The judicial method of dispute resolution has aroused in Africa countless turnarounds of positions, from rejection to acceptance, from construction to destruction, to allow its transformation. It seems to have recently stabilized in the figure of the African Court of Justice and Human Rights, merging the two existing regional judicial bodies. It is already known to us that the two Tribunals have two main pre-defined functions, one that deals with the resolution of conflicts between States of the continent and the other on the protection of human rights, which are quite different roles. So, in this article, we analyze all impediments of the judicial system of African human rights to answer the question of whether it is best for African human rights to keep the tribunals separate, regardless of the desire to reduce costs or merger is better to ensure more effectively the protection of human rights?

Keywords: African Court of Justice; African Court on Human Rights; African Charter on Human Rights; Protocol to the African Charter; Malabo Protocol.

Introduction

The international spread of Human Rights mechanisms is part of the construction of a “new world order of Human Rights,” whose procedures and norms are put to competition by judicial actors. The regional African system of promotion and protection of the rights of peoples has been developed for thirty years. The African Charter of the rights of human and peoples’ becomes a central instrument of the system which reflects the will of modern Africa “postindependence” to include human rights in a proactive approach in the jurisdictions which have political and social action. Indeed it was adopted on 27 June 1981 in Nairobi. From this instrument, including adoption marks an important step in the progression of the African path in terms of the rights of people, the system enriched, thanks to economic developments and the salience of some issues, a more dense body of standards and institutions with varied, political, administrative or technical skills. In General, we can see that if registered mutations were guided by the concern to a specific positioning of Africa, they have not always conducted orientation clearly defined upstream. The tension between the universal and the African values appears as one of the structural features of construction of the system.

In June 1998 the OAU embraced the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights. The African Human Rights Court is proposed to supplement the African Commission on Human and Peoples’ Rights, the body that has practiced mainland oversight over human rights since 1987. The Protocol recommends that the African

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1 As Joseph Raz said, “When talking of the emerging world order I have in mind the pattern of institutions, treaties and established practices that are emerging under the impact of the economic, social and cultural pressures in a world growing smaller and more interdependent through vastly enhanced communication technology. The new world order is in the making. We are in a period of fast changes in many aspects of the international situation, changes whose directions are uncertain. I would not venture to predict, or to recommend a blueprint for, a desirable outcome. My modest aim is to point to some possibilities and difficulties inherent in some of the current trends regarding the role of individual rights. But even that presupposes a certain awareness and understanding of those trends, for there is no possibility of sensible recommendations based on a priori considerations only. They must relate to the reality for which they are intended.” See Joseph Raz, Human Rights in the Emerging World Order, 1(1) Transnational Legal Theory 31, 39 (2010).

2 Human rights as a legal concept were late to arrive in Africa. Its evolution on this continent is to be seen against the background of the dynamic development of human rights within the United Nations system and that of international law, although the impetus of this evolution is owed to the struggles within African States in the colonial and post-independence eras. Anton Bösl & Joseph Diescho, Human Rights in Africa: Legal Perspectives on Their Protection and Promotion 3 (Windhoek: Macmillan Education Namibia, 2009).


4 Id.
Human Rights Court will make the advancement and the insurance of human rights in the provincial framework more successful.¹

As a history, we have to return to the two highlights that preceded the creation of the African Court of Human Rights. This is first of the resolution AHG/Res. 230 (XXX), according to which the Assembly of Heads of State and Government, met in June 1994 in Tunis (Tunisia), and expressed its support for the strengthening of the Commission and the establishment of the Court as “the beginning of real human rights enforcement.” Later in 2000, the Constitutive Act of the African Union was adopted at the Lomé (Togo) summit. And it was not ratified until July 2001 in Lusaka (Zambia) that 40 of the heads of state have ratified the transformation of the Organization of African Unity into the African Union. The act, at the same time, creates the Court of Justice of the African Union (however, the Court is not operating). The status, composition and functions of this new court are clarified by the Maputo (Mozambique) protocol, adopted on 10 July 2003 and ratified by only 5 states at the time.

At the 3rd ordinary session of the Assembly of Heads of State and Government of the African Union (AU) held in July 2004, a resolution on the headquarters of the AU bodies was adopted. The most notable decision was the merger of the African Court of Human Rights and the Court of Justice into one court, which is “the African Court of Justice and Human Rights.”³ The main argument advanced in favor of this merger was the lack of funding and staff to discuss both courses separately. Moreover, one of the reasons for the merger of the African Court of Human Rights and the Court of Justice was the concern to avoid the situation at which the European human rights system was confronted at one time. Indeed, the jurisprudence of the European Court of Human Rights and the European Court of Justice have at one time emerged simultaneously giving rise to two independent corpuses of jurisprudence. The merger would prevent them from working in opposite directions, one encroaching on the other’s jurisdiction. The main reason for merging is the desire of the African Union to establish an effective regional court with the necessary resources to defend the rule of law, human dignity and Human Rights.

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A totally new creature uncommon under the steady gaze of international law is developing in Africa. The African Court of Justice and Human Rights (ACJHR) (in this after alluded to as the Merged Court) will likewise have a criminal chamber to try international crimes. The command of the court will be tripartite and this article tries to analyze this most recent aspect; the presentation of a global criminal chamber.  

1. The Inertia of the African Court of Justice

1.1. The Grounds for Establishment

The establishment of the Court of Justice of the African Union is part of the phenomenon of the multiplication of international, regional and specialized jurisdictions, undertaken during the second decade of the last century. The jurisdictionalization has always emerged as a crucial step on the road to institutionalization. It has been centuries since human societies experienced this salutary evolution with the disappearance of private justice and the gradual emergence of the first judicial institutions. In the context of interstate relations, as governed by public international law, the establishment of a permanent international court is recent; characteristic phenomenon of the 20th century, it appears to be related to the first attempts at structured organization of international society, by which it is understood, by reference to the idealistic and generous impulses that almost always follow wars and then dream of building a new world dedicated to the peace and happiness of human beings.  

After the First World War, it was naturally at the universal level that the first experience of jurisdictionalization was attempted, while at the same time the first truly international organization was created. Established in 1920 pursuant to Article 14 of the League of Nations Covenant to which it was thus attached but of which it did not formally belong, the Permanent Court of International Justice (PCIJ) was to mark a first milestone on the path of institutionalization of international society. Two years later, in his inaugural speech, his first President affirmed “the advent of a new era in world civilization,” thereby sacrificing the optimism of the time and the somewhat mythical ideal of peace by law: the jurisdictional settlement of disputes must then guarantee the progress of the international society by preventing the escalation of conflicts.  

In contemporary times, the prohibition of using force in international relations implies the obligation to resolve conflicts by peaceful means, of which there are two main categories of methods of settlement, depending on whether they are non-  

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11 Natalie Ros, La Cour internationale de Justice comme instrument de la paix par le droit, 25(2) Études internationales 273 (1994).

