

Lost (or Found) in Transition? The Anatomy of the New African Court of Justice and Human Rights

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I. Introduction

The *African Court on Human and Peoples’ Rights* (ACtHPR) has been in transition for several years now. The locus of this transition has been an attempt to merge the Court with the *African Court of Justice* (ACJ),¹ created in 2003, into a single judicial institution. Established slightly over a decade ago by a Protocol to the African Charter on Human and

* The views expressed here are personal.

¹ Protocol of the Court of Justice of the African Union, adopted on 11 July 2003, entered into force on 11 February 2008, AU Doc. Assembly/AU/Dec. 25 (II). Article 2 of the Protocol establishes the African Court of Justice, hereinafter the ACJ or Court of Justice.

Peoples' Rights,² the ACtHPR was finally elected in 2006, two years after its constitutive Protocol came into force. Three years later, it is yet to commence its operations.

When it commences its work, it will only be for a transitional period since the African Union (AU) adopted a Protocol³ in July 2008 to merge the Court with the ACJ. The Protocol, which replaces the constitutive protocols creating these two Courts, establishes a new *African Court of Justice and Human Rights*,⁴ with features of the ACtHPR and the ACJ, all in a single judicial institution.

While the merger is a significant development in the institutionalization of human rights in Africa, some have pointed to the potential pitfalls of the merger, or at least some elements of the new Protocol.⁵ Yet others have also questioned the procedural legality, in light of the law of treaties, and the haste with which the merger was transacted.⁶ Even more critical is the attrition of some provisions in the instruments which the new Protocol replaces and the failure by the AU to re-examine the normative and institutional problems of the African Char-

² Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted 26 June 1998, entered into force 25 January 2004, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), hereinafter the 1998 Protocol. Article 1 of the Protocol establishes the African Court on Human and Peoples' Rights, hereinafter ACtHPR.

³ Protocol on the Statute of the African Court of Justice and Human Rights, adopted 1 July 2008, Assembly/AU/Dec. 196 (XI), hereinafter the new Protocol.

⁴ Article 1, the African Court of Justice and Human Rights.

⁵ 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," *NQHR* 22 (2004), 241 et seq. For a discussion of the merits, see K. Kindiki, "The Proposed Integration of the African Court of Justice and the African Court of Human Rights: Legal Difficulties and Merits," *RADIC* 15 (2007), 138 et seq.

⁶ See C. Beyani, "Recent Developments in the African Human Rights System 2004 – 2006," *Human Rights Law Review* 7 (2007), 582 et seq. (584); C. Beyani, "A Human Rights Court for Africa," *Interrights Bulletin* 15 (2004), 1 et seq.; I. Kane/ A.C. Motala, "The Creation of a new African Court of Justice and Human Rights," in: M. Evans/ R. Murray (eds), *The African Charter on Human Rights: The System in Practice 1986– 2006, 2nd edition*, 2008, 406 et seq., and Kindiki, see note 5, 140 – 144.

ter on Human and Peoples' Rights⁷ in general during this transition. Of these losses and silences, the linkages between the new Court and the African Commission on Human and Peoples' Rights,⁸ the limited direct access of individuals and non-governmental organizations (NGOs) before the new Court and the new restrictive provisions on advisory opinions stand out in particular. With the merger now being a *fait accompli*, the fundamental question remains whether the new Court will bring home an effective system of protection, or whether it has been a mere transition in name and anatomy.

On balance, while these issues remain the subject of debate, the merged Court also comes with some new accretions. Foremost of these changes is the complementarity required between the new Court and other AU treaty bodies. Accordingly, regional treaty bodies such as the African Commission, African Committee of Experts on the Rights and Welfare of the Child⁹ and other treaty bodies that may be established in future will be competent to refer cases to the new Court. Additionally, the new Court may make provision for further complementarity in its procedures. Another innovation is the granting of competence to national human rights institutions (NHRIs) to refer cases to the new Court.

This article seeks to evaluate some of these issues to examine whether the African human rights system has lost or gained new prospects in the transition from the two Courts to a single new Court.

Three premises animate this inquiry. First, institutional transitions by their nature incur gains and drawbacks, even if transitory. While it should be assumed that transitions are progressive and incremental to accrued reforms, they may also repudiate existing features and occasion far-reaching losses to existing catches in the net. This is also true in the case of new legal regimes. Second, there have been some intractable

⁷ See African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986, OAU Doc. CAB/LEG/67/3 Rev. 5, reprinted in: *ILM* 21 (1981), 59 et seq., hereinafter the African Charter or the Charter.

⁸ The African Commission on Human and Peoples' Rights, hereinafter the African Commission or the Commission, is established under article 30 of the African Charter.

⁹ See African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), adopted 11 July 1990, entered into force 29 November 1999. The Committee is established under article 32 of the Charter to promote and protect the rights and welfare of the child.

long-standing problems in the system, key of which remains the restrictive access of individuals and NGOs to the human rights Court. With ongoing debate on these issues, it is imperative to examine the response to these open questions by the new Court's architecture.

Finally, the development of the African human rights system, as indeed other human rights systems, is "work in progress". The concern therefore remains how to strengthen the system through constant reflections by both "insiders" and "outsiders." This is part of such attempt by an "outsider." The caveat here is that this is a preliminary assessment. It is by no means a complete offering as being evident from the selective analysis of key provisions *in lieu* of an article by article examination of the new Protocol. Moreover the new Court, let alone the ACtHPR elected over three years ago, is yet to be functional, once elected after the new Protocol enters into force. Their rules of procedure (only for a transitional period in the case of the ACtHPR) and the revised rules of procedure of the African Commission, whose mandate the human rights section is supposed to complement, may well address some of these issues raised here. This article will thus not address omissions of the new Protocol and Statute of provisions on admissibility¹⁰ and conditions for consideration of cases,¹¹ amicable settlement,¹² enquiries and expert testimony,¹³ all of which may be addressed in the procedures of the new Court or the revised rules of the African Commission.

II. Historicizing the African Human Rights System

The African human rights system was founded in 1981 under the African Charter on Human and Peoples' Rights. This development came two decades after the idea of a regional human rights system was first mooted.¹⁴ At the time of this initial conception, no African regional organization existed, and in 1963, when the Organization of African Unity (OAU) was formed, no regional human rights system or mecha-

¹⁰ Article 6 of the 1998 Protocol.

¹¹ Article 8, *ibid.*

¹² Article 9, *ibid.*

¹³ Article 26, *ibid.*

¹⁴ See International Commission of Jurists, *An African Charter on the Rule of Law, Geneva 1961*, cited in: C. Heyns (ed.), *Human Rights Law in Africa*, Vol. 1, 2004, 299.

nism was established.¹⁵ Normatively, the Charter of the OAU emphasized “cooperation,” “brotherhood,” “solidarity,” “sovereignty,” “territorial integrity” and “reinforced links” between African states, paying no homage to human rights.¹⁶ Moreover, while the OAU Charter outlined as one of its purposes the promotion of international cooperation, “having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights,”¹⁷ practice privileged the principle of “non-interference in the internal affairs of States”¹⁸ over human rights.

The adoption of the African Charter therefore initialed a promise to address the vexing democratic and human rights deficits of African states at that time. The development also responded to the increasing interest in and promotion of regional human rights systems.¹⁹ At the time, regional human rights regimes attracted renewed attention for the following reasons.²⁰ First, it was thought that the existence of geographic, political, social, historical and cultural affinities among states of

¹⁵ See G. Naldi, “Future Trends in Human Rights in Africa: The Increased Role of the OAU,” in: M. Evans/ R. Murray (eds), *The African Charter on Human and Peoples’ Rights: The System in Practice, 1986 – 2000*, 2002, 1 et seq. (1-5).

¹⁶ See the Charter of the Organization of African Unity, in: *ILM* 2 (1963), 766 et seq.

¹⁷ *Ibid.*, article 2.

¹⁸ *Ibid.*, article 3.

¹⁹ See A/RES/32/127 of 16 December 1977, urging in part “[s]tates in areas where regional arrangements in the field of human rights do not yet exist to consider agreements with a view to the establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights.” See also World Conference on Human Rights, *Vienna Declaration and Programme of Action*, Doc. A/CONF.157/23 (Part I) at para. 37, recognizing that “[r]egional arrangements play a fundamental role in promoting and protecting human rights ... [and] reinforce universal human rights standards.”

²⁰ For an account on the rationale of the technique of regional human rights protection, see generally D. Shelton, *Regional Protection of Human Rights*, 2008; H. Steiner/ P. Alston (eds), *International Human Rights in Context*, 2000; B.H. Weston et al., “Regional Human Rights Regimes: A Comparison and Appraisal,” *Vand. J. Transnat’l L.* 20 (1987), 587 et seq. and G.W. Mugwanya, *Human Rights in Africa: Enhancing Human Rights Through the African Human Rights System*, 2003, 32-36.

a particular region was a foundation for “common loyalties”²¹ around which human rights would benefit from “collective enforcement.”²² This view also considered that the regional human rights system would “load off” cultural, historical and social peculiarities from the international system²³ through adaptations to local values and norms.²⁴

Second, it was considered that regional human instruments would represent consensus on human rights norms within a region,²⁵ such consensus would be translated into collective enforcement or compliance. This view follows the argument that states are likely to be more confident in and less ambivalent towards regionally or locally guaranteed rights than those adopted by largely “remote” or “distant” global human rights systems.²⁶ Finally, it was, and still is considered that regional human rights systems have the potential of legitimating the human rights language in a region.²⁷ Through the application of regional human rights norms, the resulting publicity may result in rights discourse within a region, effectively publicizing and legitimating rights discourse. By providing “bonds of mutuality”²⁸ between participating states, regional human rights regimes provide a forum for peer pressure on recalcitrant states.

²¹ I. Claude, “Swords into Ploughshares,” 102, excerpt in: Steiner/ Alston, see note 20, 781 et seq.

²² See S.C. Prebensen, “Inter-state Complaints under Treaty Provisions – The Experience Under the European Convention of Human Rights”, in: G. Alfredsson et al., *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Moeller*, 2001, 533 et seq.

²³ Yash Ghai, *Human Rights and Social Development: Toward Democratization and Social Justice*, Democracy, Governance and Human Rights Programme Paper Number 5, 2001, 6 et seq., <http://www.law.wisc.edu/gls/documents/social_justice_yash_ghai.pdf>.

²⁴ See for instance M. Mutua, “The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties,” *Va. J. Int’l L.* 35 (1995), 339 et seq.

²⁵ Weston, see note 20, 589.

