THE INSTITUTIONAL STRUCTURE OF THE AFRICAN UNION: A LEGAL ANALYSIS

NSONGURUA J. UDOMBANA†

> Just because we cannot see clearly the end of the road, . . . that is no reason for not setting out on the essential journey. On the contrary, great change dominates the world, and unless we move with change we will become its victims.[1]

I. INTRODUCTION

Society is not static but dynamic as well as organic. It is made up of both structure and system. The structure determines the parts that are contained in it. The system determines how those parts interact with each other. Law is social purpose actualizing itself. Law participates in society's self-forming and in human self-socializing by retaining past acts of social willing with a view to their actualizing into future social willing. It organizes the hold of the social past on the social future by organizing the hold of the social future on the social past. The human situation is not a condition but a conjuncture. Hence, the future is determined by the flowing conjuncture of society that is the ever-changing result of an infinite number of actualities emerging from an infinite number of possibilities. As Philip Allot puts it,

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† Senior Lecturer, Department of Jurisprudence and International Law, University of Lagos, Nigeria; former visiting Research Fellow, The Danish Institute for Human Rights, Copenhagen, Denmark; LL.M., LL.B. (Lagos); udombana@hotmail.com. The author, who is a member of the Nigerian Bar and of the Nigerian Society of International Law, has written and published extensively on African international legal problems in journals such as the Nigerian Journal of Public Law, American University International Law Review, Indiana International and Comparative Law Review, Lesotho Law Journal, Boston University International Law Journal, Yale Human Rights and Development Law Journal, and Human Rights Quarterly. Also, the author has forthcoming works in the American Journal of International Law, Michigan Journal of International Law, Emory International Law Review, Brooklyn Journal of International Law and Zambia Law Journal. The author wishes to thank the editors of the California Western International Law Journal for their excellent editing and the library staff of the Danish Institute for Human Rights, particularly Karen Thylstrup, for their invaluable assistance in locating vital documents. Any remaining error is the responsibility of the author.

1. Arthur J. Olsen, *Kennedy Exhorts the Poles to Further U.S.-Soviet Friendship*, N.Y. TIMES, July 2, 1964, at C6 (quoting Robert F. Kennedy, Farewell Statement at Warsaw, Poland (July 1, 1964)).

"[t]he present that was the future in society's past becomes . . . the past of society's next future."[2]

This brief abstract on the sociology of law is needed to indicate, for example, how requirements of national life have compelled municipal legal systems to recognize unincorporated associations as legal persons[3] and how international law is also being influenced by requirements of changing international life. One example of the latter is the increasing growth of international institutions or organizations over the last six or so decades, mostly political bodies, "charged with political tasks of an important character, and covering a wide field."[4] These institutions have become "active performers upon the world stage"[5] and have grown rapidly in recent years due, essentially, to the increasing need for cooperation among nation-states based on international norms. They provide a web of relationships that shape and channel social interactions, taking over many functions that, previously, were monopolistically regulated by States—such as control over currency, passports and borders.[6]

Norms are, of course, a part of international institutions, establishing ground rules and roles and meanings to constitute, constrain, shape and enable States and non-state actors.[7] Indeed, the modern international system is not "anarchic," if that term is used in the Hobbesian sense to connote the absence of an actor with legitimate authority to tell States what to do. States no longer carry out mutual intercourse in a chaotic manner, without any regard for common rules. Thus, while international institutions or organizations afford the necessary opportunity for mutual intercourse, they also provide means for international "governance"—defined as the ability to set priorities and use power to realize them.[8] Although governance among sovereign and equal States has been regarded as "governance without government,"[9] the conduct of States in modern society is determined by certain principles and procedures.

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2. Philip Allott, *Reconstructing Humanity—New International Law*, 3 E.J.I.L. 219, 224 (1992). *See generally* PHILIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD (1990).

3. *See, e.g.*, Knight and Searle v. Dove, 2 Q.B. 631 (1964). In the absence of a constitutional system, the primary test for recognizing such associations is that of functionality. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 678 (6th ed. 1998).

4. Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 179 (Apr. 11).

5. MALCOLM SHAW, INTERNATIONAL LAW 890 (1997) (discussing the approaches to international institutions).

6. JACK DONNELLY, REALISM AND INTERNATIONAL RELATIONS 131 & 141 (2000).

7. *See id.* at 131. *See generally* C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANISATIONS (1996); H.G. SCHERMERS & N.M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW (1995).

8. *See* Elisabeth Zoller, *Institutional Aspects of International Governance*, 3 IND. J. GLOBAL LEG. STUD. 121, 122 (1995).

9. *See generally* GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS (James N. Rosenau & Ernst-Otto Czempiel eds., 1992).

International institutions also enable States to know what to expect from each other. This allows them to routinely foresee and predict each other's responses and to adjust their conduct to the behavior of their counterparts. "This pattern of mutual expectations and reciprocal behavior represents the very fabric of the international order."[10] It may be predicted that as long as the nation-state remains the community in which most men and women envision fulfillment of their social needs, nation-states will continue to find ways to carry on their day-to-day intercourse in an orderly and predictable fashion. This is the role for which States have chosen to use international law as the fundamental institution of international society. It is also for this purpose that international law can be regarded as a serviceable instrument.[11]

The above assertions hold true for the defunct Organization of African Unity (OAU), which was established *via* a Charter (OAU Charter)[12] by the independent African States to promote inter-African cooperation in the fields of economics, culture, science and technology.[13] However, on July 11, 2000, the OAU adopted the Constitutive Act of the African Union (AU Act)[14] to replace the OAU Charter.[15] The AU Act, which established the African Union (AU), was ratified with asthmatic breathlessness and entered into force on May 26, 2001,[16] less than one year after its adoption. As of September 26, 2002, all former Member States of the OAU have ratified the AU Act, with the exception of Guinea-Bissau and Madagascar, though these two countries signed the Act on July 12, 2000.[17] It may be predicted that these countries will ratify the Act in the coming months, not years.

The OAU was formally dissolved[18] on July 9, 2002, during the last (38th) ordinary session of the OAU Assembly in Durban, South Africa.[19]

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10. *See* Zoller, *supra* note 8, at 122.

11. *See* JAMES BRIERLY, THE LAW OF NATIONS 78 (1949) (6th ed. 1963).

12. The Charter of the OAU was adopted in Addis Ababa, Ethiopia, on May 25, 1963. *See* Charter of the Organization of African Unity, May 25, 1963, 479 U.N.T.S. 39, 2 I.L.M. 766 (entered into force Sept. 13, 1963) [hereinafter OAU Charter].

13. *See id.* art. II(2).

14. *See* Constitutive Act of the African Union, July 11, 2000, CAB/LEG/23.15 (entered into force Sept. 13, 1963) [hereinafter AU Act], *available at* http://www.au2002.gov.za/docs/key_oau/au_act.pdf (last visited Nov. 4, 2002).

15. *Id.* art. 33(1).

16. The AU Act was adopted on May 26, 2001. *See id.* art. 28 (providing that the Act shall "enter into force thirty (30) days after the deposit of the instruments of ratification by two-thirds of the Member States of the OAU").

17. *See* African Union, *List of Countries Which Have Signed, Ratified/Acceeded to the Constitutive Act of the African Union (as at Sept. 26, 2002)*, CAB/LEG/23.15, *available at* http://www.africa-union.org/en/docs/CONSTITUTIVE%20ACT.pdf (last visited Jan. 4, 2003).

18. There is an implied power, in the absence of any express contrary provision in the constituent instrument, in the members of an international institution to dissolve it. The decision to dissolve an international institution need not be unanimous; rather, it is sufficient that a substantial majority supports the decision. *See* I.A. SHEARER, STARKE'S INTERNATIONAL LAW 565 (1994).

The AU was formally launched during the same period, holding its first session between July 9 and July 10, 2002, also in Durban, South Africa. With the launching of the AU, the OAU ceased to be an umbrella international organization for collective Africa. However, during the rites of passage, the AU Assembly sang *nunc dimittis*[20] for the OAU, praising it "as a pioneer, a liberator, a unifier, an organizer, and the soul of [the African] continent."[21] The Assembly also praised the founding leaders of the OAU for "their tenacity, resilience and commitment to African Unity" and for standing "firm in the face of the decisive manipulations of the detractors of Africa and [fighting] for the integrity of Africa and the human dignity of all the peoples of the continent."[22]

The AU Assembly, however, acknowledged that there are still promises to keep and miles to go in actualizing true political and economical emancipation of the continent. Consequently, the present leaders rededicated themselves "more resolutely" to the principles and objectives of the OAU "and to the ideals of freedom, unity and development which the founding leaders sought to achieve in establishing the Organization."[23] The only obstacle is that transition from the OAU to the AU may not necessarily mean a transition of current leaders, many of whom ran the OAU as a mutual admiration club. These dictators, despite the eulogy, brought their respective countries to their knees due to bad governance, mismanagement and corruption.

This article undertakes a legal analysis of the institutional structure of the AU. It will compare these institutions with their equivalents in other sub-regional and supra-regional institutions, notably the institutions of the European Union (EU), to identify areas of strength and weakness. In Part II, the article will adopt a bird's eye-view of the AU Act, rather than a close-up or nuance picture. It will also briefly deal with the question of legal status of the new body. Part III examines the Organs of the Union and proposes ways of strengthening these Organs. In other words, suggestions are embedded in the analysis. Part IV looks at the relationship between the AU, Member States and their institutions, before concluding in Part V.

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19. *See* UN Secretary-General Kofi Annan, Address at the 38th Assembly of Heads of State and Government of the OAU (July 8, 2002), *at* www.au2002.gov.za/docs/speeches/anna087a.htm.

20. *See Luke* 2:29-2:35 (KJV) (a farewell song of Simeon during the rite of purification of Jesus).

21. *Durban Declaration in Tribute to the Organization of African Unity and the Launching of the African Union*, Assembly of the AU, 1st Ord. Sess., ¶ 14, A.U. Doc. ASS/AU/Decl. 2(I), Durban, South Africa (2002), *available at* http://www.africa-union.org/en/news.asp?newsid=175 (last visited Nov. 4, 2002) [hereinafter *Durban Decl.*].

22. *Id.* ¶ 13. The Assembly also paid tribute "to all the Secretaries General and all the men and women who served the OAU with dedication and commitment." *Id.*

23. *Id.* ¶ 14.

II. THE GENERAL STRUCTURE OF THE AU ACT AND THE QUESTION OF LEGAL PERSONALITY

A. A Brief Overview of the AU Act

The AU Act establishes the AU as a political, economic and social organization and provides the basis of its operation.[24] The AU replaced the OAU,[25] meaning that, as successor,[26] it takes over the rights, powers and obligations of the OAU.[27] The provisions of the AU Act, however, are not very clear, especially regarding the nature of the Union. The AU Act provides only a skeletal framework, leaving behind many issues that must be fleshed out. Also, the AU is modeled almost entirely on the EU, which grew out of its unique historical and political epoch.[28] It is, in this respect, the work of craftsmen, not artists—craftsmen copy; artists create. The provisions of the AU Act also mirror those of the Treaty Establishing the African Economic Community (AEC Treaty)[29]—ratified by all but seven African countries (excluding Morrocco)[30]—which also reflects the European model; there is, in-

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24. *See* SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES, 1945-1986, at 181 (1989) (describing whether the constitutive instrument of an international organization is a treaty or a constitution); *see also* TETSUO SATO, EVOLVING CONSTITUTIONS OF INTERNATIONAL ORGANISATIONS 163 (1996).

25. *See* AU Act, *supra* note 14, art. 33(1).

26. Note that succession between international organizations may occur in a number of different forms. It may be by replacement, as the replacement of the League of Nations by the United Nations or, as in this case, the replacement of the OAU by the AU; by absorption, like the absorption of the International Bureau of Education by UNESCO; by merger; by effective secession of part of an organization; or by a simple transfer of functions from one organization to another. *See* SHAW, *supra* note 5, at 390. Succession may also be express or implied. For the doctrine of implied succession, see International Status of South-West Africa, 1950 I.C.J. 128 (July 11) (holding, *inter alia*, that where an international organ, which is discharging certain functions in the international sphere, is dissolved, and the continued execution of those functions has not been provided for by treaty or otherwise, then those functions may automatically devolve on an international organ).

27. Note that succession of an institution to powers of another that has ceased to function involves different considerations from that of a reconstituted organization. For further discussion on succession, see generally P.R. MYERS, SUCCESSION BETWEEN INTERNATIONAL ORGANISATIONS (1993); H. Chiu, *Succession in International Organisations*, 14 INT'L & COMP. L.Q. 83 (1965).

28. Formerly known as the European Economic Community, the EU was formed to ensure stability, following two world wars, and to counterbalance the strength of Germany and defend Western Europe against the political threat from the east. *See* VISIONS OF EUROPEAN UNITY 184-85 (Philomena Murray & Paul Rich eds., 1996) (discussing ideas of European unity, from the inter-war period to the present).

29. Organization of African Unity Member States: Treaty Establishing the African Economic Community, *adopted* June 3, 1991, 30 I.L.M. 1241 (entered into force May 11, 1994) [hereinafter AEC Treaty].

30. Forty-six African countries have ratified the AEC Treaty. *See* African Union, *List of Countries Which Have Signed, Ratified/Acceded to the Treaty Establishing the African Economic Community (as at Sept. 26, 2002)*, CAB/LEG/28.1, *available at* http://www.africa-union.org/en/docs/AFRICAN%20ECONOMIC%20COMMUNITY.pdf (last visited Jan. 4,

deed, overlapping of elements. The AU Act, however, differs from the OAU Charter in important respects. For example, whereas anti-colonialism and securing national sovereignty were the ideological background and battleground of the OAU,[31] the AU is heading toward a transnational organization that includes political, social and economic integration. The list of objectives and principles in the AU Act is also more comprehensive than its equivalent provisions in the OAU Charter.[32] For example, whereas the OAU Charter contains seven principles, the AU Act contains sixteen.[33]

The AU Act has thirty-three articles, besides its Preamble, which, though not part of its substantive provisions, can be taken into consideration when interpreting the Act.[34] Although Article 2 establishes the Union,[35] in accordance with relevant provisions of the Act, the articles relevant to its existence are Articles 27 and 28, providing for signature, ratification and accession as well as entry into force. The AU Act contains two major segments: the normative (which also includes some miscellaneous provisions as well) and the institutional. The first segment is briefly highlighted in this portion of the article. The second is the subject matter of the article and will be taken up in detail later.[36]

Articles 3 and 4, containing objectives and principles, form the normative portion of the Act and introduce areas of cooperation among Member States. The Act, indeed, has many aims, but its general intent is to transform "the existing institutional framework [of the OAU and AEC] into a qualitatively higher form of integration and cooperation that would better meet the aspirations of the peoples of Africa for greater unity and solidarity in line with the vision of the Founding Fathers."[37] The Act, for example, eulogizes

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2003). Djibouti, Equatorial Guinea, Gabon, Madagascar, Somalia and Swaziland have signed but have not yet ratified the AEC Treaty. *Id.* Eritrea is the only country that has neither signed nor acceded to the Treaty. *Id.*

31. *Cf. Durban Decl.*, *supra* note 21, ¶ 2 (intending that "[t]he main objectives for establishing the organisation were, inter alia, to rid the continent of the remaining vestiges of colonisation and apartheid; to promote unity and solidarity among African States; coordinate and intensify cooperation for development; for the defence of sovereignty, territorial integrity and consolidation of the independence of African States, as well as promoting international cooperation within the framework of the United Nations").

32. *Compare* AU Act, *supra* note 14, arts. 2-4 *and* OAU Charter, *supra* note 12, arts. I & II.

33. *Compare* AU Act, *supra* note 14, art. 4 *and* OAU Charter, *supra* note 12, art. III.

34. *See, e.g.*, Vienna Convention on the Law of Treaties, *adopted* May 22, 1969, art. 31, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980), *reprinted in* 63 AM. J. INT'L L. 875 (1969) [hereinafter Vienna Convention] (providing that the context for the purpose of the interpretation of a treaty shall be, *inter alia*, its preamble). Consideration of the preamble is normally necessary in cases of doubt.

35. *See* AU Act, *supra* note 14, art. 2 (providing that "[t]he African Union is hereby established in accordance with the provisions of this Act").

36. *See infra* Parts II & III.

37. OAU, *Report of the Second Meeting of Legal Experts and Parliamentarians on the Establishment of the African Union and the Pan-African Parliament*, SIRTE/Exp/Rpt (II) [hereinafter *Rep. of Legal Experts*], para. 18.

Member States' determination "to take all necessary measures to strengthen our common institutions and provide them with the necessary powers to enable them to discharge their respective mandates effectively."[38]

Article 3 spells out the purposes of the Union, including achievement of "greater unity and solidarity between the African countries and the peoples of Africa;"[39] defense of "sovereignty, territorial integrity and independence of its Member States;"[40] and acceleration of "the political and socio-economic integration of the continent."[41] Other objectives include: promotion and defense of "African common positions on issues of interest to the continent and its peoples;"[42] promotion of "peace, security, and stability on the continent;"[43] promotion of "democratic principles and institutions, popular participation and good governance;"[44] and establishment of "the necessary conditions which will enable the continent to play its rightful role in the global economy and in international negotiations."[45] These, indeed, are important objectives so long as they are not ends in themselves, but means to an end—providing direction for the gradual realization of the objectives contained in the AU Act.

Article 4 contains the principles upon which the Union will function, such as "sovereign equality and interdependence among Member States of the Union;"[46] "peaceful resolution of conflicts;"[47] "non-interference by any Member State in the internal affairs of another;"[48] and "respect for democ-

38. AU Act, *supra* note 14, pmbl.

39. *Id.* art. 3(a).

40. *Id.* art. 3(b).

41. *Id.* art. 3(c); *cf.* Treaty on European Union, Feb. 7, 1992, 31 I.L.M. 247, art. 2 (entered into force Nov. 1, 1993), *reprinted in* EUROPEAN UNION LAW: DOCUMENTS 1 (Frank Emmert ed., 1999) [hereinafter EU Treaty] (providing that the objectives of the Union shall be, *inter alia*, "to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty").

42. AU Act, *supra* note 14, art. 3(d).

43. *Id.* art. 3(f).

44. *Id.* art. 3(g).

45. *Id.* art. 3(i).

46. *Id.* art. 4(a).

47. *Id.* art. 4(e). *See generally* Tunde Adeniran, *Pacific Settlement Among African States: The Role of the Organization of African Unity*, 2(2) CONFLICT Q. 12, 14 (1981).

48. AU Act, *supra* note 14, art. 4(g); *cf.* CHARTER OF THE UNITED NATIONS, June 26, 1945, art. 2, paras. 4 & 7, 59 Stat. 1031, T.S. 993 (entered into force Oct. 24, 1945), *amended by* G.A. Res. 1991 (XVIII) of Dec. 17, 1963, 557 U.N.T.S. 143 (entered into force Aug. 31, 1965), *and* G.A. Res. 2101 of Dec. 20, 1965, 638 U.N.T.S. 308 (entered into force June 12, 1968), *and* G.A. Res. 2847 (XXXVI) of Dec. 20, 1971, 892 U.N.T.S. 119 (entered into force Sept. 24, 1973) [hereinafter UN CHARTER]; Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco, 1923 P.C.I.J. (ser. B) No. 4, at 24-25; Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950 I.C.J. 65, 70-71 (Mar. 30); Case of the S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 18-20 (Sept. 7); Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 274-75 (Nov. 20); Minquiers and Ecrehos Case (Fr. v. U.K.), 1953 I.C.J. 47, 52 (Nov. 17). The literature on the subject is legion. *But see* EDWIN

ratic principles, human rights, the rule of law and good governance."[49] The non-interference principle has always been the bedrock of the continental organization and was held by Member States as sacrosanct. This rendered the OAU irrelevant to the needs of Africans, as the body became aloof to the brutal and repressive regimes of many Member States; the OAU looked "the other way" while its members were literally roasting and putting heavy yokes on their citizens.[50] Happily, the international community no longer holds the principle as sacrosanct.[51]

The AU Act also enshrines the sanctity of colonial boundaries[52]—*uti possidetius juris*.[53] It has been argued that *uti possidetis* was intended to serve both an external and internal purpose; "externally, it would seek to prevent irredentist tendencies by neighbors from turning into territorial claims and the possible use of force. Internally, it would give clear notice to ethnic minorities that secession or adjustment of borders was not an option."[54] The truth, however, is that it is presently difficult to reconcile *uti possidetis* with a project whose ultimate purpose is to move the continent towards a more integrated entity.

This portion of the article will not discuss the provisions of the AU Act on the Organs because this will be the focus of the next section. There are, however, other important provisions, such as those relating to sanctions on any Member State that defaults in the payment of its contributions to the budget of the Union—which has been the bane of the OAU—or fails to comply with decisions and policies of the Union. The sanctions dictated by the AU Act are similar to those of a typical social club, providing that:

DICKINSON, THE EQUALITY OF STATES 260-64 (1972); INGRID DELUPIS, INTERNATIONAL LAW AND THE INDEPENDENT STATE (1974); *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8082 (1970).

49. AU Act, *supra* note 14, art. 4(m). *See generally* JAMES G. MARCH & JOHAN P. OLSEN, DEMOCRATIC GOVERNANCE (1995) (describing an agenda of how individuals and societies can achieve institutions that make politics civil and capable).

50. *See generally* A. Bolaji Akinyemi, *The Organization of African Unity and the Concept of Non-Interference in Internal Affairs of Member-States*, 46 BRIT. Y.B. INT'L L. 393 (1972-73) (discussing how the effectiveness of the OAU could be improved if the OAU stops hiding behind the non-interference clause of Article III(2)); Obi Okongwu, *The OAU Charter and the Principles of Domestic Jurisdiction in Intra-African Affairs*, 13 INDIAN J. INT'L L. 589 (1973).

51. *See, e.g.*, Boutros Boutros-Ghali, *An Agenda for Peace*, 31 I.L.M. 953, para. 17 (1992) (arguing that "the time of absolute and exclusive sovereignty" has passed).

52. AU Act, *supra* note 14, art. 4(b).

53. *See* Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, 566-67 (emphasizing that *uti possidetis* constituted a general principle, whose purpose was to prevent the independence and stability of new States from being endangered by fratricidal struggles provoked by the challenging of frontiers).

54. Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590, 595 (1996). *Cf.* BROWNLIE, *supra* note 3, at 133 (asserting that "pre-independence boundaries of former administrative divisions, all subject to the same sovereign remain in being, is in accordance with good policy").