12 Id. at 274.
jurisdictional. Only international justice is likely to lead to a legal solution imposed on the States in dispute, but it is always optional, be it arbitral or judicial, which could be sufficient to explain the minor role that the International Court of Justice (ICJ) is ultimately called upon to play in the international society.\(^\text{13}\) In this regard, it is noted that in comparison with other continents with international or regional jurisdictions, the Pan-African Organization has failed to establish a viable jurisdictional forum and only 19 African States currently recognized the mandatory jurisdiction of the ICJ. The rest of the African States, which is also the majority, are reluctant to resort to the ICJ in settling their differences. This reluctance can be explained by the fact that some states do not want to be subjected to rules whose development they have not contributed to.\(^\text{14}\)

Hence, learning from recent history the consequences of situations of conflict between States wars and rebellions has emerged the need to resort to a jurisdictional body to resolve these conflicts that annihilate development efforts. The advent of the African Union justified the establishment of an institution to interpret and punish the non-application of the Constitution, treaties and decisions of the Union.\(^\text{15}\) In this context, the creation of the Court of Justice represents a substantial step forward, since the Member States of the former OAU experienced great difficulty in settling their disputes before an international court, preferring a settlement by consensus or mediation policy.

**1.2. Mission Not Accomplished**

The point of departure is that the African Court of Justice is not a specialized Human Rights institution, either in terms of its mandate, jurisdiction, procedures, or personnel. The African Union Constitutive Act established this Court to be as one of the AU’s principal organs. The Protocol of the Court was adopted in July 2003 and entered into force in February 2009; 30 days after 15 Member States had ratified it. In August 2016, only 44 Member States had signed the 2003 Protocol and 16 had ratified it. However, the Court did not begin to function.\(^\text{16}\)

It is worth mentioning that the African Union Court of Justice has two advisory and contentious powers. In practicing its advisory jurisdiction, the Court may provide an advisory opinion on any legal matter, at request of the Assembly, the Parliament, the Executive Council, the Peace and Security Council, the Economic, ECOSOCC, any of the financial institutions, a Regional Economic Community or such other organs of the Union as may authorized by the Assembly.\(^\text{17}\) In the exercise of its

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15 *Id.*
17 Art. 44.1 of the Protocol of the Court of Justice of the African Union.
contentious jurisdiction, the Court has jurisdiction to hear disputes and petitions submitted to it concerning the interpretation and application of the Constitution, interpretation, application or validity of treaties of the Union, for any question related to international law and all acts, decisions, regulations and directives of the organs of the Union. Its jurisdiction extends also to bilateral and multilateral agreements concluded between the States themselves or with the Union, and decides on the nature and extent of the due compensation for breaching a commitment. In addition, the Assembly may confer to assume jurisdiction on the Court to hear disputes other than those previously referred to.18

The jurisdiction of the Court over “any question relating to international law” marks the willingness of African States to settle their own inter-State disputes, which enables them to contribute to the development of international law by participating in its elaboration. Thus, the African Union complies with international standards in enumerating the sources of the law applicable by the Court, while at the same time making adjustments to the provisions that no longer have any place today.19 However, the Court of Justice does not have erga omnes jurisdiction, since its jurisdiction is limited to those States which have accepted its jurisdiction. Indeed, Article 18.3 of the Protocol provides:

The States which are not members of the Union shall not be allowed to submit cases to the Court. The Court shall have no jurisdiction to deal with a dispute involving a Member State that has not ratified this Protocol.20

19 According to Article 20 of the Protocol, in addition to the Constitutive Act and the “secondary law” of the African Union, the Court of Justice applies the same sources of law in the settlement of disputes referred to it. The ICJ: international treaties, international custom, general principles of law, judicial decisions and the doctrine of publicists. The drafters of the Protocol thus seem to crystallize the hierarchy of norms of international law that appeared to be operative in Article 38 of the Statute of the ICJ. However, the idea that Article 38 of the Statute establishes a hierarchy of norms is not really validated and this provision is considered by publicists as incomplete and partly obsolete. The Protocol brings just two new features. On the first hand, the enumeration made by Article 38 does not take into account certain sources of law that have developed since 1945: the law of international organizations and the unilateral act of Member States, for example. In this respect, the Protocol of the Court of Justice breaks new ground by including in the hierarchy “the regulations, the directives and the decisions of the Union as auxiliary means of determining the rules of law,” corresponding to the potential development of law of the Pan-African Community. On the other hand, the notion of terminology today is questionable. This expression is obsolete in an international system, moreover U.N., which recognizes the sovereign equality of States and should be rectified. In this regard, the African Union is taking the first step, reformulating the said provision as follows: “General principles of law recognized universally or by African States.” The term “civilized nations” is removed, universalism is proclaimed, and the position of African States and Africa is valued in the construction of international law.

20 This brings us back to the role of state consent in the implementation of international law. This consent is traditional with respect to the intervention of the judge. However, some states have long been traditionally opposed to such intervention and other processes still limit this possible intervention (exception of incompetence, reservations, ICJ, Spain/Canada case). See Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432.
With regard to States Parties to the Protocol, the judgments shall be binding.\textsuperscript{21} As for the interpretation and application of the Act, the decisions of the Court are binding on the Member States and the organs of the Union and are taken by a qualified majority of at least two votes and in the presence of at least nine judges.\textsuperscript{22} Other decisions of the Court and, in particular, advisory opinions, are taken by a majority of the judges present and, in the event of a tie, the presiding judge has a casting vote.\textsuperscript{23}

States Parties to the Protocol must abide by the judgments of the Court and enforce them within a time limit fixed by the Court;\textsuperscript{24} in the event of non-execution, the Court may, at the request of either party, refer the matter to the Assembly, which may impose sanctions under Article 23.2 of the Act.\textsuperscript{25} Thus, the Court interprets and ensures the application of the African Union treaties, secondary legislation, international law, and renders binding judgments. In case of the non-execution by which the State in question is likely to be brought before the Court, the Assembly may impose sanctions.

2. The African Court on Human Rights as a Judicial Protector Is Better Than Nothing

2.1. The African Court as a Mechanism to Fill the Judicial Gap

For many years, the African human rights system has been structured around the African Commission on Human and Peoples’ Rights, which was then the only African institution (not a judicial body) responsible for the protection of human rights. But less than two decades after the activation of the African Commission, this uni-institutional landscape will be disrupted by the entry into force on 25 January 2004 of the Protocol to the African Charter on Human and Peoples’ Rights creating the African Court on Human and Peoples’ Rights.\textsuperscript{26}

The Human Rights system in Africa is long embodied by the African Commission has been the subject of much criticism resulting from its status as a quasi-judicial body. The last laudatory terms did not fail to indicate the powerlessness of the African Commission to fulfill its mission of protecting and promoting human rights. In this

\begin{itemize}
\item \textsuperscript{21} Art. 37 of the Protocol of the Court of Justice of the African Union.
\item \textsuperscript{22} \textit{Id.} Art. 38.
\item \textsuperscript{23} \textit{Id.} Art. 34.
\item \textsuperscript{24} \textit{Id.} Art. 51.
\item \textsuperscript{25} \textit{Id.} Art. 52.
\end{itemize}
context, the Conference of Heads of State and Government at its 34th session held in Ouagadougou (Burkina Faso) from 8 to 10 June 1998; approved the Protocol of establishing the Court. Finally, the Protocol will enter into force on six years later along with depositing the instrument of ratification by the Comoros.27

The system placed by the Protocol is resolutely aimed at remedying the shortcomings of the Charter. Wherefore, the establishment of the African Court is a necessary stage to establish a consistent and effective system for the protection of human rights in Africa. This new step reinforces and complements the existing structure of the African Charter and the original body “the African Commission on Human and Peoples’ Rights” for monitoring respect for the rights guaranteed by them.