²⁶ Steiner/ Alston, see note 20, 783. See also C. Odinkalu, “The Individual Complaints Procedures of the African Commission on Human and Peoples’ Rights: A Preliminary Assessment,” *Transnat’l L. & Contemp. Probs.* 8 (1998), 359 et seq. (360- 362) and Mugwanya, see note 20, 32-36.

²⁷ Steiner/ Alston, see note 20, 792.

²⁸ N. Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, 2002, 82 et seq. See also Claude, see note 21, 102.

While the African human rights system has not fully vindicated these premises, there has been considerable progress in the human rights movement on the continent. Over the years, there has been an evolution, albeit slow, of human rights instruments and institutions for the protection and promotion of human rights.²⁹ The calls for an effective human rights Court have been at the centre of these developments. Following years of advocacy by NGOs, the OAU Assembly of Heads of State and Government finally adopted a Protocol in 1998 establishing the ACtHPR with advisory and contentious jurisdiction³⁰ to complement and reinforce the work of the African Commission on Human and Peoples' Rights.

Three points need to be mentioned in relation to this development. First, the idea of a human rights Court is as old as the initial conceptions of a regional human rights system.³¹ These antecedent developments reveal that a regional Court was considered as key to the protection of human rights under the African system. This view was rejected, the contested explanation being that the judicial mechanism of adjudicating human rights at the international level was not an African phenomenon.³² Further, it appears that during the initial discussions in which the desirability of such a human rights Court was raised, individuals were envisaged as its main consumers.³³ Finally, during the pe-

²⁹ See generally C. Heyns (ed.), *Compendium of Key Human Rights Documents of the African Union*, 2005.

³⁰ Arts 3 and 4 of the 1998 Protocol. For an analysis of the Court's jurisdiction, see I. Österdahl, "The Jurisdiction *ratione materiae* of the African Court on Human and Peoples' Rights: A Comparative Critique," *Review of the African Commission on Human and Peoples' Rights* 7 (1998), 132 et seq. and A.P. van der Mei, "The new African Court on Human and Peoples' Rights: Towards an effective Human Rights Protection Mechanism for Africa?," *LJIL* 18 (2005), 113 et seq.

³¹ Although a recent addition to the system, the idea of a regional human rights system and human rights court dates back over four decades ago, when the idea was mooted at the African Conference on the Rule of Law, 3-7 January 1961, Lagos, Nigeria. See Heyns see note 14, 299. For a brief history, see also F. Viljoen, "A Human Rights Court for Africa, and Africans," *Brooklyn J. Int'l L.* 30 (2004), 1 et seq. (4-10) and F. Ougergouz, *The African Charter on Human and Peoples' Rights*, 2003, 688 et seq.

³² Kindiki, see note 5, 139 challenging this view and Odinkalu, see note 26, 363-364. This argument has little purchase since there is no monolithic African approach or tradition in dispute settlement, or even customary law.

³³ Viljoen, see note 31, 5, quoting a delegate who proposed that a regional court be established as a forum to "judge crimes against humanity against

riod in which the need for a human rights Court gained momentum over the last two decades, there was consensus, at least among the civil society, that the protection of human rights on Africa required a regional Court.³⁴

During this period, another transition was taking place in the African continent. This transition related to calls for economic and political integration in Africa,³⁵ whose apogee, it was expected, would be the creation of a new regional organization to replace the nearly forty year old OAU. Following a declaration in 1999 in the Great Socialist People's Libyan Arab Jamahiriya,³⁶ the OAU adopted the Constitutive Act in Lomé, Togo in July 2000, and declared the establishment of the African Union in Sirte on 2 March 2001.³⁷ Like it had been the case during the establishment of the AU's predecessor, the drafters of the Constitutive Act did not establish, assimilate or "constitutionalize" the African Commission on Human and Peoples' Rights or the ACtHPR as key organs of the AU. Instead, the Act established the ACJ.³⁸ The Act provided that the Court would interpret matters arising from the application or implementation of the Constitutive Act, whose function would repose in the Assembly of the AU pending its establishment,³⁹ making the Court appear not only as an arbiter or advisor in legal issues, but also in cases or questions of a "political and economic nature."⁴⁰ In

mankind and violations of human rights." See Organization of African Unity, Rapporteur's Report of the Ministerial Meeting in Banjul, OAU Doc. CAB/LEG/67/Draft Rapt. Rpt (II) Rev. 4, para. 13.

³⁴ Viljoen, see note 31, 13-22.

³⁵ Among the preceding piecemeal measures was the adoption of a treaty establishing the African Economic Community. See J. Senghor, "Treaty Establishing the African Economic Community: An Introductory Essay," *African Yearbook of International Law* 1 (1993), 101 et seq.

³⁶ Sirte Declaration of 9 September 1999, OAU Doc. EAHG//Decl. (IV) Rev. 1.

³⁷ The establishment of the AU was declared by the 5th Extraordinary Assembly Session of the OAU. See Constitutive Act, adopted 11 July 2000, and entered into force on 26 May 2001, Decision on the African Union, OAU Doc. EAHG/Dec. 1 (V).

³⁸ *Ibid.*, article 5, para. 1 (d), and article 18. See generally T. Maluwa, "The Constitutive Act of the African Union and Institution-Building in Post-colonial Africa," *LJIL* 16 (2003), 157 et seq.

³⁹ Article 26 of the Constitutive Act.

⁴⁰ Viljoen/ Baimu, see note 5, 251.

2003, as mentioned above, the AU adopted the Protocol establishing the ACJ.⁴¹

At the drafting of the Statute establishing the ACJ, the question of a merger with the human rights Court arose, even finding expression in some drafts of the Protocol.⁴² It would appear that since the ACJ was intended to be an organ primarily for states or AU organs and not individuals, grafting the human rights Court in the instrument would have been structurally or conceptually ambiguous, unless modeled primarily as an inter-state, collective human rights system. In the final text of the Protocol adopted by the AU Executive Council and later the Assembly of Heads of State and Government, a resolution to expunge the ACtHPR from the Draft Protocol and retain it as separate and distinct from the ACJ was passed.⁴³ However, barely a year later after the Protocol establishing the ACtHPR entered into force in January 2004, a decision was taken by the AU to merge the Courts in July 2004.⁴⁴ This decision was reinforced by a further decision in 2005 by the Assembly urging that a draft legal instrument relating to the establishment of the merged Court comprising the ACtHPR and the ACJ be completed.⁴⁵ Following several drafts and recommendations of the Executive Coun-

⁴¹ For an analysis of the Court, see K. Magliveras/ G. Naldi, "The African Court of Justice," *ZaöRV* 66 (2006), 187 et seq. According to records of the AU, the 15th Instrument of ratification was deposited by Algeria on 11 January 2008, and accordingly, pursuant to article 60 thereof, the Protocol effectively entered into force on 10 February 2008, <<http://www.africa-union.org/root/au/index/index.htm>>.

⁴² Viljoen/ Baimu, see note 5, 254.

⁴³ Kane/ Motala, see note 6, 406. See Assembly, *Decision on the Draft Protocol of the Court of Justice of the African Union*, 11 July 2003, AU Doc. Assembly/AU/Dec. 25 (II), in which the Assembly followed the recommendations of the Executive Council, AU Doc. EX/CL/58 (III) and AU Doc. EX/CL/Dec. 58 (III) (July 2003).

⁴⁴ Decision on the Seats of the African Union, AU Doc. Assembly/AU/Dec. 45 (III), para. 4 (July 2004). This "decision on seats" also resolved that the African Court on Human and Peoples' Rights and the Court of Justice be integrated into one Court, mandating the Chairperson of the African Union Commission (the executive arm of the Union) to work out the modalities on implementing the decision.

⁴⁵ 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) (July 2005).

cil,⁴⁶ the AU Assembly adopted a Protocol merging the infant ACtHPR with the ACJ in July 2008.

The premises for the merger have been advanced as follows. First, it has been argued that the AU does not have enough resources to maintain two Courts.⁴⁷ A merger would save resources which can be applied in complementary protection activities of the African human rights system.⁴⁸ Even though this argument must be considered seriously as it has been a key problem of the African Commission, it is premised on a functional argument that the Courts have concurrent mandates. Even so, such argument is selective as the same has not been applied to the duplicity of executive or legislative organs of the AU.⁴⁹ Moreover, the merger may not reduce the expenses in relation to remuneration of judges (who are to serve on a part-time basis,⁵⁰ although the total number of the judges of the two Courts has been reduced from 22 to 16 with the merger⁵¹) or technical staff. However, there is credit that a merger would ensure pooling together centralized support such as human resources, information services and systems and physical resources – something that would have been equally addressed by a decision to have the seats of the Courts in one place, with shared basic human resources and physical structures.

Second, proponents of a single Court have adumbrated the view that proliferation of Courts in Africa is not good for the continent.⁵² By

⁴⁶ See Meeting of the Permanent Representatives Committee and Legal Experts on Legal Matters, 16-19 May 2006, AU Doc. EX.CL/211 (VIII) Rev. 1, Annex I. See also Report on the Draft Single Legal Instrument on the Merger of the African Court on Human and Peoples Rights and the Court of Justice of the African Union, AU Doc. EX/CL/253 (IX), Annex II (2006).

⁴⁷ B. Kioko, "The African Union and the Implementation of the Decisions of the African Court on Human and Peoples' Rights," *Interrights Bulletin* 15 (2004), 7 et seq. quoting the Chairperson of the Assembly of Heads of State and Government during the plenary of the 3rd ordinary session of the Assembly held in Addis Ababa from 6 to 8 July 2004.

⁴⁸ Kindiki, see note 5, 145.

⁴⁹ See Kane/ Motala, see note 6, 414.

⁵⁰ Article 8 (4) of the Statute of the new Court.

⁵¹ Article 3 (1) of the Statute of the new Court. Under article 11 of the 1998 Protocol, the ACtHPR was composed of 11 judges, the same holds true under article 3 of the 2003 Protocol on the ACJ.

⁵² N. J. Udombana, "An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication," *Brooklyn J. Int'l L.*

simplifying the system, the merger would address potential confusion of the two Courts by future consumers. However, this view has not been applied to the growth of sub-regional Courts in Africa and their application of the African Charter and human rights generally.⁵³ Even so, proliferation of international Courts and Tribunals remains a subject of debate, and it is still unclear whether it is a good or bad phenomenon,⁵⁴ neither is there a pre-ordained unequivocal prescription to the world. Generally, the establishment of two or more Courts with different mandates and philosophical bases should not be considered to be proliferation, but rather a process of institutional growth to meet emerging needs. Applying this logic to the present case, the two African Courts should have been considered as distinct entities operating in distinct spheres, with the ACJ as the principal judicial organ of the AU and the ACtHPR as a treaty body being established under a human rights instrument.⁵⁵ This tempers the proliferation argument.

