol authorizes the Assembly to confer, if deemed necessary, power on the AU Court to assume jurisdiction “over any dispute other than those referred to in this Article”. It is submitted that to extend the Court’s jurisdiction by virtue of a mere Assembly decision is problematic. As has already been mentioned, Article 18(2) keeps away from the AU Court those Member States that have not ratified the Protocol. On the other hand, all Member States participate in the Assembly. If, for the sake of argument, the Assembly were to confer further powers to the Court as soon as the Protocol entered into force, only 15 out of the current membership of 53, i.e. less than one third, would have any real interest in the matter.<sup>99</sup> Moreover, since two-thirds of the Union membership forms a quorum in Assembly meetings and non-procedural decisions are voted by the same majority (i.e. by 35 Member States),<sup>100</sup> those not participating in the Court could impose their views on those participating, even though the matter is of no concern to them. Naturally, the most appropriate manner would have been an amendment of the Protocol, which would have been negotiated and concluded among the contracting parties only.

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<sup>97</sup> See Article 6(3) in conjunction with Article 9 of the Act laying down the Assembly powers, in which only the function to consider requests for membership in the Union features. Thus, there is no mention of either suspension of membership rights or expulsion from membership.

<sup>98</sup> Cf. Article 36(2)(d) of the Statute of the ICJ.

<sup>99</sup> Cf. Article 60 of the Protocol and discussion *infra*.

<sup>100</sup> See Article 7 of the Act.



Notwithstanding these considerations, one must examine what kind of disputes might fall within the ambit of Article 19(2). Comparing the AU Court's jurisdiction with that of the ECJ, two categories of disputes could conceivably be conferred upon the former. The first comprises private disputes, other than labour disputes between the Union organs as employers and their employees, and in particular disputes relating to the contractual<sup>101</sup> and non-contractual liability of the Union.<sup>102</sup> The second category comprises actions raised by natural or legal persons against the Union and/or its organs before the Court.<sup>103</sup> Whereas the former category should without any doubt be included, as the Union is a living Organization with presence in various Member States, it is doubtful whether African leaders would wish, at least for the foreseeable future, to accord to their nationals and companies even a limited right of appeal before the AU Court.

## Sources of Law

Article 20(1) of the Protocol lays down in descending order the sources of law to which the AU Court shall resort in determining the cases before it:

- (a) The Constitutive Act;
- (b) International treaties establishing rules that are expressly recognized by the litigant states;
- (c) International custom, as evidence of a general practice having the force of law;
- (d) General principles of law, which are recognized either universally or by African states; and
- (e) Solely as subsidiary means for the determination of the rules of law, judicial decisions and the writings of the most highly qualified publicists of various nations as well as the regulations, directives and decisions of the African Union.

In addition, the AU Court has the power to decide a case *ex aequo et bono* if the parties agree.<sup>104</sup>

An initial observation is that this clause is very similar to Article 38(1)-(2) of the Statute of the ICJ. In keeping with the generally accepted view that Article 38(1) of the Statute of the ICJ does not enumerate a formal hierarchy of sources, although in practice they may be applied sequentially,<sup>105</sup> the same may be said of Article 20(1) of the Protocol, save for the obvious "subsidiary means" listed in sub-para. (e). Some differences may be observed, however, reflecting the Protocol's regional background. First, the AU Court must have regard to the Constitutive Act. This is hardly surprising in view of the fact that the Constitutive Act is the constitutional document of the AU. Secondly, the reference to international treaties in sub-para.

<sup>101</sup> Cf. Article 288(1) of the EC Treaty.

<sup>102</sup> Ibid., Articles 235 and 288(2).

<sup>103</sup> Ibid., Article 230(4).

<sup>104</sup> Article 20(2) of the Protocol.

<sup>105</sup> I. Brownlie, *Principles of Public International Law*, 6<sup>th</sup> ed., Oxford 2003, 5.