The creation of a coherent African system for the protection of human rights responds to a broader international movements for elaborating the regional systems so as to protect the Human Rights initiated by adopting the Convention for the Protection of Human Rights and Fundamental Freedoms in 195028 followed by the European Court of Human Rights29 and the entry into force of the American Convention on Human Rights, in 1969 created the Inter-American Court of Human Rights,30 while the delay in establishing the African system corresponds mainly to the political environment of the 1960s and 1970s marked by some leaders more concerned with brandishing the principle of national sovereignty to hide Human Rights violations committed in their country than to build a supra national system

27 Yerima 2017, at 359.
29 Established on 21 January 1959, it is responsible for upholding the fundamental rights enshrined in the European Convention on Human Rights, adopted on 1950 by the Council of Europe, which defines the rights and freedoms that Member States commit to guarantee their citizens. It is composed of a number of judges equal to that of the States that have ratified the Convention (currently 47). Anyone who claims to be a victim of a violation by a State of the provisions of the Convention may lodge a complaint with the Court.
30 Developed by the Inter-American Commission on Human Rights, the American Convention on Human Rights (ACHR) was adopted on 1969 by the Organization of American States (OAS) and entered into force in 1978. With the exception of Canada, from Cuba and some Caribbean states, most states in the Americas have signed the ACHR. The United States signed it in 1977 but has not ratified it yet. So far (November 2011), 24 states have ratified the Convention. Trinidad and Tobago withdrew its membership in 1998. The ACHR not only defends the rights of its own citizens, but also of every person within the jurisdiction of a signatory state. In addition to containing human rights guarantees, the ACHR provides the foundation for the Inter-American Court of Human Rights and defines the activities and powers of the Court as well as the Inter-American Commission on Human Rights. These two organs of the OAS are responsible for the application of the ACHR. For more details, see Katrin Nyman-Metcalf & Ioannis Papageorgiou, Why Should We Obey You?: Enhancing Implementation of Rulings by Regional Courts, 1 African Human Rights Yearbook 167, 177 (2017).
for the protection of human rights. But this delay is going to be bridged by the adoption of African instruments for the protection of Human Rights and the bodies responsible for ensuring respect of Human Rights.

According to Article 3.1 of the Protocol,

> The jurisdiction of the Court shall extends to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instruments ratified by the States concerned.

This formula, which opens a field of indefinite jurisdiction, is inspired by the model of the Inter-American Court of Human Rights, whereas more conventionally the jurisdiction of the European Court only covers the Convention and its Protocols. Similarly, the Court clearly gives the applicants the status of “party’s choice.” This quality, thus, allows any applicant, in particular a non-state applicant to be represented by right directly before the Court by the legal counsel of his choice. Further, legal representation or assistance may be provided free of charge in cases where the interests of justice so require.

Within this framework, the African Court exercises its contentious function vis-à-vis the States Parties recognizing its jurisdiction. In accordance with the provisions of Articles 5.3 and 34.6 of the Protocol, the Court may also receive applications from the African Commission, individuals and non-governmental organizations against such States. There is no doubt that this is a significant development of African human rights law. Undoubtedly, in international law, the recognition of fundamental rights to individuals and peoples has not originally been accompanied by the legal capacity to apply in cases of violation. The consecration of a right of direct or indirect access of private persons (individuals and non-governmental organizations) in the courtroom of the African Court, which is in the overall wake of the recognition of these persons as subjects of international law, is therefore a real juridico-institutional revolution.

In conjunction with this contentious function, the African Court has an advisory function under the provisions of Article 4 of the Protocol and Article 68 of its Rules of Procedure. Requests for opinions are at the initiative of the Member States, the African Union, however, any African Union organ or African organization are recognized by the Union.

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31 Art. 10.2 of the Protocol to the African Charter on Human and Peoples’ Rights.


33 Télesphore Ondo, La jurisprudence de la Cour africaine des droits de l’homme et des peuples: entre particularisme et universalité, 1 African Human Rights Yearbook 244, 246 (2017).

34 Id. at 247.
In carrying out its mission, the Court defines the different actors in this perspective; it guarantees direct confrontation between the alleged victims of human rights violations and the respondent States, while respecting the adversarial principle recognizes the rights of victims to participate in the trial and compensation for the damage caused to them; and guarantees the equality of arms between the parties throughout the proceedings before the Court, and respecting the requirements of a fair trial. In so doing, the Court interprets, irrigates, develops and enriches African human rights law.\footnote{Ondo 2017, at 247.}

For the better protection of Human Rights, the African Court has the greatest freedom since it may order “appropriate orders to remedy the violation, including the payment of fair compensation or reparation,”\footnote{Art. 27.1 of the Protocol to the African Charter on Human and Peoples’ Rights.} one of these possibilities being the payment of a compensatory allowance or compensation. The obligation to give reasons for the Court’s judgments is also fundamental to both the doctrine and the parties. Furthermore, even if the decisions are taken by a majority, the judges will have the possibility to add their individual or dissenting opinion.\footnote{Nyman-Metcalf & Papageorgiou 2017, at 176.} The members of the Commission did not have such freehand.

To avoid any risk of confidentiality as well, another criticism often made against the Commission, “The judgment of the Court shall be read in open court, due notice must be given to the parties.”\footnote{Art. 28.5 of the Protocol to the African Charter on Human and Peoples’ Rights. See Nyman-Metcalf & Papageorgiou 2017, at 177.}

Finally, the States Parties undertake to execute the judgments of the African Court, the follow-up of the execution thereof assigned to the Council of Ministers of the African Union. This solution, more realistic than the one previously adopted by the Charter 7, is closer to that of the procedure in force in the European system, where the execution of judgments rendered by the Court is entrusted to the Committee of Ministers of the Council of Europe. However, beyond this technical density that we observe in the new African system, there are still some limits that could be detrimental to its action.\footnote{Arts. 29 and 30 of the Protocol.}

\subsection*{2.2. The Complementary Relationship with the African Commission}

Together the African Court on Human and Peoples’ Rights with the African Commission on Human and Peoples’ Rights, constitute the African system for the protection of human rights. Within this framework she performs her duties vis-à-vis States Parties and may receive requests from the African Commission, individuals and A-governmental organizations against States having accepted jurisdiction.
First of all, the cohabitation of numerous institutions found to protect and defend Human Rights requires a relationship among the institutions concerned. The principle that controls this relationship is the “principle of complementarity.” Considering firstly the overlapping jurisdictions of the Commission and the Court, also the substantial function the Commission could perform as a party before the Court, a proper understanding of the significance of the principle, as principle of interaction, becomes fundamental. And it is worth mentioning that complementarity is indicated in the preamble to the Protocol as well as in Articles 2 and 8. Article 2 provides that the Court should complement the protective mandate of the Commission, whereas the Preamble mentions the reinforcement of its efforts under its protective mandate. Article 8 provides that:

Rules of Procedure of the Court shall lay down the detailed conditions under which the Court shall consider cases brought before it, bearing in mind the complementarity between the Commission and the Court.