> The Assembly shall determine the appropriate sanctions to be imposed on any Member State that defaults in the payment of its contributions to the budget of the Union in the following manner: denial of the right to speak at meetings, to vote, to present candidates for any position or post within the Union or to benefit from any activity or commitments, therefrom.[55]

The Assembly may also deny a defaulting Member State transport and communications links with other Member States, and may also impose other measures of a political and economic nature as it deems fit.[56] Comparatively, under Article 97 of the Financial Rules and Regulations of the OAU, defaulting Member States can be deprived of their right to participate or to vote on OAU decisions, but the Resolution on Arrears of Contribution further deprives such members of the right to speak at OAU meetings and their right to present candidates for OAU posts or bodies.[57] Recruitment of staff to the Organs of the body from defaulting member countries is also prohibited, including "temporary staff such as the freelance technical staff."[58]

Another provision relates to the headquarters of the Union, which will remain in Addis Ababa, Ethiopia,[59] where the OAU has been conducting its business for many years. This, however, is without prejudice to establishment of other offices of the Union as the Assembly may determine.[60] This makes economic, even if not political,[61] sense, because a change of headquarters will involve the huge expense of building another Secretariat and its usual accompaniments. The porous financial position of the continental Organization should forbid it from embarking on any white elephant project, at least for now.

There are already many incomplete projects that the AU must complete, like the headquarters of the African Commission on Human and Peoples'

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55. AU Act, *supra* note 14, art. 23(1).

56. *Id.* art. 23(2).

57. Resolution on Arrears of Contributions, Council of Ministers, 52d Ord. Sess., ¶ 2(d), O.A.U. Doc. CM/Res. 1279 (LII), Addis Ababa, Ethiopia (1990), *reprinted in Letter Dated 15 August 1990 from the Permanent Representative of Niger to the United Nations Addressed to the Secretary General*, U.N. GAOR, 45th Sess., Annex I, Prov. Agenda Item 30, U.N. Doc. A/45/482 (1990); Resolution on Arrears of Contributions, Council of Ministers, 53rd Ord. Sess., O.A.U. Doc. CM/Res. 1311 (LIII), Addis Ababa, Ethiopia (1991).

58. *See Decision on the Report of the Fifteenth Session of the Committee on Contributions (CM/2189 (LXXIII))*, Council of Ministers, 73rd Ord. Sess., ¶ 6(c), O.A.U. Doc. CM/Dec. 550 (LXXIII), Tripoli, Libya (2001), *reprinted in Letter Dated 10 April 2001 from the Permanent Representative of Mozambique to the United Nations Addressed to the Secretary-General*, U.N. GAOR, 55th Sess., Annex II, Agenda Item 27, U.N. Doc. A/55/951 (2001).

59. AU Act, *supra* note 14, art. 24.

60. *Id.*

61. Until recently, Ethiopia, where the Headquarters of the OAU is situated, has been embroiled in intractable interstate conflict with its neighboring Eritrea; a conflict that undermines the authority of the OAU itself. *See, e.g.*, *Divided by War, but Africa's Big Men Put on a Show of Unity; African Summit Democrats and Despots Meet in Bid to End Bloodshed and Poverty and Forge a Future for their Continent Modelled on Europe*, INDEPENDENT (London), July 10, 2001, at 3.

Rights in Banjul, The Gambia, presently under construction.[62] Even the present Secretariat of the OAU/AU is a former prison that Emperor Haile Selassie of Ethiopia donated to the body at its founding in 1963. Thirty-nine to forty years later, an organization set up to liberate the continent and its peoples from the bitter herbs of colonialism is still operating from a former prison! A permanent headquarters has been under construction for years and was not completed before the eclipse of the OAU. That task now falls on the AU. This is another reason why a relocation of headquarters should not be within the contemplation of the AU at this moment.

Other provisions of the AU Act address the working languages of the AU and its institutions, which "shall be, if possible," African languages, Arabic, English, French and Portuguese,[63] vestiges of colonialism. It is not clear, however, what the criteria for selecting the "African languages" will be. Previous attempts to adopt Swahili[64] as a common African language was not met with general agreement. The new, improved AU might want to reconsider it.

There are also provisions on admission to membership, which is restricted to "African States."[65] Admission will be decided by a simple majority of Member States.[66] The Act does not, however, define a "State" for the purposes of admission, which means that the relevant Organ of the AU, in this case the Assembly, will decide if an entity seeking admission is a "State."[67] In the case *Conditions of Admission of a State to Membership in the United Nations*, the International Court of Justice (ICJ) stated that conditions for admission are subject to the judgment of the Organization, meaning that the conditions for membership are subject to the judgment of the Organization's members. [68] It is not clear, however, whether an admission to

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62. The foundation stone for the permanent headquarters was laid on October 24, 2001, during the Commission's 30th session. *See Foundation Stone Laid for ACHPR's Permanent Building*, 1(6) AFR. COMMISSION FOR HUM. & PEOPLES' RTS. BULL., July – Dec. 2001, at 7, *available at* http://www.achpr.org/html/newsletter.html (last visited Jan 4, 2003).

63. AU Act, *supra* note 14, art. 25.

64. "Swahili" means "the coast" and is, basically, of Bantu (African) origin. It, however, has borrowed words from other languages, such as Arabic—probably due to the fact that the Swahili people, being predominantly Muslims, used the *Quran* for spiritual guidance—and some words from the Portuguese who controlled the Swahili coastal towns. Regarding the formation of the Swahili culture and language, some scholars attribute these phenomena to the intercourse of African and Asiatic people on the coast of East Africa. Early Arab visitors to the coast used the word "Swahili," which later came to be applied to the people and the language. *See* Hassan O. Ali, *A Brief History of the Swahili Language*, *at* http://www.glcom.com/hassan/swahili_history.html (last visited Aug. 22, 2002).

65. AU Act, *supra* note 14, art. 29(1).

66. *Id.* art. 29(2); *cf.* OAU Charter, *supra* note 12, art. XXIV(1) ("This Charter shall be open for signature to all independent sovereign African states and shall be ratified by the signatory States in accordance with their respective constitutional processes.").

67. *See* Ebere Osieke, *Admission to Membership in International Organizations: The Case of Namibia*, 51 BRIT. Y.B. INT'L L. 189, 220 (1986).

68. Conditions of Admission of a State to Membership in the United Nations, 1948 I.C.J. 57, 62 (May 28).

membership by a simple majority will translate into collective recognition of statehood. Brownlie is of the opinion that "[a]dmission to membership is prima facie evidence of statehood, and non-recognizing members are at risk if they ignore the basic rights of existence of another State the object of their non-recognition."[69]

Unlike the OAU Charter, which had no express provision for suspension or expulsion of erring members, the AU Act provides that "[g]overnments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union."[70] This provision reflects the wave of democratization that is engulfing the continent. It restates, in a capsule form, the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government in 2000.[71] This Declaration proclaims a continent-wide commitment to democracy and attempts to give substance to that commitment by setting out "common values and principles for democratic governance" in African countries.[72] It unanimously rejects any unconstitutional change in government as an anachronism and a contradiction to Africa's commitment "to promote democratic principles and conditions."[73]

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69. *See* BROWNLIE, *supra* note 3, at 95.

70. AU Act, *supra* note 14, art. 30.

71. *Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government*, Assembly of Heads of State and Government, 36th Ord. Sess., O.A.U. Doc. AHG/Decl.5 (XXXVI), Lome, Togo (2000), *available at* http://www.iss.co.za/AF/RegOrg/unity/pdfs/oau/hog/10HoGAssembly2000.pdf (last visited Nov. 4, 2002) [hereinafter *Decl. on Unconstitutional Changes of Gov't.*]; *cf. see OAU/AU Declaration on the Principles Governing Democratic Elections in Africa*, Assembly of Heads of State and Government, 38th Ord. Sess., O.A.U. Doc. AHG/Decl. 1 (XXXVIII), Durban, South Africa (2002), *available at* http://www.africa-union.org/en/ commpub.asp?ID=106 (last visited Aug. 10, 2002) (reaffirming the principles of democratic governance in earlier instruments and asserting, *inter alia*, that "[d]emocratic elections are the basis of the authority of any representative government," *id.* ¶ II(1); and "[d]emocratic elections should be conducted: (a) freely and fairly; (b) under democratic constitutions and in compliance with supportive legal instruments; (c) under a system of separation of powers that ensures in particular, the independence of the judiciary; (d) at regular intervals, as provided for in National Constitutions; [and] (e) by impartial, all-inclusive competent accountable electoral institutions staffed by well-trained personnel and equipped with adequate logistics," *id.* ¶ II(4)).

72. *Decl. on Unconstitutional Changes of Gov't*, *supra* note 71, para. 8.

73. *Id.* para. 4. The Declaration sets out four scenarios that would constitute such an unconstitutional change: "military *coup d'état* against a democratically elected Government; intervention by mercenaries to replace a democratically elected Government; replacement of democratically elected Governments by armed dissident groups and rebel movements; [and] the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections." *Id.* para. 11. If any of these should occur, then a number of actions are triggered. First, the Secretary-General "should immediately and publicly condemn such a change and urge the speedy return to constitutional order." *Id.* para. 12. Second, he "should also convey a clear and unequivocal warning to the perpetrators of the unconstitutional change that, under no circumstances, will their illegal action be tolerated or recognized by the OAU." *Id.* This appears to be commitment not to seat a delegation sent to the Organization by the usurping regime. And, in fact, this is the next step. At the request of the Chairman, the Secretary General or any Member State, the OAU Central Organ may be convened to con-

The AU Act provides for cessation of membership, which is a contradiction of the purposes of an international organization.[74] Such cessation, however, must be by notice and takes effect "[a]t the end of one year from the date of such notification, if not withdrawn."[75] So far, only Morocco has availed itself of this provision, under the OAU Charter.[76] It withdrew from the OAU in 1984, in protest of the formal recognition of the Sahrawi Arab Democratic Republic (SADR) by the OAU.[77] There are also detailed provisions on amendment and revision of the AU Act. Any Member State may submit proposals for an amendment.[78] Libya has already kick-started the process for the amendment of the AU Act, just two years after its adoption![79] The Assembly, on advice of the Executive Council, will examine such proposals within one year, and, if the proposal is adopted "by consensus or, failing which, by a two-thirds majority and submitted for ratification by all Member States . . . shall enter in force."[80] It is arguable that this provision, which relaxes normal procedures under the Vienna Convention,[81] will enable the AU to revise the Act more easily than through the normal law-making procedures of the Organization.

There is, finally, a transitional arrangement allowing the OAU Charter to remain operative for a period of one year for such further period as the Assembly may determine.[82] In 2001, the OAU decided that the one-year transition period should run from July 2001, "in view of the magnitude of the tasks to be performed and bearing in mind the need for consultations

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demn the change. *Id.* paras. 13-14. A six-month period follows, during which a restoration of constitutional government will hopefully occur. *Id.* para. 14. The Declaration provides that "during the six month period, the government concerned should be suspended from participating in the Policy Organs of the OAU." *Id.* Finally, if after six months constitutional order has not been restored, "a range of limited and targeted sanctions against the regime that stubbornly refuses to restore constitutional order should be instituted." *Id.* para. 15. A Sanctions Subcommittee of the General Organ will be established to monitor compliance with its decisions. *Id.* para. 17. It should be noted that virtually all these steps appear to be mandatory (actions "should" be taken, as opposed to "may").

74. *See* Rudolf Bindschedler, *International Organizations, General Aspects*, *in* 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1289, 1291 (Rudolf Bernhardt ed., 2000).

75. AU Act, *supra* note 14, art. 31(1).

76. *See* OAU Charter, *supra* note 12, art. XXXI.

77. GINO J. NALDI, THE ORGANIZATION OF AFRICAN UNITY: AN ANALYSIS OF ITS ROLE 36 (2d ed. 1999) [hereinafter NALDI, ORGANIZATION OF AFRICAN UNITY].

78. AU Act, *supra* note 14, art. 32(1).

79. *See Decision on the Proposed Amendments to Articles of the Constitutive Act of the African Union*, Assembly of the AU, 1st Ord. Sess., A.U. Doc. ASS/AU/Dec. 6(I), Durban, South Africa (2002), *available at* http://www1.umn.edu/ humanrts/africa/audec1-8.html (last visited Nov. 4, 2002) (considering proposal by Libya on amendments to articles of the AU Act and calling on the interim Chairperson of the Commission to "circulate the Libyan amendments to all Member States," *id.* ¶ 1).

80. AU Act, *supra* note 14, arts. 32(3) & (4).

81. *See* Vienna Convention, *supra* note 34, art. 40 (providing for the rules governing the amendment of treaties where there are no express provisions in the treaty itself).

82. AU Act, *supra* note 14, art. 33(1).

with Member States."[83] On July 9, 2002, the transition period was terminated and an interim period inaugurated for a duration of one year.[84] Thereafter the AU Assembly shall, at its second ordinary session, appoint the Chairperson, Deputy Chairperson and the Commissioners through the Executive Council."[85] Meanwhile, the Interim Commission has been authorized to continue with the transfer of assets and liabilities of the OAU to the AU.[86] Also, the Secretariat will "continue to use the OAU Logo, Flag and Anthem until the General Secretariat or the Commission initiates and finalizes the process of their review for gradual adaptation or replacement through competitions. . . ."[87]

B. The Legal Personality of the AU

The attribution of personality to international organizations has become indispensable in modern international law. It is not certain if this recognition is derivable from the sovereign "will" of Member States or from general international law.[88] What is certain is the "conceptual need to come to terms with the existence of international organizations, in conjunction with the normative position that such organizations are generally a good thing."[89] It is a self-evident inference that without such recognition, these organizations

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83. *Decision of the Assembly of Heads of State and Government on the Implementation of the Sirte Summit Decision on the African Union*, Assembly of Heads of State and Government, 37th Ord. Sess., ¶ 15, O.A.U. Doc. AHG/Dec. 160 (XXXVII), Lusaka, Zambia (2001) [hereinafter *Decision on Implementation*], *reprinted in Letter Dated 9 October 2001 from the Permanent Representative of the Sudan to the United Nations Addressed to the Secretary-General*, U.N. GAOR, 56th Sess., Annex I, Agenda Item 21(j), U.N. Doc. A/56/457 (2001). The transitional period will enable the OAU and AEC, *inter alia*, to undertake the necessary measures regarding devolution of assets and liabilities to the AU. It will also, plausibly, allow for the selection of AU symbols—Logo, Flag, Anthem, etc.—formation of executive committee, and the creation of decision-making process for executive committee.

84. *Decision on the Interim Period*, Assembly of the AU, 1st Ord. Sess. ¶ 2(iii), A.U. Doc. ASS/AU/Dec. 1(I), Durban, South Africa (2002) [hereinafter *Decision on Interim Period*].

85. *Id.*

86. *Id.* ¶ 2(ix); *cf. Decision on Implementation*, *supra* note 83, ¶ 12 (mandating the Secretary General to "undertake the necessary measures for the devolution of assets and liabilities of the OAU to the African Union" and to "review and, where appropriate, seek the amendment of OAU agreements with other parties, including the Headquarters and Host Agreements").

87. *Decision on Implementation*, *supra* note 83, ¶ 13.

88. See, for the debate, Finn Seyersted, *Objective International Personality of Intergovernmental Organizations: Do their Capacities Really Depend Upon Their Constitutions?*, 34 NORDISK TIDSSKRIFT FOR INTERNATIONAL RET OG JUS GENTIUM 1 (1964) (on file with the California Western International Law Journal) (establishing "whether the capacity of an intergovernmental organization really (i.e. in practice) depends upon the convention establishing it").

89. Jan Klabbers, *The Changing Image of International Organisations*, *in* THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 221, 227 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001).

cannot carry out their tasks, because legal competences are necessary corollaries of duties and responsibilities.

The question of legal personality of an international organization must be decided by positive law and, in particular, the constituent treaty of such an organization.[90] Brownlie lists certain criteria of legal personality, each of which relates to "delicate issues of law and fact."[91] These are, "a permanent association of states, with lawful objects, equipped with organs; a distinction, in terms of legal powers and purposes, between the organization and its member States; [and] the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states."[92] It is necessary to highlight features of the AU, as gauged from its "Constitutive Act," in order to determine its personality. To start with, the AU was created to take up the multifaceted challenges confronting the African continent and peoples "in the light of the social, economic and political changes taking place in the world."[93] Though brought into being by the Member States, it has a separate existence from them. It is endless in size and eternal in time, allowing for the admission of other members "at any time after the entry into force" of the Act.[94]

The objectives of the Act have already been highlighted. It remains to add that Member States, signatories to the Act, subscribed to these objectives. The Act opens with "We, Heads of State and Government of the Member States of the Organization of African Unity (OAU) . . . have agreed as follows."[95] Furthermore, the objectives and principles in the Act are independent of those of its Member States, though not diametrically opposed. One of such principles is the "peaceful co-existence of Member States and their right to live in peace and security."[96] Another is the "peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly."[97]

However, being an artificial entity, the AU does not have hands, legs, eyes, a brain and such other organs that are the natural attributes of a person. It can function only through various organs vested with special tasks and manned by natural persons. The AU Act, consequently, establishes various organs with defined functions. These organs, which will be discussed shortly, are of the Organization, not of the Member States, though composed essentially of the latter. Their powers extend to matters expressly mentioned in the Act as well as those necessarily implied for effective performance of

90. *See* Bindschedler, *supra* note 74, at 1299.
91. BROWNLIE, *supra* note 3, at 680.
92. *Id.* at 679-80.
93. AU Act, *supra* note 14, pmbl. para. 5.
94. *Id.* art. 29(1).
95. *Id.* pmbl.
96. *Id.* art. 4(i).
97. *Id.* art. 4(e).

their duties,[98] such as the ability to confer diplomatic protection to its servants in the performance of their duties and to espouse their claims at the international level. Rules concerning organization and procedure of the organs will also be implied. If the end is intended, so also must be the means to attain it. To use the language of the ICJ, "[t]he Organization must be deemed to have those powers which, though not expressly provided in the Charter [Act], are conferred upon it by necessary implication as being essential to the performance of its duties."[99] The Court of Justice of the EU has also adopted the theory of implied powers,[100] but it should be borne in mind that "only those powers . . . which least affect the freedom of member States and which are shown to be necessary in order to fill genuine technical gaps in the treaty" should be implied.[101]

For these and for several other reasons, it is submitted that the AU, undoubtedly, is an international legal person, at least in relation to the Member States. It also has an international legal responsibility—extending beyond, but alongside, the Member States.[102] It is, again to borrow the words of the ICJ:

> intended to exercise and enjoy . . . functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. . . . That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. . . . It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.[103]

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98. There are certain debates on the powers of international organizations, including the attribution theory and implied powers theory. *See generally* HENRY SCHERMERS & NILES BLOKKER, INTERNATIONAL INSTITUTIONAL LAW §§ 206-236 (1995).

99. Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 182 (Apr. 11); *see also* International Status of South-West Africa, 1950 I.C.J. 128, 136-38 (July 11); Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, 1955 I.C.J. 67 (June 7); Admissibility of Hearings of Petitioners by the Committee on South West Africa, 1956 I.C.J. 23 (June 1); South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1962 I.C.J. 319, 328-29 and 331 (Dec. 21).

100. *See, e.g.*, Case 8/55, Federation Charbonniere de Belgique v. High Authority of the European Coal and Steel Community (ECSC), 1954-1956 E.C.R. 292 (1956); Case 25/59, Netherlands Government v. ECSC, E.C.R. 355 (1960); European Transport Agreement, Case 22/70, E.C.R. 263 (1971); Germany et al. v. Commission, Case 281/85, E.C.R. 3203 (1987).

101. *See* Bindschedler, *supra* note 74, at 1294.

102. *See* MOSHE HIRSCH, THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARD THIRD PARTIES: SOME BASIC PRINCIPLES 147-48 (1995) (on the responsibility of Member States for acts attributable to international organizations).

103. Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 179 (Apr. 11).

III. THE INSTITUTIONAL STRUCTURE OF THE AU

The character of an international organization depends on the nature of its organs. For the AU, nine organs are provided for, each with a different composition, power, sphere of operation, origin and voting procedure. The organs expressly named in the Act are the Assembly of the Union, the Executive Council, the Pan-African Parliament, the Court of Justice, the Commission, the Permanent Representatives Council, the Specialized Technical Committees, the Economic, Social and Cultural Council, and the Financial Institutions.[104] The Assembly is, however, given power to establish any other organ of the Union.[105] This will be crucial in the future due to the fact that one of the major weaknesses of the Act is the absence of political mechanisms to implement the Act and support its ambitious objectives.

It may also be assumed that those Organs of the AEC that are not inconsistent with the provisions of the AU Act will become AU Organs. [106] Furthermore, the OAU Council of Ministers, which met in Lusaka between July 5 and July 8, 2001, called for incorporation of "organs, institutions/bodies which have not been specifically mentioned in the Constitutive Act." Specifically and significantly, the AU Assembly has, at its first ordinary session, decided that, "the African Commission on Human and Peoples' Rights and the African Committee of Experts on Rights and Welfare of the Child shall henceforth operate within the framework of the African Union."[107] At the end of the day, the list of AU Organs will cover anything that can be put in the same catalog without being in the same category. What is clear is that the list of Organs in the AU Act is longer than its equivalent provision in the OAU Charter, but closely similar to the organs provided for in the EU[108] and the AEC Treaty.[109] The OAU Charter provided for four principal institu-

104. *See* AU Act, *supra* note 14, art. 5.

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

106. *See id.* art. 33(2) (providing that the "Act shall take precedence over and supersede any inconsistent or contrary provisions of the [AEC Treaty]").

107. *Decision on Interim Period*, *supra* note 84, ¶ 2(xi).

108. The EU has five institutions: 1) the European Parliament (elected by the peoples of the Member States); 2) the Council (representing the governments of the Member States); 3) the Commission (the executive and the body having the right to initiate legislation); 4) the Court of Justice (ensuring compliance with the law); and 5) the Court of Auditors (responsible for auditing the accounts). Other bodies also support the five principal institutions. These are the Economic and Social Committee and the Committee of the Regions (advisory bodies helping to ensure that the positions of the EU's various economic and social categories and regions respectively are taken into account); the European Ombudsman (dealing with complaints from citizens concerning maladministration at European level); the European Investment Bank (EU financial institution); and the European Central Bank (responsible for monetary policy in the euro area). *See generally* P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN LAW 61-171 (7th ed. 1999).