(b) should be read as encompassing all OAU/AU treaties, for example, the Convention on Refugees, the African Charter on Human and Peoples' Rights, and the Convention on Terrorism.<sup>106</sup> Express reference is made to rules particular to African States. Account should also be taken of regional customary law. Consequently, whether or not the reference is to general principles of international law or rules of municipal law accepted in different parts of Africa, included in such rules could be a right to development<sup>107</sup> and second and third generation human rights.<sup>108</sup> Finally, the decisions of the AU may also be taken into account if appropriate. In this context this appears to be a sensible step as they could assist the Court in the clarification of any dispute but it could also be interpreted as an acknowledgement of the norm generating possibilities of soft law.<sup>109</sup>

In light of the reference to general principles of law the development of such principles by the AU Court must be contemplated. Member States are under an obligation to uphold the international rule of law and to promote the objectives and principles of the AU and AEC. The promotion and protection of human rights is one such fundamental principle.<sup>110</sup> It therefore does not seem unreasonable to contemplate the possibility that the AU Court may follow the lead trailed by the ECJ and declare that AU legislation must comply with human rights norms,<sup>111</sup> or the principles of legal certainty,<sup>112</sup> legitimate expectations<sup>113</sup> and proportionality.<sup>114</sup>

## Submission of Disputes – Interim Measures – Intervention – Non-Appearance

According to Article 21 of the Protocol, disputes are submitted to the AU Court by means of a written application to the Registrar, indicating the subject of the dispute, the applicable law and the basis for the Court's jurisdiction. The Registrar will immediately notify not only all concerned parties but also the Member States and the Chairperson of the Commission. Considering that the Protocol does not

<sup>106</sup> The texts of these treaties are available at: <[www.africa.union.org](http://www.africa.union.org)>.

<sup>107</sup> See Murray, *supra* note 25, 240-241.

<sup>108</sup> *Ibid.*, 245-259.

<sup>109</sup> Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. USA*) ICJ Reports 1986, 14 at 99-100; *Legality of the Threat or Use of Nuclear Weapons* Case, ICJ Reports 1996, 226, para. 70. In Case C-322/88 *Grimaldi v. Fonds des Maladies Professionnelles* (1989) ECR 4407 the ECJ held that non-binding measures are not necessarily without legal significance.

<sup>110</sup> Articles 3(e), (g) and (h), and 4(m) of the Constitutive Act.

<sup>111</sup> Case 4/73 *Nold v. Commission* (1974) ECR 491; Opinion 2/94 (1996) ECR I-1759.

<sup>112</sup> Case 63/83 *R v. Kirk* (1984) ECR 2689.

<sup>113</sup> Case 120/86 *Mulder v. Minister van Landbouw en Visserij* (1988) ECR 2321; E. Sharpston, *Legitimate Expectations and Economic Reality*, 15 *European Law Review* (1990), 103.

<sup>114</sup> Case C-331/88 *R v. Minister for Agriculture, Fisheries and Food ex parte Fedesa* (1990) ECR 4023; G. de Búrca, *The Principle of Proportionality and Its Application in EC Law*, 13 *Yearbook of European Law* (1993), 105.

indicate another means of commencement of proceedings, it is submitted that there is a *lacuna*. Thus, although Article 21 deals with disputes, it fails to cover other types of jurisdiction coming before the Court that are not disputes, e.g. applications for the interpretation of the Act or of subsidiary legal instruments, for the determination of questions of international law, etc. Most probably the same procedure will be followed in such cases, with the only exception that there will be no notification to “concerned parties”, as there will be none.

Article 22(1) of the Protocol empowers the AU Court to indicate provisional measures of protection “on its own motion or on application by the parties ... if it considers that circumstances so require [and] ought to be taken to preserve the respective rights of the parties”.<sup>115</sup> That the Court may do so *ex officio* means that it will first have to consider the dispute and determine whether provisional measures are called for. Since this is rather unlikely, a litigant party or parties will most probably file the relevant application and the Court will rule on it. As is the case with the Statute of the ICJ, the Protocol does not deal with the delicate question of whether the Court must first ascertain its jurisdiction to try the case and then order the provisional measures, or whether these two issues are not related and, consequently, the former is not a *conditio sine qua non* for the latter. Hugh Thirlway, analyzing the ICJ’s case law on this issue for the period 1954-1989, has concluded that both views have their advantages and disadvantages and, therefore, which would prevail may only be decided on a case to case basis.<sup>116</sup>