The complementary relationship through fruitful cooperation between the African Court and the African Commission has been shaped by the many successes that are usually achieved by both entities in terms of the protection of Human Rights. Further, recognizing the fact that the isolation can in many cases generate a danger for both entities, they have decided to eliminate the distance. This took the form of joint sessions and consultation sessions. Thus, the Rules of Procedure of the African Commission on Human and Peoples’ Rights states that it shall meet with the Court at least once a year and, if necessary, to ensure good working relations between the two institutions.

The bet of the consecration of the principle of complementarity was to put an end to the sluggishness of the system and to resolutely return with the efficiency for a greater credibility. Thus, the main objective of the complementarity is functional; its purpose is to improve the efficiency and effectiveness of the system. Today, remarkable progress has been made and testifies to the productive nature of the relationship between the African Court and Commission. This progress is palpable especially in terms of their protection mandate.

41 Id.
43 Yerima 2017, at 376.
The Human Rights mandate has certainly been one of the best achievements and one of the greatest beneficiaries of cooperation. The complementarity between the African Court and the Commission has already resulted in the protection of human rights in concrete cases. It is thus with the competence of referral to the African Court by the African Commission that this last paragraph of Article 5 of the Protocol.44

As far as, the advisory opinions are concerned, everything seems to indicate the success of the harmonization of the internal regulations of the two institutions. Indeed, the fear of entanglement or divergence related to the competing jurisdiction of the African Court and Commission in advisory matters remained in the hypothetical state. The African Court has accommodated itself to its advisory role by ensuring respect for the principle of complementarity. Notably through the respect of Article 68(3) of its Rules of Procedure and Article 4(1) of the Protocol which forbid him to intervene on matters whose subject is related to a case pending before the African Commission. To date, it has demonstrated a strict application of this precept.45

The appeal by the African Court with the jurisprudence of the African Commission is also one of the most significant marks of trust between the two entities. The High

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44 The African Commission was thus party to the African Court in already two finalized cases. The first is the African Commission on Human and Peoples’ Rights v. Great Socialist People’s Libyan Arab Jamahiriya case. In this dispute, the African Commission by an application dated 3 March 2011 has in accordance with Article 118(3) of its Rules of Procedure brought an action against the Great Socialist People’s Libyan Arab Jamahiriya alleging serious and massive violations of human rights. Irrespective of the “unsuccessful” outcome of this procedure, the African Commission through this petition truly concretized this aspect of the complementary relations between it and the African Court. See African Commission on Human and Peoples’ Rights v. Great Socialist People’s Libyan Arab Jamahiriya, App. No. 004/2011, Order on Merits of the Application, 15 March 2013; see also Joseph M. Isanga, The Constitutive Act of the African Union, African Courts and the Protection of Human Rights: New Dispensation?, 11(2) Santa Clara Journal of International Law 267, 287–288 (2013); Judy Oder, The African Court on Human and Peoples’ Rights’ Order in Respect of the Situation in Libya: A Watershed in the Regional Protection of Human Rights?, 11(2) African Human Rights Law Journal 495, 497 (2011). The second case to which the African Commission was a party is even more symptomatic of the positive application of complementarity. This is the African Commission v. Libya case. In connection with this dispute, the African Commission, by an application dated 28 February 2013, lodged an appeal against the Libyan state on behalf of Dr. Saif al-Islam Gaddafi alleging “violation of the rights” of the latter by the Libya. This case which led to the condemnation of the Libyan state glorifies the principle of complementarity in two ways. Firstly, it is a simple observation of the effectiveness of the constructive relationship between the two institutions through the use by the African Commission of its right of referral. Complementarity is also revealed because of the individual origin of the referral made by the African Commission. This request is, therefore, the sign not only of the vitality of the principle of complementarity, but also the proof of the rationality and the applicability of the parade to the limitation of the right of direct access of individuals to the African Court. See African Commission on Human and Peoples’ Rights v. Libya, App. No. 002/2013, Order on Merits of the Application, 15 March 2013.

45 For example, in the Socio-Economic Rights and Accountability Project (SERAP), where the Court states that “By letter dated 9 March 2012, the Registrar enquired from the African Commission whether or not the subject-matter of the request is related to any matter pending before the Commission. By letter dated 7 June 2012, the Commission informed the Registrar that the subject matter is not related to any matter before it.” See Socio-Economic Rights and Accountability Project (SERAP), Request No. 001/2012, 15 March 2013.
Court does not hesitate to rely on the jurisprudence of the African Commission to support analyze and provide solutions.\(^{46}\)

The fate of the complementarity between the African Court and the Commission is closely linked to the African system of human rights as a whole. The success of complementarity is assuredly a guarantee of the effectiveness of the system which itself a condition for the success of complementarity.\(^{47}\)

### 2.3. The Winds Do Not Blow as the Vessels Wish: Some Criticisms

It is better than nothing, but unfortunately, “Man does not attain all his heart’s desires.” The Court has been criticized for its effectiveness.

#### 2.3.1. Insufficient Rate of Ratification of the Protocol to the African Charter

Ratification is an essential stage towards achieving the objectives of treaties by States parties. Although it is axiomatic, the question remains: Why should States ratify conventions? This question is linked to the fundamental objective of the partial subject matter, namely the examination of the practice of the States members of the African Union with regard to ratification of the conventions of the Organization, particularly, the Protocol to the African Charter. In fact, within this limited literature, most research focused on state behavior and motivation is based on ratification and compliance with, Human Rights conventions.\(^{48}\) It can be demonstrated that by ratifying the treaty under certain circumstances and motives, the State itself attaches to many other States that may equally wish to adopt human rights norms. There may be a motive for other countries to strengthen their legitimacy, reputation and respect among their peers or even in the broader international community by adopting standards by ratifying the treaty in question and avoiding stigmatization of exclusion as a non-ratified state.\(^{49}\) However, we find to date, only 30 AU Member States have ratified the Protocol. It should be noted that, by comparison, 54 AU Member States have already ratified the Charter.\(^{50}\) We cannot say for sure the reasons.

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\(^{46}\) In the matter of limitation of rights for legitimate interest, the African Court spontaneously convenes the Communications of the African Commission in the *Mtikila v. United Republic of Tanzania* case. The African Court relies on the proportionality measurement technique used by the African Commission to assess the impact, nature and extent of the limitation in relation to the legitimate interest of the State for certain purposes. See *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. United Republic of Tanzania*, App. Nos. 009&011/2011, Order on Merits of the Application, 14 June 2013.

\(^{47}\) Yerima 2017, at 378.


\(^{49}\) Id. at 11.

\(^{50}\) The Protocol was signed in June 1998 and, thirty days after the required fifteenth ratifications by the Union of the Comoros on 26 December 2003, it entered into force on 25 January 2004. To date, the Ouagadougou Protocol has been ratified by 30 AU Member States (Algeria, Benin, Burkina Faso,
They can be for some conceptual. Indeed, the African conception of human rights has a specificity that is rooted in cultural and traditional values. The Charter itself recalls in its preamble that it takes into account “the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples’ rights.”