109. AEC Treaty, *supra* note 29. The AEC Treaty provides for seven Organs including: 1) the Assembly of Heads of State and Government; 2) the Council of Ministers; 3) the Pan-African Parliament; 4) the Economic and Social Commission; 5) the Court of Justice; 6) the General Secretariat; and 7) the Specialized Technical Committees. *Id.* art. 7(1). The Special-

tions: the Assembly of Heads of State and Government; the Council of Ministers; the General Secretariat; and the Commission of Mediation, Conciliation and Arbitration.[110]

It may be assumed that all the Organs in the AU Act, with, maybe, the exception of the Assembly, are equal under the Act, although, in the real world of politics, as in the animal world of George Orwell, some of these Organs will be more equal than others. The OAU itself implies this when, in mandating the Secretary General to undertake necessary consultations with Member States with a view towards working out modalities and guidelines for the launching of the Organs of the Union, he was asked to give priority to the "key Organs"—the Assembly, the Executive Council, the Commission and the Permanent Representatives.[111] What is striking, however, is that establishment of the Union, with full Parliament, Executive Council and Court of Justice, is a novel phenomenon in collective Africa. A central government that is bifurcated according to the political theory and legal doctrine of separation of powers—legislature, executive and judiciary—is thus envisioned.[112] This doctrine should, however, not be carried too far. As will be shown shortly, certain vital matters, such as legislative powers, external enforcement and important acts of internal administration—like the budget—are concentrated in the AU Assembly.

It has been suggested that more organs be added to the existing list, in order to fully implement the objectives of the Union. There is, for example, a febrile feminist advocacy for the creation of a Gender Commission, the role of which will be to ensure that the AU's objective of promoting gender equality[113] is actually realized both in spirit and action.[114] One such advocate believes that "a competent and committed person, preferably a woman who should hold the rank of all other heads of the organs of the Union" should head the Gender Commission.[115] Her responsibility will be to "monitor,

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ized Technical Committee has seven components including: 1) the Committee on Rural Economy and Agricultural Matters; 2) the Committee on Monetary and Financial Affairs; 3) the Committee on Trade, Customs and Immigration Matters; 4) the Committee on Industry, Science and Technology, Energy, Natural Resources and Environment; 5) the Committee on Transport, Communications and Tourism; 6) the Committee on Health, Labour and Social Affairs; and 7) the Committee on Education, Culture and Human Resources. *See id.* art. 25(1).

110. *See* OAU Charter, *supra* note 12, art. VII.

111. *See Decision on Implementation*, *supra* note 83, ¶ 4.

112. *See* African Center for Democracy and Human Rights Studies, *The New African Union and the African Human Rights System*, 11(2) AFR. HUM. RTS. NEWSLETTER, Apr.-June 2001, at 10) (on file with the California Western International Law Journal) (including extracts of Justice Kayode Eso's *The Role of the African Human Rights System and Civil Society in the African Union*, a paper delivered at the NGO Forum organized by the African Center for Democracy and Human Rights Studies, preparatory to the twenty-ninth Ordinary Session of the African Commission).

113. *See* AU Act, *supra* note 14, art. 4(l).

114. *See* Maria Nzomo, The Architecture and Capacity of the African Union, Comments at the AU/ADF III Symposium (Mar. 7, 2002), *available at* http://www.uneca.org/eca_resources/Speeches/2002_speeches/030702prof_maria.htm (last visited Aug. 24, 2002).

115. *Id.*

evaluate, review and recommend gender mainstreaming in all organs and activities of the AU."[116] She will also monitor application of the Act to ensure gender equity in all governance and decision-making structures and processes.[117]

The gender concerns are certainly legitimate, but the African Union should not go that far that fast. The poor financial state of the organization cannot justify the creation of additional institutions at this time. It might even make some sense to trim some of the unnecessary components of existing structures. Paradoxically, even the proposer of the Gender Commission asserted that, "in building AU we should not just ask where resources are going to come from but also how we can cut down on costs."[118] The Union will not cut cost by establishing other institutional structures that could actually be accommodated elsewhere, but by "strengthening the still relevant existing OAU institutions" and collaborating with the sub-regional institutions.[119]

The OAU, to its credit, has over the years duly acknowledged the need for the empowerment of women, as well as the needs of youth and children. A Protocol to the African Charter on the Rights of Women is already at an advanced stage of elaboration before adoption by the AU.[120] This is expected to fill in gaps that the African Charter created regarding rights of women.[121] Although affirmative action is required to implement these norms, a special Commission is not necessary at this time. There is nothing to show that the existing structures, if properly funded and equipped, will not be able to achieve such goals. Some Member States already have special ministries for women's affairs, and the AU should encourage those States without such ministries to create them. Implementation of these structures is needed more at the grassroots, national level because that is where the majority of African women struggle everyday—between "wine and starvation."

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116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *See* Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, O.A.U. Doc. CAB/LEG/66.6 (2000).

121. *See* The African Charter on Human and Peoples' Rights, *adopted* June 27, 1981, O.A.U. Doc. OAU/CAB/LEG/67/3/Rev.5 (entered into force Oct. 21, 1986) [hereinafter African Charter]. The Charter failed to sufficiently address the peculiar problems of women, such as guaranteeing the right of consent to marriage and equality of spouses during and after marriage. Furthermore, it did not explicitly address concerns that many customary practices, such as female genital mutilation, are life threatening to women. *See* Chaloka Beyani, *Toward a More Effective Guarantee of Women's Rights in the African Human Rights System*, *in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 288 (Rebecca Cook ed., 1994) (noting that "[m]ale attitudes towards the treatment of women have dominated the conception of human rights" and have failed to apply such rights to women in an equitable manner, resulting in women concluding that abstract human rights ideals were never intended to apply to women). *See generally* Claude E. Welch, Jr., *Human Rights and African Women: A Comparison of Protection under Two Major Treaties*, 15 HUM. RTS. Q. 549 (1993) (comparing the African Charter to the Convention on the Elimination of All Form of Discrimination Against Women).

With these preliminary observations, this article now turns to an analysis of the Organs of the AU.

A. The Assembly

The Assembly of the AU (AU Assembly or Assembly) is the political organ of the Union, similar to the General Assembly of the United Nations (UN) or the European Council of the EU. It is comprised of the Heads of States and Government of member countries or their representatives.[122] It is also "the supreme organ of the Union,"[123] headed by a Chairman who shall be "a Head of State or Government elected after consultations among the Member States."[124] It shall meet at least once a year in ordinary session and, when approved by a two-thirds majority, in extraordinary session.[125]

The AU Act, like its predecessor, the OAU Charter, is silent on the location of the AU Assembly and of its meetings. The practice of the OAU Assembly was to meet in a different State capital each year. However, the Rules of Procedure of the Assembly of the Union (Assembly Rules)[126] have settled the problem, providing that the Assembly shall meet at the Headquarters of the Union, "unless a Member State invites the Assembly to hold a session in its country."[127] Even where a Member State hosts the Assembly,[128] the meeting must always return to the Headquarters of the Union "at least every other year."[129]

Usually, the host Head of State or Government becomes the Chairman of the OAU until the subsequent summit. The AU Assembly has already chosen to follow this practice, as demonstrated by the election of President Thabo Mbeki of South Africa as the first Chairman of the AU. He was elected during the inaugural summit of the AU Assembly hosted by South Africa in Durban, in July 2002. This practice had its setbacks, leading to, for example, the elections of acknowledged dictators and despots as heads of the continental body, to the consternation of Africans and the international community. Thus, despite opposition by some African countries—notably

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122. AU Act, *supra* note 14, art. 6(1).

123. *Id.* art. 6(2); *cf.* AEC Treaty, *supra* note 29, art. 8(1).

124. AU Act, *supra* note 14, art. 6(4).

125. *Id.* art. 6(3); *cf.* OAU Charter, *supra* note 12, art. IX.

126. *See* Rules of Procedure of the Assembly of the Union, Assembly of the AU, 1st Ord. Summit, A.U. Doc. ASS/AU/2(I)-a, Durban, South Africa, (2002), *available at* http://www.au2002.gov.za/docs/summit_council/assemrop.pdf (last visited Jan. 4, 2003) [hereinafter AU Assembly Rules].

127. *Id.* Rule 5(1).

128. A Member State offering to host the Assembly will be responsible for the extra expenses incurred by reason of holding the session outside the Headquarters of the AU. *Id.* Rule 5(2). Such State, which must not be under sanctions, shall additionally "meet pre-determined criteria to be adopted by the Assembly, including adequate logistical facilities and a conducive political atmosphere." *Id.* Rule 5(3).

129. *Id.* Rule 5(1).

Botswana, Mozambique, Tanzania, and Zambia—Idi Amin of Uganda was elected as the Chairman of the Assembly when the country hosted the summit in 1975, notwithstanding his unenviable human rights records. In its protest, the Government of Tanzania noted that, "Africa is in danger of becoming unique in its refusal to protest crimes committed against Africans, provided that such actions are done by African leaders and African governments." [130]

The provision for a central location, namely the Headquarters of the Union, for the meeting of the Assembly is thus a welcome development. With this new development, the Assembly will, hopefully, not have to "bend over backwards" when appointing its Chairperson. The position, though merely titular and ceremonial, elicits some aura and enjoys the respect of the international community when held by acknowledged statesmen. A Mandela chairmanship, for purposes of illustration, makes a world of difference to a Sani Abacha or, even, a Mugagbe chairmanship! A charismatic leadership is urgently needed in Africa particularly, during these periods of economic and political meltdown.

The AU Act vests the Assembly with crucial functions and wide authorities,[131] largely similar to the functions of the European Council under the EU.[132] The Assembly will determine the common policies of the Union and monitor their implementation by the Member States.[133] It will also adopt the budget of the Union; "receive, consider and take decisions on reports and recommendations from the other organs of the Union; [and] consider requests for Membership of the Union."[134] The Assembly will appoint the principal officers of the AU Organs—such as the judges of the Court of Justice, the Chairperson and Deputy Chairperson of the Commission and other Commissioners.[135] It will also determine their functions and terms of office.[136] Additionally, the Assembly may "give directives to the Executive Council on the management of conflicts, war and other emergency situations and the restoration of peace."[137] The new Rules have extended the Assembly's functions[138] to include electing the Chairperson of the Assembly and other officers[139] and deciding upon the venue of its meetings.[140]

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130. Claude E. Welch, Jr., *The OAU and Human Rights: Towards a New Definition*, 19 J. MOD. AFR. STUD. 401, 405 (1981) (quoting statement issued on July 25, 1975 by the Tanzanian Ministry of Information and Broadcasting).

131. AU Act, *supra* note 14, art. 9.

132. *See, e.g.*, EU Treaty, *supra* note 41, art. 4 (providing that the European Council shall provide the political impetus for the EU, defining the general political guidelines of the EU).

133. AU Act, *supra* note 14, art. 9(1)(a) & (e).

134. *Id.* art. 9(1)(b)-(c).

135. *Id.* art. 9(1)(h)-(i).

136. *Id.* art. 9(1)(g).

137. *Id.*

138. *See generally* AU Assembly Rules, *supra* note 126, Rule 4.

139. *Id.* Rule 4(1)(p).

The Assembly will also, undoubtedly, assume other functions not enumerated in the AU Act or the Assembly Rules, such as the appointment of members of the African Commission under the African Charter,[141] a function formerly performed by the OAU Assembly. In the event of the death or resignation of a member of the Commission, the Assembly will also have the power to replace that member for the remainder of his term.[142] The Assembly will also be responsible for the appointment of judges to the African Human Rights Court pursuant to Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights [143] and, like the Commission, the Assembly can replace any member of the Court in the event of any vacancy.[144]

Furthermore, the African Charter empowers the Assembly to delegate to the African Commission tasks other than those enumerated in the Charter.[145] The Assembly receives the Annual Activity Report from the Commission and exerts some political pressure on errant States by, *inter alia*, authorizing publication of the reports, pursuant to the African Charter.[146] When the Court is established, the Assembly will also be involved in monitoring execution of its judgments through the Council of Ministers,[147] and receive annual reports detailing the work of the Court.[148] Such reports shall, *inter alia*, specify "the cases in which a State has not complied with the Court's judg-

140. *Id.* Rule 4(1)(q).

141. *Cf.* African Charter, *supra* note 121, art. 33 (providing that "[t]he members of the Commission shall be elected by secret ballot by the Assembly of Heads of State and Government, from a list of persons nominated by the States parties to the present Charter").

142. *See id.* art. 39(3).

143. *See* Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, June 9, 1998, art. 14(1), OAU/LEG/MIN/AFCHPR/PROT (III), *available at* http://www.africa-union.org/en/docs/protocol%20african%20court.pdf (last visited Jan. 4, 2003) [hereinafter Prot. to African Charter] (providing that "[t]he judges of the Court shall be elected by secret ballot by the Assembly").

144. *See id.* art. 20(2) ("The Assembly shall replace the judge whose office became vacant unless the remaining period of the term is less than one hundred and eighty (180) days.").

145. *See* African Charter, *supra* note 121, art. 45(4). The Commission is the institutional body charged with the implementation of the rights guaranteed in the African Charter. It was given a sweeping but weak mandate "to promote human and peoples' rights and ensure their protection in Africa." *Id.* art. 30. The Commission, essentially, performs three primary functions: to *promote* and *protect* human and peoples' rights and to *interpret* the provisions of the African Charter. *Id.* art. 45. *See generally* Peter Amoah, *The African Charter on Human and Peoples' Rights: An Effective Weapon for Human Rights?*, 4 REVUE AFRICAINE DE DROIT INTERNATIONAL ET COMPARÉ [RADIC] 226, 237 (1992); RACHEL MURRAY, THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS & INTERNATIONAL LAW 11-31 (2000); EVELYN ANKUMAH, THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS 27 (1996).

146. African Charter, *supra* note 121, art. 59 ("The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.").

147. *See* Prot. to African Charter, *supra* note 143, art. 29(2).

148. *Id.* art. 31.

ment."[149] Finally, but not exhaustively, the Assembly will likely take over the dispute resolution function previously assigned to the Assembly of the AEC, pursuant to the Protocol on the Relationship between the African Economic Community and the Regional Economic Communities.[150]

As already demonstrated from the last submission of the Assembly in Durban, South African, it is clear that immediate concerns of the Assembly will include economic development and conflict resolution,[151] combating of poverty and disease[152] and, with September 11, joining forces in the global "war" against terrorism.[153]

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149. *Id.*

150. *See* Protocol on the Relationship between the African Economic Community and the Regional Economic Communities, *opened for signature* Feb. 25, 1998, art. 30, *reprinted in* 10 REVUE AFRICAINE DE DROIT INTERNATIONAL ET COMPARÉ [RADIC] 157 [hereinafter AEC Protocol on RECs].

151. *See, e.g., Decision on the Establishment of the Peace and Security Council of the African Union,* AU Assembly, 1st Ord. Sess., A.U. Doc. ASS/AU/Dec. 3 (I), Durban, South Africa (2002) [hereinafter *AU Assembly Dec. on Peace and Security Council*], *available at* http://www1.umn.edu/humanrts/africa/audec1-8.html (last visited Nov. 4, 2002) (adopting the Protocol on the establishment of the Peace and Security Council of the AU and calling on "all Member States to sign and ratify the Protocol so as to ensure its early entry into force"); *see also Decision on a Common African Defence and Security,* AU Assembly, 1st Ord. Sess., A.U. Doc. ASS/AU/Dec. 8 (I), Durban, South Africa (2002), [hereinafter *AU Assembly Dec. on Common African Defence*], *available at* http://www1.umn.edu/humanrts/ africa/audec1-8.html (last visited Nov. 4, 2002) ("stress[ing] the need for a common African defense and security in the context of the [AU Act] [and] request[ing] the Chairman of the Assembly to establish a group of experts to examine all aspects related to the establishment of a common African defence and security and submit recommendations for the consideration of the next session of the Assembly").

152. *See, e.g., Decision on the Status Report on Global Alliance for Vaccines and Immunization (GAVI),* Assembly of Heads of State and Government, 38th Ord. Sess., ¶ ¶ 3-5, O.A.U. Doc. AHG/Dec. 174 (XXXVIII), Durban, South Africa (2002), *available at* http://www.au2002.gov.za/docs/summit_council/oaudec1.htm (last visited Sept. 10, 2002) (acknowledging "that vaccines constitute one of the most effective means of improving health and reducing the suffering and mortality occasioned by infectious diseases [and] urg[ing] Member States to take all necessary measures to ensure that every child in Africa is fully immunized by widening, for all children, the range of basic vaccines (measles, poliomyelitis, BCG and DTC) to include Hepatitis-B Vaccines." The Assembly further urged "Member States to establish more effective linkages between immunization and health sector development in general, and create technical partnerships between low and medium income countries to promote experience and resource sharing so as to reduce the gap between children born in different environments.").

153. *See, e.g., Report on OAU Efforts to Prevent and Combat Terrorism,* Central Organ of the OAU Mechanism for Conflict Prevention, Management and Resolution at Ministerial Level, 5th Extra-Ord. Sess., Organ/MEC/MIN/2/Ex.ord (V), New York, USA (2001), *available at* http://www.africa-union.org/en/commpub.asp?id=137 (last visited Aug. 26, 2002). This document reported, *inter alia,* on the Summit meeting of Heads of State and Government that convened on Oct. 17, 2001, at the initiative of President Abdoulaye Wade of Senegal. *Id.* ¶ 18. The summit brought together twenty-seven African countries in Dakar and was attended by the OAU Secretary General. *Id.* It adopted the Dakar Declaration against Terrorism which, *inter alia,* "expressed solidarity with the USA; strongly condemned any act of terrorism on the African continent or in any other part of the world; called upon all the African countries to ratify the OAU Convention [on the Prevention and Combating of Terrorism, AHG/Dec. 132 (XXXV)] as a matter of urgency and similar UN instruments and take the legal, diplomatic,

The Assembly shall adopt its own Rules of Procedure,[154] which, as indicated above, has already been done. The Assembly Rules provide further and better particulars on the workings of the Assembly, giving flesh to the bare bones of the AU Act on the many aspects of the Assembly. The new Assembly Rules have similarities with the Rules of Procedure of the OAU Assembly,[155] though it takes a more nuance posture than its predecessor. The Assembly Rules have been drafted to describe, prescribe and empower. This is important because clusters of rules that define relationships are of little use, unless they also sufficiently empower the agencies that will apply them.

The Assembly Rules cover matters such as the composition of the Assembly,[156] its power and functions,[157] place of meeting and the quorum,[158] ordinary and extraordinary sessions,[159] agenda of the meetings,[160] public and private meetings of the Assembly,[161] working languages,[162] election and functions of the Chairperson,[163] and attendance and participation in the sessions of the Assembly.[164] Section III of the Assembly Rules addresses decision-making procedures including: majority rule,[165] decisions,[166] speaker lists and use of the floor,[167] point of order,[168] and closing and adjournment of debate.[169] There are also rules on voting rights, which specify that each State will receive one vote (provided such a State is not under sanctions)[170] and

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financial and other measures to fight against terrorism at the national, sub-regional, regional and international levels." *Id.*

154. AU Act, *supra* note 14, art. 8.

155. The Rules of Procedure of the OAU Assembly [hereinafter OAU Assembly Rules of Proc.], *reprinted in* DOCUMENTS OF THE ORGANIZATION OF AFRICAN UNITY 25–31 (Gino J. Naldi ed., 1992) [hereinafter NALDI, DOCUMENTS].

156. *See* AU Assembly Rules, *supra* note 126, Rule 3.

157. *Id.* Rule 4.

158. *Id.* Rules 5 & 6.

159. *Id.* Rules 7 & 11.

160. *Id.* Rules 8, 9 & 12 (regarding ordinary and extraordinary sessions, respectively).

161. *Id.* Rule 13.

162. *Id.* Rule 14. It is important to note that the Assembly Rules include Spanish as one of the working languages of the Assembly, although the AU did not include it as one of the official languages of the AU. *Compare* AU Act, *supra* note 14, art. 25 *and* AU Assembly Rules, *supra* note 126, Rule 14. Although this may have been included to accommodate the interests of some Member countries, this will need to be reflected in any subsequent amendment to the AU Act because the AU Act, being a superior instrument, prevails in the event of conflict with the Assembly Rules.

163. AU Assembly Rules, *supra* note 126, Rules 15 & 16.

164. *Id.* Rule 17.

165. *Id.* Rule 18.

166. *Id.* Rule 19.

167. *Id.* Rule 20.

168. *Id.* Rule 21.

169. *Id.* Rules 22 & 23.

170. *Id.* Rule 26. If a State is subject to sanctions, that State will not have the right to vote. *Id.*

method of voting (secret ballot).[171] Some provisions of the Assembly Rules require extended comments.

The rules governing the members of the Commission are laid out in Rules 38 through 42. The duties of the Chairperson, for example, include: convening sessions of the Assembly, opening and closing the sessions, submitting the records of the sessions for approval by the Assembly, directing debates, granting use of the floor, submitting matters under discussion to a vote and announcing the results and ruling on points of order in accordance with the AU Act and the Rules of the Assembly.[172] Because the Assembly's meetings are not frequent, the Chairperson must, between sessions and consultations with the Chairperson of the Commission, represent the AU in conformity with the fundamental objectives and principles of the AU Act.[173]

Like the OAU Assembly, the AU Assembly "shall take its decisions by consensus or, failing which, by a two-thirds majority of the Member States of the Union,"[174] although "procedural matters, including the question of whether a matter is one of procedure or not, shall be decided by a simple majority."[175] The requirement of unanimity in the decision-making process follows from the doctrine of the equality and sovereignty of States; in other words, no State can be bound without its consent.[176] This principle, which is frequently applied for political reasons—even in situations where a majority voting would be adequate—undermined the effectiveness of the OAU.[177] On the other hand, a qualified majority will facilitate the power of the AU to make decisions and to act on them, particularly in crisis situations that might require humanitarian intervention. Such situations frequently beckon in Africa.

The Rules provide that the Assembly's decisions may take one of three forms. Decisions may be in the form of regulations to all Member States to "take all necessary measures to implement them."[178] Decisions may also take the forms of directives "addressed to any or all Member States, to undertakings, or to individuals."[179] Such directives "bind Member States to the objectives to be achieved while leaving national authorities with power to determine the form and the means to be used for their implementation."[180] Finally, decisions may be in the form of recommendations, declarations,

171. *Id.* Rule 30(1). The Assembly, however, may adopt other methods of voting on procedural matters. *Id.* Rule 30(2).