Related to proliferation of Tribunals and Courts is the question of fragmentation of international law as a result of multiple international judicial organs. While there is no consensus on the scope and undesirability of fragmentation,⁵⁶ there is a growing interest in the phenome-

28 (2003), 811 et seq. and Viljoen/ Baimu, see note 5, 252. See also Kindiki, see note 5, 144 referring to proliferation as a “problem” that requires an “antidote.”

⁵³ These include the Court of Justice of the Economic Community of West African States (ECOWAS), the East African Court of Justice (EACJ); the Southern African Development Community (SADC) Tribunal, the Court of Justice of the Common Market of East and Southern Africa (COMESA), and the Court of Justice of the Economic and Monetary Union of West Africa (UEMOA). See F. Viljoen, *International Human Rights Law in Africa*, 2007, 479 et seq. and G.M. Wachira (ed.), *Regional and Sub-regional Platforms for Vindicating Human Rights in Africa: Judiciary Watch Report*, 2007.

⁵⁴ See T. Buergenthal, “Proliferation of International Courts and Tribunals: Is It Good or Bad?” *LJIL* 14 (2001), 267 et seq.; B. Kingsbury, “Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?” *N. Y. U. J. Int’l Law & Pol.* 31 (1999), 679 et seq. and C.P. Romano, “The Proliferation of International Judicial Bodies: The Pieces of the Puzzle,” *N. Y. U. J. Int’l Law & Pol.* 31 (1999), 709 et seq.

⁵⁵ Kane/ Motala, see note 6, 409.

⁵⁶ See for example, M. Koskenniemi/ P. Leino, “Fragmentation of International Law? Postmodern Anxieties,” *LJIL* 15 (2002), 553 et seq.; R. Higgins, “A Babel of Judicial Voices: Ruminations from the Bench,” *ICLQ* 55 (2006), 791 et seq.; B. Simma, “Fragmentation in a Positive Light,” *Mich. J.*

non not just in Africa but all over the world.⁵⁷ The concern here is that effective international governance and state compliance requires a common understanding of the normative content of international law, normally achieved through norm clarification by judicial organs. Conflicting judgments undermine this goal of “unity” or coherence, and should be avoided. Applied to the co-existence of the ACtHPR and the ACJ, potential jurisdictional overlaps, “forum shopping” and fragmentation of jurisprudence are likely to arrest the standing of these Courts hence the need for a merger.⁵⁸ However, with the increasing number of sub-regional Courts whose mandates extend to human rights, it is not clear how the merger of the ACtHPR and the ACJ will be a solution to the putative fragmentation. Moreover, it is also plausible that the two Courts would have restrained themselves from this scenario, or even better still, the ACJ may have evolved, as did the European Court of Justice, into a “human rights court.”⁵⁹

Finally, conspirators to a merged Court have also pointed to such integration as a means of ensuring that human rights on the continent are not interpreted in a decontextualized or depolitical venue, far from the Union’s key organs. According to this view, human rights, the economy and politics are inter-related and by merging the ACtHPR and the ACJ, the intersection between human rights and economic and political well-being is likely to be realized.⁶⁰ On the contrary, opponents of the merger claimed that the ACtHPR was a specialized tribunal and that a merger would subsume and relegate human rights to the

Int’l L. 25 (2004), 845 et seq.; G. Hafner, “Pros and Cons Ensuing From Fragmentation of International Law,” *Mich. J. Int’l L.* 25 (2004), 849 et seq.; G. Abi-Saab, “Fragmentation or Unification: Some Concluding Remarks,” *N. Y. U. J. Int’l Law & Pol.* 31 (1999), 919 et seq.; and P. Dupuy, “The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice,” *N. Y. U. J. Int’l Law & Pol.* 31 (1999), 791 et seq.

⁵⁷ See International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, 2006, UN General Assembly Doc. A/CN.4/L.682, reprinted in: H. Steiner/ P. Alston/ R. Goodman, *International Human Rights in Context*, 3rd edition, 2008, 402 et seq.

⁵⁸ Udombana, see note 52, 855- 859.

⁵⁹ The ECJ is not *strictu sensu* a human rights Court, but may address such issues in the context of European community law.

⁶⁰ Kindiki, see note 5, 145 and Viljoen/ Baimu, see note 5, 253- 261.

periphery.⁶¹ While both arguments are plausible, mere merger alone may not subsume human rights issues if the Court is properly structured or divided into thematic sections as has been the case. Nor can mere institutional integration consummate normative intersectionality of socio-economic and political considerations in the Court's jurisprudence. Even so, the admission of human rights cases by sub-regional Courts illustrates that such inter-linkages are already on course.⁶²

III. Key Features of the Protocol and Statute on the Integrated African Court

The Protocol on the Statute of the new Court merges the ACtHPR and the ACJ into a single Court. The instrument replaces, over a transitory period, the 1998 Protocol establishing the ACtHPR and the 2003 Protocol of the ACJ. The Protocol stipulates that the 1998 Protocol shall be provisionally valid for a transitional period not exceeding a year after entry into force of the new Protocol.⁶³ This means that pending entry into force of the new Protocol, the ACtHPR⁶⁴ may receive cases under article 5 of the 1998 Protocol, or requests for advisory opinions under article 4. Should such cases (and opinions)⁶⁵ be pending following the entry into force of the new Protocol, they shall be transferred to the Human Rights Section of the single Court.⁶⁶ While the Protocol of the ACJ came into force in February 2008, the Protocol and Statute of the new Court does not make reference to any transitional arrangements relating thereto, perhaps because this was not envisaged as possible before the adoption of the Protocol.

⁶¹ Viljoen/ Baimu, see note 5.

⁶² Viljoen, see note 53, 500, referring to the emergence of a common human rights standard in the sub-regional systems.

⁶³ Article 7 of the Protocol on the Statute of the new Court.

⁶⁴ Pursuant to the African Protocol, the Assembly of Heads of State and Government of the African Union appointed judges at its 6th ordinary session held in Khartoum between 23-24 January 2006. See Assembly/AU/Dec. 100 (VI) Decision on the Election of Judges of the African Court on Human and Peoples' Rights. On 1 July 2008, following the expiry of the term of four judges, it adopted the [re]election of four judges as recommended by the Executive Council. See Assembly/AU/Dec. 202 (XI).

⁶⁵ Arguably, this would also apply to advisory opinions, although the new Protocol makes no transitional provisions therefore.

⁶⁶ Article 5 and article 7 of the Protocol on the Statute of the new Court.

1. The New Court as Principal Judicial Organ

The new Court the *African Court of Justice and Human Rights* shall now be the principal judicial organ of the AU.⁶⁷ The Court is integrated, but divided, that is, it comprises a General Affairs Section and a Human Rights Section.⁶⁸ The Human Rights Section is mandated to hear all cases concerning human rights,⁶⁹ while the General Affairs Section will hear all cases other than those relating to human and peoples' rights.⁷⁰ This division notwithstanding, the Court is considered being a single entity, and so are the judgments of its sections or chambers, which shall all be considered as rendered by the Court.⁷¹ Either of the sections can defer a matter to the full Court for consideration if it deems it necessary.⁷² This may apply in cases raising serious questions or in which a decision may be inconsistent with a judgment previously delivered by the Court, as is the case in the European human rights system where a chamber can in such cases relinquish jurisdiction in favor of the Grand Chamber.⁷³

The mandating of a principal judicial organ to determine human rights cases has several advantages. First, it has the potential of "demarginalizing" human rights issues heretofore only ancillary to the AU. Even the General Affairs Section, mandated with the interpretation of Union law other than human rights law, may develop a human rights regime based on the Constitutive Act.⁷⁴ As a key organ of the Union, this also means that human rights issues will now be mainstreamed into the conversations of other organs of the Union, through the provisions for instance on the enforcement of judgments.⁷⁵ Ultimately, this has the

⁶⁷ Article 2 of Statute of the new Court and article 5 (1) of the Constitutive Act of the AU.

⁶⁸ Article 16 of the Statute of the new Court.

⁶⁹ Article 17 (2), *ibid.*

⁷⁰ Article 17 (1), *ibid.*

⁷¹ Article 19, *ibid.*

⁷² Article 18, *ibid.*

⁷³ Article 30 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222, adopted on 4 November 1950, entered into force on 3 September 1953, 213 UNTS 221, as amended.

⁷⁴ Viljoen/ Baimu, see note 5, 246-248, noting the human rights principles in the Constitutive Act.

⁷⁵ See Kioko, see note 47, 7.

prospect of transforming the African Charter on Human and Peoples' Rights into a "constitutional instrument"⁷⁶ of the Union and its members. Second, the mainstreaming of human rights into the principal judicial organ of the Union would most likely have a bearing on compliance with its decisions. The argument here is that if states comply with the decisions of the Court on the interpretation of general legal issues, their non-compliance with the Court's human rights decisions would be seen to be selective.

Finally, the merger and establishment of a single judicial organ will also address the concern over bifurcation of the system and related possibilities of fragmentation of jurisprudence arising from these systems. While the General Affairs Section may make decisions with human rights implications, the Human Rights Section could also make judgments or rulings with implications on the AU's laws or decisions. Nonetheless, the establishment of a single presidency, vice-presidency and registry⁷⁷ should ensure efficient coordination between the two sections. The new Court should also adopt formal procedures or informal measures that would enable its sections or chambers to avoid jurisdictional overlaps. For example, there could be a preliminary assessment of the legal issues during the admissibility stage, references made to the relevant section, or deferred altogether to a Full Court or specially constituted chamber with judges from both sections.⁷⁸

2. "Transnationalizing" Human Rights Protection in Africa?

The Protocol and Statute of the new Court is an attempt, albeit incomplete,⁷⁹ to "transnationalize" human rights protection and promotion in the continent. The theory and practice of the "transnational legal proc-

⁷⁶ The idea is borrowed from reference by the European Court to the European Convention for the Protection of Human Rights and Fundamental Freedoms as a "constitutional instrument", in: *Loizidou v. Turkey* (Preliminary Objections) (1995) 20 EHRR 99.

⁷⁷ Article 22 of the Statute of the new Court.

⁷⁸ Under article 19 of the Statute of the new Court, the judgments of such chambers shall be considered as rendered by the Court.