Thus, the Charter, in its conception, militates in favor of a settlement of disputes concerning human rights through “the institution of the palaver tree.” The latter is nothing other than the African preference for the non-jurisdictional settlement of disputes, which favors methods of amicable settlement through dialogue and consultation. It must be recognized fundamentally that, from the sociological point of view, the African citizen prefers conciliation to the judicial decision with a punitive connotation. The concept of recourse to the Court is hardly acceptable; when you attack an act, the perpetrator considers itself personally targeted. Considering that the Charter has not in itself provided for the establishment of a legal system for the protection of human rights. It preferred to entrust this task to a commission by demanding that it endeavors by all appropriate means to reach an amicable solution. This conception at the origin of the Charter certainly explains its massive ratification, states not being too afraid of their sovereignty. However, the advent of the Ouagadougou Protocol will transform this conception and translate the idea of a real institutionalized justice. Although it provides for the possibility of amicable settlement, the activity of the Court is purely judicial. This difference in the design of the Charter and the Protocol is certainly one of the reasons explaining the states’ infatuation with the ratification of the first and the cautiousness with regard to the ratification of the second.

The low ratification rate of the Protocol can also be explained by limited institutional capacity in some States. It is clear that States are aware of the institutional failures of their judicial system or of their system of protection of human rights in general, which ipso facto will be condemned by the African Court, if the State in question recognizes the competence by ratifying the Protocol. For many, ratification would mean facing an automatic condemnation of the African Court whenever the

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52 Id. at 545–546.
State in question was attacked before it. Thus, some prefer to make the necessary reforms to adapt to international standards, before recognizing the jurisdiction of the African Court.\textsuperscript{53}

2.3.2. The Dilemma of the Execution of the Provisions of the African Court

International regional courts face various challenges. The execution of their judgments is one of the most difficult, because the control mechanisms are often powerless and unsuitable. As a general rule, regional Human Rights conventions provide member countries with a broad initiative for the execution of these judgments. In addition to the absence of punitive provisions sanctioning any deficiency in case of non-performance, the control is in turn devolved to bodies rather political than judicial.

It seems in practice that African countries prefer other solutions over judicial solutions, and are not bound by judicial decisions even in cases where such states have theoretically accepted such obligations. Not only because of the fear of being punished, although this danger plays a role, either directly or indirectly. Cultural norms and beliefs also play a role, where most jurists assume that it is more important than such sanctions. States continue to tend to implement their international obligations voluntarily, with no interference from any on the basis of the principles of international law, especially, the principles of sovereignty. As well, one question for obeying or disobeying rules is the legitimacy of the body that issues decision that determines the propensity to act in accordance with it. The issue is political and not practical. If there is political will, methods will be found to enforce the decisions. States join a society to achieve certain goals and for this purpose renounce part of their sovereignty. In the scope of protection of Human Rights, which are no longer exclusively internal, States are under the influence of many factors that accept such commitments and, to the extent possible, seek to implement them, especially if they do not conflict with the various interests of the State concerned.\textsuperscript{54}

On the one hand, international Human Rights conventions, on the other hand, seem to have assumed in States parties the implementation of their obligations in good faith in accordance with the provisions of international law, granting States full freedom to implement their obligations.\textsuperscript{55} Under Article 30 of the Protocol to

\textsuperscript{53} Diop 2014, at 546.

\textsuperscript{54} Nyman-Metcalf & Papageorgiou 2017, at 183.

\textsuperscript{55} With regard to international law, Article 26 of the 1969 Vienna Convention states: “Every treaty in force is binding upon the parties and must be performed by them in good faith.” This principle also implies that States parties to a treaty cannot avail themselves of obstacles posed by their domestic legal order to avoid the fulfillment of their international obligations. Article 27 of the Vienna Convention states that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” See Gonzalo Sánchez de Tagle, The Objective International Responsibility of States in the Inter-American Human Rights System, 7(2) Mexican Law Review 115, 121–122 (2015).
the African Charter, States Parties undertake to comply with the provisions of the Court and to ensure their implementation in any case to which it is a party within the period determined by the Court. This is not easy, but requires taking into account the circumstances of each State Party concerned with the judgments of the Court and its capacity and willingness to implement those provisions. Nevertheless, the good faith of the States can in no way be regarded as a guarantee of the execution of the decisions of the Court.

The Protocol does not depart from what is customary in the field of monitoring the implementation of the provisions of the international human rights by regional courts. The task of supervising the implementation of these provisions is usually entrusted to political bodies established not even within the framework of Human Rights conventions, but within the framework of the conventions under which they were concluded, such as the Committee of Ministers within the framework of the Council of Europe and the Executive Council within the framework of the African Union, which negatively affects its work in this area. Experience has shown that such devices are rarely subject to political pressures as different in Africa, especially, if we know that the Executive Council of the African Union shall assume this function on behalf of the Conference of African Heads of State and Government only, as provided for in the Protocol and Rules of Procedure of the Court, which shall entrust the oversight of the implementation of the judgments of the Court to the Executive Council. Pursuant to Article 29.2 of the Protocol, this Council shall be notified of the provisions of the Court to monitor its implementation on behalf of the Conference, but with the exception of indicating the time or duration required to implement the provisions, neither the Protocol nor the Rules of Procedure of the Court shall be specified nor indicate how such to the powers of the Executive Board in this area even in cases where the States concerned do not take action to implement the sentences or originally refused. But in principle it can be said that it will follow the general procedures provided for in the Constitutive Act of the African Union and the bylaws of the Executive Board, where it will monitor implementation through the inclusion of provisions on its agenda and discuss them during its meetings that are held twice a year or even at its extraordinary session.56

One of the most important problems in the effective implementation of the provisions of international human rights law – including those of international human rights courts – is the lack of effective means of implementation within the territories of States where human rights are violated, especially since the protection mechanisms adopted so far – international and individual reports and complaints – remains ineffective in the absence of an effective sanctions regime and the absence of international provisions governing sanctions that may result from non-compliance

or rather human rights violations, so that international bodies in charge of protection cannot take any legal action. The Security Council, for example, can adjust these violations in a manner that is a threat to international peace and security. The international sanctions imposed on States for the purpose of protecting human rights, whether they are social, economic, political or even armed, is a work based on Chapter VII of the Charter of the United Nations and implemented by the highest political organ – the Security Council – has failed to carry out such tasks in some countries of the African continent, and the sanctions imposed on Rhodesia and South Africa, but the results were then successive concessions from the white minority for the benefit of the black majority, which was finally able to achieve independence.57

However, previous considerations have not prevented Human Rights workers from trying to find as many different ways of protecting human rights and in applying even the slightest sanctions against Human Rights violators. There are many international sanctions that they can sign in this scope, such as the suspension of economic aids, freezing of funds, the refusal of states to join some international organizations and the provision of conditional assistance to respect human rights. There are even those who stress the importance of publishing and defaming issues related to Human Rights violations, the aim of which is to show these violations to public opinion of the forms of punishment, where the public opinion is really a powerful pressure force may lead to the reversal of such violations. The Protocol does not depart from this trend. The failure to implement the Court’s decisions is to include cases of non-implementation in the annual report of the Court. This latter is obliged, in accordance with Article 31 of the Protocol, to submit to each ordinary session of the Assembly of Heads of State and Government a report containing the work and activities carried out during the year In particular in all cases where States have not complied with the provisions of the Court, contrary to the Charter, which requires the prior approval