172. *See id.* Rule 16(1).

173. *Id.* Rule 16(3).

174. *See* AU Act, *supra* note 14, art. 7(1); *cf.* AU Assembly Rules, *supra* note 126, Rule 6; UN CHARTER, *supra* note 48, art. XXV (empowers the Security Council to take binding decisions on certain matters by a majority vote).

175. AU Act, *supra* note 14, art. 7(1).

176. *See* OAU Charter, *supra* note 12, art. X.

177. *See* NALDI, ORGANIZATION OF AFRICAN UNITY, *supra* note 77, at 19.

178. AU Assembly Rules, *supra* note 126, Rule 33(1)(a).

179. *Id.* Rule 33(1)(b).

180. *Id.*

resolutions or opinions.[181] In general, resolutions or recommendations of international organizations are not binding on Member States; rather they are formal texts formulating the conclusions of debates and "are intended to guide and harmonise the viewpoints of the Member States."[182] They normally "request," "urge," "take note," or "agree to," thereby indicating their limited competence. However, resolutions are very persuasive evidence of international law. When resolutions are concerned with general norms of international law, acceptance by a majority vote constitutes *evidence* of the opinions of governments in the widest forum for the expression of such opinions.[183] As Hans Kelsen puts it:

> if the norm is adopted by a majority-vote decision of an organ, composed of representatives of all parties to the treaty establishing the organ, and especially by the majority-vote decision of an organ composed only of representatives of some of the parties to this treaty, the creation of the norm assumes the character of legislation.[184]

Some declarations or resolutions, or parts of them, may eventually become binding under international law if their provisions are shown to have become general practice by States. If they attain this status, they are said to have become part of customary international law.[185] In some cases, resolutions may have direct legal effects, both as authoritative interpretations and as applications of the principles of the treaty and the speedy consolidation of customary rules.[186]

The AU Assembly may delegate any of its powers and functions to any organ of the Union,[187] though it is the only body able to amend or revise the AU Act by a consensus or two-third majority.[188] However, unlike the European Council, which must submit to the European Parliament, "a report after

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181. *Id.* Rule 33(1)(c).

182. *Id.*

183. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 98-104 and 107-08 (June 27).

184. HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 507 (2d ed. 1966).

185. *See* South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.) 1966 I.C.J. 6, 292 (July 18) (dissenting opinion of Judge Tanaka).

186. *See* BROWNLIE, *supra* note 3, at 14. *See generally* JORGE CASTANEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS (1969).

187. AU Act, *supra* note 14, art. 9(2); *cf.* AU Assembly Rules, *supra* note 126, Rule 4(2); AEC Treaty, *supra* note 29, arts. 8(2) & (3). Note that the AEC Prot. on RECs additionally vests on the AEC Assembly a dispute resolution function. AEC Prot. on RECs, *supra* note 150, art. 30.

188. AU Act, *supra* note 14, art. 32. Proposals for an amendment or revision of the treaty may be submitted by any Member State to the Chairman of the Commission, "who shall transmit same to Member States within thirty (30) days of receipt thereof. The Assembly, upon the advice of the Executive Council, shall examine the proposal within a period of one year" and, where an amendment is made effective, such amendment "shall enter into force thirty (30) days after the deposit of the instruments of ratification with the Chairman of the Commission by a two-thirds majority of the Member States." *Id.* arts. 32(2) - 32(4).

each of its meetings and a yearly written report on the progress achieved by the Union,"[189] the AU Assembly has no such obligation under the AU Act. It is, however, submitted that such a procedure will be necessary in order to allow for checks and balances within the system, which is a built-in principle of the doctrine of separation of powers. African leaders need such checks, because of the frequent "trends towards omnipotence."[190]

B. The Executive Council

The Executive Council of the AU (AU Council or Council) will function both as a political body and an economic body of the Union. It "shall be composed of the Ministers of Foreign Affairs or such other Ministers or Authorities as are designated by the Governments of Member States."[191] This is analogous to the composition of the Council of Ministers of the OAU,[192] as well as the Council of the EU, where composition is geared to specific subject areas.[193] The foreign minister or the minister responsible for the subject matter in question, such as agriculture, education, finance, transport, etc., comprises the Council of the EU. This means that the Council's composition varies according to the subject discussed.

The AU Council will obviously be a diplomatic Organ, like the AU Assembly. The members will inevitably be bound by the instructions of their governments. Like the AU Assembly, the Council is not a permanent body; but unlike the Assembly, which meets once a year, the Council will meet at least twice a year.[194] When requested and approved by two-thirds of its members, the AU Council may meet in a special or "extra-ordinary" session.[195] This follows the practice of the Council of Ministers of the OAU, which met in February and August of each year.[196] At the February meetings, the Council usually considered and approved the program and budget of the OAU for the subsequent fiscal year.[197] Indeed, the Rules of the OAU Council of Ministers provided that "[t]he fiscal year of the Organization

189. EU Treaty, *supra* note 41, art. 4.

190. CHRISTOPHER G. WEERAMANTRY, JUSTICE WITHOUT FRONTIERS: FURTHERING HUMAN RIGHTS 89 (1997).

191. AU Act, *supra* note 14, art. 10(1).

192. *See* OAU Charter, *supra* note 12, art. XII.

193. *See* European Community Treaty, Mar. 25, 1957, art. 203, 37 I.L.M. 56, *reprinted in* EUROPEAN UNION LAW: DOCUMENTS (Frank Emmert ed. 1999) (providing that "[t]he Council shall consist of representative of each Member State at ministerial level, authorised to commit the government of that Member State"). For an informative and detailed account of the work of the Council, both in its generic sense and sectorially, see MARTIN WESTLAKE, THE COUNCIL OF THE EUROPEAN UNION (1995).

194. AU Act, *supra* note 14, art. 10(2).

195. *Id.*

196. *See, e.g.*, Rules of Procedure of the Council of Ministers [hereinafter Rules of Council of Ministers], Rule 6, *reprinted in* NALDI, DOCUMENTS, *supra* note 155, at 19.

197. *Id.*

shall be from the first of June to the thirty-first of May."[198] However, during the Durban meeting of the OAU Council of Ministers in July 2002—the last of such meetings under the auspices of the OAU—the Council fixed the financial year of the AU from January 1 through December 31.[199]

The AU Act does not indicate the meeting place of the AU Council, but it may be assumed that, like the Council of Misters of the OAU, the sessions of the AU Council shall be held at the Organization's headquarters.[200] This conclusion is further fortified by the fact that the Assembly has also chosen the headquarters of the Union for its annual sessions, subject to the exceptions contained in its Rules.[201] A quorum of not less than two-thirds of the total membership of the Council will be necessary for meetings.[202] Like the AU Assembly, the Council shall adopt its own Rules of Procedure;[203] it is likely that the Rules of Procedure of the Council of Ministers of the OAU will serve as a template. Basically, the Rules will cover issues concerning the composition and functions of the Council; matters relating to meetings, election and functions of the Chairman and Vice-Chairman; quorum and debates, voting, resolutions; and amendments to the Rules.[204]

The Council "shall take its decisions by consensus or, failing which, by a two-thirds majority of the Member States."[205] This contrasts with the Council of Ministers of the OAU, where a simple majority adopted resolutions,[206] apparently because "Council resolutions are merely recommendations to the Assembly which is the organ competent to take final decisions."[207] For the AU Council, a simple majority vote is required only for procedural matters, including the question of whether a matter is one of procedure or not.[208] For its European counterpart, it is not so straightforward. The general rule is that the Council acts by a majority of its members.[209] However, in a great majority of the cases, the EU Treaty requires a qualified

198. *Id.*

199. *Decision on the Financial Situation of the Organization as at 31 May 2002*, Council of Ministers, 76th Ord. Sess., ¶ 4, O.A.U. Doc. CM/Dec. 651, Durban, South Africa (2002), *available at* http://www.au2002.gov.za/docs/summit_council/cmdec1.htm (last visited Sept. 11, 2002).

200. *Cf.* Rules of Council of Ministers, *supra* note 196, Rule 8.

201. AU Assembly Rules, *supra* note 126, Rule 5.

202. AU Act, *supra* note 14, art. 11(2); *cf.* Rules of Council of Ministers, *supra* note 196, Rule 18.

203. AU Act, *supra* note 14, art. 12.

204. *See generally* Rules of Council of Ministers, *supra* note 196.

205. AU Act, *supra* note 14, art. 11(1).

206. *See* OAU Charter, *supra* note 12, art. XIV(2); Rules of Council of Ministers, *supra* note 196, Rule 29 ("All resolutions shall be determined by simple majority of the members of the Council of Ministers.").

207. NALDI, THE ORGANIZATION OF AFRICAN UNITY, *supra* note 77, at 21.

208. AU Act, *supra* note 14, art. 11(1).

209. *See* European Community Treaty, *supra* note 193, art. 205(1).

majority and, in some cases, unanimity. For this purpose, votes of each Member State are weighed[210] to maintain a particular equilibrium.

Unlike the Council of Ministers of the OAU, it appears that decisions of the AU Council will be binding in their entirety on those to whom they are addressed; this will, presumably, include the Member State, a firm or an individual.

The AU Council is responsible *for* the functioning and development of the AU and accountable *to* the AU. It considers issues that the Assembly refers to it and monitors the implementation of policies the Assembly formulates.[211] Its activities, which are at the core of integration, amplify the mandate of the Council of Ministers under the OAU Charter.[212] Specifically, the AU Council shall coordinate and take decisions on policies in areas of common interest to the Member States. Such areas include:

> foreign trade; energy, industry and mineral resources; food, agricultural and animal resources, livestock production and forestry; water resources and irrigation; environmental protection, humanitarian action and disaster response and relief; transport and communications; insurance; education, culture, health and human resources development; science and technology; nationality, residency and immigration matters; social security, including the formulation of mother and child care policies, as well as policies relating to the disabled and the handicapped; [and] establishment of a system of African awards, medals and prizes.[213]

The AU Council will also receive project proposals from the Specialized Technical Committees as well as reports and recommendations on implementation of provisions of the Act.[214] It will also be involved in giving directives on meetings of the Committees,[215] as well as recommending any future establishment of "other offices of the Union" to the Assembly.[216] It will advise the Assembly on any proposal for the amendment or revision of the AU Act.[217] It may also have the power to request advisory opinions from the AU Court of Justice, pursuant to the AEC Treaty,[218] but subject to the

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210. *Id.* art. 205(2). These are weighed as follows: Belgium (5); Denmark (3); Germany (10); Greece (5); Spain (8); France (10); Ireland (3); Italy (10); Luxembourg (2); Netherlands (5); Austria (4); Portugal (5); Finland (3); Sweden (4); and United Kingdom (10). *Id.*

211. AU Act, *supra* note 14, art. 13(2).

212. *See, e.g.*, OAU Charter, *supra* note 12, art. XIII(2) (entrusting the Council of Ministers with the function of coordinating inter-African cooperation, "in accordance with the instructions of the Assembly [and in] conformity with Article II(2) of the present Charter"). Art. II(2) included coordination and harmonization of "economic cooperation, including transport and communications; educational and cultural cooperation; health, sanitation, and nutritional cooperation; scientific and technical cooperation; and cooperation for defence and security." *Id.* art. II(2).

213. AU Act, *supra* note 14, art. 13(1).

214. *Id.* art. 15(a) & (d).

215. *Id.* art. 16.

216. *Id.* art. 24(2).

217. *Id.* art. 32(3).

218. *See* AEC Treaty, *supra* note 29, art. 11(f).

Protocol on the Court that is yet to be elaborated. Like the AU Assembly, however, the Council will be actively involved in activities of both the African Commission and the Court. It will, for example, monitor execution of the Court's judgments on behalf of the Assembly.[219]

Comparatively, the European Community Treaty organizes activities of its Council around three separate areas: the Union's Community activities; the common foreign and security policy; and the cooperation in the field of justice and home affairs.[220] In Community activities, for example, the Council ensures Member States' coordination of general economic policies and their responsibilities in the fields of education, culture, health, European citizenship and visa policy.[221]

C. The Pan-African Parliament

Like the AU Assembly, the Pan-African Parliament (PAP) is another political organ of the AU. Its establishment, like its EU counterpart, is to "ensure the full participation of African peoples in the development and economic integration of the continent."[222] The AU Assembly reiterated this rhetoric of popular participation, through the PAP, during its first ordinary session in South Africa, in July 2002; thus, "[i]n order to ensure the involvement of our peoples and their civil society organisations in the activities of the Union, we recommit ourselves to the early establishment of the Pan African Parliament and the Economic, Social and Cultural Council (ECOSOCC) as envisaged in the Constitutive Act of our Union."[223]

The AU Act, however, did not define the composition, powers or functions of the PAP. These were left for a later protocol.[224] Happily, this is now academic, as the Assembly of the OAU, at its 5th Extraordinary Summit in Sirte on March 2, 2001 has adopted the Protocol to the AEC Treaty to establish the Pan-African Parliament,[225] pursuant to the recommendation of the

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219. *See* Prot. to African Charter, *supra* note 143, art. 29(2).

220. The European Community Treaty confers on the Council the responsibility of ensuring that the objectives set out in the treaty are attained. European Community Treaty, *supra* note 193, art. 202. The Council also coordinates the general economic policies of the Member States, with power to take decisions and "to confer on the Commission, in the acts that the Council adopts, powers for the implementation of the rules that the Council lays down." *Id.* In some cases, the Council may reserve the right to exercise its implementing powers directly itself. *Id.*

221. *See generally* EUROPEAN UNION, INTERINSTITUTIONAL DIRECTORY (1995).

222. AU Act, *supra* note 14, art. 17(1); *cf.* Roquette Freres v. Council, [1980] E.C.R. 3333 (1980), para. 33 (regarding, as a "fundamental democratic principle[,] that the peoples should take part in the exercise of power through the intermediary of a representative assembly").

223. *See Durban Decl.*, *supra* note 21, ¶ 17.

224. AU Act, *supra* note 14, art. 17(2); *cf.* AEC Treaty, *supra* note 29, art. 14(2).

225. *See Decision on the Draft Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament*, Assembly of the Heads of State and Government, 5th Extra-Ord. Sess., O.A.U. Doc. EAHG/Dec. 2 (V), Sirte, Great Jamahiriya

73rd Ordinary Session of the Council of Ministers.[226] Although this falls short of the 2000 deadline set by the OAU for the establishment of the Parliament,[227] it is better late than never.

The PAP Protocol, signed by twenty-one Member States and ratified by three countries,[228] will enter into force after the deposit of the instruments of ratification by a simple majority of the Member States.[229] It has twenty-five articles and deals with the anatomy and physiognomy of the PAP. It establishes a PAP to "represent all the peoples of Africa"[230] with the ultimate aim of evolving "into an institution with full legislative powers, whose members are elected by universal adult suffrage."[231] The PAP, however, is vested only with consultative and advisory functions,[232] apparently because African leaders do not want to subordinate the AU Assembly to any other political organ in terms of policy formulation and creation of binding decisions.

The PAP shall be composed of five representatives from Member States, one of whom must be a woman,[233] thus striking a note of gender sensitivity, even if it is a semi-tone and not nearly deep enough. If all fifty-three of the erstwhile OAU Member States ratify the AU Act, then the total number of Parliamentarians will come to 265 or 270 whenever Morocco rejoins the Organization.[234] The European Parliament,[235] in contrast, allots specific

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(2001) (adopting the Draft Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament). Twenty-one Member States have signed the Protocol so far and three countries have ratified it. *See* Transition from the OAU to the African Union, available at http://www.au2002.gov.za/docs/background/oau_to_au.htm (last visited Aug. 11, 2002). The Protocol will enter into force after the deposit of the instruments of ratification by a simple majority of the Member States. Protocol to the Treaty establishing the African Economic Community (AEC) Relating to the Pan-African Parliament, Mar. 2, 2001, art. 22, available at http://www.au2002.gov.za/ docs/key_oau/papprot.htm (last visited Jan. 6, 2003) [hereinafter PAP Protocol].

226. *See Decision on the Draft Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament (Doc. CM/2198 Annex 1)*, Council of Ministers, 73rd Ord. Sess., O.A.U. Doc. CM/Dec. 566 (LXXIII), Tripoli, Libya (2001).

227. *See Sirte Declaration*, Assembly of Heads of State and Government, 4th Extra-Ord. Sess., ¶ 8(ii)(b), O.A.U. Doc. EAHG/Decl. (IV) Rev.1 ("We aim to establish that Parliament by the year 2000, to provide a common platform for our peoples and their grass-root organizations to be more involved in discussions and decision-making on the problems and challenges facing our continent.").

228. *See Transition from the OAU to the African Union*, *supra* note 225.

229. *See* PAP Protocol, *supra* note 225, art. 22.

230. *Id.* art. 2(2).

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

232. *Id.*

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

234. The OAU is currently making efforts to restore the broken relationship and bring Morocco back to its fold. *See, e.g.*, David Bamford, *OAU Considers Morocco Readmission*, BBC NEWS, July 8, 2001 (stating that the OAU is currently making efforts to restore the broken relationship with Morocco) *at* http://news.bbc.co.uk/2/hi/world/africa/1428796.stm (last visited July 25, 2002).

235. The European Parliament consists of representative of the peoples of the States brought together in the Community. European Community Treaty, *supra* note 146, art. 189. It exercises powers conferred upon it by the Treaty, including participation in legislative and

numbers of representatives for each Member Country,[236] the total of which must not exceed seven hundred.[237] The numbers are calculated on the basis of population, but are weighed in favor of the small States in order to avoid excessive concentration of voting in the hands of a few large States and to ensure proper representation of various political opinions.[238]

Numerically then, the European Parliament is larger, in comparison, to the PAP. However, it must be stressed that the EU has the financial muscle to support such numbers, and this is made possible by the strong financial commitment of Member States to the Union. A forest a thousand years old is still collectively alive because some trees are dying and others are growing up. This is not the case in Africa, where Member States do not always pay their dues on time, if at all. Indeed, if the current paralytic financial state of the continental body is anything to go by, then it is doubtful that the Organization will be able to support the PAP, because each of the Parliamentarians "shall be paid an allowance to meet expenses in the discharge of their duties."[239] This will, presumably, include transportation to and from the seat of Parliament, lodging, food, secretarial support, and a thousand-and-one other miscellaneous or incidental expenses that usually accompany such picnics. What is more, the devil is usually in the details of such expenses, as corruption has become a rooted reality, indeed, a *lingua franca*, in most African countries. It is also the bane of the continent. Sad but true!

Each member of the PAP "shall be elected or designated by the respective National Parliaments or any other deliberative organs of the Members States."[240] Unlike the European Parliament, where members serve for a fixed term of five years,[241] the term of office of a member of the PAP "shall run concurrently with his or her term in the National Parliament or other deliberative organ."[242] This means that a person will cease to be a member of the PAP when, *inter alia*, he correspondingly ceases to be a member of, or is recalled by, his National Parliament or other deliberative organ.[243] This method of electing the Parliamentarians to the PAP has advantages and

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budgetary processes of the institutions of the EU and in the EU's initiatives in areas of foreign and security policies as well as cooperation in the field of justice. *See generally* THE EUROPEAN PARLIAMENT (Corbett Richard et al. eds., 1995)

236. *See* European Community Treaty, *supra* note 193, art. 190(2).

237. *Id.* art. 189(1).

238. The allotment are as follows: Belgium (25); Denmark (16); Germany (99); Greece (25); Spain (64); France (87); Ireland (15); Italy (87); Luxembourg (6); Netherlands (31); Austria (21); Portugal (25); Finland (16); Sweden (22); and United Kingdom (87). *Id.* art. 190(2).

239. PAP Protocol, *supra* note 225, art. 10.

240. *Id.* art. 5(1).

241. European Community Treaty, *supra* note 193, art. 190(3).

242. PAP Protocol, *supra* note 225, art. 5(3).

243. *Id.* art. 5(4). Additionally, the seat of a member will become vacant if he or she dies; resigns in writing to the President; cannot perform his or her functions due to physical or mental incapacity; is removed on the basis of misconduct; or if his or her State withdraws from the Union. *Id.* arts. 5(4) & 19.

drawbacks. On the bright side, it will reduce the huge cost and numerous logistical problems that a continent-wide electoral process would entail.[244] On the dark side, it will allow some members to serve for longer periods than others, depending on the constitutional arrangements in each Member State. Africa is still infested will all kinds of governments—pseudo-democratic, oligarchic, authoritarian, totalitarian, paternalistic, hierarchical and monarchical (basically, all forms of dictatorships). It is, thus, doubtful if the arrangement under the PAP Protocol will bring harmony, in view of these different constitutional and non-constitutional structures.

Another shortcoming of the PAP Protocol is its failure to allot some quota for non-governmental institutions in the PAP, with the result that the PAP will be made up of only recycled and partisan politicians. The civil society—defined as comprising those associational bodies between the person and the State[245]—has effectively been left out; but it must resist such marginalization because the business of the continent is too serious to be left solely in the hands of often selfish, corrupt and opportunistic politicians alone. Everyone should be given a sense of ownership of the AU. The PAP must be broadened from a government-led process to one that engages the broadest spectrum of Africans, including citizens, their elected representatives, civil society organizations, intellectuals and academics, the private sector, and the Diaspora. The AU must work to restore the propulsion of all communities.

The ultimate aim of the PAP, of course, will be "to evolve into an institution with full legislative powers whose members are elected by universal adult suffrage."[246] This is the practice in Europe[247] and is an ideal situation because it creates uniform standards. It will ensure that all eligible citizens of Member States have the opportunity to aspire for membership of the PAP. Floating of political parties at the continental level will also not be a bad idea because they allow broad based, continent-wide participation. In addition, uniformity of elections and suffrage will assure integration within the Union and contribute to forming an African awareness and voice that expresses the political will of the citizens of the Union.[248] That way, there will be a reciprocal pleasure in governing and being governed.

Whichever method of election is employed, it is vitally important that the process not only be fair, but it must also be perceived as fair. This will be critical not only to the legitimacy of the process but also to the legitimacy of

244. *Cf. Rep. of Legal Experts*, *supra* note 37, para. 26.

245. *See* Paul Gifford, Book Review, 30 J. RELIGION IN AFR. 494, 495 (2000) (reviewing CIVIL SOCIETY AND DEMOCRACY IN AFRICA: CRITICAL PERSPECTIVES (Nelson Kasfir ed., 1998)).