⁷⁹ The incompleteness of the project based on the critique below on the limitations of individual and NGOs' direct access to the new Court. See Part III. 4. on individual access.

ess”⁸⁰ explains how public and private actors – nation-states, international organizations, national human rights institutions, NGOs, and private individuals – interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately internalize international law.⁸¹ This idea rests on the interaction between states and non-state actors *inter se* and with international bodies, as well as normative processes of interpretation, internalization and enforcement.⁸² The empowerment of the Executive Council to supervise the execution of the judgments of the new Court⁸³ and the granting of powers to the Assembly to impose sanctions for non-compliance with the judgment or decisions of the Court⁸⁴ are leading examples of an attempt to ensure effective enforcement of human rights in the African human rights system through this transnational technique. To this list add the complementarity required between the new Court and other treaty bodies.

In this process of “transnationalization”, the granting of competence to African national human rights institutions (NHRIs)⁸⁵ stands out in particular. Increasingly, the NHRI is a key player not only in domestic but also global and regional protection of human rights.⁸⁶ In mandating

⁸⁰ See H. Koh, “Transnational Legal Process,” *Nebraska Law Review* 75 (1996), 181 et seq.

⁸¹ *Ibid.*, 183, 184.

⁸² *Ibid.*

⁸³ Article 43 (6) of the Statute of the new Court provides that “[T]he Executive Council shall also be notified of the judgment and shall monitor its execution on behalf of the Assembly.”

⁸⁴ Article 46 (4) and (5) of the Statute of the new Court provide that in case of non-compliance, the Court shall refer the matter to the Assembly, which may impose sanctions by virtue of para. 2 of article 23 of the Constitutive Act.

⁸⁵ Article 30 (e) of the Statute of the new Court.

⁸⁶ See L. Reif, *The Ombudsman, Good Governance, and the International Human Rights System*, 2004; R. Murray, *The Role of National Human Rights Institutions at the International and Regional Levels: The Experience of Africa*, 2007; International Council on Human Rights Policy, *Performance & Legitimacy: National Human Rights Institutions*, 2004 and R. Kumar, “National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights,” *Am. U. Int’l L. Rev.* 19 (2003), 259 et seq. See also Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa*, 2001, A. Müller/F. Seidensticker, *The Role of National Human Rights Institutions in the United Nations Treaty Body Process*, 2007.

these institutions to refer cases to the Court, an opportunity arises for NHRIs to promote and protect human rights through reference of cases, local discourses on state compliance, awareness raising on the Court and the African Commission, and generally, monitoring compliance with international human rights law. Considering the limited access of individuals before the Court, NHRIs could use this function to seize the African Court in urgent matters requiring speedy determination or interim measures, particularly where these are domestically unavailable.

The Statute of the new African Court of Justice and Human Rights defines NHRIs as “public institutions established by a state to promote and protect human rights.”⁸⁷ Following this definition, it is safe to say that any NHRI is competent to refer cases to the Court. In countries where NHRIs have restricted mandates that would otherwise be construed domestically as not to permit such references, the Court or the African Commission should urge States Parties to ensure that the mandates accorded to NHRIs include these functions of domestic and regional protection and the promotion of human rights. Nonetheless, absent such express mandates, African NHRIs can imply these powers from their express mandates.

3. Extending Complementarity beyond the Court and the African Commission

Complementarity between the African Commission and the Court has been long considered overdue. At the time of the adoption of the 1998 Protocol which also enunciated this principle, human rights violations remained commonplace in Africa, thanks in part to the weaknesses of the protective and promotional mandates of the African Commission. Advocates for an effective human rights system argued that only a Court would remedy the weaknesses of the protective mandate of the African Commission in considering individual communications, providing interim measures and laying down binding decisions. Under such an arrangement, the Commission would continue to exercise limited protective functions and focus on promotional or “political” roles.⁸⁸

⁸⁷ Article 1 of the Statute of the new Court.

⁸⁸ For example, Makau Mutua has argued that the Commission should have soft promotional functions such as monitoring and oversight through state

While the principle of complementarity enshrined in the Protocol and Statute is animated by the historiography of a weak system of protection and enforcement, it is as well driven by the move towards complementarity between international and regional human rights bodies in general. The Preamble of the Protocol on the Statute of the new Court thus acknowledges that in order to achieve the objectives of the African Charter, the Court will supplement and strengthen the mission of the African Commission, the African Committee of Experts on the Rights and Welfare of the Child,⁸⁹ and other continental treaty bodies and special mechanisms.⁹⁰ Similarly, article 38 of the Statute enjoins the Court to lay out its procedures, taking into account the complementarity between the Court and other treaty bodies of the Union.

On the whole, these provisions are *prima facie* super-equivalent to the 1998 Protocol. Under the latter, the ACtHPR was established to complement and reinforce⁹¹ the protective mandate of the African Commission. In contrast, the new Protocol and Statute expressly include other treaty bodies and NHRIs, setting the stage for a multi-layered system of human rights protection. However, the new Protocol has lost, at least from its text, some key complementarity provisions embedded in the 1998 Protocol. For example, the 1998 Protocol expressly empowered the Court to request the opinion of the Commission on the admissibility of cases referred to it by individuals or NGOs.⁹² Further provision was made for the Court to transfer cases it deemed necessary to the Commission.⁹³ Such cases, it can be interpreted, may have included those in which the Court needed the Commission's assistance in fact finding, as in the Inter-American system.⁹⁴

reporting procedures and technical support in legislation and policy. See M. Mutua, "The African Human Rights Court: A Two Legged Stool?", *HRQ* 21 (1999), 342 et seq. (360- 361).

⁸⁹ Preamble to the Protocol on the Statute of the new Court, para. 5.

⁹⁰ *Ibid.*, para. 10. For special mechanisms in the African human rights system, see R. Murray, *The Special Rapporteurs in the African System*, in: Evans/Murray, see note 6, 344.

⁹¹ Article 2 and Preamble of the 1998 Protocol, para. 7.

⁹² Article 6 (1) of the 1998 Protocol.

⁹³ Article 6 (3) *ibid.*

⁹⁴ C. Medina, "The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture," *HRQ* 12 (1990), 439 et seq. (460).

Another venue where complementarity would have been found is amicable settlement, which has been lost from the text of the new Protocol.⁹⁵ It could be argued that since this is best done by quasi-judicial bodies like the African Commission,⁹⁶ cases for amicable settlement are among those that the Court may have transferred under this provision. Also, the requirement that the Rules of Procedure of the Court should lay down the detailed conditions under which the Court shall consider cases brought before it, bearing in mind the complementarity between the Commission and the Court⁹⁷ may have been interpreted as a certificate granting the Commission some functions of filtering cases, or at the very least, advising the Court on the admissibility of cases.⁹⁸ Taking this interpretation, only cases of “principle”, with the potential to contribute to the jurisprudence of the Court, may be referred to the Court.⁹⁹

Finally, the Protocol has also failed to clearly demarcate the responsibilities and institutional relations between the Court and the African

⁹⁵ Unlike the 1998 Protocol, the new Protocol makes no such provision for amicable settlement. See article 9 of the 1998 Protocol on the Establishment of the ACtHPR.

⁹⁶ See for instance article 48 (1)f of the American Convention on Human Rights, in: Basic Documents Pertaining to Human Rights in the Inter-American System 25, OEA/Ser. L.V/ II.82, Doc. 6, Rev. 1 (OAS General Secretariat 1992 and article 52 of the African Charter). See also R. Murray, “A Comparison between the African and European Courts on Human Rights,” *African Human Rights Law Journal* 2 (2002), 195 et seq. (199-201).

⁹⁷ Article 8 of the 1998 Protocol.

⁹⁸ This has of course its advantages and disadvantages. Some have argued that this would “choke” off some cases at the Commission, which would have otherwise been admitted by the Court, while others have argued that the Commission should only have promotional and political functions such as monitoring and oversight through state reporting procedures and technical support in legislation and policy. Another recent development also disrupts the image that the independence of the African Commission[ers] had been attained following the declaration of a seat of a Commissioner as vacant before the end of his term as a result of concerns over his lack of independence from his government. See R. Murray, “Recent Developments in the African Human Rights System 2007,” *Human Rights Law Review* 8 (2008), 356 et seq. (357); J. Harrington, “The African Court on Human and Peoples’ Rights”, in: Evans/ Murray, see note 15, 319 et seq. (322).

⁹⁹ Mutua, see note 88, 362.

Commission in their contentious and advisory jurisdictions.¹⁰⁰ While the procedural rules may address the lacunae or silences in the Protocol and Statute, the existence of patent and latent ambiguities in the instrument purveys no unequivocal drafting “instructions” to the writers of these rules. For instance, as will be argued in subsequent sections of this article,¹⁰¹ there is no clear justification why the African Commission is required to seek the authority of the Assembly in order to submit a request for an advisory opinion. This gives the impression that complementarity is not considered imperative in this sphere, yet the possibility of fragmented jurisprudence in the advisory opinions of the new Court and the African Commission makes a compelling case for complementarity.¹⁰²

In order to address this, the Assembly should grant the Commission and its special mechanisms “unlimited” authority to request advisory opinions as and when they deem necessary. The explanation here is that as an organ established by the African Charter, the African Commission should have unfettered access to the Court on any question regarding the interpretation of the Charter, as this will help it to perform its tasks.¹⁰³ It is not enough that it can intervene¹⁰⁴ or appear before the Court¹⁰⁵ subsequent to a request for an advisory opinion by another body, as this presupposes that the Commission will have been notified.¹⁰⁶ In the Inter-American human rights system, for instance, the In-

¹⁰⁰ See I.A.B. Elsheikh, “The Future Relationship between the African Court and the African Commission,” *African Human Rights Journal* 2 (2002), 252 et seq.

¹⁰¹ See Part III. 7.

¹⁰² N. Krisch, “The Establishment of an African Court on Human and Peoples’ Rights,” *ZaöRV* 58 (1998), 713 et seq. (720).

¹⁰³ Elsheikh, see note 100, 257.

¹⁰⁴ Arts 50 (2) and 52 (2) of the Statute, applicable by analogy to advisory opinions, impliedly grant the African Commission, as an organ of the Union having been notified of an advisory opinion, the right to intervene in proceedings relating to any interpretation and application of the Constitutive Act or any other treaties respectively.

¹⁰⁵ *Ibid.*, article 54 (1). Also, article 54 (2) only makes references to states or any Intergovernmental Organization considered by the Court as the key entities likely to appear before the Court during advisory proceedings.