57 The Security Council Committee established pursuant to resolution 253 (1968) on Southern Rhodesia was, on the other hand, a subsidiary organ of the Council under Rule 28 of the Provisional Rules of Procedure of Southern Rhodesia. Its composition was initially limited to seven members but was soon enlarged to include all members of the Council. The Committee functioned from 28 October 1968 to 21 December 1979, and during this period it examined the implementing measures, drafted twelve annual reports and a number of special reports for the Council, made recommendations on various aspects of implementation, were informed of several hundred violations reported by governments (in particular the United Kingdom) and non-governmental organizations and examined the detailed analyzes made by the Secretariat on the effects of sanctions on economy of Southern Rhodesia. U.N. Security Council, Security Council resolution 253 (1968) [Southern Rhodesia], 29 May 1968, S/RES/253.

of the Assembly of African Heads of State and Government, to publish the reports of the African Commission Human and peoples.\textsuperscript{58}

With reference to Article 13 of the Constitutive Act of the African Union, we conclude that, in the absence of enforcement, the Assembly may impose the appropriate sanctions of an economic nature such as depriving the State of transport links or contacts with other States or suspending economic ties or sanctions of a political nature such as severing diplomatic relations or even suspension of membership or expulsion from the African Union, which will make this country in isolation from the rest of the other countries.\textsuperscript{59} Nonetheless, we cannot be assured of the role played by the Assembly as one of the principal political organs affected by the political considerations that guide its discussions and decisions, which may weaken its role in monitoring the implementation of the provisions of the Convention and the ineffectiveness of its decisions against States that refuse to implement the decisions of the African Court. On the other hand, since suspension of the membership of the Contracting Party or even expulsion from the Organization final does not achieve the desired goals, especially if there is a continuation of cases of violation and the unresolved issues outstanding in the field of Human Rights.

3. The Merger Court: Advantages and Impediments

3.1. Convergence and Divergence

The question of the merger between the two courts had been debated for the first time in Mauritius, in April 2003, at the meeting of Ministers of Justice which had been organized in order to draw up the draft Protocol of the Court of Justice of the African Union. This discussion was based on the work of the Group of Legal Experts and the Committee of Permanent Representatives, which highlighted the need to streamline the two courts, to reduce the costs of their operation and the existence of two courts with similar skills that could lead to conflicting competencies and contradictory judgments. Verily, the scope of the Court of Justice’s mandate could create interference with the African Court of Human Rights. Articles 3(h) and 4(m) of the Constitution establishing the objective and the principle of protection and respect for Human Rights, the Court of Justice could rule on the inapplicability of these by a Member State. This duality of jurisdiction could pose difficulties including different interpretations and judgments on the same point of law.\textsuperscript{60}

\textsuperscript{58} Fatsah Ouguergouz, La Cour africaine des droits de l’homme et des peuples – Gros plan sur le premier organe judiciaire africain à vocation continentale, 52 Annuaire Français de Droit International 213, 225 (2006).


\textsuperscript{60} Bakandeja wa Mpungu 2008, at 13.
Despite the opinions expressed by some legal experts and members of the Permanent Representatives Committee, the meeting finally decided that the two courts should be separated. On the recommendation of the Conference of Ministers, the Executive Council, followed by the Assembly, decided in July 2003 that the African Court on Human and Peoples’ Rights would be maintained as a separate institution and separated from the African Union Court of Justice. Among the objections raised against the merger, some delegations had mentioned, first of all, the difference in jurisdictional mandates between the two Courts. Of course, the African Court on Human and Peoples’ Rights was created to complement the African Commission, particularly in the scope of Human Rights protection, while the Court of Justice is a broader jurisdiction whose jurisdiction extends to all AU treaties and conventions as well as to all matters concerning international law. Some defenders expressed fear that the merger of the two courts would compromise the African Court’s human rights mandate. On the other hand, some delegations pointed out that an outright merger of the two Courts would require the drafting of a new protocol and a new commitment by African States to submit to this jurisdiction. Further, the merger could also delay the establishment of the African Court of Human Rights since the Court of Justice had not obtained the number of ratifications sufficient to its creation.

Despite objections to the proposed merger, the Assembly finally decided that the African Court on Human Rights and the Court of Justice should be merged into a single Court and asked the President of the Commission to elaborate the modalities for the implementation of his decision in a report to be submitted to it at its next session. In addition, in July 2005, at the Sirte Summit, the Assembly mandated Mr. Mohammed Bedjaoui, Minister of Foreign Affairs of Algeria and former President of the ICJ, to prepare a draft legal instrument on the implementation in headquarter of the Court resulting from that merger.

The draft legal instrument was made and amended by the Algiers Working Group of Jurists from Member States, meeting in Algiers (Algeria) from 21 to 24 November 2005, taking into account observations and comments made by Member States. By a decision of the Executive Council of 24–28 January 2005, the draft legal instrument and the recommendations of the Commission and the Committee of Permanent Representatives relating thereto were referred to a meeting of the Permanent Representatives Committee and governmental legal experts for finalization and presentation to the 7th ordinary session of the Executive Board. However, following

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the meeting of the Committee of Permanent Representatives and Legal Experts from 16 to 19 May 2006, many doubts have remained about the relevance of certain provisions of the “Draft Protocol on the Statute of the African Court of Justice and Human Rights.” The contentious issues were then referred for consideration to the Executive Council which decided to entrust the examination of the legal instruments to a meeting of the Ministers of Justice in order to finalize them and to report to the next ordinary session of the Council in January 2007.65

In fact, the slowness of the negotiations on the institutional merger was partly due to a divergence of views on the formal aspects of the integration of the two courts. Undoubtedly, three options were at the heart of the discussions. The first was to adopt a new Protocol establishing a single Court which would consist of the main elements contained in the Protocol of the African Court and in the Protocol of the Court of Justice. The new Protocol was to replace the existing Protocols, but it would have the disadvantage of delaying the creation of the new Court, since the Protocol of the African Court of Human Rights had already entered into force. However, this option would have the advantage of animating negotiations on the opening of the referral of the African Court to individuals and non-governmental organizations. The second option was to maintain the Protocols of the African Court of Human Rights and the Court of Justice and to adopt a third amended Protocol which would regulate the merger of the two Courts and which would invite states to be parties to the three instruments. This option had the advantage of requesting only the signature of the States Parties to the two previous Protocols, for the entry into force of the amended Protocol. Finally, a third option, considered complementary, was to create, as a matter of urgency, the African Court of Human Rights through the adoption by the Conference of decisions on the terms of office of judges, the seat of the Court, the budget.66 At the end, on the recommendation of the Committee of Permanent Representatives, the first option was retained by the Executive Board, in addition to the third, by which it designated the eleven judges of the African Court of Human and Peoples’ Rights.67

3.2. Granting a Variety of Skills

The jurisdiction of the Court extends to all cases and disputes of a legal nature that are submitted to it and which have as their object all the areas set out in the Protocol relating to the Court of Justice, to which are added the interpretation and the application of the African Charter on Human and Peoples’ Rights, the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter

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on Human and Peoples’ Rights on the Rights of Women or any other human rights instrument to which the States concerned are parties.\textsuperscript{68}