246. *See* PAP Protocol, *supra* note 225, art. 2(3).

247. The European Parliament is allowed to draw up a procedure "for elections by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States." *See* European Community Treaty, *supra* note 193, art. 190(4).

248. *Cf. id.* art. 191.

the AU itself. Common values embedded in African traditions, rule of law and constitutionalism should form the foundation for an effective and democratic AU. Ownership by the African people, both men and women, should form the linchpin of legitimacy.

The objectives of the PAP shall be to facilitate effective implementation of the policies and objectives of the AEC and the AU; "facilitate cooperation and development in Africa; promote the principles of human rights and democracy in Africa; [and] encourage good governance, transparency and accountability in Member States."[249] Others are to:

> familiarize the peoples of Africa with the objectives and policies aimed at integrating the African Continent within the framework of the establishment of the AU; promote peace, security and stability; contribute to a prosperous future for the peoples of Africa by promoting collective self-reliance and economic recovery; strengthen continental solidarity and build a sense of common destiny among the peoples of Africa; and facilitate cooperation among [RECs] and their Parliamentary fora.[250]

In pursuit of these objectives, the PAP, either on its own initiative or at the request of the Assembly or other policy organs, can examine, discuss or express an opinion on any matter and make such recommendations it may deem fit.[251] Such matters should relate to human rights, the consolidation of democratic institutions, the promotion of good governance and the rule of law.[252] The PAP shall also discuss its budget and that of the AU and make recommendations for the Assembly's approval and work towards harmonization of the laws of Member States. The harmonization of laws will be a particularly Herculean task—though a necessary one—in view of the mosaic character of the laws of African countries, a colonial legal heritage. The PAP will also make recommendations, possibly to the AU Assembly, towards the attainment of the objectives of the AEC and draw the attention of relevant bodies to the challenges facing the integration process in Africa and proffer strategies for dealing with them.[253] It shall promote programs and objectives of the AEC in the constituencies of Member States.[254]

The Parliamentarians "shall vote in their personal and independent capacity,"[255] which means that they are not to be dictated to and should refuse any dictation by their home governments. To ensure independence, the Protocol provides that PAP members shall not perform executive or judicial functions in their countries that are incompatible with their functions as Par-

249. PAP Protocol, *supra* note 225, art. 3.
250. *Id.*
251. *Id.* art. 11(1).
252. *Id.*
253. *Id.* art. 11(4).
254. *Id.*
255. *Id.* art. 6.

liamentarians.[256] The Protocol, however, allows the PAP to work in close cooperation with parliaments of the RECs, national parliaments or other deliberative organs of Member States. This will, subject to its Rules of Procedure, include "conven[ing] annual consultative fora . . . to discuss matters of common interests."[257] It is, however, not clear whether the PAP will have supra-national prerogative over national parliaments. This question arose during the second meeting of Legal Experts. It was suggested that, "if the [Pan-African] Parliament were to be vested with supra-national powers, it would be necessary to define the nature of the Executive Branch that would enforce its legislative enactments."[258] Because this has not been done, it may be assumed that the PAP will exercise no supra-national powers, though this position might change in the near future.

While exercising their functions, the Parliamentarians shall enjoy in the territory of each Member State immunities and privileges extended to representatives of Member States under the General Convention on the Privileges and Immunities of the OAU[259] and the Vienna Convention on Diplomatic Relations,[260] though the PAP has the power to waive such immunity.[261] Privileges and immunities of international diplomats rest on several theories, such as the representative theory (which emphasizes the diplomat's role as an agent of a sovereign State, such as, in this case, the AU) and the functional theory (which rests on practical necessity).[262]

Whatever the theory, it is important to stress that the provision of privileges and immunities "is neither merely a housekeeping problem for those organizations nor an insidious encroachment on the equal application of the rule of law, but is rather an essential device for protecting these organizations from unilateral and sometimes irresponsible interference by individual governments."[263] Furthermore, it may be assumed that immunities and privi-

256. *Id.* art. 7.

257. *Id.* art. 18.

258. *Rep. of Legal Experts*, *supra* note 37, para. 28.

259. General Convention on the Privileges and Immunities of the Organization of African Unity, Oct. 25, 1965, 1000 U.N.T.S. 393 [hereinafter OAU Privileges and Immunities Conv.].

260. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95, 55 AM. J. INT'L L. 1064 (entered into force Apr. 24, 1964) [hereinafter Vienna Relations Convention]. "Parts of the Convention are based on existing practice and other parts constitute a progressive development of the law." BROWNLIE, *supra* note 3, at 349-50.

261. PAP Protocol *supra* note 225, art. 8; *cf.* U.N. CHARTER, *supra* note 48, art. 105(2) ("Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization").

262. *Cf.* Vienna Relations Convention, *supra* note 260, pmbl. (providing that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States"); *see also* Private Servant of Diplomat Case, 71 I.L.R. 546 (Aus. Sup. Ct. 1971); Dorf Case 71 I.L.R. 552 (Nor. Sup. Ct. 1973); BROWNLIE, *supra* note 3, at 351.

263. Paul Szasz, *International Organizations, Privileges and Immunities*, *in* 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1325, 1326 (Rudolf Bernhardt ed., 2000).

leges will cover PAP's support staff, whether their rank be high or low, their assignments diplomatic, professional, technical, secretarial or merely manual. Such extension, of course, might provide grounds for attack by Member States because of practical problems relating to the massive increase in diplomatic personnel.[264]

The ICJ stressed the importance of the principles embodied in the Vienna Relations Convention in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*.[265] In this case, the Iranian Government was held responsible for failing to prevent and, subsequently, approving the actions of militants who invaded the United States Embassy in Tehran and held diplomatic and consular personnel "hostage." The Court observed, "the obligations of the Iranian Government here in question are not merely contractual . . . but also obligations under general international law."[266] This obligation is, however, without prejudice to rights of the host State to require diplomats to leave its territory if they abuse their privileges.[267]

Similarly, subject to the right of waiver of immunity, Parliamentarians:

> shall enjoy parliamentary immunity in each Member State. Accordingly, a member of the Pan-African Parliament shall not be liable to civil or criminal proceedings, arrest, imprisonment or damages for what is said or done by him or her within or outside the Pan-African Parliament in his or her capacity as a member of Parliament in the discharge of his or her duties.[268]

Article 12 of the PAP Protocol deals with the Rules of Procedure and Organization of the PAP, providing for election of the President and four Vice-Presidents, which must reflect the geographical milieu of the continent.[269] The terms of office of the President and Vice-Presidents shall, like other Parliamentarians, run concurrently with their terms at their national parliaments.[270] These officers "shall be responsible for the management and administration of the affairs and facilities of the Pan-African Parliament and its organs."[271] This also, presumably, includes representing the Parliament in its external relations with the other Organs of the AU, as well as other aspects of international relations. The President or, in his absence, the Vice-Presidents, who are "ranked in accordance with the result of their votes and

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264. *Cf.* Vienna Relations Convention, *supra* note 260, art. 11(1) (providing that the receiving State may require that the size of a mission be kept within limits considered by it to be reasonable and normal).

265. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 7, 18-19 (Order of Dec. 15); United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 30, 30-43 (Judgment of May 24).

266. United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. at 31, 33 & 41.

267. Szasz, *supra* note 263, at 1329.

268. PAP Protocol, *supra* note 225, art. 9(1).

269. *Id.* art. 12(2).

270. *Id.* art. 12(3).

271. *Id.* art. 12(5).

subsequently by rotation,"[272] will preside over all Parliamentary proceedings, except those held in committee.[273] There are also provisions dealing with vacancy of the President or Vice-Presidents, method of their removal, filling of such vacancies, quorum for meetings of the PAP—which shall be by a simple majority—voting rights, and committees.[274]

Other provisions in the PAP Protocol deal with oath of office,[275] sessions,[276] budget,[277] seat of the PAP—which is determined by the Assembly[278]—and the working languages, which shall be, "if possible, African languages, Arabic, English, French and Portuguese"—vestiges of colonialism.[279] There are also provisions on withdrawal,[280] interpretation,[281] signature and ratification,[282] entry into force,[283] accession,[284] amendment or revision,[285] as well as review of the Protocol—which shall be carried out after the first five years of its entry into force and subsequently every ten years.[286]

In principle, the PAP is conceived as a legislative body capable of creating international law—like the EU. This is a great advance in the development of the law of international institutions in Africa, unlike the OAU, whose Charter contemplated and provided that the objectives of the OAU would be carried out principally through harmonization of the general policies in various fields. With time, however, the OAU was able to create inter-

272. *Id.* art. 12(4).

273. *Id.* art. 12(7).

274. *See id.* arts. 12(8) – (14).

275. *Id.* art. 13 (providing that "[a]t its first sitting, after the election and before proceeding with any other matter, the Pan-African Parliamentarians shall take an oath or make a solemn declaration").

276. *Id.* art. 14 (providing details regarding who will preside over sessions, frequency of sessions, Extraordinary sessions and that "the proceedings . . . shall be open to the public").

277. *Id.* art. 15 (providing that the PAP's budget will be an "integral part" or the regular budget of the OAU/AEC and the manner in which the budget will be drawn up).

278. *Id.* art. 16 (stating that the seat of the PAP will be determined by the Assembly, but that the PAP can convene in any Member State's territory upon invitation).

279. *Id.* art. 17.

280. *Id.* art. 19 (providing that "[t]he Pan-African Parliamentarians from a Member State which withdraws from the Community shall automatically cease to be Pan-African Parliamentarians").

281. *Id.* art. 20 (providing that "[t]he Court of Justice shall be seized with all matters of interpretation emanating from [the PAP Protocol]").

282. *Id.* art. 21 (stating that the PAP Protocol will be signed and ratified by Member States according to their Constitutional procedures and that the instruments of ratification will be deposited with the Secretary General of the OAU).

283. *Id.* art. 22 (providing that the PAP Protocol will "enter into force thirty (30) days after the deposit of the instruments of ratification by a simple majority of the Member States").

284. *Id.* art. 23 (providing that any Member State can accede to the PAP Protocol after its entry into force by notifying the Secretary General).

285. *Id.* art. 24 (stating that the PAP Protocol can be amended or revised by the decision of a two-thirds majority of the Assembly).

286. *Id.* art. 25.

national law "through the adoption of multilateral law-making treaties and resolutions (or declarations), in addition to the longer established law-creating process of custom-formation."[287] In carrying out its mandate, it will be important for the PAP to constantly draw lessons from existing regional parliamentary structures, both within and without Africa, such as the South African Development Community (SADC) Parliamentary Forum, the Economic Community of West African States (ECOWAS) Parliament, the European Parliament, the Latin American/Andean Parliament and the Asia-Pacific Parliamentary Forum.

D. The Court of Justice

The Court of Justice (AU Court) is another Organ of the AU.[288] It is the judicial counterpart of the political organs (the Assembly and the Executive Council) and the economic and social organs (the Executive Council and the Economic, Social and Cultural Council) of the AU. Like the PAP, however, "its statute, composition and functions shall be defined in a separate protocol,"[289] though its judges shall be appointed and terminated by the Assembly.[290] It is crucial that the appointment of judges be carried out with great circumspection. They should be appointed from the ranks of qualified lawyers (those who hold the highest national judicial posts or are recognized jurisconsults) and whose independence is beyond question. Because Africa is a continent where wisdom and virtue are not the only or most common qualification for a place in the government, serious effort must be made to ensure that the Court is not composed of agents and mouthpieces of Member States. The judges must be completely independent of their governments, both in theory and in practice.

Similarly, in drawing up the protocol and defining the composition and functions of the Court, the independence of the Court must be fully guaranteed. It will also be important to bear in mind the different legal traditions in Africa and, as is customary with the OAU organs, to reflect an equitable geographical balance in the composition of the Court. It is equally important that the PAP Protocol be gender sensitive. Happily, the AU Act has the "promotion of gender equality" as one of its principles.[291]

The AU Act, however, provides that "[t]he Court shall be seized with matters of interpretation arising from the application or implementation of

287. *See* Tiyanjana Maluwa, *International Law-Making in the Organisation of African Unity: An Overview*, 12 REVUE AFRICAINE DE DROIT INTERNATIONAL ET COMPARÉ [RADIC] 201, 201-02 (2000).

288. *See* AU Act, *supra* note 14, art. 5(1)(d).

289. *Id.* art. 18.

290. *Id.* art. 9(h).

291. *Id.* art. 4(l).

this Act."[292] It shall also interpret the PAP Protocol.[293] This implies that some of the organs of the AU, such as the AU Assembly or the AU Council, will have the competence to seek an advisory opinion of the Court on interpretation of the Act. Because interpretation of the constituent instrument of an international organization is always a matter within the functions of that organization, the organization is thus always entitled to request an advisory opinion from the Court on the point. The advisory function of the Court will assist the organs of the AU in the resolution of legal questions that affect their work, providing them with a means of resolving legal questions on which concrete aspects of their work depend. However, in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (request by the World Health Organization (WHO)),[294] the ICJ held that an organization "is not empowered to seek an opinion on the interpretation of its Constitution in relation to matters outside the scope of its functions."[295] The Court held, in relation to that case, that the WHO had no competence to address the question of the legality of the use of nuclear weapons.[296]

In general, the Court will have to strike a balance between a restrictive interpretation, which seeks to protect the sovereignty of Member States, and the principle of *effet utile* (effectiveness). A restrictive interpretation of a treaty clause must not render ineffective the limitations and duties intended by the parties and provided for by the treaty.[297] Thus, the rule of thumb

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292. *Id.* art. 26; *cf.* European Community Treaty, *supra* note 193, art. 220 (describing the duties of the European Court of Justice (ECJ)).

293. *See* PAP Protocol, *supra* note 225, art. 20.

294. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 I.C.J. 66 (July 8).

295. *Id.* at 82; s*ee also* Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 232-35 (July 8), 35 I.L.M. 809, 817.

296. *Contra* Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 I.C. J. 66, 128-29 (dissenting opinion of Judge Weeramantry) ("I find it difficult also to accept that an organ of the United Nations, empowered to seek an advisory opinion on a question of law, has no competence to seek an interpretation of its own Constitution."); Dapo Akande, *The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice*, 9 E.J.I.L. 437 (1998). Akande argues, *inter alia*, that:

> an organization always has some competence to deal with breaches of its constitution. This competence may be limited and the steps the organization may take in the event of such breaches may have limited practical effect, but one can say that the breach of an organization's constitution is always a matter within the scope of concern of that organization and always a matter on which the organization can take some action (whatever that action may be). The Court seems to have ignored this possibility. By so doing, the Court's opinion may well have limited the prospect of international organizations obtaining assistance from the Court on a matter (the breach of their constitution) they are entitled to discuss.

Id. at 454.

297. The Vienna Convention furnishes the guidelines for the process of trying to establish from the text of a treaty the intention of the parties, so as to determine the proper application of the treaty in specific circumstances. *See* Vienna Convention, *supra* note 34, arts. 31-33.

should be the rule *pacta sunt servanda*—the principle that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[298] The Court should lean towards the teleological or functional approach, according to which it should always determine the objects and purposes of the treaty and give effect to them. It is only by so doing that the Court will be able to uphold the great promises in the Act and compel the usually reluctant Member States to maintain faith with the Court. When the issue of interpretation relates to the AU Act and its protocols, then a flexible and effective approach will be justifiable.

The ICJ has, for example, adopted the principle of effectiveness and implied powers consistent with the aims and purposes of the UN Charter in cases affecting the organs of the UN. In *Reparation for Injuries Suffered in the Service of the United Nations* (*Reparation* case),[299] for example, the Court held that "an interpretation which would deprive the Minorities Treaty of a great part of its value is inadmissible."[300] However, the process of interpretation and the wide margin of appreciation should not be subordinated to arbitrary devices. As Judge Hackworth observed, in the *Reparation* case, "[p]owers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are 'necessary' to the exercise of powers expressly granted."[301] Striking a balance between these contending views will, undoubtedly, exact the AU Court's creative ability.

It is vitally important for future protocols to vest the AU Court with the power of judicial review to counterbalance the extensive powers of the political organs. The European Community Treaty, for example, makes general provisions for this, giving the ECJ the power to:

> review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.
>
> It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.[302]

298. *Id.* art. 26.

299. Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174 (Apr. 11).

300. *Id.* at 180.

301. *Id.* at 198.

302. European Community Treaty, *supra* note 193, art. 230.

If the action is well founded, the ECJ has the power to void it and, in the case of a regulation, to state "which of the effects of the regulation which it has declared void shall be considered as definitive."[303]

Pending its establishment, interpretative matters over both the AU Act and the PAP Protocol will be submitted to the AU Assembly, "which shall decide by a two-thirds majority,"[304] a provision which, like the peace of God,[305] passes all understanding. This provision raises extremely fascinating constitutional questions of how a political organ, such as the Assembly, can transform itself into a judicial body, capable of interpreting its own actions *vis-à-vis* the Act. Will the Member States of the Assembly have the independence of thought and action to give an unbiased interpretation of matters "arising from the application or implementation" of the Act? How will the actions of the Assembly be checked to ensure that they conform to the provisions of the Treaty, if the same Assembly vests itself with the power of interpretation? Will the Assembly be able to annul its acts through a majority vote? The absence of an independent force that can neutralize the excesses of the Assembly has created an absence of a political symmetry. The solution to these foreseeable confusions lies in an immediate adoption of the protocol to set up the Court.

It may be assumed that the yet-to-be-established AEC Court of Justice (AEC Court) will be overtaken by the AU Court, in view of the apparent conflict between the AEC Treaty and the AU Act.[306] However, because the protocol on the AU Court is yet to be elaborated, it may be necessary to briefly highlight the constituent elements of the AEC Court under the AEC Treaty. The reason for such an exercise is that the future protocol is not likely to be radically different in substance from the provisions in the AEC Treaty. Like the AU Act, the AEC Treaty establishes an AEC Court to interpretation the provisions of the Treaty.[307] In deciding disputes submitted to it concerning the "interpretation and application" of the Treaty, the Court "shall ensure the adherence to law."[308] The phrase "the interpretation and application of"—"two distinct terms relating to two distinct operations"[309]—has been given a broad interpretation to include any dispute between States concerning the responsibility of one of them for an alleged breach of an in-

303. *Id.* art. 231.

304. AU Act, *supra* note 14, art. 26; PAP Protocol, *supra* note 225, art. 20.

305. *See Philippians* 4:7 (KJV).

306. *See* AU Act, *supra* note 14, art. 33(2) (providing that "[t]he provisions of this Act shall take precedence over and supersede any inconsistent or contrary provisions of the Treaty establishing the African Economic Community").

307. *See* AEC Treaty, *supra* note 29, art. 18(1). For commentary on the AEC Court, see generally Chris M. Peter, *The Proposed African Court of Justice—Jurisprudential, Procedural, Enforcement Problems and Beyond*, 1 E. AFR. J. PEACE & HUM. RTS. 117 (1993) and NALDI, THE ORGANIZATION OF AFRICAN UNITY, *supra* note 77, at 245-47.

308. AEC Treaty, *supra* note 29, art. 18(2).

309. ROSENNE, *supra* note 24, at 224.

ternational obligation, whatever its origin.[310] Similarly, in the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*,[311] the ICJ, in its "first significant judicial pronouncement regarding the meaning of 'application,'"[312] maintained that the appraisal of conduct in the light of the relevant principles of the treaty pertains to the application of the law rather than to its interpretation; and this must be undertaken in the context of the general evaluation of the facts which are established in relation to the applicable law.[313]

The AEC Court has both a contentious and an advisory[314] mandate. The AEC Court shall, for example, entertain "actions brought by a Member State or the Assembly on grounds of the violation of the provisions of this Treaty, or of a decision or a regulation or on grounds of lack of competence or abuse of powers by an organ, an authority or a Member State."[315] Similarly, parties to a "dispute regarding the interpretation or the application of the provisions of [the AEC] Treaty" may, failing amicable settlement, also refer the matter to the Court.[316] Lastly, the Assembly may refer any dispute concerning the AEC Protocol on RECs to the Court as a measure of "last resort."[317] This emphasis on amicable settlement is a common refrain in most African regional and sub-regional instruments[318] and strikes at the heart of African ju-

310. *See, e.g.*, Mavrommatis Palestine Concessions, 1924 P.C.I.J. (ser. A) No. 2, 15-16; Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 390, 427-28 (Jurisdiction and Admissibility Judgment of Nov. 26); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1996 I.C.J. 594, 615-17 (Preliminary Objections Judgment of July 11); Oil Platforms (Iran v. U.S.), 1996 I.C.J. 803, 820 (Preliminary Objections Judgment of Dec. 12); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriva v. U.S.), 1998 I.C.J. 115, 123 (Preliminary Objections Judgment of Feb. 27).

311. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 117.

312. ROSENNE, *supra* note 24, at 224 n.51 & 224.

313. Nicar. v. U.S., 1986 I.C.J. at 117.

314. *See* AEC Treaty, *supra* note 29, art. 18(3) (providing that the Court, "shall decide on actions brought by a Member State or the Assembly," and, "at the request of the Assembly or Council, [can] give advisory opinion[s]"). For further discussion on advisory opinions, see generally Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 I.C.J. 66 (Jul. 8).