¹⁰⁶ Based on the requirement that a request for an advisory opinion should not relate to an application before the African Commission, it is to be expected that the Court will notify the Commission of all requests for advisory opinions.

ter-American Commission on Human Rights, as an organ of the Organization of American States (OAS), has an absolute right to request an advisory opinion from the Inter-American Court on any matter within its "sphere of competence."¹⁰⁷ Through this structure, the Court complements the Commission's work by determining human rights questions within the OAS.¹⁰⁸ Whether such question is admissible is a judicial question, only within the province of the Court to determine. Second, from the view that the Court may not issue an advisory opinion *suo motu*,¹⁰⁹ it appears that requests for advisory opinions will mainly come from human rights bodies.

4. The Case for Direct Access for Individuals and NGOs

Much of the criticism about the 1998 Protocol was directed at the restricted direct access of individuals and NGOs to the ACtHPR.¹¹⁰ Under article 5 (1) of this Protocol, only the African Commission, States Parties and African Intergovernmental Organizations had automatic access to the Court. In contrast, the Court had the discretion to allow relevant NGOs with observer status at the African Commission and individuals to institute cases directly before it,¹¹¹ provided that the State

¹⁰⁷ Article 64 (1) of the American Convention.

¹⁰⁸ See J. M. Pasqualucci, "The Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law," *Stan. J. Int'l L.* 38 (2002), 241 et seq.

¹⁰⁹ This may however be the case, if the rules of procedure or practice so crystallize, taking note that the African Commission recently issued an advisory opinion *suo motu*. See African Commission on Human and Peoples' Rights, Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous People (2007).

¹¹⁰ J. Harrington, "The African Court on Human and Peoples' Rights," in: Evans/ Murray, see note 15, 319; G. Bekker, "The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States," *Journal of African Law* 51 (2007), 151 et seq.; A.A. Mohammed, "Individual and NGO Participation in Human Rights Litigation before the African Court on Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights," *Journal of African Law* 43 (1999), 201 et seq.; E. de Wet, "The Protection Mechanism under the African Charter and the Protocol on the African Court on Human and Peoples' Rights," in: Alfredsson, see note 22, 724-725.

¹¹¹ Article 5 (3) of the 1998 Protocol on the Establishment of an ACtHPR.

Party concerned had made a declaration accepting the competence of the Court to receive such cases at the time of the ratification of the Protocol or any time thereafter.¹¹² As was the case under the 1998 Protocol and now the 2008 Protocol, the duration of the declarations is not clear, and it is possible that such declarations may be valid for an indefinite time or a specified period.¹¹³ Moreover, as was the case in the “old”¹¹⁴ European human rights system, some States Parties may make declarations with impermissible limitations,¹¹⁵ or where the declarations are time specific, may fail or neglect to renew their declarations.¹¹⁶

While no credible justification was made for this restrictive approach, it was considered a necessary incentive for the adoption or ratification of the Protocol establishing the Court.¹¹⁷ Another justification evident from the initial versions of the 1998 Protocol is that the drafters may have preferred access by individuals or NGOs only in exceptional circumstances.¹¹⁸ With the experience of over 40,000 cases submitted to the European Court of Human Rights every year,¹¹⁹ it could have been further argued that the Court should ideally not be a venue for individual justice, but rather a source of jurisprudence on the African Charter.

¹¹² Article 34 (6) of the 1998 Protocol.

¹¹³ Article 45 (3) of the American Convention on Human Rights provides these options.

¹¹⁴ Reference is made here to the “old” European human rights system which was institutionally anchored on two organs, the European Commission on Human Rights and the European Court of Human Rights. See C. Ovey/ R. White, *European Convention on Human Rights*, 2002, for a historiography of the European human rights system.

¹¹⁵ D. Harris et al., *Law of the European Convention on Human Rights*, 1995, 581 et seq.

¹¹⁶ For instance, the United Kingdom did not renew its declaration following its expiry in 1981 until 1993, because of an unfavorable decision in a case that had been initiated by an individual. See Harris, see note 115, 33 citing the case of *Tyrer v. UK* (1978) Series A, No. 26, 2 EHRR 1.

¹¹⁷ See I.A.B. Elsheikh, “Draft Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights: Introductory Note,” *African Journal of International and Comparative Law* 9 (1997), 943 et seq. (947).

¹¹⁸ Mei, see note 30, 121.

¹¹⁹ See generally S. Greer, “What’s Wrong with the European Convention on Human Rights?,” *HRQ* 30 (2008), 680 et seq.

Yet such objective can be met through stringent admissibility rules or review of working methods over time,¹²⁰ or optional jurisdiction.¹²¹

It is clear that during the negotiations of the Protocol, the ambivalence by some states on the potential “danger” of allowing direct access to the Court was not a secret, and only a compromise would appease their desires.¹²² Despite this heavy price, it turned out that the rate of ratification and accession still remained too slow, and only one state had deposited declarations accepting the ACtHPR’s competence to receive cases directly from individuals and NGOs at the time of the merger.¹²³

Under article 29 of the new Statute, States Parties, the Assembly, the Parliament and other organs of the AU authorized by the Assembly or an appellant staff member of the Union are competent to refer cases to the Court. This article, which tracks provisions on the jurisdiction *ratione personae* of the ACJ,¹²⁴ further provides that the Court shall not be open to states which are not members of the Union nor shall it have jurisdiction to deal with a dispute involving a member of the Union that has not ratified the Protocol.¹²⁵ This formulation is premised on the narrative of consent in international law, in which the exercise of jurisdiction is generally given through ratification of the treaty concerned, declaration of acceptance of jurisdiction *ratione personae* or *ad hoc* agreements.¹²⁶ In relation to *ad hoc* agreements, the new Protocol has lost a provision of the 2003 Protocol on the Statute of the ACJ, which allowed third Parties under conditions to be determined by the Assembly, and with the consent of the State Party concerned, to submit cases before the Court.¹²⁷

¹²⁰ See for example, under the European human rights system, Lord Woolf, *Review of the Working Methods of the European Court of Human Rights*, 2005.

¹²¹ Mutua, see note 88, 361-362.

¹²² Harrington, see note 110, 310-316.

¹²³ Burkina Faso.

¹²⁴ Article 18 of the 2003 Statute on the ACJ.

¹²⁵ Article 29 (2) of the Statute of the new Court.

¹²⁶ See generally C. Romano, “The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent,” *N. Y. U. J. Int’l Law & Pol.* 39 (2007), 791 et seq. and J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, 2003, 98 et seq.

¹²⁷ Article 18 (1) d of the 2003 Statute on the ACJ.

Similarly, article 30 of the Protocol on the Statute of the new Court is a deposit in part of the provisions of article 5 of the 1998 Protocol on entities entitled to refer cases to the Court.¹²⁸ The additional entities expressly recognized under article 30 are the African Committee of Experts on the Rights and Welfare of the Child¹²⁹ and African NHRIs.¹³⁰ Article 30, read together with article 38 of the Statute and the overall object of complementarity expressed in the preamble, is an attempt to redeem the pitfalls of human rights protection under the African human rights system. However, the significant additional entities in article 30 are only NHRIs, which had theretofore no recognition as competent bodies to seize the Court.¹³¹ Under the 1998 Protocol, a purposeful interpretation of international organizations would have included the African Committee of Experts on the Rights and Welfare of the Child, or any other treaty body.¹³² Article 30 of the Statute of the new Court is however more restrictive than its predecessor by qualifying the category of African inter-governmental organizations as those “accredited to the Union or its organs.”¹³³

This is compounded by the definition of African intergovernmental organizations which is restricted to those established with the aim of

¹²⁸ Viljoen, see note 31, 23- 40 and D. Juma, “Access to the African Court on Human and Peoples’ Rights: A Case of the Poacher turned Gamekeeper,” *Essex Human Rights Review* 4 (2007), 1 et seq. (7- 21). Under article 5 (1) the following are entitled to submit cases to the Court: the Commission; the State Party which had lodged a complaint to the Commission; the State Party against which the complaint has been lodged at the Commission; the State Party whose citizen is a victim of human rights violation; African Intergovernmental Organizations. Under article 5 (3), “[t]he Court may entitle relevant Non Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol”.

¹²⁹ Article 30 (c) of the Statute of the new Court.

¹³⁰ Article 30 (e) of the Statute of the new Court.

¹³¹ For an account of the current engagement of NHRIs at the African Commission, N. Mbelle, “The Role of Non-governmental Organizations and National Human Rights Institutions at the African Commission”, in: Evans/ Murray, see note 6, 289.

¹³² See P. Sands/ P. Klein, *Bowett’s Law of International Institutions*, 2001, 16 et seq. and H.G. Schermers/ N.M. Blokker, *International Institutional Law*, 2001, 39 et seq.

¹³³ Article 30 (d) of the Statute of the new Court.

ensuring socio-economic integration, or other sub-regional, regional or inter-African organizations.¹³⁴

While the granting of *locus standi* to individuals and NGOs to the new Court regardless of whether they are victims or directly affected by the complaint is a progressive move, the key concern remains the restricted direct access of individuals and NGOs under the Protocol and Statute to the new Court. As has been argued elsewhere,¹³⁵ the direct access of individuals to any human rights system is based on four main premises. First, the *leitmotif* of human rights is to insulate the individual from the “predatory state,”¹³⁶ a scheme which necessitates platforms accessible to the individual to complain in cases of violations. This view, based on the liberal theory of human rights, further rests on the thesis that individuals are the foremost consumers of the human rights protection systems, of which the African Court is a part.¹³⁷ The same state, presented in the image of a poacher,¹³⁸ cannot be granted the primary remit to seek redress on behalf of individuals whose rights it has violated through its acts or omissions.

Second, the limitation of individuals and NGOs also defies the object of internationalization and regionalization of human rights protection.¹³⁹ Absent declarations by States Parties permitting direct access, the main gateway for individuals to the Court may be the African Commission,¹⁴⁰ NHRIs and other treaty bodies. However, this presupposes that the protective mandate and functioning of these institutions is not sub-optimal. Moreover, while almost all African countries now have NHRIs of varying descriptions, each of them is founded on and functions in different political, legal and constitutional environments. This will implicate their willingness or capacity to refer cases to the new African Court of Justice and Human Rights. In the case of the African Commission, whose jurisdiction *ratione materiae* extends only to the

¹³⁴ Article 1, *ibid.*

¹³⁵ Juma, see note 128, 6-7.