It seems that the Statute of the new Court could improve the jurisdiction of the African system for the protection of Human Rights through current discussions on the extension of the compulsory jurisdiction of the Court to new entities and especially to individuals. Indeed, under Article 31 of the Statute of the African Court of Justice and Human Rights, the following entities could have standing to refer to the Court any violation of human rights: States parties to Protocol, the African Commission on Human and Peoples’ Rights, the African Committee of Experts on the Rights and Welfare of the Child, the African intergovernmental organizations accredited to the Union, the national human rights, natural persons and NGOs accredited to the Union or its organs. This extension of the compulsory jurisdiction of the Court would thus make the African system for the protection of Human Rights a progressive system, like the European system which recognizes the right of individual petition and makes it mandatory for all Contracting Parties. The drafters drew their inspiration from the practice followed by the Security Council, of which a considerable number of its resolutions are addressed, not only by United Nations Member States, but by a plurality of non-state entities. The non-state recipients of Security Council resolutions are entities or actors that include, among others, intergovernmental organizations, rebel movements and individuals – individuals and private legal entities.\textsuperscript{69}

\textbf{3.3. “Killing More Birds with One Stone”: The Multi Advantages Criminal Jurisdiction}

The merger has resulted in the creation of Three Sections: the General Affairs Section, the Human and Peoples’ Rights Section and the International Criminal Section. The first Section is responsible, on the one hand, for disputes between African States and, on the other hand, of the Legal Department of the African Union with its staff. The second Section is a regional court of Human Rights. The third Section is one that is established by the Protocol in Malabo. Under the terms of Article 28A of the Malabo Protocol, according to International Criminal Section, it is competent \textit{ratione materiae} to deal with fourteen international crimes: genocide, crimes against humanity, war crime, crime related to the change unconstitutional change of Government, piracy, terrorism, mercenary activities, corruption, money laundering, trafficking in persons, illicit trafficking of drugs, illegal traffic of hazardous wastes, illicit exploitation of natural resources and the crime of aggression. The enumeration of these crimes is not exhaustive. Article 28.2 provides that the list of

\textsuperscript{68} Art. 28 of the Protocol on the Statute of the African Court of Justice and Human Rights.

\textsuperscript{69} Udombana 2014, at 201–202.
the above-mentioned crimes may be updated in the light of the development of international law.\textsuperscript{70}

The quest for a regional court competent with respect to international crimes which have been politically motivated by the conflicts that have arisen, on the one hand, between the African Union and the International Criminal Court about its focus on Africa and, on the other hand, between the African Union and the European Union, on the misuse of universal jurisdiction by the courts some of the Member States of this organization with respect to Africans in general, and of their leaders, especially.\textsuperscript{71}

Article 4(h) of the AU Constitutive Act provides in fact,

the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.

More, Article 4(o) affirmed, \textit{inter alia}, to reject impunity. Thus, in the legal view, we can say that the constitutive Act of the AU provides an implicit traditional basis for the establishment of an African criminal court in which the International criminal division is embodied. Although these articles do not provide for a strict legal obligation to establish a court, they demonstrate the African Union’s acceptance that it has an obligation to prevent the punishment of international crimes.\textsuperscript{72}

The advantage of the new Court is its permanence which allows overcoming the long process that characterized the implementation of hybrid courts. The permanent


\textsuperscript{71} While not excluding the possibility that the \textit{Al Bashir} case, for example, has exacerbated the desire of Africa to pursue international crimes, it considers that it is misleading to conclude that on this episode that is the basis for the search for the International Criminal Court in Africa. According to him, the possibility of establishing a regional Criminal Court had already been attempted – before later – be rejected during the drafting of the African Charter of the rights of man and of peoples in the early 1970s, mainly as a mechanism to fight against the regime of apartheid in South Africa which the U.N. General Assembly had in 1966 labelled a crime against humanity, a determination affirmed by the Security Council in 1984. See Ademola Abass, \textit{Historical and Political Background to the Malabo Protocol} in \textit{The African Criminal Court: A Commentary on the Malabo Protocol} 15–16 (G. Werle & M. Vormbaum (eds.), The Hague: Asser Press, 2017); Kelly Lekkerkerker, \textit{The African Quest for an Inter-African Jurisdiction: Looking Beyond the International Criminal Court Versus African Debate}, Master’s Thesis, Leiden University (2017), at 4; Ademola Abass, \textit{The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects}, 60(1) Netherlands International Law Review 27, 49–50 (2013); Smis & Amani Cirimwami 2017, at 322.

\textsuperscript{72} On the basis of the same provisions, the African Union established the Committee of Eminent African Jurists to reflect on the prosecution mechanisms of Hissène Habré, in particular recommended that the African Court extend its jurisdiction to Criminal cases to ensure that Africa can act in a timely and massive Human Rights violations. Abass 2017, at 16–17; Smis & Amani Cirimwami 2017, at 322.
nature could meet the urgent and imperative necessity to achieve human justice at the time of the victims or, at the very least, reduce the gap between the two. To some extent, the merged Court could be a bulwark in situations where lack of will policy to establish a hybrid Court, or in situations where local actors are opposed to the creation of such a court. This is the only condition that the goals of transitional justice, including, to bring to justice those responsible for serious violations or bring justice and dignity to victims could be achieved. Another advantage is skill. The regionalization of international criminal law also makes it possible to extend the catalogue of crimes for which the merged Court, in its International Criminal Section, will exercise its jurisdiction, while preserving the four main crimes of international law: war crimes, crimes against humanity, genocide and the crime of aggression. This provides a definite advantage relating to the jurisdiction 
\textit{ratione materiae} which brings back in its material field almost all situations where the quest for justice would call for creating a new internationalized or hybrid criminal jurisdiction in Africa.

Among the new regional crimes, it should highlight the crime related to the unconstitutional change of Government. The exercise of jurisdiction of the Court with respect to this crime is particularly interesting.

Actually, the jurisdiction 
\textit{ratione personae} is advantageous – in some ways – in that the Protocol in Malabo provides for the criminal liability of companies. This is still an important innovation in the field of criminal justice International. To date, international criminal courts are hardly interested in the question of the criminal liability of legal persons. Articles 9 and 10 of the international military Tribunal Statute allowed it to declare criminal any group or organization to which the accused belonged, in consequence of which others could be prosecuted for their adherence to this group or organization. In cases tried by the Court and later proceedings in respect of Act No. 10 of the board of control, a number of organizations have thus

\footnote{For example, the victims of the crimes of Habré from 1982–1990 witnessed the creation and the operationally of the Extraordinary African chambers within the Senegalese courts (EAC) between 2012 and 2013. It is same for the victims of the atrocities committed since 2003 in the car which, to date, expect that the Special Criminal Court in Central African Republic (SCC) actually begins its work. Is that – to quote the judge of the ICJ Antônio Trindade – time of victims do not seemed has not be human justice in both hybrid courts. Human justice thus ran, taking often more time than a human life. Smis & Amani Cirimwami 2017, at 324–325.}

\footnote{Id. at 325.}

\footnote{It is worth mentioning that the circumstances which led to the creation of EAC and the SCC have for origin of the facts that could be described as “unconstitutional change of Government.” Indeed, on 7 June 1982, Hissène Habré and the Forces armies of the North, a rebel movement led by him, overthrew the Government of Union national transient headed by Goukouni Weddeye and took the direction of Chad. It is from this reign that the crimes of which he was accused were committed. Rather, it is the coup of 2003 François Bozizé challenged by Michel Djotodia which marked the beginning of several civil wars in the car, before the violent rise to power in 2013 of the rebels of the Seleka and the escalation of violence that had ensued between ex-Séléka and anti-Balaka. However, it appears from the statutes of the CAE and the C.P.S. this crime of unconstitutional change of Government is not the jurisdiction of these courts. Id. at 326.}
been designated as criminals, but in the end, only physical people have been tried and punished.\(^\text{76}\)

The complementarity between the merged Court and the national courts is also a major asset. The Malabo Protocol enshrines the principle of complementarity, whereby the new Court intervenes when the State party concerned cannot, and will not prosecute international crimes committed on its territory, thus leaving the priority for the national court at the same time; Article 46H of the Malabo Protocol introduced a new order of jurisdiction: the course of regional communities. This article provides that

The jurisdiction of the Court shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities.