However, one could refer to a number of ICJ cases (including *Nicaragua*<sup>117</sup> and *Bosnia v. Yugoslavia*<sup>118</sup>) where the ICJ laid down the principle that, as long as it has *prima facie* jurisdiction, it will be prepared to entertain the request for interim measures, even if it later turns out that it lacks jurisdiction, rejecting the argument that it should first ascertain that jurisdiction is well-founded before it considers such requests.<sup>119</sup> This approach has more recently been followed in the *Arrest Warrant* Case, where the ICJ concluded that, on the one hand, it is not necessary, before deciding whether or not to indicate provisional measures, to “satisfy itself that it has jurisdiction on the merits of the case” but, on the other hand, it cannot indicate them, unless the provisions invoked appear *prima facie* to constitute a basis on

<sup>115</sup> Save for the addition of the Court acting in its own motion or on application by the parties, this provision is a verbatim repetition of Article 41(1) of the Statute of the ICJ. See also Article 27(2) of the Protocol Establishing the African Human Rights Court, which is a verbatim reproduction of Article 63(2) of the American Convention of Human Rights.

<sup>116</sup> H. Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989*, 69 *BYIL* (1998) 1, 22-23.

<sup>117</sup> *Military and Paramilitary Activities in and against Nicaragua, Provisional Measures*, Order of 10 May 1984, ICJ Reports 1984, 169; 23 *ILM* (1984), 670.

<sup>118</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Provisional Measures Order of 8 April 1993, ICJ Reports 1993, 3.

<sup>119</sup> Sir Hersch Lauterpacht, *The Development of International Law by the International Court of Justice*, Reprinted by Cambridge University Press, Cambridge 1996, 110-112.

which to found its jurisdiction.<sup>120</sup> It remains to be seen how the AU Court will tackle this issue when it becomes operative.

Unfortunately, the Protocol is silent on another crucial matter, namely whether provisional measures are of a legally binding nature or not. Interpreting the Protocol, the answer should be in the negative. This conclusion is based on the wording of Article 22, which refers to the Court's power to "indicate" and not to "order" provisional measures and provides that they "ought" and not "must" be taken to maintain the *status quo* among the parties to the dispute. If one looked into the recent practice of international courts<sup>121</sup> and quasi-judicial entities<sup>122</sup> to determine whether interim measures are compulsory or not, one would conclude that there is a trend towards regarding them as binding. As far as the ECJ is concerned, Article 243 of the EC Treaty authorizes it to "prescribe any necessary interim measures". However, there has not been consistent case law to the effect that they are compulsory for the party/ies to which they are addressed.<sup>123</sup> It goes without saying that the interim measures' efficacy would be seriously compromised if they were to be treated as solely guidelines addressed to litigant parties.<sup>124</sup>

The Protocol does not specify at which stage of the proceedings the AU Court may indicate provisional measures. Taking into consideration the provision of Article 22(2) stipulating that, pending the final decision, notice of the measures shall immediately be given to the parties and to the Commission's Chairperson, it follows that they could be indicated at any stage of the proceedings but before the concluding judgment has been issued.<sup>125</sup> Finally, the Protocol is also silent on the issue of canceling or varying provisional measures when the circumstances so dictate. It should be accepted that the Court reserves this right, even though no express reference has been included in the Protocol. Otherwise, any interim measures followed by the party to which they were addressed would be to its detriment, if

<sup>120</sup> Case *Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Provisional Measures, Order of 8 December 2000, ICJ Reports 2000, 182 at para. 67.