¹³⁶ See M. Mutua, “Savages, Victims and Saviors: The Metaphor of Human Rights”, *Harv. Int’l L. J.* 42 (2001), 201 et seq. (221); and C. Douzinas, *The End of Human Rights*, 2000, 119 et seq.

¹³⁷ Mutua, see note 88, 355, 361 and Harrington, see note 110, 320.

¹³⁸ Juma, see note 128, 3-6.

¹³⁹ For a similar argument, see H.J. Steiner, “International Protection of Human Rights”, in: M. Evans (ed.), *International Law*, 2003, 760 et seq.

¹⁴⁰ F. Viljoen, “Admissibility under the African Charter”, in: Evans/ Murray, see note 15, 95.

African Charter,¹⁴¹ a strict interpretation may imply limitations on receipt and referral of cases relating to “any other relevant human rights instrument ratified by the states concerned.”¹⁴² Another difficulty may relate to urgent cases referred to the Commission for transmission to the Court for judicial protection measures when the Commission is not in session.¹⁴³ If the Court adopts a two-tier system of individual complaints procedures as is the case under the Inter-American human rights system,¹⁴⁴ the Court and the Commission will have to address these issues in their procedural rules.

Third, an underlying intent of human rights law is to provide legal remedy in cases of violations of rights guaranteed. Human rights are not intended to be pious platitudes, but rather justiciable claims through among other means, adjudication.¹⁴⁵ The vindication of these rights is generally to be initiated by individual claimants and bearers of these rights. The case for unfettered access of individuals and NGOs to the African Court is thus to be viewed from the optic of enabling aggrieved parties to seize the Court for obtaining justice or remedies to which they are entitled. Consequently, this will also have the effect of elucidating the scope of the African Charter and other human rights instruments which the Court will apply.

Moreover, from the procedural point of view, it has become a basic tenet of the judicial process that each party to a dispute be afforded a reasonable opportunity to present its case under conditions that do not place either party at an appreciable disadvantage *vis-à-vis* the other.¹⁴⁶ A scheme through which States Parties have automatic access whereas individuals and NGOs only have access to the African Court if the

¹⁴¹ Under article 61 of the Charter, the Commission is enjoined to take into consideration other sources and principles of international law only as subsidiary means of interpretation.

¹⁴² Article 30 of the Statute of the new Court.

¹⁴³ See under <http://www.achpr.org/english/_info/sessions_en.html> African Commission on Human and Peoples' Rights.

¹⁴⁴ Article 44 of the American Convention on Human Rights, OAS Treaty Series No. 36, 1144 UNTS 123, adopted on 22 November 1969, entered into force 18 July 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 Doc. 6 Rev. 1, at 25 (1992).

¹⁴⁵ Jayawickrama, see note 28, 125.

¹⁴⁶ See *Dombo Beheer B.V. v. The Netherlands* (1993) Series A, No. 274, 18 EHRR 213.

State Party consents through a declaration repudiates this principle of equality of arms.¹⁴⁷

Unlike cases submitted directly by individuals and NGOs as parties with the freedom to choose who to represent or assist them in the proceedings,¹⁴⁸ it is probable that the individual victim or representative of the victim may not be a party to the proceedings in cases referred to the African Court by the African Commission, State Party, NHRIs or the African Inter-governmental Organization as was the case in the “old” European system until 1983.¹⁴⁹ If this approach is taken, these entities will then be considered as the party representing the interests of the individual.¹⁵⁰ Yet there is no guarantee that the interests of the individual and the recognized party will be congruent.¹⁵¹ Where the interests of the Commission or any other designated representatives of the individual do not meet, the likelihood of “injustice” in the eyes of the individual is not remote. Even so, the fact that the individual is not a party to the proceedings makes individual remedial justice not the object of the proceedings, but rather state violation of rights, as was stated by the European Court in the *Vagrancy Cases* thus:

“Since the [individual] is not party to the proceedings before the Court, the object of those proceedings, strictly speaking, is not the

¹⁴⁷ See A.A.C. Trindade, “The Inter-American Human Rights System at the Dawn of the New Century: Recommendations for Improvement of its Mechanism of Protection”, in: D.J. Harris/ S. Livingstone (eds), *The Inter-American System of Human Rights*, 1998, 411 et seq., citing imbalances between the individuals and states such as the fact that states do raise preliminary objections before the Court on questions such as admissibility, whereas individuals cannot do so since they are not parties to the case.

¹⁴⁸ Article 36 (5) of the Statute.

¹⁴⁹ Harris, see note 115, 660-661.

¹⁵⁰ This interpretation follows article 36 (4) of the Statute which provides for representation of the African Commission, the African Committee of Experts, African Inter-governmental Organizations and African NHRIs. Unless where these are intervening or are submitting cases as *amici curiae*, this provision, it appears refers to situations where these entities submit cases to the Court and are thus parties. However, where an individual or an NGO submits a case, it is clear that such will be a party, and pursuant to article 36 (4), may be represented or assisted by a person of their choice.

¹⁵¹ D. Shelton, *Remedies in International Human Rights Law*, 1999, 3 et seq.

damage suffered by him but the violation of the Convention alleged against the respondent State.”¹⁵²

Finally, from an effectiveness perspective, no human rights treaty is worth the paper it is written on unless it has credible means of enforcement.¹⁵³ Put differently, human rights are guaranteed in any system to provide a mechanism for ensuring enforcement of recognized rights and obligations through the judicial process or any other means. At the international level, the guaranteeing of these rights to the individual necessitates access and “full power”¹⁵⁴ of the individual to enforce them in an international tribunal.¹⁵⁵ This requires that regional mechanisms are accessible to enforce these rights where the domestic level falters. But the case is compelling further because as with other human rights treaties, the African Charter has not been domesticated in the municipal systems of all States Parties.¹⁵⁶ This implies that the domestic level in many of the States Parties is arid in relation to the guaranteed rights. This is not helped by the claw-back clauses which have been used to undermine the Charter,¹⁵⁷ constitutional limitations, and general ambivalence of states towards the findings of the African Commission.¹⁵⁸

¹⁵² *De Wilde, Ooms and Versyp v. Belgium* (The Vagrancy Cases), (No. 1) (1971) 1 EHRR 373.

¹⁵³ For a critique of the incompleteness of this “enforcement-centric” argument, see O.C. Okafor, *The African Human Rights System, Activist Forces and International Institutions*, 2007.

¹⁵⁴ R. Murray, “A Comparison between the African and European Courts of Human Rights,” *African Human Rights Law Journal* 2 (2002), 195 et seq. (201).

¹⁵⁵ Ovey/ White, see note 114, 6-9.

¹⁵⁶ Heyns, see note 14, 49 and C. Heyns/ F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, 2002, 46 et seq., citing regions, among them Africa, where engagement in this enterprise is the “lowest.”

¹⁵⁷ Mutua, see note 88, 358, 359.

¹⁵⁸ See generally R. Murray, “Decisions by the African Commission on Individual Communications under the African Charter on Human and Peoples’ Rights,” *ICLQ* 46 (1997), 412 et seq.

5. Interveners and *Amicus Curiae*

It is no longer in dispute that international law is not exclusively the law of nations. States are no longer considered the only players in international law and governance, but also other non-state entities like individuals.¹⁵⁹ Nowhere is this better illustrated than in international human rights law, where individuals and NGOs are influential participants in standard setting, monitoring, reporting, advocacy, litigation, enforcement and other human rights protection measures.¹⁶⁰ The latter has entailed actions before judicial or quasi-judicial organs, ranging from instituting cases as parties or petitioning requests for advisory opinions to acting as interveners or *amici curiae* in contentious cases or advisory opinions.

In the African human rights system, NGOs have played a phenomenal role in human rights protection.¹⁶¹ Most individual communications before the African Commission have been lodged by or at the initiative of these organizations,¹⁶² even where they are not “victims” or “directly affected” by the violations alleged.¹⁶³ This implies that the African Charter, as was held in *SERAC v. Nigeria*,¹⁶⁴ allows *actio popularis*. By the same token, there has been a practice of *amicus curiae* briefs before the African Commission, albeit limited. However, it is not clear if the Commission also allows interveners before it. Only with the adoption of the new Protocol and Statute has the status of interveners in the African human rights system been clarified. However, there are some limitations which bear noting.

¹⁵⁹ H.J. Steiner, “Individual Claims in a World of massive Violations: What Role for the Human Rights Committee”, in: P. Alston/ J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring*, 2000, 15 et seq.

¹⁶⁰ See generally C. Welch Jnr. (ed.), *NGOs and Human Rights: Promise and Performance*, 2001; D. Shelton, “The Participation of Nongovernmental Organizations in International Judicial Proceedings,” *AJIL* 88 (1994), 611 et seq. and M. Mutua, “Standard Setting in Human Rights: Critique and Prognosis,” *HRQ* 29 (2007), 547 et seq. (589-604).

¹⁶¹ See C. Welch Jnr. (ed.), *Protecting Human Rights in Africa: Roles and Strategies of Non-governmental organizations*, 1995.

¹⁶² For the cases, see <<http://www.achpr.org>>.

¹⁶³ Odinkalu, see note 26, 378, 379. Article 56 of the African Charter.

¹⁶⁴ Decision Regarding Communication 155/96 (2001), *Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria*, Case No. 155/96 ACHPR/COMM/A044/1, para. 3.

Under the Statute of the new Court, interested States Parties and organs of the AU can intervene in the proceedings of the Court whenever the question of interpretation of the Constitutive Act¹⁶⁵ or other treaties¹⁶⁶ arises in a case¹⁶⁷ in which they are not parties. It appears that the idea behind this article is to ensure “collective enforcement” of resulting judgments in issues where the States Parties and AU organs have an interest, since the Statute provides that the judgment will be binding for all parties.¹⁶⁸ If this interpretation is not disrupted, it is not clear why human rights, which impose obligations *erga omnes*¹⁶⁹ have been excluded from the category of cases in which States Parties or organs of the AU can intervene.¹⁷⁰

The other problem relates to the limitation of entities that can intervene. In these cases States Parties and organs of the AU only. Here, a textual reading of the Statute repudiates the competences of NGOs, NHRIs and individuals to intervene in such cases, which was a possibility under the 1998 Protocol.¹⁷¹ While it has to be recognized that the Statute is silent on *amicus curiae* and hence the Court can admit NGOs as such through its procedural rules and purposeful interpretation of the Statute,¹⁷² the exclusion of these entities may have an effect since interveners and *amici curiae* have different rights in a judicial process:

¹⁶⁵ Article 50 of the Statute.

¹⁶⁶ Article 51, *ibid.*

¹⁶⁷ Article 56 of the Statute of the new Court makes the provisions on contentious cases applicable analogously to advisory opinions.