315. AEC Treaty, *supra* note 29, art. 18(3)(a); *cf.* European Community Treaty, *supra* note 193, art. 227 (providing that "[a] Member State which considers that another Member State has failed to fulfill an obligation under this Treaty may bring the matter before the Court of Justice"). The European Community Treaty, however, provides that a Member State must first take a matter to the Commission, before proceeding to the ECJ. *Id.*

316. AEC Treaty, *supra* note 29, art. 87(1) .

317. AEC Prot. on RECs, *supra* note 150, art. 30.

318. *See, e.g.*, Treaty of the South African Development Community (SADC), Aug. 17, 1992, art. 32, 32 I.L.M. 116 (1993), *reprinted in* 5 REVUE AFRICAINE DE DROIT INTERNATIONAL ET COMPARÉ [RADIC] 415 (1993) (The SADC Treaty provides that disputes arising from the interpretation and application of the SADC Treaty should be settled amicably through a process of friendly settlement. If a dispute cannot be settled amicably, it is referred to the SADC Tribunal).

risprudence. African culture frowns upon litigation, the adversarial and adjudicative procedures common to Western legal systems. Africans consider third party adjudication as generally confrontational; they favor consensus and amicable settlement of disputes.[319]

The judgments of the AEC Court are final and, therefore, not subject to appeal,[320] though the question of whether the Court will have power to revise its own judgment is not addressed.[321] It is submitted that the AU Court should be vested with such power, in light of new evidence, under conditions as might be set out in the Rules of the Court.[322] The Court should also be able to interpret its own decisions.[323] The judgments of the AEC Court are, however, binding on Member States and organs of the AEC.[324]

Finally, but importantly, "[t]he Court of Justice shall carry out the functions assigned to it independent of the Member States and other organs of the Community."[325] The AEC Assembly, now to be subsumed in the AU Assembly, may also confer on the Court power to assume jurisdiction by virtue of the Treaty "over any dispute other than those referred to in" the AEC Treaty.[326] This implies that the Assembly may refer to the Court disputes between natural or legal persons. Indeed, natural and legal persons have proved to be effective guardians of the EC legal order and have contributed significantly to the evolution of the EC law.[327] Individuals should be allowed access to the future AU Court. The function of the Court in a Union having the ambitious aims it set for itself should be to protect the "state of law." It is, therefore, extremely important that "individuals must . . . be able to appeal directly to the Court of Justice against an act of one of the institutions of the Union infringing their basic rights."[328]

A problematic issue is the nature of the relationship between the proposed AU Court and the African Human Rights Court that is also awaiting its establishment. On June 9, 1998, at Ouagadougou, Burkina Faso, the OAU

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319. *See generally* TASLIM O. ELIAS, THE NATURE OF AFRICAN CUSTOMARY LAW (1962) (describing African forms of adjudication).

320. AEC Treaty, *supra* note 29, art. 87(2).

321. *Cf.* Protocol on the Statute of the Court of Justice of the European Community, art. 40, *reprinted in* EUROPEAN UNION LAW: DOCUMENTS 209 (Frank Emmert ed. 1999) [hereinafter ECJ Statue] and Rules of Procedure of the European Court of Justice of the European Communities of 19 June 1991, art. 102, *reprinted in* EUROPEAN LAW: DOCUMENTS 218 (Frank Emmert ed.) [hereinafter ECJ Rules of Procedure].

322. Prot. to African Charter, *supra* note 143, art. 28(3).

323. *Id.* art. 28(4).

324. AEC Treaty, *supra* note 29, art. 19.

325. *Id.* art. 18(5).

326. *Id.* art. 18(4).

327. *See, e.g.*, Christopher Harding, *The Private Interest in Challenging Community Action*, 5 E.L. REV. 354 (1980); Carol Harlow, *Towards a Theory of Access for the European Court of Justice*, 12 Y.E.L. 213 (1992).

328. *Report on European Union by Belgium Prime Minister, "Tindemans Report,"* 1/76 BULL. EUR. COMMUNITIES (Dec. 29, 1975) (Supp. 1993) (on file with the California Western International Law Journal).

adopted a Protocol to the African Charter on the Establishment of the African Human Rights Court.[329] The proposed Court will "complement the protective mandate of the African Commission," conferred upon it by the African Charter.[330] The Human Rights Court is vested with jurisdiction extending "to all cases and disputes submitted to it concerning the interpretation and application of the [Banjul] Charter, [its] Protocol and other relevant Human Rights instrument ratified by the States concerned."[331] Like the AEC Court, and possibly the AU Court, the Human Rights Court is also fitted with advisory powers.[332]

There is a real possibility of jurisdictional conflicts between the two courts, particularly because the AU Act also contains human rights provisions.[333] Such fragmentation of dispute settlement mechanisms creates the attendant possibility, even if remote, of creating disparate norms, as both courts might give conflicting interpretations to the provisions of relevant human rights instruments invoked before each Court. The result will be to thwart, rather than develop, human rights jurisprudence. International law should develop uniformly in the continent and, by extension, throughout the international legal community. The issues "flowing from the multiplicity of procedures and mechanisms"[334] have, indeed, been major concerns of international lawyers in recent years.[335] The ICJ has also reflected on the problem:

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329. *See* Prot. to African Charter, *supra* note 143.

330. *Id.* art. 2 & pmbl. For commentaries on the Protocol, see Nsongurua J. Udombana, *Towards the African Court on Human and Peoples' Rights: Better Late Than Never*, 3 YALE HUM. RTS. & DEV. L.J. 45 (2000); Gino J. Naldi & Konstantinos D. Magliveras, *Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights*, 16 NETH. Q. HUM. RTS. 431 (1998); Andre Stemmet, *A Future African Court for Human and Peoples' Rights and Domestic Human Rights Norms*, 23 S. AFR. Y.B. INT'L L. 233 (1998); John Mubangizi & Andreas O'Shea, *An African Court on Human and Peoples' Rights*, 24 S. AFR. Y.B. INT'L L. 256 (1999); Makau Mutua, *The African Human Rights Court: A Two-legged Stool?*, 21 HUM. RTS. Q. 350 (1999).

331. Prot. to African Charter, *supra* note 143, art. 3.

332. *Id.* art. 4 (providing that "[a]t the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments").

333. *See* AU Act, *supra* note 14, arts. 3(e) - (h) (seeking, *inter alia*, to encourage international cooperation, taking due account of the UN Charter and the UDHR; promote peace, security and stability in Africa; "promote democratic principles and institutions, popular participation and good governance; and promote and protect human and peoples' rights in accordance with the African Charter and other relevant human rights instruments").

334. REMEDIES IN INTERNATIONAL LAW: THE INSTITUTIONAL DILEMMA vii (Malcolm Evans ed., 1998).

335. *See generally* Tullio Treves, *Advisory Opinions of the International Court of Justice on Questions Raised by Other International Tribunals*, 4 MAX PLANCK U.N. Y.B. 215 (2000); Hugh Thirlway, *The Proliferation of International Judicial Organs and the Formation of International Law*, *in* INTERNATIONAL LAW AND THE HAGUE'S 75TH ANNIVERSARY 433 (W. P. Heere ed., 1999); Jonathan Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697 (1999);

> The proliferation of international courts gives rise to a serious risk of conflicting jurisprudence, as the same rule of law might be given different interpretations in different cases. . . . A dialogue among judicial bodies is crucial. The International Court of Justice, the principal judicial organ of the United Nations, stands ready to apply itself to this end if it receives the necessary sources.[336]

In the case of Africa, a possible solution will be to expand the mandate of the Human Rights Court to cover interpretation of the AU Act and halt establishment of the Court of Justice, particularly in view of the very lean purse of the continental body. There may also be strength in collapsing the Human Rights Court into the AU Court; either way, the truth is that Africa cannot afford two supra-national courts in these austere times.[337]

E. The Commission

The Commission "shall be the Secretariat of the Union."[338] It shall be composed of the Chairman, his or her deputy or deputies and the Commissioners, to be assisted by the necessary staff for the smooth functioning of the Commission.[339] The Assembly of the AU will determine its structure, functions and regulations.[340] Before inauguration of the AU Assembly, the OAU Assembly had mandated its Secretary General, in consultation with Member States, "to submit proposals regarding the structure, functions and powers of the Commission."[341] The AU Assembly has renewed that mandate, authorizing "the Interim Commission to complete its proposals on structure of the Commission for submission to Member States and undertake all the necessary measures to facilitate the election and appointment of the Chairperson, the Deputy Chairperson and the Commissioners in July 2003."[342]

Symposium, *The Proliferation of International Tribunals: Piecing Together the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 697 (1999).

336. Statement of the President of the ICJ, Gilbert Guillaume to the UN General Assembly of 26 Oct. 2000, *quoted in* Karin Oellers-Frahm, *Multiplication of International Courts and Tribunals and Conflicting Jurisdiction—Problems and Possible Solutions*, 5 MAX PLANCK U.N. Y.B. 67, 68 (2001); *cf.* similar statement from the former ICJ President Schwebel, ICJ PRESS COMMUNIQUE, 99/46 of 26 Oct. 1999.

337. For a fuller analysis of this problem, see Nsongurua J. Udombana, *A Needful Duality or a Needless Duplication? The African Court of Justice and the African Court on Human and Peoples' Rights*, 28 BROOK. J. INT'L L. (forthcoming 2003).

338. AU Act, *supra* note 14, art. 20(1); *see also id.* art. 1.

339. *Id.* art. 20(2). They are to be "assisted by the necessary staff for smooth functioning of the Commission." *Id.*

340. *Id.* art. 20(3); *see also* art. 9(1)(i) (providing that the Assembly shall "appoint the Chairman of the Commission and his or her deputy or deputies and Commissioners of the Commission and determine their functions and terms of office").

341. *Decision on Implementation*, *supra* note 83, ¶ 5.

342. *Decision on Interim Period*, *supra* note 84, ¶ 2(vi); *see also id.* ¶ 2(vii) (authorizing "the Interim Chairperson to prepare the financial implications of the structure of the Commis-

The structure of the Commission will, no doubt, be influenced by those of the defunct OAU Secretariat,[343] the AEC Secretariat[344] and, plausibly, the European Commission[345]—described as "the catalyst of the European Union."[346] Under the AEC Treaty, for example, the Secretariat implements the decisions of the Assembly, applies the regulations of the Council and promotes development programs.[347] It also prepares proposals for the program of activity of the AEC as well as the budget and, upon their approval by the Assembly, ensures their implementation.[348] Finally, the AEC Secretariat drafts studies aimed at attaining the objectives of the AEC.[349]

The AU Assembly has, meanwhile, designated the Secretary General, the Assistant Secretaries General and the Staff of the General Secretariat of the OAU as the Interim Commission pursuant to Article 33(4) of the AU Act.[350] The Secretary General is the Interim Chairperson with the Assistant Secretary Generals acting as Commissioners of the Union.[351]

Some of the functions of the Commission and of its Chairman are, however, scattered in the AU Act. The Commission, for example, will receive

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sion and undertake the necessary consultations with Member States prior to submitting them to the Executive Council and ultimately to the Assembly in July 2003").

343. Article 11 of the Rules of the Secretariat lists the functions of the Secretary-General of the OAU Secretariat to include the following: he submits to the Member States, a month in advance of the OAU Summit, the budget and the minutes of the Council of Ministers and specialized commissions; he communicate a copy of the notification of accession or adhesion to the Charter to Member States; he receives a written notification from any State wishing to renounce its membership; receive a written request from any Member State for the amendment or revision of the Charter and notify all the Member States accordingly; accept, on behalf of the OAU, gifts, bequests and other donations after approval by the Council of Ministers; call ordinary and extraordinary sessions of the Council of Ministers and of the Assembly; draft the provisional agenda and communicate it to the Member States; prepare and submit the OAU's annual budget for the approval of the Council of Ministers; and create or abolish, subject to the approval of the Council of Ministers, any administrative or technical offices or sections which he deems necessary for the proper functioning of the General Secretariat.

344. AEC Treaty, *supra* note 29, art. 22. Under the AEC Treaty, the secretariat is charged with securing the "implementation of the decisions of the Assembly and the application of the regulations of the Council; promot[ing] development programmes; . . . prepar[ing] proposals concerning the programme of activity and budget and upon their upon their approval by the Assembly ensure the implementation thereof," and drafting studies with the aim of attaining the objectives of the AEC. *Id.* art. 22(2).

345. *Cf.* European Community Treaty, *supra* note 193, art. 211 (vesting on The Commission the responsibility of ensuring that the provisions of the treaty and decisions are correctly applied; formulating recommendations or delivering opinions on matters dealt with in the treaty; participating in the shaping of measures taken by the Council and the Parliament and exercising powers conferred on it by the Council for the implementation of the rules laid down by the latter). For a description and conceptualization of the Commission, see THE EUROPEAN COMMISSION (Geoffrey Edwards & David Spence eds., 1994).

346. EUROPEAN UNION, INTERINSTITUTIONAL DIRECTORY, *supra* note 221, at ix.

347. AEC Treaty, *supra* note 29, art. 22(2).

348. *Id.*

349. *Id.*

350. *Decision on Interim Period*, *supra* note 84, ¶ 2(iv).

351. *Id.* ¶ 2(v).

the instruments of accession to the AU Act from any Member wishing to do so.[352] It shall receive notification of intention to accede to the Act from any African State, transmit the notification to all Member States and transmit the decision of the Union on such request to the State concerned.[353] The Commission will also receive written notification from any State wishing to renounce its membership from the AU and inform Member States accordingly.[354] Proposals for the amendment of the AU Treaty must be submitted to the Chairman of the Commission, who will transmit the proposals to Member States within thirty days of receiving them.[355] The Chairman of the Commission is also mandated to transmit a certified true copy of the AU Act to the Government of each signatory State.[356]

Undoubtedly, the Commission will be the anchor of the AU. It must, therefore, be properly grounded "firm and deep," in order for it to withstand the billows that will inevitably row it. The AU must emphasize the quality of human resources that will run the Commission and be prepared to pay competitive salaries in order to hire quality technocrats.[357] It is gratifying that African leaders have taken the right steps in this direction. As an interim measure, the Council of Ministers, at its 76th Ordinary Session in South Africa, in July 2002, granted a "15% salary increase, across the board, to the entire staff [of the OAU] retroactively, with effect from 1st March 2002,"[358] and requested "the General Secretariat . . . [to] determine in absolute terms, the financial implications of the salary increase granted and to take necessary steps to implement immediately the decision for the benefit of the current Staff."[359]

Furthermore, it is important that the staff of the Commission should be appointed purely on the basis of merit and professional qualifications. They should also be insulated, as far as possible, from political wrangling, to enable them to perform their functions impartially. Member States must avoid the temptation to place their people in certain positions in order to have a presence. The Commission should be allowed to play both constructive and conservative roles.

The Union should also periodically provide quality training to equip the staff of the Commission and, in particular, to expose them to new information and communications technologies. Special training programs should also be organized to upgrade the skills of OAU staff members, many of

352. *See* AU Act, *supra* note 14, art. 27(3).
353. *Id.* art. 29.
354. *Id.* art. 31(1).
355. *Id.* art. 32(2).
356. *Id.* art. 33(5).
357. *See Decision on Improvement in the Conditions of Service of OAU Staff*, Council of Ministers, 76th Ord. Sess., O.A.U. Doc. CM/Dec. 654, Durban, South Africa (2002).
358. *Id.*
359. *Id.*

whom will, inevitably, be reabsorbed by the AU.[360] These are not luxuries; they are necessities. They are essential for strengthening the Commission's and Africa's ability, *a fortiori*, to compete globally. The AU will be as good as the Commission; a Commission that works with outdated facilities will produce outdated results. On the other hand, any man will forge a bar of iron, if he is given a hammer.

Finally, it will be important for the PAP to exercise some form of control on the Commission. It should have the right to summon, where the need arises, the Commissioner and other members of the Commission for questioning on every aspect of their activities—something similar to the Committees of Inquiry of the European Parliament. The European Community Treaty, for example, provides that:

> [i]n the course of its duties, the European Parliament may, at the request of a quarter of its Members, set up a temporary Committee of Inquiry to investigate, without prejudice to the powers conferred by this Treaty on other institutions or bodies, alleged contraventions or maladministration in the implementation of Community law, except where the alleged facts are being examined before a court and while the case is still subject to legal proceedings.[361]

This should be seriously considered in any future amendment of the PAP Protocol because it is one of the ways by which the Commission will be made to function effectively and not relapse into the bureaucracy that was the hallmark of the OAU Secretariat.

F. The Permanent Representative Committee

The Permanent Representatives Committee (PRC) "shall be composed of permanent representatives of the Union and other Plenipotentiaries of Member States."[362] This structure was not formally recognized under the OAU, but it is analogous to the Committee of Ambassadors and the Committee of Permanent Representatives under the EU Treaty.[363] The PRC, which will work closely with the Commission, will prepare the work of the AU Council and act on its instructions.[364] It will also probably be involved in the process of nomination and appointment of Commissioners and will look into selection and appointment of consultants and follow-up on implementa-

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360. *See, e.g.*, *Decision on Interim Period*, *supra* note 84, ¶ 2(iv) (designating "the Secretary General, the Assistant Secretaries General and the Staff of the General Secretariat of the OAU as the Interim Commission in accordance with Article 33(4) of the Constitutive Act").

361. European Community Treaty, *supra* note 193, art. 193.

362. AU Act, *supra* note 14, art. 21(1).

363. *Cf.* European Community Treaty, *supra* note 193, art. 207(1) (placing on the Committee of Permanent Representatives (COREPER) the responsibility of "preparing the work of the Council and for carrying out the tasks assigned to it by the Council").

364. AU Act, *supra* note 14, art. 21(2).

tion of Summit decisions. The PRC will arguably assume more functional responsibilities than the current Committee of Ambassadors. This is why it is important to orient its powers and functions properly.[365]

G. The Specialized Technical Committees

The Specialized Technical Committees (STCs)[366] are the same sectoral committees established under the AEC Treaty,[367] the major difference being that, under the AU Act, the STCs are to report to the Executive Council.[368] Under the AEC Treaty, the STCs reported to the Economic and Social Commission, composed of ministers responsible for economic development, planning and integration of each Member State, which, in turn, reported to the Council of Ministers.[369] Ministers or senior officials in charge of relevant sectors within their competence shall make up the STCs.[370] Within its field of competence, the STC shall:

> shall prepare projects and programmes of the Union and submit it to the Executive Council; ensure the supervision, follow-up and the evaluation of the implementation of decisions taken by the organs of the [AU]; ensure the coordination and harmonization of projects and programmes of the [AU]; submit to the Executive Council, either on its own initiative or at the request of the Executive Council, reports and recommendations on the implementation of the provisions of [the] Act; [and] carry out any other functions assigned to it for the purpose of ensuring the implementation of the provisions of [the] Act.[371]

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365. *See Report of the Secretary General on the Implementation of the Sirte Decision on the African Union (EAHG/Dec. 1(V))*, Council of Ministers, ¶ 34, O.A.U. Doc. CM/2210 (LXXIV) [hereinafter *Report of the Sec. Gen.*] (on file with the California Western International Law Journal).

366. These are seven in number, although the Assembly has the power to restructure the existing ones or establish new ones. AU Act, *supra* note 14, arts. 14(1) & 14(2). The existing ones are the committee on Rural Economy and Agricultural Matters; the Committee on Monetary and Financial Affairs; the Committee on Trade, Customs and Immigration Matters; the Committee on Industry, Science and Technology, Energy, Natural Resources and Environment; the Committee on Transport, Communications and Tourism; and the Committee on Health, Labor, Culture and Human Resources. *Id.* art. 14(1).

367. *See* AEC Treaty, *supra* note 29, art. 25(1). *Cf. Decision on Implementation*, *supra* note 83, ¶ 9(i) (acknowledging the existence of ministerial conferences and commissions and stressing the need to ensure that they work as integral parts of the AU).

368. *See* AU Act, *supra* note 14, art. 14(1).

369. *See* AEC Treaty, *supra* note 29, art. 26; *cf.* the coordination organs established under the AEC Prot. on RECs. AEC Prot. on RECs, *supra* note 150, arts. 6-10.

370. AU Act, *supra* note 14, art. 14(3); *cf.* AEC Treaty, *supra* note 29, art. 25(3) ("Each Committee shall comprise a representative of each Member State.").

371. AU Act, *supra* note 14, art. 15. *Cf.* AEC Treaty, *supra* note 29, art. 26. In interpreting the provisions of article 26 of the AEC Treaty, dealing with the functions of technical committees, Gino Naldi maintains that "the term 'decisions' in this context refers to secondary legislation only, i.e., Council decisions and Commission regulations." NALDI, THE ORGANIZATION OF AFRICAN UNITY, *supra* note 77, at 245. Naldi did not provide any plausible

Meanwhile, the Secretary General (now Chairman of the Commission) has been mandated to prepare and submit to the Council of Ministers of the OAU a comprehensive report on various aspects of the functioning of the STCs.[372] The report, according to the mandate, should include their terms of reference and modalities for program formulation and implementation; the relationship between the STCs and similar organs of the RECs, African governmental and non-governmental organizations and international institutions; and streamlining of activities and functional and programatic relationships between STCs and existing ministerial sectoral conferences and commissions.[373]

In examining these functions, the Commission's Chairman should take notice of certain ministerial conferences established by the OAU Assembly to deal with specific sectoral issues. These include the OAU Labor and Social Affairs Commission, which is tripartite in nature—comprised of governments, employers and workers—and organized jointly with the International Labor Organization (ILO); the Conference of Ministers of Health, organized jointly with the World Health Organization (WHO); the Conference of Ministers of Industry, organized jointly with the Economic Commission for Africa (ECA) and UN Industrial Development Organization; and the Food and Agricultural Organization (FAO) Regional Conference for Africa. The STCs and the ministerial commissions/conferences would thus need to be rationalized.[374]

It is vitally important to involve the private sector in the workings of the STCs. Together with the civil society organizations, the private sector is a major component of the economic integration process. An atmosphere must be created that will enable it to be proactive in finding regional mechanisms for coordinating their input into the AU in accordance with relevant protocols. A private sector forum for dialogue with the AU should also be created.

H. The Economic, Social and Cultural Council

The Economic, Social and Cultural Council (ECOSOCC) is arguably the most important specialized organ in respect of all activities relating, directly or indirectly, to the intended establishment of the AU. This is one organ that will most likely provide for the participation of civil society. It "shall be an advisory organ composed of different social and professional groups of the Member States of the Union."[375] It is significant to note that the Economic and Social Commission of the AEC is composed of the ministers responsible for economic development, planning and integration of the

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reason for his restrictive interpretation. It is submitted, however, that the wordings of the AU Act should be interpreted literally.

372. *See Decision on Implementation*, *supra* note 83, ¶ 9(ii).

373. *Id.*

374. *See Report of the Sec. Gen.*, *supra* note 365, ¶ 36.

375. AU Act, *supra* note 14, art. 22(1).

Member States,[376] and that Representatives of the RECs have the right to take part in the Economic and Social Commission's meetings.[377]

The AU Assembly will determine the functions, powers, composition and organization of the ECOSOCC,[378] though it is not clear how the social and professional groups will be elected or appointed and on what issues the ECOSOCC would be competent to offer advice and to whom this advice would be submitted for consideration. These are questions that the Secretary General will have to address, in consultation with Member States.