<sup>121</sup> For the ICJ, see *LaGrand Case (Germany v. United States of America)*, Judgment of 27 June 2001, ICJ Reports 2001, 466 at paras. 99-103, ruling that its orders indicating provisional measures have binding effect. For commentary, see G. Naldi, *International Court of Justice Declares Provisional Measures of Protection Binding*, 118 *Law Quarterly Review* (2002), 35. For the European Court of Human Rights, see *Momatkulov and Abdurasulov v. Turkey*, Judgment of 6 February 2003, available at: <www.echr.coe.int/ENG/Judgments.htm>, reversing the widely held view that interim measures were not binding, which was established in *Cruz Varas v. Sweden* in 1991, Series A, No. 201.

<sup>122</sup> For the Human Rights Committee established under the International Covenant of Civil and Political Rights, see Communication No. 869/1999, *Piandiong, Morillos and Bulan v. The Philippines*, UN Doc. CCPR/C/70/D/869/1999 (19 October 2000); for the UN Committee Against Torture, see Communication No. 99/1997, *TSP v. Canada*, UN Doc. GAOR A/55/44, annex VIII, section A (16 May 2000). Generally, see G. Naldi, *Interim Measures in the UN Human Rights Committee*, 53 *ICLQ* (2004), 445.

<sup>123</sup> See T.C. Hartley, *The Foundations of European Community Law*, 5<sup>th</sup> ed., Oxford 2004, 321-322.

<sup>124</sup> Lauterpacht, *supra* note 119, 254.

<sup>125</sup> Cf. Rule 73 of the ICJ.

the circumstances calling for them have ceased to exist. It should not escape one's attention that such measures are indicated solely for preserving the parties' respective rights, in other words to maintain an equilibrium between them.<sup>126</sup> Thus, if the effect of the measures' implementation were to return to the disrupted *status quo*, any prolongation would lead to a new breach of the equilibrium with the position of the litigant parties reversed. It can only be hoped that the Rules of the Court, which the AU Court shall adopt itself pursuant to Article 58 of the Protocol, shall address satisfactorily the issue of interim measures and supplement any *lacunae* in the Protocol.

According to Article 24 of the Protocol, proceedings are broken up into two parts: written and oral.<sup>127</sup> The former, which is compulsory, consists of communications and applications to the Court, statements, defenses and replies as well as the submission of supporting documents. The latter, which is optional and for the Court to decide its necessity, consists of witnesses' and experts' testimony as well as the hearing of agents and counsels. All Court sessions are public, unless it decides on its own motion or upon the parties' application to exclude the public.<sup>128</sup>

Any Member State having a legal interest in a case pending before the AU Court and which interest could be affected by the judgment may request the Court to permit its intervention in the case.<sup>129</sup> This again is a problematic provision as it could have the effect of giving a kind of *locus standi* to Members which are not contracting parties to the Protocol. As will be recalled, Article 19(3) does not confer jurisdiction to the Court to hear disputes involving such Members. However, the effect of Article 42 leads to the Court indirectly entertaining their views. Consequently, Article 42 ought to have read "Member States, which are contracting parties to the present Protocol, ...".

Pursuant to Article 32(1) of the Protocol, should one of the parties fail to appear before the AU Court or fail to defend the case brought against it, the other litigant party may petition the Court to give its judgment without offering another opportunity to the defaulting party to be heard. The corresponding provision in the Statute of the ICJ is Article 53(1). It has the same wording with the notable exception that it is the other party which asks the ICJ to rule in favour of its claim. Thus, it would appear that the Statute of the ICJ understands the non-appearance of a litigant party as a move tantamount to withdrawal from the proceedings and af-

<sup>126</sup> Their purpose is to protect "rights which are the subject of dispute in judicial proceedings", *Aegean Sea Continental Shelf Case (Greece v. Turkey)* ICJ Reports 1976, 3 at 9. See also *Fisheries Jurisdiction Cases (United Kingdom, Germany v. Iceland)* ICJ Reports 1972, 12 at 16. Cf. the aforementioned Article 243 of the EC Treaty, which fails to specify the aim of prescribing interim measures.

<sup>127</sup> Cf. Article 43 of the Statute of the ICJ.

<sup>128</sup> See Article 26 and Article 46 of the Statute of the ICJ.