¹⁶⁸ Arts 50 (3) and 51 (2) of the Statute of the new Court.

¹⁶⁹ *Barcelona Traction Case*, Contentious Case, ICJ Reports 1970, 3 et seq. The ICJ stated that in obligations relating to “the basic rights of the human person ... all states can be held to have a legal interest in their protection; they are obligations *erga omnes*.”

¹⁷⁰ Article 51 (3) of the Statute provides that these provisions are not applicable to cases relating to alleged violations of human rights.

¹⁷¹ Mohammed, see note 110, 202, 203 and 211-213 and V.O.O. Nmeielle, *The African Human Rights System: Its Laws, Practices and Institutions*, 2001, 318 et seq. Under 26 (2) thereof, “[t]he Court may receive written and oral evidence including expert testimony and shall make its decision on the basis of such evidence.” This can be interpreted to include *amici curiae* since it does not make reference to parties or States Parties.

¹⁷² For example, article 54 (4) of the Statute contemplates that organizations may present written or oral statements or both in proceedings on advisory opinions. See also article 36 (5) of the Statute, in relation to parties in contentious cases.

the former generally become parties to the proceedings, with the rights and obligations appurtenant to that status, while *amici curiae* “cannot control the direction or management of a case as parties can.”¹⁷³

6. The New Court’s Jurisdiction *Ratione Materiae*

Like its predecessors,¹⁷⁴ the new Court has jurisdictional competence over all cases and all legal disputes relating to the interpretation, validity or application of the Constitutive Act,¹⁷⁵ the African Charter¹⁷⁶ and its Protocols,¹⁷⁷ or any other general¹⁷⁸ or human rights treaties of the Union,¹⁷⁹ and all subsidiary legal instruments or acts and decisions of the organs of the Union.¹⁸⁰ Further, it also has competence on any question of international law,¹⁸¹ breach of an obligation owed to a State Party or to the Union¹⁸² and the nature or extent of the reparation to be made

¹⁷³ Shelton, see note 160, 611-612. See also G. Williams, “The *Amicus Curiae* and Intervener in the High Court,” *Federal Law Review* 28 (2000), 1 et seq.; S. Kenny, “Interveners and *Amici Curiae* in the High Court,” *The Adelaide Law Review* 20 (1998), 159 et seq. and R. Owens, “Interveners and *Amicus Curiae*: The Role of the Courts in a Modern Democracy,” *The Adelaide Law Review* 20 (1998), 193 et seq.

¹⁷⁴ Article 3 (1) of the 1998 Protocol provides that “[t]he jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.” Article 19 of the 2003 Statute provides that: “The Court shall have jurisdiction over all disputes and applications referred to it in accordance with the Act and this Protocol which relate to: (a) the interpretation and application of the Act; (b) the interpretation, application or validity of Union treaties and all subsidiary legal instruments ...; (c) any question of international law; (d) all acts, decisions, regulations and directives of the organs of the Union; (e) ... (f) ... breach of an obligation owed to a State Party or to the Union; (g) the nature or extent of the reparation to be made for the breach of an obligation.”

¹⁷⁵ Article 28 (1) of the new Statute.

¹⁷⁶ *Ibid.*, arts 28 (c) and 30.

¹⁷⁷ *Ibid.*, arts 28 (b), (c) and 30.

¹⁷⁸ *Ibid.*, arts 28 (d), (e),(h) and 30.

¹⁷⁹ *Ibid.*, arts 28 (b), (c) and 30.

¹⁸⁰ *Ibid.*, arts 28 (b), (e) and 30.

¹⁸¹ *Ibid.*, arts 28 (a), (d), (g), (h) and 30.

¹⁸² *Ibid.*, arts 28 (g) and 30.

for the breach of an international obligation.¹⁸³ Another innovation is that the Court shall have subject matter jurisdiction through special agreement.¹⁸⁴

Without any doubt, this is the foremost broad and liberal jurisdiction *ratione materiae* ever conferred on a regional Court.¹⁸⁵ However, some observations are in order. It is clear that the generous jurisdiction envisaged under article 28 of the Statute relates to the General Affairs Section,¹⁸⁶ with respect to matters relating to international law, the Union's constitutive instrument, or any other general treaties of the AU. Ergo, the jurisdiction *ratione materiae* of the Court is not a blank cheque as it may appear at first sight. In the case of the Human Rights Section, the question, case or dispute must relate to claims of violation of a right guaranteed by the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relevant to human rights ratified by the States Parties concerned.¹⁸⁷ The Human Rights Section is, like the General Affairs Section, the Full Court or any chamber of the Court, empowered to apply the Constitutive Act, customary international law and international treaties ratified by the contesting states,¹⁸⁸ or other treaties to which these treaties or the other African human rights treaties make

¹⁸³ Ibid., arts 28 (h) and 30.

¹⁸⁴ Ibid., article 28 (f).

¹⁸⁵ Pasqualucci, see note 126, 91 discussing *Las Palmeras v. Colombia (Preliminary Objections 2000)*, IACtHR Series C No. 67 (2000), para. 22 operative para. 2. In contrast, the Inter-American Court of Human Rights does not have jurisdiction to render judgments on violations of other human rights treaties which do not confer jurisdiction on the Court, even if the states concerned have signed the treaty. However, in rendering advisory opinions, it can consider any human rights treaty, article 64 (1).

¹⁸⁶ Article 17 (1) of the Statute.

¹⁸⁷ Article 30 of the new Statute. See also article 34 (1) which requires that cases brought before the Court relating to an alleged violation of a human right shall indicate the right(s) alleged to have been violated, and, insofar as it is possible, the provision or provisions of the African Charter on Human and Peoples' Rights, the Charter on the Rights and Welfare of the Child, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa or any other relevant human rights instrument, ratified by the state concerned, on which it is based.

¹⁸⁸ Article 31 of the new Statute.

reference to.¹⁸⁹ To this extent therefore, the provisions on jurisdiction and applicable law¹⁹⁰ are not super-equivalent to the 1998 Protocol.

On the other hand, while international human rights law is a “specialized” genre of international law, interpreting the former will inevitably invite methods of interpretation of international law and its norms and general principles of law.¹⁹¹ For example, a State Party may bring an inter-state complaint before the General Affairs Section based on an alleged violation of another State Party’s obligation to respect or protect human rights under the Principles of the Constitutive Act.¹⁹² By the same token, this question or dispute may be brought to the Human Rights Section. Accordingly, the strict view that the Human Rights Section will have jurisdiction in all human rights cases and questions must be tampered, since human rights systems are not after all “self-contained regimes” divorced from general international law.¹⁹³

Another silence on the Court’s jurisdiction *ratione materiae* relates to *relevant* human rights instruments. While it is clear that these must be ratified by the States Parties concerned, some practical issues relating to duplex jurisdiction with other judicial or quasi-judicial treaty bodies may arise. The concerns here are that this may lead to fragmentation and uncertainty as to which of the interpretations is authoritative. While there is no clear way out of this jurisdictional reach, it may be considered that objections to jurisdiction will be common in the Court’s contentious cases. Such objections, if persistent and common, may have an effect on the standing of the new Court. Another possibility is that some states may make subject matter reservations, thus un-

¹⁸⁹ For example, article 60 of the African Charter provides that the African Commission shall draw inspiration from the international law on human and peoples’ rights, the Charter of the United Nations, the [Constitutive Act], the Universal Declaration of Human Rights and any other human rights instruments.

¹⁹⁰ Under article 7 of the 1998 Protocol, “[t]he Court shall apply the provision of the Charter and any other relevant human rights instruments ratified by the States concerned.”

¹⁹¹ Kindiki, see note 5, 142.

¹⁹² See arts 28 and 29 of the new Statute.

¹⁹³ See B. Simma/ D. Pulkowski, “Of Planets and the Universe: Self-Contained Regimes in International Law,” *EJIL* 17 (2006), 483 et seq. (528) and B. Simma, “How Distinctive are Treaties Representing Collective Interest? The Case of Human Rights Treaties,” in: V. Gowlland-Debbas (ed.), *Multilateral Treaty-Making: The Current Status of Challenges to and Reforms Needed in the International Legislative Process*, 2000, 87 et seq.

dermining the generous provisions of the Protocol. One way of resolving this is to insert compromisory clauses granting the Court jurisdiction in future treaties. However, this should not be a pathway for forum shopping or the granting of jurisdiction otherwise vested in other courts through *lex specialis* treaties, such as for instance, the International Criminal Court. The Court could also consider issuing an advisory opinion on the scope of the Court's jurisdiction in receiving questions or cases based on "other relevant treaties ratified by the States Parties concerned."

7. Advisory Jurisdiction

The new African Court has jurisdiction to deliver advisory opinions on any legal question at the request of the Assembly, the Parliament, the Executive Council, the Peace and Security Council, the Economic, Social and Cultural Council, the Financial Institutions or any other organ of the Union as may be authorized by the Assembly.¹⁹⁴ To avoid disguised contentious cases being submitted as requests for advisory opinions and to limit jurisdictional overlaps, the subject matter of the advisory opinion must not be related to a pending application before the African Commission or the African Committee of Experts on the Rights and Welfare of the Child.¹⁹⁵ While it is not expressly provided in the Protocol on the Statute, nor the Statute itself, the Court like other similar judicial bodies has the *compétence de la compétence* to determine whether it has the jurisdiction on any "legal question" referred to it.¹⁹⁶ It is still however unclear whether questions of jurisdiction and admissibility in general will be determined by the Registry, Full Court, a chamber or either Sections of the Court depending on the subject matter.

The advisory jurisdiction is a key feature of international legal and regional human rights systems.¹⁹⁷ The idea stems from the premise that

¹⁹⁴ Article 53 (1) of the new Statute.

¹⁹⁵ Article 53 (3) of the new Statute.

¹⁹⁶ See generally D. Akande, "The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice," *EJIL* 9 (1998), 437 et seq. and Pasqualucci, see note 108, 250, 251.