This is an incentive to the domestic courts and sub-regional to develop their own capacity to pursue and deal with serious crimes. The implementation of this complementarity allows us to participate in the national systems and sub-regional systems, to strengthen in order to better provide for the Suppression of all crimes for Court is competent.\(^\text{77}\)

### 3.4. Some Challenges

As mentioned above, the African Court of Justice has not been operating to date. It was born dead out of the womb of the African Union, therefore we cannot assess its role or even criticize it. As for the African Court of Human Rights, it has faced some criticisms concerning the question about its effectiveness, which makes us inquire about the ability of the merged Court to avoid the same criticisms.

#### 3.4.1. The Defy Related to Ratification

The Protocol shall be open for signature, ratification or accession by Member States of the African Union in accordance with their respective constitutional procedures.\(^\text{78}\)

For some delegations, the content of the Protocol is not exactly the same as that of the two existing Protocols and the new provisions should be re-examined as part of the ratification. Other delegations felt that the choice should be given to other Member States that had already ratified the two existing Protocols, including the

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76 Neither the T.P.I.Y. nor the T.P.I.R. not have been granted jurisdiction over legal persons. However, the special chambers responsible for serious crimes committed in East Timor, the EAC or the SCC, have not been filled. The authors of the Rome Statute had found that opinions diverge are deeply as to whether to include in the Statute the criminal responsibility of legal persons and, despite the proposals made in this sense, the final text contains no provision on the issue. Smis & Amani Cirimwami 2017, at 327–328.

77 Id. at 330.


The Protocol and the Statute of the African Court of Justice and Human Rights shall enter into force thirty days after the deposit of the instruments of ratification of fifteen Member States.\footnote{Art. 9.1 of the Protocol on the Statute of the African Court of Justice and Human Rights; Art. 11.1 of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.} One of the problems that are readily apparent is that some States that are parties to the Human Rights Protocol, for whatever reason, do not wish to ratify the Protocol, will not have to appear before the new Court.\footnote{Udombana 2014, at 193.} Moreover, the number of ratifications required for the entry into force of the Protocol has not been completed. Only six countries to this day have ratified it.\footnote{Benin (28 June 2012), Burkina Faso (23 June 2010), Congo (14 December 2011), Libya (6 May 2009), Mali (13 August 2009), Liberia (23 February 2014).} We cannot say whether the Protocol will achieve a high percentage of ratifications or not. We do not mean the percentage required entering into force, but we mean to go beyond the stipulated rate to avoid criticism of the weak ratification rate that the African Court of Human Rights faced.

3.4.2. The Compulsory Implementation of the Judgments of the Merged Court

Admittedly, the implementation of the judgments of the African Court of Human and Peoples’ Rights is essentially voluntary. However, the follow-up of the execution of the Court’s judgments is entrusted, in accordance with Article 29.2, to the executive Council of ministers and the Court submits to the Assembly, at each ordinary session, an annual report of its activities which, in particular, cases where a State has failed to comply with the decision of the Court.\footnote{Art. 31 of the Protocol to the African Charter on Human and Peoples’ Rights.} No measure of constraint is therefore provided for in the Ouagadougou Protocol to ensure the execution of the Court’s judgments. The review of the provisions of the Statute Protocol of the new Court reveals a significant improvement by extending the provisions on the binding force of the judgments of the Court of Justice contained in the 2003 Protocol to all judgments of the new Court, including those relating to the violation of Human Rights. Indeed, if a party to the dispute does not execute the judgment of the Court, the latter may refer the case to the Conference, which may decide on the measures to be taken in order to give effect to the decision, including the imposition of sanctions under Article 23.2 of the Constitutive Act of the African Union.\footnote{Art. 47 of the Statute of the African Court of Justice and Human Rights.}
In a positive sense, the merger would make it possible, on the one hand, to reduce the costs related to the functioning of the organs of the African Union as well as to reduce the risks of conflicts of competence between the jurisdictional organs of the Union and on the other hand, to introduce into the institutional framework of the Constitutive Act of the AU, a section on Human Rights. In addition, it would be likely to improve the African system for the protection of human rights and peoples through the possibility of opening the referral to the Court to individuals and NGOs and through the extension to the section of human rights of the possibility of sanctioning the failure of States to execute judgments of the Court.

Conclusion

It seems that the merged court could increase the effectiveness of the AU’s Judicial function in general and the protection of Human Rights on the African continent, in particular, if it has the capacity to receive and deal with individual requests and whether the merger carried out ensures a faster and activated African jurisdiction, thanks to an economy of material and financial means. Thus, the future of the Court of Justice of the African Union and of the African Court of Human Rights is for the moment uncertain because it is at the heart of national reticence concerning the submission of States to the verdict of a regional court and thus the question of the abandonment of certain elements of sovereignty in favor of a supranational structure.

It is not a secret that the execution of judicial decisions at the state level is not always guaranteed due to numerous inter alia political interferences. At the level of a jurisdictional body such as the AU Court of Justice, this issue will be very acute, especially if human rights violators are heads of State in office and even outgoing heads of state.

Africa plagued by wars and other repetitive political convulsions as the internal wars or rebellions, inter-state wars masked by supporters of rebel movements, insurgent movements against established powers, Which cause many damage and massive violations of human rights, needed a jurisdiction to track down all human rights violators. The heads of state of the AU have understood this by deciding to establish the Court of Justice of the African Union. It will be merged with the current African Court of Human and Peoples’ Rights. The continent is thus endowed with an important instrument, not only for the protection of human rights but also for the administration of an independent Pan-African justice, in the aim of the construction of the rule of law and the consolidation of democracy. The objective is to put an end to the reign of impunity that has long characterized Africa. It is desirable that this merged Court should not be diluted in the African Court of Human and Peoples’ Rights which has only specialized competence and limits on the enforcement of its decisions, whereas the new Court of the Union has a General competence in the interpretation of Community law (right of treaties and secondary law).
The permanent character of the new Court, in its International Criminal Section coupled with the other benefits described, presents more advantages for the achievement of transitional justice. Even more so, if hybrid jurisdictions were preferred because they were less costly and operating directly in the conflict-affected country and with the affected population, the court’s permanence still reduces the cost of setting up future jurisdictions and nothing in its statute or in the Malabo Protocol precludes it from organizing its roaming procedures or trials in either country affected by the crimes.

Finally, we are keen to stress that the legal rule whether not applied or breached does not negate its existence and origin as a legal rule that associated with a material penalty for whom violates thereof. At the African regional level, especially in the field of human rights; there are several regional conventions. The latter will lose much of their effectiveness unless there is a real judicial guarantee in case of violation. However, the regional courts itself are at risk of losing their effectiveness unless they respect the new Court’s judgments. Thus, the merger shall not only aim to reduce expenses, but the best outcome for human rights is to ensure implementation of the judgments of the new Court.

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