<sup>129</sup> Article 42 of the Protocol. Cf. Article 62 of the Statute of the ICJ; *Continental Shelf (Tunisia v. Libya)*, Application by Malta for Permission to Intervene, ICJ Reports 1981, 3 and *Continental Shelf (Libya v. Malta)*, Application by Italy for Permission to Intervene, ICJ Reports 1984, 3; K. Oellers-Frahm, Die Intervention nach Art. 62 des Statuts des Internationalen Gerichtshofs, ZaöRV 41 (1981), 579.

fords to the other party the opportunity to request that the ICJ rule in its favour, as there is no contestation of its arguments.<sup>130</sup> Naturally, a party (especially the respondent) is not obliged to make an appearance before the ICJ, but as Judge Jennings argued in his Dissenting Opinion in the *Nicaragua* Case, “a party which fails at the material stage to appear and expound even at the material that it has already provided, inevitably prejudices the appreciation and assessment of the facts of the case”.<sup>131</sup>

Article 32 of the Protocol departs from the corresponding provision in the Statute of the ICJ in two other respects. First, in addition to requiring that the AU Court must first establish that it has jurisdiction to hear the case and that the claim is well founded in fact and in law, the (rather obvious) condition has been attached to satisfy itself that due notice was given to the non-appearing party. Secondly, Article 32(3) stipulates that the non-appearing party may lodge an objection within 90 days following the notification of the default judgment to it. However, the lodging of such objection (and presumably its examination) “shall not have the effect of staying the enforcement of the judgment in default”.

## Reasoning of the Judgment – Revision – Binding Effect

According to Article 35(1) and (2) of the Protocol, judgments must state the reasons on which they are based and must “state the names of the Judges who have taken part in the decision”.<sup>132</sup> Even though these provisions are a repetition of Article 56 of the Statute of the ICJ, the use of the word “decision” seems to be problematic for the following two reasons.<sup>133</sup> First, because “decision” usually denotes the various rulings made by an international court, e.g. on whether to grant interim measures, on the taking of evidence, etc., while “judgment” is associated with the final decision, which it issues at specific stages of contentious proceedings, i.e. ju-

<sup>130</sup> Although non-appearance before the ICJ is nowadays an unlikely occurrence, previous jurisprudence shows that the ICJ would act on behalf of a party that was absent but had already submitted legal argumentation in support of its case, see, *inter alia*, *US Diplomatic and Consular Staff in Tehran Case (United States of America v. Iran)*, Judgment of 24 May 1980, ICJ Reports 1980, 3, and *Fisheries Jurisdiction Cases*, ICJ Reports 1974, 3.

<sup>131</sup> *Supra* note 109, 544. As will be recalled, it was in this Case that the United States, following the ICJ’s rejection of its objections to jurisdiction (ICJ Reports 1984, 392; D.W. Greig, *Nicaragua and the United States: Confrontation Over the Jurisdiction of the International Court*, 62 BYIL (1991), 119), refused to appear in the Merits phase and thereafter withdrew its Article 36(2) acceptance of the ICJ’s jurisdiction. As A. Verdross/B. Simma have argued in *Universelles Völkerrecht*, 3<sup>rd</sup> ed., Berlin 1984, 124-125, the non-participation in the proceedings is not a violation of international law but runs against the spirit of the ICJ Statute.

<sup>132</sup> Separate or dissenting opinions are expressly allowed under Article 36 of the Protocol. Cf. Article 36 of the Statute of the ICJ. Unlike the ECJ, judgments do not require unanimity but only a majority of judges present and, in case of a tie, the presiding judge has the casting vote; Article 34 of the Protocol; cf. Article 55 of the Statute of the ICJ.

<sup>133</sup> Cf. Article 33 of the ECJ Statute, which correctly talks about the judges who participated in the deliberations.

risdiction and admissibility, merits, application for intervention, etc. Secondly, because, as is explained below, judgments are final and not subject to variation, whereas decisions could be amended and varied according to the how the case evolves.