¹⁹⁷ See Article 96 of the Charter of the United Nations, article 47 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended and article 64 American Convention on Human

the law's provisions are most often capable of varying interpretation, and it is only desirable that in cases of doubt, the apex judicial organ in the judicial system concerned should provide an authoritative interpretation. Advisory opinions have the following key functions. First, they are venues for clarification of legal standards and norms, particularly where legal provisions or obligations are ambiguous or contested. This in turn enables players in the enforcement of rights and obligations to effectively undertake their tasks. Second, advisory opinions, particularly those relating to the compatibility of domestic laws, practices and policies with international laws are important impulses for state compliance with international law.¹⁹⁸ Even where these are not specific to any state, the evolution of practices voluntarily or through resulting pressure following these opinions points to the potency of advisory opinions.¹⁹⁹ Third, although non-binding and "soft" in nature, advisory opinions provide non-adversarial means of resolving or preventing international legal disputes.²⁰⁰

While the subject matter jurisdiction on any "legal question" provides the Court with latitude to receive the broadest possible range of questions, this provision has lost the spirit and letter of the 1998 Protocol on the ACtHPR.²⁰¹ Instead, it embraces the provisions of article 44 of the Statute of the ACJ, which granted competence only to similar organs of the AU. Conspicuously missing are NGOs, NHRIs, the Af-

Rights. Article 45 (3) of the African Charter mandates the African Commission to "[I]nterpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU."

¹⁹⁸ Pasqualucci, see note 108, 241, 243 and 284-286. See article 64 (2) of the American Convention which mandates the Inter-American Court to provide advisory opinions to requesting states regarding the compatibility of any of its domestic laws with the American Convention or of other treaties concerning the protection of human rights in the American states.

¹⁹⁹ T. Buergenthal, "The Advisory Practice of the Inter-American Human Right's Court," *AJIL* 79 (1985), 1 et seq. (25).

²⁰⁰ Pasqualucci, see note 108, 247.

²⁰¹ Krisch, see note 102, 718, 724. Under article 4, any Member State of the AU, the AU, any of its organs, or any African organization recognized by the AU may request the African Court to provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments.

rican Commission,²⁰² and Member States of the AU,²⁰³ although the latter can request an advisory opinion through organs of the AU.

Two key problems arise out of the new provisions on advisory opinions. First, the general formulation of the provisions casts the advisory opinion as a facility for the organs of the AU. In contrast, the advisory opinion contemplated in the 1998 Protocol empowered not only the AU, but also Member States and any African organization to request an advisory opinion. While the Protocol did not define African organizations, observers argued that African NGOs could request advisory opinions under this article.²⁰⁴ In addition to the exclusion of NGOs, it is not clear why NHRIs – most of whose mandates include advisory functions – have not been granted competence to submit requests for advisory opinions to the new Court. It is also not clear why NGOs and NHRIs have been excluded from the entities which the Court has discretion to notify when a request for an advisory opinion is received.²⁰⁵

Second, and related to the above, it appears from a textual reading of the relevant parts of the Statute that the advisory opinion is largely intended as a mechanism for inter-state or inter-governmental relations within the AU.²⁰⁶ Nothing illustrates this better than the omission of the African Commission, the African Committee of Experts on the Rights and Welfare of the Child, NHRIs and NGOs from the list of entities competent to submit requests for advisory opinions, discussed above. Moreover, the state-centrism of the advisory opinion is not only evinced by the categories of entities competent to request advisory

²⁰² After over twenty years of existence, the Commission issued its first advisory opinion in May 2007, which points to the inadequacy of its advisory opinion functions.

²⁰³ States Parties, for instance, may need advisory opinions not as a group within the AU, but individually on domestic issues such as the compatibility of its laws with international human rights law.

²⁰⁴ See A.P. van der Mei, “The advisory jurisdiction of the African Court on Human and Peoples’ Rights,” *African Human Rights Law Journal* 5 (2004), 27 et seq. (35-37).

²⁰⁵ Article 54 (1) and (4) of the new Statute.

²⁰⁶ See article 53 (1) of the new Statute detailing AU organs and granting the Assembly the “gatekeeper” role. See also article 54 (1), (2), (3) and (4) respectively, making reference in part to “States or organs entitled to appear before the Court,” “State[s] entitled to appear before the Court or any Intergovernmental Organization[s],” “States entitled to appear before the Court” and “States and Organizations.” See also arts 50 and 51 on interveners in contentious cases, applicable by analogy to advisory opinions.

opinions, but also the requirement that the Assembly grants authority to any other AU organ seeking an advisory opinion.

The problem with this is that some advisory opinions may need to be given speedily, for instance, on a question before the African Commission, otherwise the *substratum* of the question may be lost before the requisite authority is given. Another ambiguity with this provision is that the granting of “initial” authority by the Assembly, a political body, is technically a judicial process, almost similar with consideration of admissibility of such requests. Unless the Assembly will merely authorize without looking at the merits of a request, this determination should be the province of the Court.

Finally, it also remains to be seen how the Court will construe the scope of any “legal question.” The difficulty here is that the Statute does not define any instruments that the “legal question” relates to. However, considering the object and purpose of the Protocol on the Statute of the new Court, the “legal question” should primarily relate to the interpretation or application of the Constitutive Act, African Charter on Human and Peoples’ Rights and its Protocols and related human rights treaties, and any other treaties adopted within the framework of the AU.²⁰⁷

On the whole, this provision appears to be a generous offering at first glance, yet it is its generality that may also grant the new Court discretion to reject matters which may be within the scope of human rights, yet are not purely legal. The questions here are: can the Court admit a request for an advisory opinion, for instance, on contemporary forms of colonialism or global justice? Can an advisory opinion be requested on a political question based on non-compliance by a State Party to the African Charter on Democracy, Elections and Governance when it comes into force?²⁰⁸

Following the experience of the ICJ, there is no doubt that the new Court will be faced with the issue of whether a matter is legal or politi-

²⁰⁷ See Preamble of the Protocol on the new Statute.

²⁰⁸ Kane/ Motala, see note 6, 427,428. African Charter on Democracy, Elections and Governance, adopted on 30 January 2007, AU Doc. Assembly/AU/Dec.147 (VIII). While this is not clear, in relation to contentious cases, article 25 of the Charter envisages trial of perpetrators of unconstitutional change of government in Africa before the competent Court of the Union. It has been argued that such may be criminal trials, best conducted through specialized criminal tribunals or the International Criminal Court, and not the African Court.

cal in almost all the requests. Within the context of the utility of the advisory opinion in strengthening the African human rights system, the Court may need to note the “political” in human rights²⁰⁹ and politicization as a means of securing and enforcing human rights.²¹⁰ So long as the Court can relate these to any existing principles and rules contained in international law and the treaties of the AU in relation to the matter, the same should be regarded as a legal question. Thus in the Advisory Opinion on the Legality of the Use of Nuclear Weapons, the ICJ reaffirmed its interpretation on the scope of a “legal question” in earlier advisory opinions thus:

“The fact that ... [a] question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a ‘legal question’ ... Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law ... The Court moreover considers that the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion.”²¹¹

IV. *In Lieu of a Conclusion*

A decade ago, it seemed that the idea of the ACtHPR, having been conceived, could not be unthought-of. But the recent merger of the Court with the ACJ to establish a single Court has proved that the African human rights system is indeed “work in progress.” Accordingly, views on the losses and gains in the new Protocol and Statute are only pre-

²⁰⁹ Illustrated in cases involving unconstitutional change of government and denial of citizenship rights for political reasons such as *Dawda Jawara vs The Gambia*, African Commission on Human and Peoples’ Rights, Comm. Nos. 147/95 and 149/96 (2000) and *John K. Modise vs Botswana*, African Commission on Human and Peoples’ Rights, Comm. No. 97/93 (2000). See generally M. Ignatieff (ed.), *Human Rights as Politics and Idolatry*, 2001.

²¹⁰ M. Ruteere, “Politicization as a Strategy for Recognition and Enforcement of Human Rights in Kenya,” *Human Rights Review* 7 (2006), 6 et seq.

²¹¹ *Legality of the Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, 226 et seq. (234, para. 13).

liminary. Current efforts, in this regard, including those of the African Commission, to finalize its revised rules of procedure, some of which may remedy some of the current problems in the protective mandate of the system, should be noted.

However, the breakneck speed with which the merger was undertaken may lead to intractable differences between states in the African human rights system and the precarious foundations of its institution. As has been illustrated in this article, while the new Protocol largely tracks the provisions of the 1998 Protocol on the ACtHPR and the 2003 Protocol on the ACJ, there has been an erosion of several elements of both instruments.

Yet others are silent and thus remain open to interpretation. Of these, the continued restricted direct access of individuals and NGOs to the new Court in the absence of Declarations by States Parties stands out in particular. In addition to the practical difficulties of accessing the Court through the entities competent to seize the Court, this continued privileging of States Parties also gives an impression that the new Court is intended to be a Court for African States or the AU, with human rights being only ancillary. This impression is further enhanced by the provisions on advisory opinions of the Court, which makes the mechanism appear intergovernmental or state-centric by excluding NHRIs and NGOs from the list of entities competent to refer questions to the new Court for an advisory opinion.

It has also been argued that the new Court alone may not ordain a departure from the normative and institutional deficiencies of the system in general. In this regard, the architecture of the African human rights system is still unclear even after the adoption of the Protocol and Statute. Here, the concern remains the reform of the African Commission and its working methods, and its linkages with the new Court. While some of these aspects may be addressed in the procedural rules of the new Court and through revision of the procedures of the African Commission, these piecemeal changes may result in a patchwork. Even more worrying are recent developments concerning the AU's attempts to curtail the powers of the African Commission to adopt country-specific resolutions,²¹² and more recently, allegations of lack of inde-

²¹² Kane/ Motala, see note 6, 437, referring to the AU Assembly's adoption of the 19th Activity Report of the African Commission, "except for those containing [human rights violations] the Resolutions on Eritrea, Ethiopia, the Sudan, Uganda and Zimbabwe." See Decision on the 19th Activity Report of the African Commission on Human and Peoples' Rights, Doc.

pendence of a member of the African Commission, which led to his seat being declared vacant.²¹³ While the African Commission has witnessed notable advances in its jurisprudence and working generally, these developments repudiate the standing of the institution in the African human rights system.

Finally, at the normative level, the entry into force of the Protocol on Women's Rights and most recently the adoption of a treaty on the rights of Internally Displaced Persons must be considered significant. Nevertheless standard setting and the development and clarification of human rights norms by no means complete the matrix of human rights realization. In this regard, NGOs should also be competent to request advisory opinions from the new Court as envisaged by the 1998 Protocol. Finally, whether or not the substantive premises and impulses for reform have been lost in the transition to a new African Court of Justice and Human Rights is a matter for determination in the future.

EX.CL./236 (VIII), Assembly/AU/Dec.101 (VI), Assembly of the African Union, 6th ordinary session Khartoum, Sudan, Assembly/AU/Dec. 91-110 (VI).

²¹³ See note 98.