The OAU has mandated that the Secretary General submit to the Council of Ministers, after consultation with the Member States, a comprehensive report on ECOSOCC, with recommendations on wide-ranging issues.[379] These include the structure, functioning, areas of competence and relationship of the ECOSOCC to other organs of the Union; the procedure and criteria for selecting the members of ECOSOCC, including their terms of office; the relationship between ECOSOCC and African regional non-governmental and professional groups; and the Rules of Procedure of ECOSOCC and the preparation of its work program.[380]

Significantly, the AEC Treaty provides for the establishment of consultative mechanisms between the AEC, non-governmental organizations (NGOs) and socio-economic organizations and associations,[381] "with a view to encouraging the involvement of the African peoples in the process of economic integration and mobilizing their technical, material and financial support."[382] The ECOSOCC of the AU Act might possibly be the consultative mechanism of the AEC Treaty.[383] In this way, it could also contribute to the preparation of the work programs and meetings of the Specialized Technical Committees and offer the AEC some advice.[384] Finally, it is important that the ECOSOCC should be a priority institution to ensure the effective representation of civil society organizations and their input into the decision-making processes of the Union.

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376. *See* AEC Treaty, *supra* note 29, art. 15(2). The AEC Commission is expected, *inter alia*, to prepare policies and strategies for cooperation in the fields of economic and social development among African countries, and between Africa and the international community, and make recommendations to the Assembly, through the Council, on the coordination and harmonization of the activities of the RECs; to coordinate, harmonize and supervise the activities of the Secretariat and the Committees; to examine and assess the reports and recommendations of the Committees and forward them to the Assembly, through the Council; and supervise the preparation of international negotiations and report to the Assembly, through the Council. *Id.* art. 16.

377. Representatives of RECs have the right to take part in the Economic and Social Commission's meetings. *Id.* art. 15(3).

378. AU Act, *supra* note 14, art. 22(2).

379. *See Decision on Implementation*, *supra* note 83, ¶ 7(a)(ii).

380. *Id.*

381. *See* AEC Treaty, *supra* note 29, art. 90.

382. *Id.* art. 90(1).

383. *See Report of the Sec. General*, *supra* note 365, ¶ 31.

384. *Id.*

I. The Financial Institutions

The last, but by no means the least, of the Organs expressly mentioned in the AU Act is the Financial Institutions. Three of these are envisaged: the African Central Bank, the African Monetary Fund, and the African Investment Bank (AIB).[385] Like the AU Court, the "rules and regulations" of the financial institutions are to be worked out in a separate protocol.[386] These institutions will probably perform functions similar to the Bretton Woods institutions—the World Bank and the International Monetary Fund (IMF).[387] It is, however, not clear if the African Development Bank (ADB) will merge with the future AIB or, in fact, if the ADB will metamorphose into the AIB. The latter appears the most reasonable, in view of the ADB's present structure and infrastructure.

The ADB was established by an Agreement signed in Khartoum, Sudan, in August 1963, by thirty independent African States, though its present membership has been enlarged to include nearly all the current Member States of the OAU.[388] Initiated by the ECA, the Bank was established "to finance projects and specific investment programmes which foster regional cooperative and integrated development in African countries."[389] It provides its Member States with technical assistance for studies, preparation and execution of projects and programs.[390] It grants loans to governments and private enterprises with government guarantees,[391] as well as "lines of credit for on-lending to national and subregional development banks."[392]

Finding a compromise between Member States on these issues will certainly take some time. Because issues such as the extent of transferred sovereignty and authority of each mechanism will be decided through discussion among Member States, confrontation should be expected.

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385. AU Act, *supra* note 14, art. 19.

386. *Id.*

387. The World Bank was created as a development bank to assist in the development and restructuring of war-torn and underdeveloped countries; while the International Monetary Fund (IMF) was created to provide short-term loans to member countries experiencing balance of payment deficits and to advise them on exchange rate matters.

388. Emmanuel G. Bello, *Regional Cooperation and Organization: African States*, *in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 107, 108 (Rudolf Bernhardt ed., 2000).

389. *Id.*

390. *Id.*

391. *Id.*

392. *Id.*

J. The Mechanism for Conflict Prevention, Management and Resolution

Africa presently holds the highest record of interstate wars and conflicts.[393] These conflicts have contributed more to the socio-economic decline of the Continent and the suffering of the civilian population than any other factor.[394] Indeed, conflicts:

> have brought about death and human suffering, engendered hate and divided nations and families. Conflicts have forced millions of our people into a drifting life as refugees and internally displaced persons, deprived of their means of livelihood, human dignity and hope. Conflicts have gobbled-up scarce resources, and undermined the ability of our countries to address the many compelling needs of our people.[395]

When the OAU Charter was adopted in 1963, it created the Commission of Mediation, Conciliation and Arbitration to accomplish the purposes of the Charter[396] and to provide a mechanism for the peaceful settlement of "disputes"[397] among Member States.[398] A Protocol was also adopted in 1964,[399] which defined the duties and powers of the Commission. There was no provision for a formal adoption of the Protocol. This was done deliberately to avoid undue delay that might stultify efforts to address urgent security problems plaguing the Member States.[400] The Protocol merely required the ap-

393. *See Yaoundé Declaration (Africa: Preparing for the 21st Century)*, Assembly of Heads of State and Government, 32d Ord. Sess., ¶ 6, O.A.U. Doc. AHG/Decl.3 (XXXII), Yaoundé, Cameroon (1996) [hereinafter *Yaoundé Declaration*].

394. *See* Protocol Relating to the Establishment of the Peace and Security Council of the African Union, AU Assembly, 1st Ord. Sess., Durban, South Africa (2002), pmbl. para. 10, *available at* http://www.au2002.gov.za/docs/summit_council/secprot.htm (last visited Jan. 4, 2003) [hereinafter Protocol on Peace and Security].

395. *Declaration of the Assembly of Heads of State and Government on the Establishment within the OAU of a Mechanism for Conflict Prevention, Management and Resolution*, Assembly of Heads of State and Government, 29th Ord. Sess., ¶ 9, O.A.U. Doc. AHG/Decl.3 (XXIX), Cairo, Egypt (1993), *reprinted in Letter Dated 10 August 1993 from the Permanent Representative of the United Republic of Tanzania to the United Nations Addressed to the Secretary-General*, U.N. GAOR, 48th Sess., Annex II, Prov. Agenda Item 43, U.N. Doc. A/48/322 (1993) [hereinafter *Cairo Decl.*].

396. *See* OAU Charter, *supra* note 12, art. XIX & VII(4).

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

398. *See* Taslim O. Elias, *The Commission of Mediation, Conciliation and Arbitration of the Organization of African Unity*, 40 BRIT. Y.B. INT'L L. 336 (1964); Colin Legum, *The Specialised Commissions of the Organisation of African Unity*, 2 J. MOD. AFR. STUD. 587 (1964).

399. *See* Protocol of the Commission of Mediation, Conciliation and Arbitration, *signed* July 21, 1964, 3 I.L.M. 1116 (1964) [hereinafter Protocol on Dispute Settlement].

400. *See* Elias, *supra* note 398, at 347.

proval of the OAU Assembly for it to become an integral part of the OAU Charter.[401] This approval was given at the first Assembly in July 1964.[402]

The Commission was not a judicial body, though it provided three modes of settlement—mediation, conciliation and arbitration—all of which have technical meanings. Mediation and conciliation are non-adjudicatory, informal procedures. Mediation, a non-binding procedure, involves an official third party who seeks to reconcile the views and claims of the parties or offers advice for a possible solution.[403] By contrast, conciliation refers to an impartial examination of the dispute and a search for acceptable settlement.[404] This requires objective evaluation and clarification of the issues in dispute in the attempt to bring about agreement between the parties through mutually acceptable terms.[405] Arbitration, on the other hand, a compulsory means of dispute settlement, is a judicial method that delivers a binding decision "based on law by a tribunal whose composition is determined by the parties."[406] Submission to arbitration is dependent upon prior agreement of the parties.[407]

The Commission was also vested with the powers of investigation and inquiry with regard to disputes submitted to it.[408] The Commission, an *ad hoc* body, never became operational and was, subsequently, abolished. Even before its abolition, the Commission was restricted to interstate conflicts.[409] Its non-functionality has been attributed to Africa's mistrust of formal dispute settlement, though, "paradoxically, African States have not been averse to the establishment of numerous *ad hoc* bodies under the auspices of the OAU" and the involvement of the UN to settle their disputes.[410]

In 1992, the Secretary-General of the OAU submitted to the 56th Ordinary Session of the Council of Ministers and the 28th Ordinary Session of the Assembly of the OAU, meeting in Dakar, Senegal, the Report of the Secretary-General on the Establishment, within the OAU, of a Mechanism for Conflict Prevention, Management and Resolution.[411] Following the report,

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401. *See* Protocol on Dispute Settlement, *supra* note 399, art. XXXII.

402. *See id.*

403. NALDI, ORGANIZATION OF AFRICAN UNITY, *supra* note 77, at 24; *see also* Protocol on Dispute Settlement, *supra* note 399, art. XXI.

404. NALDI, ORGANIZATION OF AFRICAN UNITY, *supra* note 77, at 24.

405. *Id.* at 24; *see also* Protocol on Dispute Settlement, *supra* note 399, arts. XXIV & XXVI.

406. NALDI, ORGANIZATION OF AFRICAN UNITY, *supra* note 77, at 25.

407. *Id.* at 25; *see also* Protocol on Dispute Settlement, *supra* note 399, arts. XXV & XXIX. *See generally* J. G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT (1998).

408. Protocol on Dispute Settlement, *supra* note 399, art. XVIII.

409. *See* Osita C. Eze, *Background Paper*, UN, SEMINAR ON THE ESTABLISHMENT OF REGIONAL COMMISSIONS ON HUMAN RIGHTS WITH SPECIAL REFERENCE TO AFRICA, Monrovia, Liberia, Sept. 10 – Sept. 21, 1979, UN Doc. HR/Liberia/1979BP/3, at 7 (on file with the California Western International Law Journal).

410. *See* NALDI, THE ORGANIZATION OF AFRICAN UNITY, *supra* note 77, at 28-29.

411. *Report of the Secretary-General on the Establishment, Within the OAU, of a Mechanism for Conflict Prevention, Management and Resolution*, Assembly of Heads of

the OAU Assembly adopted a declaration establishing, within the OAU, a Mechanism for Conflict Prevention, Management and Resolution (MCPMR),[412] to take over from the redundant and *ad hoc* Commission of Mediation, Conciliation and Arbitration. One of the deficiencies of *ad hoc* arrangements for dealing with conflicts is that "they are reactive and remedial rather than proactive and preventative."[413] The establishment of the MCPMR is thus intended "to bring to the processes of dealing with conflicts in our continent a new institutional dynamism, enabling speedy action to prevent or manage and ultimately resolve conflicts when and where they occur."[414]

Surprisingly, however, the AU Act did not initially provide for any mechanism for conflict prevention, management and resolution, though this is one of the goals of the Union.[415] The Act failed to factor in the Cairo Declaration, which established the MCPMR. It also failed to factor in the Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World,[416] in which the OAU rededicated itself "to work together towards the peaceful and speedy resolution of all the conflicts on [the African] continent."[417] It failed to factor in the Cairo Agenda for Action,[418] in which the OAU pledged "to give the maximum political and financial support to the OAU Mechanism for Conflict Prevention, Management and Resolution, for its effective peacemaking operations, by involving all segments of the population and mobilizing adequate official and private resources for the OAU Peace Fund."[419]

State and Government, 29th Ord. Sess., O.A.U. Doc. AHG/Dec. 1 (XXXVII) (1993), *reprinted in* OAU, RESOLVING CONFLICTS IN AFRCIA: IMPLEMENTATION OPTIONS 3 (OAU Information Services Publication—Series (II), 1993) (on file with the California Western International Law Journal).

412. *See Cairo Decl.*, *supra* note 395, ¶ 13.

413. Gino J. Naldi, *Future Trends in Human Rights in Africa: The Increased Role of the OAU*, *in* THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE, 1986-2000 1, 4 (Malcolm Evans & Rachel Murray eds., 2002) [hereinafter Naldi, *Future Trends in Human Rights in Africa*].

414. *Cairo Decl.*, *supra* note 395, ¶ 12.

415. *See* AU Act, *supra* note 14, art. 4(g) (providing "non-interference by any Member State in the internal affairs of another").

416. *Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World*, Assembly of Heads of State and Government, 26th Ord. Sess., O.A.U. Doc. AHG/Decl.1 (XXVI), Addis Ababa, Ethiopia (1990), *available at* http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/oau/hog/2HoGAssembly1990.pdf (last visited Nov. 4, 2002) [hereinafter *Addis Ababa Declaration*].

417. *Id.* ¶ 11.

418. *See* OAU, *Relaunching Africa's Economic and Social Development: The Cairo Agenda for Action*, Council of Ministers, 17th Extra-Ord. Sess., O.A.U. Doc. CM/1892 (LXII), Cairo, Egypt (1995).

419. *Id.* ¶ 10(v).

The omission was baffling, considering the sentiment of the OAU in its 1999 Algiers Declaration that "the OAU Mechanism for Conflict Prevention, Management and Resolution is a valuable asset for our continent which must be nurtured and consolidated," and that the mechanism "symbolises the concrete resolve of our continent to fully assume its responsibilities."[420] The omission of the MCPMR in the AU Act has been attributed to the "haste with which the drafters [of the Act] had to meet the impatient deadlines set by Libya."[421] Africa needs to learn that even the finest baker must allow his dough to rise.

As an afterthought, though not an accident, the OAU has rectified these deficiencies by incorporating the objectives and principles of the Cairo Declaration as "an integral part of the declared objectives and principles of the African Union."[422] The Central Organ of the MCPMR is now included as one of the Organs of the AU, in accordance with Article 5(2) of the AU Act.[423] The AU Assembly has also adopted a Protocol on the Establishment of the Peace and Security Council of the AU,[424] following an earlier decision of the OAU Council of Ministers.[425] However, "pending the ratification and entry into force of the Protocol, the Cairo Declaration on the OAU Mechanism for Conflict Prevention, Management and Resolution shall remain valid."[426]

The Central Organ of the MCPMR consists of the Member States of the OAU Summit Bureau, with the Secretary-General and the Secretariat as its operating arm.[427] Its primary objective is anticipation and prevention of conflicts,[428] which has the advantage of "obviat[ing] the need to resort to the complex and resource-demanding peace-keeping operations, which our countries will find it difficult to finance."[429] Where conflicts have already occurred, the MCPMR will be expected to embark on peace-making missions in order to facilitate resolutions of such conflicts. Civil or military observation groups may be deployed, though such must be limited in scope and duration.[430] In any case of degeneration of conflicts, the assistance of the UN

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420. *Algiers Declaration*, Assembly of Heads of State and Government, 35th Ord. Sess., para. 13, O.A.U. Doc. AHG/Decl. 1 (XXXV), Algiers, Algeria (1999), *available at* www.au2002.gov.za/docs/summit_council/algiers.htm (last visited July 2, 2002).

421. Jakkie Cilliers, *Commentary: Towards the African Union*, 10(2) AFR. SEC. REV. (2001), *at* http://www.iss.co.za/Pubs/ASR/10No2/Cilliers.html (last visited Dec. 20, 2002).

422. *See Decision on Implementation*, *supra* note 83, ¶ 8(a)(i).

423. *Id.* ¶ 8(a)(ii).

424. *See AU Assembly Dec. on Peace and Security Council*, *supra* note 151.

425. *See Decision on the Establishment of the Peace and Security Council of the African Union*, Council of Ministers, 67th Ord. Sess., O.A.U. Doc. CM/Dec. 31 (LXXVI) Rev.1, Durban, South Africa (2002) [hereinafter *Council of Ministers Dec. on Peace and Security Council*].

426. *AU Assembly Dec. on Peace and Security Council*, *supra* note 151, para. 4.

427. *Cairo Decl.*, *supra* note 395, ¶ 17.

428. *Id.* ¶ 15.

429. *Id.*

430. *Id.*

may be sought.[431] The Central Organ of the MCPMR has, in the past, reviewed various conflict situations in Africa, including internal conflicts.[432]

In all situations, the MCPMR must be guided by the objectives and principles of the OAU Charter and, *a fortiori*, the AU Act, particularly sovereign equality and respect for the sovereignty and territorial integrity of Member States, their inalienable right to independent existence, the peaceful settlement of disputes and the inviolability of borders—*uti possidetis juris.* It will additionally function on the basis of the consent and the cooperation of the parties to a conflict.[433] This dogmatism regarding sovereignty and non-intervention might weaken the MCPMR. The ideal thing is to allow it to treat each case on its merits. A revision of these doctrines has even been called for[434] and this appears to be the only way by which the AU will demonstrate that it is not a reincarnation of the OAU. It is assuring that the OAU has already requested the Secretary General "to undertake a review of the structures, procedures and working methods of the Central Organ, including the possibility of changing its name."[435]

Before leaving this subject, it is important to mention that the AU has already adopted a Protocol on the establishment of Peace and Security Council (PSC) for the continent.[436] Once it has entered into force, the Protocol will supersede all resolutions and decisions of the OAU relating to the MCPMR in Africa that are in conflict with it.[437] The Protocol establishes an operational structure "for the effective implementation of the decisions taken in the areas of conflict prevention, peace-making, peace support operations and intervention, as well as peace-building and post-conflict reconstruction."[438] The AU also adopted the Protocol because of the threat that "illicit proliferation, circulation and trafficking of small arms and light weapons" posed to peace and security in Africa, deflating efforts of African countries to improve the living standards of their citizens.[439]

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431. *Id.* ¶ 16.

432. *Cf. Letter Dated 28 March 1994 from the Permanent Representative of Cameroon to the United Nations Addressed to the President of the Security Council*, U.N. Security Council, UN Doc. S/1994/351 (1994); *Letter Dated 7 November 1997 from the Acting Permanent Observer of the Organization of African Unity to the United Nations Addressed to the President of the Security Council*, U.N. Security Council, U.N. Doc. S/1997/869 (1997).

433. *Cairo Decl.*, *supra* note 395, ¶ 14.

434. *See* M. A. Hefny, *Enhancing the Capacities of the OAU Mechanism for Conflict Prevention, Management and Resolution: An Immediate Agenda for Action*, 7 AFR. SOC'Y INT'L AND COMP. L. [ASICL PROC. 7] 176, 180 (1995).

435. *See Decision on Implementation*, *supra* note 83, ¶ 8(a)(iii).

436. *See* Protocol on Peace and Security, *supra* note 394.

437. *Id.* art. 22(2).

438. *Id.* pmbl. para. 17.

439. *Id.* pmbl. para. 13; *see also id.* pmbl. para. 14 ("Aware that the problems caused by landmines and the illicit proliferation, circulation and trafficking of small arms and light weapons constitute a serious impediment to Africa's social and economic development, and that they can only be resolved within the framework of increased and well coordinated continental cooperation.").

The PSC will be a decision-making organ for the prevention, management and resolution of conflicts. It "shall be a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa."[440] The Commission, a Panel of the Wise, a Continental Early Warning System, an African Standby Force and a Special Fund will support the PSC.[441]

The Protocol sets out the objectives[442] and principles[443] of the PSC. It provides for the composition,[444] functions[445] and powers[446] of the PSC as well as matters of procedure.[447] The objectives are many. Firstly, in addition to protecting the environment, the Protocol seeks to protect life and property of Africans, enhance their well-being and create good conditions for sustainable development.[448] The Protocol, however, acknowledges that these are unachievable without peace, security and stability, which the PSC must promote.[449] Where conflicts have broken out in Africa, as they often do, the

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440. *Id.* art. 2(1).

441. *Id.* art. 2(2).

442. *See generally id.* art. 3 (including the promotion of "peace, security and stability in Africa, in order to guarantee the protection and preservation of life and property, the well-being of the African people and their environment, as well as the creation of conditions conducive to sustainable development; anticipate and prevent of conflicts . . . [but] where conflicts have occurred, the [PSC] shall have the responsibility to undertake peace-making and peace-building functions for the resolution of these conflicts; promote and implement peace-building and post-conflict reconstruction activities to consolidate peace and prevent the resurgence of violence; co-ordinate and harmonize continental efforts in the prevention and combating of international terrorism in all its aspects; develop a common defence policy for the Union, in accordance with the article 4(d) of the [AU Act]; promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts").

443. *See id.* art. 4 (providing that the PSC "shall be guided by the principles enshrined in the Constitutive Act, the Charter of the United Nations and the Universal Declaration of Human Rights. It shall, in particular, be guided by the following principles: (a) peaceful settlement of disputes and conflicts; (b) early responses to contain crisis situations so as to prevent them from developing into full-blown conflicts; (c) respect for the rule of law, fundamental human rights and freedoms, the sanctity of human life and international humanitarian law; (d) interdependence between socio-economic development and the security of peoples and States; (e) respect for the sovereignty and territorial integrity of Member States; (f) non interference by any Member State in the internal affairs of another; (g) sovereign equality and interdependence of Member States; (h) inalienable right to independent existence; (i) respect of borders inherited on achievement of independence; (j) 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, in accordance with Article 4(h) of the Constitutive Act; [and] (k) the right of Member States to request intervention from the Union in order to restore peace and security, in accordance with Article 4(j) of the Constitutive Act").

444. *Id.* art. 5.

445. *Id.* art. 6.

446. *Id.* art. 7.

447. *Id.* art. 8.

448. *See id.* art. 3(a).

449. *Id.*

PSC shall "undertake peace-making and peace-building functions for the resolution of these conflicts."[450] The PSC also has a role to play in post-conflict reconstruction in Africa. This role involves promotion and implementation of peace-building that is aimed at "consolidat[ing] peace and prevent[ing] the resurgence of violence."[451]

In recognition of the current threat posed by international terrorism, the Protocol has, as one of its objectives, the prevention and combating of terrorism. Consequently, the PSC shall harmonize efforts of the Member States in this regard.[452] One of the principles in the AU Act is to establish a common defense policy for the continent.[453] The PSC Protocol reflects this as part of its objectives.[454] The Protocol recognizes the values of democracy, good governance, rule of law, human rights (including respect for the sanctity of human life) and humanitarian law. These values contribute towards preventing conflicts; so, the Protocol aims to promote and encourage them.[455]

The PSC shall consist of ten members elected for a term of two years and five members elected for a term of three years in order to ensure continuity.[456] Its functions include the "promotion of peace, security and stability in Africa; early warning and preventive diplomacy; peace-making, including the use of good offices, mediation, conciliation and enquiry; and peace support operations and intervention, pursuant to article 4 (h) and (j) of the [AU Act]."[457] In addition to any other function that the AU Assembly might determine, the PSC will also engage in "peace-building and post-conflict reconstruction; humanitarian action and disaster management; and any other function that the Assembly might decide upon."[458]

Other matters covered by the Protocol include entry points and modalities for action;[459] the role of the Chairperson of the Commission, which in-

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450. *Id.* art. 3(b).