Regarding the possibility of lodging an appeal against a judgment, Article 35(3) of the Protocol simply states that, subject to Article 32 (default judgments) and Article 41 (revision), judgments shall be final. It is rather curious that on this particular instance, the drafters did not follow the corresponding provision in Article 60 of the Statute of the ICJ, which benefits from legal clarity, as it stipulates that judgments are without appeal. The AU Court is not alone in not specifying whether appeals are permissible or not. Another example is the ECJ, where, although commentators agree that its judgments are not subject to appeal,<sup>134</sup> no such provision is to be found in the EC Treaty or the ECJ's Statute. If for the sake of argument the AU Court were to issue a judgment which was manifestly ill-founded or grossly unfair or fundamental aspects of the procedure were not observed, how could the party/ies, whose rights have been prejudiced, react? Arguably, they could appeal to the Assembly, in its capacity as the supreme organ of the Organization, for a declaration that the judgment in question is null and void, or that it lacks any legal effects, etc. However, if one were to accept that the domestic law principle of division of powers applies equally to international organizations and, specifically, to the AU,<sup>135</sup> the Assembly would not be able to trespass onto the territory judicial branch and meddle in its affairs.

Article 41 of the Protocol, an almost verbatim repetition of Article 61 of the Statute of the ICJ, permits the revision of judgments subject to a number of mandatory and discretionary conditions. First, that the application for revision is based on the discovery of a new fact, which, if it were known at the time, would have influenced considerably the outcome of the case. Secondly, that a double statute of limitations has been observed: the application was lodged no later than 6 months of the new fact's discovery and not later than 10 years from the date of the judgment. Thirdly, that the ignorance of the discovered fact was not due to negligence. Fourthly, that the party in question has already complied with the terms of the judgment, if the Court exercising its discretion had so required.

Contrary to decisions ordering provisional measures, Article 37 of the Protocol stipulates expressly that judgments are binding on the parties and in respect of the case in which they were issued.<sup>136</sup> It is not clear whether the term "parties" includes

<sup>134</sup> See Hartley, *supra* note 123, 59. With the advent of the Court of First Instance (CFI), which began hearing cases in October 1989, the inability to lodge appeals against ECJ judgments has become obvious, as Article 225(1) of the EC Treaty specifically allows appeals against CFI judgments on points of law. Note that the Treaty Establishing a Constitution for Europe, which was adopted in October 2004 but not yet in force, is also silent on whether ECJ judgments may be appealed against.

<sup>135</sup> This would operate as follows: the Assembly would be the legislative branch, the Executive Council the executive branch and the Court of Justice the judicial branch.

<sup>136</sup> Cf. Article 59 of the Statute of the ICJ, which has been drafted in an *a contrario* fashion, *i.e.* that judgments have no binding force except between the parties.

those Member States that have been allowed by the AU Court to intervene pursuant to Article 42, as this provision does not expressly confer upon them the procedural status of a “party”. Consequently, they appear not to fall within the ambit of Article 37. However, this argument cannot be easily justified. In particular, since, by deciding to intervene, Members are offered the opportunity to present their views and potentially influence the outcome of the case, they should be considered as having consented to their being legally bound by the judgment. To put it otherwise, this is not a case of pick and choose: if a Member intervenes, then it has no option but to accept the judgment whether it is in its favour or not.

The provision of Article 37 is to be given effect through Article 51 stipulating that the parties to the dispute must not only comply with the judgment within the time stipulated by the AU Court but also guarantee its execution.<sup>137</sup> The fact that Article 51 does not refer to orders for provisional measures also points to the direction that they do not have a legally binding effect. It is commendable that Article 52 deals expressly with Members’ failure to comply with judgments, an issue which, generally speaking, is not satisfactorily dealt with in the statutes of international courts. Thus, if a party fails to comply with a judgment, the other party may ask the AU Court to refer the matter to the Assembly. In its turn, the Court may pass on the matter to the Assembly, which has the discretion to decide which measures are to be taken to give effect to the judgment and may impose sanctions pursuant to aforementioned Article 23(2) of the Constitutive Act.<sup>138</sup>

A first observation to be made is that Article 52 is silent on whether the AU Court must first examine the validity of the claim of non-fulfillment and then refer it to the Assembly.<sup>139</sup> If the Court were not to rule on the claim and considering that it lacks the power to impose sanctions for non-fulfillment, there would appear to be no good reason why the complaining party should not bring the claim directly to the Assembly. On the other hand, before the Assembly is to determine the measures to be taken and/or the sanctions to be imposed, a decision must be reached on whether the judgment was indeed not complied with. This should be considered to be a legal and not a political issue and, consequently, the appropriate organ to decide would be the Court itself. A second observation is the element of discretion that both the AU Court and the Assembly have. Thus, neither organ is

<sup>137</sup> Cf. Article 94(1) of the UN Charter, where the provision regarding the execution of the judgment does not appear.

<sup>138</sup> Cf. Article 94(2), the corresponding provision in the UN Charter, which differs in that the other party has the right to appeal directly to the Security Council. On Article 94(2), see K. Oellers-Frahm, *Zur Vollstreckung der Entscheidungen internationaler Gerichte im Völkerrecht*, *ZaöRV* 36 (1976), 654; G. Guillaume, *De l’exécution des décisions de la Cour Internationale de Justice*, 4 *Revue Suisse de droit international et de droit européen* (1997), 431, reprinted in: G. Guillaume, *La Cour Internationale de Justice à l’aube du XXXème siècle*, Paris 2003), 173; C. Schulte (ed.), *Compliance with Decisions of the International Court of Justice*, Oxford 2004.

<sup>139</sup> See also Article 53 of the Protocol stipulating that the AU Court is to submit annual reports to the Assembly, where it will, *inter alia*, specify those cases where Member States have not complied with its judgments. It follows that the Court will only record those instances, which have been brought to its attention by the parties complaining of non-compliance.



compelled to act even if it were determined that the party in question violated its Article 52 obligations. Arguably, this situation could open the gates for political manoeuvring. In conclusion, if the Protocol had mandated the Court to refer the matter to the Assembly and the latter to take measures and/or impose sanctions, Article 52 would have been a truly effective provision.

### Some Other Procedural Aspects of the Protocol

The Protocol does not specify the seat of the AU Court. This is in line with the fact that none of the AU organs had its seat determined in advance with the exception of Article 24 of the Constitutive Act, which designates Addis Ababa as the Union Headquarters. This selection reflected the fact that this had been the seat of the OAU. In its Third Ordinary Session (Addis Ababa, 6-8 July 2004), the AU Assembly decided that the organs should not be centralized but should be “located in different regions of Africa on the basis of the principle of geographical distribution”.<sup>140</sup> Eastern Africa has been designated as the region hosting the AU Court.<sup>141</sup>

Regarding the Protocol’s amendment, Article 45 and Article 46 envisage, respectively, two separate procedures. Any contracting party making a written request to the Chairperson of the Assembly initiates the former. However, the actual proposals for amendment shall be submitted to the Chairperson of the Commission, who is instructed to “transmit same to Member States” within 30 days. Although the reference to Member States and not to the other contracting parties sounds odd (after all the proposed amendments concern only them), it is connected with the fact that the amendments are to be adopted by the Assembly acting by a simple majority and after the AU Court has given its opinion. It follows that those Members not participating in the AU Court have the right to vote on the proposals, even though they are not personally concerned.

The latter procedure is initiated by the AU Court, which proposes to the Assembly any amendments that it deems necessary and communicates in writing to the Commission their contents. For the remainder of the procedure, the provision of Article 45 shall apply. The above procedures are silent on the issue of ratification of amendments so as to enter into force. As the Protocol now stands, amendments become operative the moment they are accepted by the Assembly. It is submitted that this is an omission by the drafters. Indeed, the other two Protocols to the Constitutive Act dealing with AU organs expressly require ratification.<sup>142</sup>

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<sup>140</sup> See Decision on the Seats of the African Union, AU Doc Assembly/AU/Dec. 45(III), 8 July 2004, para. 3.