451. *Id.* art. 3(c).

452. *See id.* art. 3(d).

453. *See* AU Act, *supra* note 14, art. 4(d).

454. *See* Protocol on Peace and Security, *supra* note 394, art. 3(e).

455. *Id.* art. 3(f).

456. *Id.* art. 5 (setting the criteria with regard to each prospective Member State, including "commitment to uphold the principles of the Union; contribution to the promotion and maintenance of peace and security in Africa." In this respect, "experience in peace support operations would be an added advantage; capacity and commitment to shoulder the responsibilities entailed in membership; participation in conflict resolution, peace-making and peace-building at regional and continental levels; willingness and ability to take up responsibility for regional and continental conflict resolution initiatives; contribution to the Peace Fund and/or Special Fund created for specific purpose; respect for constitutional governance, in accordance with the Lomé Declaration, as well as the rule of law and human rights; having sufficiently staffed and equipped Permanent Missions at the Headquarters of the [AU] and the [UN], to be able to shoulder the responsibilities which go with the membership; and commitment to honor financial obligations to the Union.").

457. *Id.* art. 6; AU Act, *supra* note 14, arts. 4(h) & (j).

458. Protocol on Peace and Security, *supra* note 394, art. 6.

459. *Id.* art. 9.

cludes, "deploy[ing] efforts and tak[ing] all initiatives deemed appropriate to prevent, manage and resolve conflicts."[460] There is also the Panel of the Wise, which, *inter alia*, shall advise the PSC and the Commission's Chairperson "on all issues pertaining to the promotion, and maintenance of peace, security and stability in Africa."[461] There are also provisions on the continental early warning system,[462] the African Standby Force,[463] peace building[464] and humanitarian action.[465]

More importantly, the Protocol defines the relationship between the PSC and regional mechanisms for conflict prevention, management and resolution, including, of course, the MCPMR. The relationship is organic. Thus, the PSC shall promote initiatives towards anticipating and preventing conflicts and, where they have already occurred, perform peace-making and peace-building functions.[466] The PSC will do this in consultation with the Regional Mechanisms.[467] This requires the regional mechanisms to keep the PSC fully and continuously informed of their activities and ensure that these activities are closely harmonized and coordinated with the activities of the PSC. The PSC must reciprocate in like manner.[468]

Overall, the MCPMR and the PSC appear to herald "a more resolute approach to dispute settlement by the [AU]."[469] Endowing the MCPMR with a preventive role in conflict management is particularly welcome because prevention is still better than a cure. The Mechanism and, later, the PSC should be sufficiently funded by the Member States to succeed in its appointed tasks. This will be the yardstick by which to measure the political will of Member States concerning peace and security in the continent. Willing the end is one thing; willing the means is quite another. It is absence of the political will of Member States that accounted for the failure of previous efforts. The AU should coordinate its activities with other African organizations, cooperate where appropriate and practicable with neighboring countries, and liaise with the UN in regards to peacekeeping and peacemaking activities.[470] These may appear to be insignificant factors, but, really, the truth is that enormous things often turn upon tiny things.

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460. *Id.* art. 10(1).
461. *Id.* art. 11(3).
462. *Id.* art. 12.
463. *Id.* art. 13(1) (establishing an African Standby Force which "shall be composed of standby multidisciplinary contingents, with civilian and military components in their countries of origin and ready for rapid deployment at appropriate notice").
464. *Id.* art. 14.
465. *Id.* art. 15.
466. *Id.* art. 16(2).
467. *Id.*
468. *Id.* art. 16(3).
469. Naldi, *Future Trends in Human Rights in Africa*, *supra* note 413, at 5.
470. *Id.* at 4.

IV. THE RELATIONSHIP BETWEEN THE AU AND ITS MEMBER STATES

What is the status of the AU Act and, by extension, the AEC Treaty *vis-à-vis* municipal legal systems? Similarly, what is the relationship between the organization and its members?[471] And what are the legal characters of the AU institutions *vis-à-vis* municipal institutions? Will the decisions of the AU Court, for example, create binding norms for the Member States of the Union? These are important questions having international legal significance. To start with, the AU Act contains no provision on the obligations of States Parties to bring their internal laws into conformity with their obligations under international law. But such an obligation must be assumed.[472] In general, "a failure to bring about such conformity is not in itself a direct breach of international law . . . a breach arises only when the state concerned fails to observe its obligations on a specific occasion."[473]

International organizations are entities that allow States to "pool their sovereignty and their resources in order to tackle common problems and find common solutions and, therewith, act in the national interest."[474] Such pooling of sovereignty, in the case of Africa, implies some limitations of national laws in favor of the AU law. In other words, no State that has ratified the AU Act and/or any of its protocols can refer to its domestic law in order to escape obligations derived from the Act.[475] The law in this respect is well settled and supported by numerous decisions of the Permanent Court of International Justice (PCIJ) and the ICJ.[476] In the case, *Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory*,[477] for example, the PCIJ stated thus:

> It should . . . be observed that . . . a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force. Applying these principles to the present case, it results that the question of the treatment of Polish nationals or other persons of Polish origin or speech must be settled

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471. *See generally* ATHENA DEBBIE EFRAIM, SOVEREIGN (IN)EQUALITY IN INTERNATIONAL ORGANIZATIONS (2000) and MAGDALENA MARTINEZ, NATIONAL SOVEREIGNTY AND INTERNATIONAL ORGANIZATIONS (1996).

472. *See* Exchange of Greek and Turkish Populations, 1925 P.C.I.J. (ser. B) No. 10, at 20 (Feb. 21).

473. BROWNLIE, *supra* note 3, at 35.

474. Jan Klabbers, *The Life and Times of the Law of International Organizations*, 70 NORDIC J. INT'L L. 287, 293 (2001).

475. *See* Vienna Convention, *supra* note 34, art. 27 ("[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty . . .").

476. *See, e.g.*, Case of the S.S. "Wimbledon" (U.K. v. F.R.G.), 1923 P.C.I.J (ser. A) No. 1, at 25 (Jun. 28); Fisheries Case, (U.K. v. Nor.), 1951 I.C.J. 116, 132 (Dec. 18); Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4, 20-21 (Apr. 6).

477. Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory, 1931 P.C.I.J. (ser. A/B) No. 44 (Feb. 4).

> exclusively on the bases of the rules of international law and the treaty provisions in force between Poland and Danzig.[478]

The Member States of the AU, by ratifying the AU Act and its protocols, recognize the legal order of the AU, with all its unforeseeable potential developments. Such recognition introduces the AU law into fields previously governed exclusively by municipal law. It permits some of the institutions of the AU, such as the Court, to assume the character of supranational entities.[479] The AU organs will thus exercise their powers in the fields contemplated by the AU Act and its protocols, and will require national agencies to refrain from interfering in these fields. The decisions and pronouncements of the AU Court, either in its contentious or advisory capacities, will create binding norms for the Member States of the Union.

The same position applies as regards the EU law and the national law of the Member States.[480] Thus, in *Costa v. ENEL*[481] and *Amministrazione delle Finanze dello Statto v. Simmenthal SpA*,[482] the European Court of Justice (ECJ) enunciated the doctrine of limitation of the sovereign rights of the Member States and the transfer to the European Communities certain powers, stressing that EC (EU) law has precedence over domestic law. According to Advocate-General Lagrange, in the *ENEL* case:

> the Treaty establishing the [EEC], as well as the other two 'European Treaties,' created its own *legal system* which, although distinct from the legal system of each of the Member States, by virtue of certain precise provisions of the Treaty, which bring about a *transfer of jurisdiction* to the Community institutions, partly replaces the internal legal system.[483]

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478. *Id.* at 24.

479. An organization has a supranational character if an organ composed of individual persons can make decisions that bind on the Member States. *See* Bindschedler, *supra* note 74, at 1295.

480. *See* Francesco Capotorti, *European Communities: Community Law and Municipal Law*, *in* 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 165, 165-66 (Rudolf Bernhardt ed., 2000). *See generally* TREVOR HARTLEY, FOUNDATIONS OF EUROPEAN COMMUNITY LAW (1998); ADJUSTING TO EUROPE: THE IMPACT OF THE EUROPEAN UNION ON NATIONAL INSTITUTIONS AND POLICIES (Yves Mény et al. eds., 1996); F. E. Dowrick, *A Model of the European Communities' Legal System*, 3 Y.B. EUR. L. 169 (1983); Richard Plender, *The European Court as an International Tribunal*, 42 CAMBRIDGE L.J. 279 (1983); JOHN USHER, EUROPEAN COMMUNITY LAW AND NATIONAL LAW: THE IRREVERSIBLE TRANSFER? (1981).

481. Case 6/64, Costa v. ENEL, [1964] E.C.R. 585, [1964] C.M.L.R. 425 (1990).

482. Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA, [1978] E.C.R. 629.

483. Case 6/64, 1964 E.C.R. at 602 (emphasis in original). Similarly, "[b]y creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of power from the states to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves." *Id.* at 593.

The Court reiterated this motif in the *Simmenthal* case, maintaining that there is a separate "Community legal order" and that national courts must protect rights conferred upon individuals by it.[484]

Some scholars have argued that the transfer of powers to international organs in no way changes the legal status of the Member State.[485] States "continue, as before, to be subject only to international law, since the constitution of the organization itself remains a treaty."[486] This opinion finds its echo in the Permanent Court of International Justice's (PCIJ) famous holding that, rather than incompatible with sovereignty, entering into commitments is actually an attribute of State sovereignty.[487]

What is not clear, at least from the wordings of the AEC provisions, is whether the AU Court will be empowered to annul community, or for that matter, municipal, legislation. It has been argued that "[t]he absence of judicial review enabling the Court to annul Community legislation would undermine the rule of law and marginalize the Court to the point of irrelevancy. Such power must be implied."[488] Comparatively, the ECJ can require that a national statute be set-aside on the ground of incompatibility with EC law, though it cannot invalidate municipal law.[489]

Two different situations, however, must be distinguished with regard to the internal or domestic application of the AU Act and its protocols. This relates to the dualist and monist controversy. The dualists insist that "international law and internal law are two separate legal orders, existing independently of one another;"[490] the monists insist that international law and internal law are part of the same order.[491] If the dualist view is taken, then the question that arises is on what basis can it be said that either of the two systems is superior over the other?[492] This question does not, however, arise in the case of monism, because it is presumed that "one or other of them [is] supreme over the other *within that order*."[493] However, both these schools of thought assume that there is a common field where the international and municipal

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484. Case 106/77, [1978] E.C.R. 629; *see also* Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhrund Vorratsstelle fur Getreide und Futtermittel, [1970] E.C.R. 1125 (where Court referred to Community law as "[t]he law stemming from the Treaty, an independent source of law," to be distinguished from and to take precedence over opposing national laws).

485. *See* Bindschedler, *supra* note 74, at 1295.

486. *Id.*

487. *See* Case of the S.S. "Wimbledon," 1923 P.C.I.J (ser. A) No. 1. For further discussion, see Jan Klabbers, *Clinching the Concept of Sovereignty: Wimbledon Redux*, 3 AUSTRIAN REV. INT'L & EUR. L. 345 (1998).

488. NALDI, THE ORGANIZATION OF AFRICAN UNITY, *supra* note 77, at 245.

489. *See* Case C-213/89, The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd et al. (No.2), [1990] ECR I-2433.

490. Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, in II RECUEIL DES COURS 5, 70 (1957).

491. *Id.*

492. *Id.*

493. *Id.* (emphasis in original).

legal orders can operate at the same time regarding the same subject matter;[494] the problem is, which is to be master?

For States with a monist tradition, the courts can apply the obligations of international law, in this case, the AU Act and its protocols, immediately after ratification of the Treaty. Hans Kelsen, for example, was a diehard monist. According to his hypothesis of the primacy of international law, the basic norm of national law is not:

> a norm only presupposed in juristic thinking but a positive norm of international law; and then the question arises as to the reason for the validity of the international law order to which the norm belongs on which the validity of the individual national law is founded—the norm in which this legal order finds its direct, although not its ultimate, reason for the validity. This reason of validity, then, can only be the basic norm of international law, which, therefore, is the indirect reason for the validity of the national legal order. As a genuine basic norm, it is a presupposed—not a positive norm. It represents the presupposition under which general international law is regarded as the set of objectively valid norms that regulate the mutual behaviors of states.[495]

For States favoring a dualist approach, the substantive norms of the Treaty must be "transformed" or "adopted" in order to become applicable in domestic law.[496] With regards to the EU law, for example, Lord Denning frequently invoked Community law in the English Court of Appeal, referring to it as "a new system."[497] He, however, insisted that parts of Community law operate in the UK "as part of our law," an opinion reiterated in the two English cases of *Macarthys Ltd. v. Smith*[498] and *Garden Cottage Foods v. Milk Marketing Board.*[499] In *Garden Cottage Foods v. Milk Marketing Board*, Lord Diplock echoed this dualist view, asserting that the European Economic Community Treaty creates enforceable rights for individuals within the UK *qua* statute law *via* the UK European Communities Act of 1972.[500] But Lord Wilberforce maintained that "[c]ommunity law, which is what the English court will be applying, is, in any case, sui generis."[501] The problem of whether international treaties can be incorporated in domestic

494. *See* BROWNLIE, *supra* note 3, at 31. Fitzmaurice believes that this common field does not exist, making the entire monist-dualist controversy "unreal, artificial and strictly beside the point." *See* Fitzmaurice, *supra* note 490, at 71.

495. KELSEN, *supra* note 184, at 215.

496. *See* Thomas Buergenthal, *Self-Executing and Non-Self-Executing Treaties in National and International Law*, *in* IV RECUEIL DES COURS 303 (1992); Antonio Cassese, *Modern Constitutions and International Law*, *in* III RECUEIL DES COURS 331 (1985).

497. *See, e.g.*, Bulmer v. Bollinger, 2 All E.R. 1226, 1231-33 (1974).

498. Macarthys Ltd. v. Smith, 3 All E.R. 325, 328 (1979); Macarthys Ltd. v. Smith (No. 2), 1 All E.R. 111, 120 (1981).

499. Garden Cottage Foods v. Milk Marketing Board, 2 All E.R. 770, 778 (1983).

500. *See id.* at 775.

501. *Id.* at 783.

law without losing their character as international law, which may have consequences for their interpretation, however, remains a thorny issue.

In sum, the AU law will be binding not only on Member States—including their legislative agencies, courts and administrations—but also on natural and legal persons under their jurisdictions.[502] Like the European experience, most African countries will find their national bureaucracies increasingly taken up with AU decision-making, though some countries might be able to manage their relations with the AU more effectively than others, exercising more strategic influence where there is more centralized national coordination of AU decision-making. It could also be extrapolated that the rights and obligations created by AU law will bind the citizens of Member States, not only their governments.

V. CONCLUSION

The adoption of the AU Act has opened a cleft in the pitiless walls of the continent, though the anxiety is greater than the joy. The Act has identified the component institutions of the AU, but the specific powers and duties of these institutions need to be determined, along with the sequencing of their establishment. As indicated earlier, some key institutions have already been established—the AU Assembly, the Executive Council and the Commission. However, because political and economic integration is, presumably, the major motif of the Act, the immediate task should be to establish and/or revitalize other institutional arrangements encompassed in the Act. This is the only way they can effectively implement the objectives of the Act and meet the challenges of globalization, democratization and popular participation.[503]In creating institutions there will, of course, be need for prioritization. The priority given to respective organs will depend on what is seen as the overriding political concern. If the principal impetus of the AU is for regional economic cooperation and integration, then the ECOSOCC, the STCs and the financial institutions should be prioritized. If, on the other hand, the first agenda is governance and democracy, then the PAP and the Court of Justice should be established first. Still, if the main concern is peace and security—on the basis that *salus populis suprema lex*[504]—then "the existing Organs of the OAU should suffice, but will require a much more extensive

502. Arguably, this would include persons in an "international zone" (in which neither domestic nor international law is said to apply) because persons present in such a zone are within State jurisdiction and are validly subject to the exercise of authority by the territorial State. They are, in this sense, clearly within the sphere of that State's legal competence.

503. *Cf. Durban Decl.*, *supra* note 21, ¶ 16 (where African leaders committed themselves "to urgently establish all institutional structures to advance the agenda of the African Union and call[ed] on all Member States to honour their political and financial commitments and to take all necessary actions to give unwavering support to all the Union's initiatives aimed at promoting peace, security, stability, sustainable development, democracy and human rights in [the] continent").

504. The safety of the people is the highest law. CICERO, DE LEGIBUS, bk. III, pt. iii, § 8.

engagement with existing problems and related institutions."[505] It does, however, appear that "[t]he first task [of the AU] is to achieve unity, solidarity, cohesion, [and] cooperation among peoples of Africa and African states."[506] In that case, the AU "must build all the institutions necessary to deepen political, economic and social integration of the African continent."[507]

It is hoped that the institutional structure of the AU will be variable across domains of competency and that its policy style will be flexible, heterogeneous and issue-specific, rather than corresponding to any national style. It is also hoped that there will be an open policy-making process, managed by officials of the various organs in an anticipatory and consensual manner. There should be no division, discord or lack of adaptation of the Organs to each other. Collaboration between the Organs of the AU will be crucial to attaining the objectives contained in the AU Act.

Collaboration between the political and supranational Organs will be particularly important, due to the fact that the former represents the interests of the individual States, while the latter represents the interests of the Union. The two must be reconciled because "a house divided against itself cannot stand."[508] This will also make for interest representation to be sectorally structured and linked with a vast, though sometimes incoherent, network of national and Afro-wide groups. The AU is much more than the sum of its Member States; it is a new institutional complex in its own right that will also increase the complexity of its constituent parts.

Women should be mainstreamed and involved in the operation of all aspects of regional integration in Africa. It is also important to consider organizational culture, structures and processes that may conflict with women's empowerment goals. Happily, the AU recognizes "the pivotal role of women in all levels of society and . . . that the objectives of the African Union cannot be achieved without the full involvement and participation of women at all levels and structures of the Union."[509] What remains is how to take this from the realms of idealism and put it into practice, ensuring gender equity in all institutions of the AU.

Active participation of young people in the processes and institutions of the AU is equally important, given that half the population in Africa is

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505. *See The Architecture and Capacity of the African Union*, Economic Comm. for Africa, African Union Symposium, A.D.F. III (2002), *available at* http://www.uneca.org/adfiii/auissuepn2.htm (last visited Jan. 6, 2003).

506. AU Chairperson Thabo Mbeki, Address at the Launch of the AU in Durban, South Africa (July 9, 2002), *available at* http://www.au2002.gov.za/docs/speeches/mbek097a.htm (last visited Jan. 6, 2003) (noting also that the second task confronting the AU "is that of developing new forms of partnerships at all levels and segments of our societies, between segments of our societies and our governments and between our governments," *id.*).

507. *Id.*

508. Abraham Lincoln, Address at the State Republican Convention (June 16, 1858), *available at* http://www.usembassy.de/usa/etexts/speeches/rhetoric/abehouse.htm (last visited Jan. 20, 2003).

509. *Durban Decl.*, *supra* note 21, ¶ 18.

young. They are at the center of many of Africa's problems, including the HIV/AIDS pandemic and conflicts. They are also the key to finding solutions to these crises. In light of the above, the Assembly of the AU should be commended for welcoming and recognizing "the important contribution of the youth, women, business community, parliamentary representatives and civil society and [for calling] upon these stakeholders to continue participating fully as partners in the regeneration of the African Continent through the programmes of the African Union."[510] Again, as with women, African youths want to see more of practice than precepts.

The AU Act provides a great and historical opportunity for major economic and political transformations of Africa—if the current bad weather of indifference on the part of its leaders will allow it to take off from the ground. Because the AU does not exist for its own sake, but for the sake of the continent's citizens, African leaders should quickly lay the foundation for the institutions that will give direction to a destiny henceforward shared. Africa should not allow itself to be classified as "a scar on the conscience of the world."[511] Contrary to the "Ham Theory,"[512] Africa is not destined to be the wretched, oppressed and exploited continent of the earth. In fact, what a man becomes in life is not stamped on his birth certificate. A man reaps what he sows, no matter where he is, just as fire never fails to warm, regardless of where in the world it burns. This applies, with equal force, to a nation, a State or a continent. Africans need a decolonizing of the mind![513]

The AU should strive to achieve what is ideal, but it should also be prepared to strike a balance between the ideal and the reality that may not always measure up to the ideal. This is vital, because "the penalty for insisting on what is ideal may be to achieve no result at all."[514] A passionate, yet more rational, prayer should be that of the medieval theologian: "Good Lord, give

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510. *Id.*

511. Ewen MacAskill, *Blair Scorns the Cynics—PM Attempts to Set New Partnership Agenda for West*, THE GUARDIAN (London), Feb. 8, 2002, at 1 (quoting British Prime Minister Tony Blair).

512. The "Ham Theory" posits that black peoples were victims of a fall, due to the curse brought upon them by the irreverent behavior of their ancestor, Ham, who, it is alleged, was the starting point of their race. The story is that Ham uncovered his father's (Noah) nakedness during the latter's drunken debauchery. Noah cursed Ham, declaring that he will be "a servant of servants" to his brethren. *See Genesis* 9:25 (KJV). It is, however, submitted that this was not a special curse upon the black race because Ham's descendants extended beyond Africa. They included Cush (progenitor of Ethiopians), Mizraim (progenitor of Egyptians), Phut (progenitor of Libyans and peoples of Africa), Canaan (progenitor of Palestinians), and Sin (founder of the oriental peoples of China, Japan and India). *See* H.L. WILLMINGTON, WILLMINGTON'S GUIDE TO THE BIBLE 12 (1984) (noting also that "as the curse was specifically leveled at Canaan and not Phut (who may have founded the African nations), there exist absolutely no racial implications whatsoever within that curse," *id.* at 33).

513. *See* NGUGI WA THIONG'O, DECOLONISING THE MIND *passim* (1986) (an exhortation for African writers to embrace their native tongues in their art).

514. *See* Andreas Jacovides, *The Role of International Law in the World Today and Tomorrow*, *in* INTERNATIONAL LAW ON THE EVE OF THE TWENTY FIRST CENTURY 69, 78 (International Law Commission ed., 1997).

me the courage to change the things that can be changed, the serenity to accept the things that cannot be changed and the wisdom to know the difference between the two."[515]

515. *Id.*