<sup>141</sup> See *supra* note 14.

<sup>142</sup> See Article 24 of the Parliament Protocol requiring ratification by two-thirds of the membership and Article 22(6) of the Peace and Security Council Protocol, which refers to the ratification clause (Article 32) of the Constitutive Act.

## Conclusions

It is not possible to predict with a given degree of certainty when the Protocol of the AU Court will enter into force. However, judging by the fact that so far only eight Member States (out of the required 15) have ratified it, its prompt operation should be ruled out. If the ratification process of the Protocol Establishing the African Court of Human and Peoples' Rights were used as an indication, the prospect is rather disappointing, as it took some six years. On the other hand, if the time period required for the entry into force of the African Parliament and the Peace and Security Council Protocols were taken as a guide, the message is more encouraging: the former took two and a half years and the latter less than 18 months.

It is submitted that the required 15 ratifications is a very small number, as it corresponds to less than one-fourth of the AU membership. Thus, at the initial stages of its operations, the role to be played by the AU Court would be rather limited, since its decisions would cover only a fraction of all Member States. For this reason, it would have been more appropriate for the Protocol to stipulate the ratification by the whole membership,<sup>143</sup> or certainly by a number large enough to be representative of Africa's principal legal traditions, although one can understand the considerations of pragmatism that drove the drafters to opt for only 15 ratifications. Until such time as the AU Court becomes operational, the Assembly is the body authorised to interpret the Constitutive Act.<sup>144</sup>

The other challenge facing the AU Court even before the commencement of its operations is the proposed merger with the African Human Rights Court. We believe that this would be a mistake. Although they are judicial organs serving the institutions of the same Organization, they have been set up to deal with separate issues and to serve different goals. They not only employ dissimilar procedures but even the qualifications that the judges must possess are disparate. Moreover, the argument over inadequate financial and personnel resources, which was advanced in favour of an amalgamated court, is far from convincing.<sup>145</sup> As the present authors have argued, the number of organs in the African Union is very large and, consequently, they result in a financial burden.<sup>146</sup> However, this is a more general problem plaguing all AU organs and should not be employed solely for merging two specific institutions. In its current state of affairs, the African Continent is in clear need of both judicial entities. Indeed, if they (are allowed to) operate efficiently, they should bring about the much-needed rule of law in the Continent and

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<sup>143</sup> Cf. Magliveras/Naldi, *supra* note 11, 229, arguing that also in the case of the Pan-African Parliament Protocol the requirement for ratification by all Member States should have been envisaged.

<sup>144</sup> Article 26 of the Constitutive Act.

<sup>145</sup> See Summary of Proceedings of the Second Meeting of Experts/Judges and PRC on the Draft Protocol of the African Court of Justice of the African Union, 4-6 June 2003, AU Doc. Expt.Judg/Draft/Prot/ACJ/Rpt. (II), at para. 20.

<sup>146</sup> See Magliveras/Naldi, *supra* note 3, 419.

persuade Member States that they must respect the obligations they have undertaken.

As far as the Protocol itself is concerned, one could point out to its being heavily influenced by the Statute of the ICJ, as well as to a number of *lacunae* and badly drafted provisions. Given that the AU Court will have a role in interpreting and implementing aspects of economic law it is regrettable that the experience of the ECJ appears to have been largely overlooked. Undoubtedly, the AU Court will be called upon to clarify the meaning of certain ambiguous passages. Notwithstanding this criticism, the Protocol, together with the Rules, which shall be adopted once it becomes operative, should be adequate for the Court to fulfill its role as the “principal judicial organ” of the Union. But to do so both the AU organs and the Member States should be convinced of the advantages of judicial settlement in their dealings. For otherwise the Court could end up in disuse, which is exactly what happened with the aforementioned OAU Commission of Mediation, Conciliation and Arbitration which was the initial dispute settlement mechanism.<sup>147</sup>

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<sup>147</sup> See Magliveras/Naldi, *supra* note 11, 44.

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