

## **Fostering the Rule of Law in African Integration: myth or reality?**

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### **Introduction**

Regional integration, or the process of instituting deeper regional cooperation through building of regional institutions and common rules and policies, has proliferated in many parts of the world with the success of the European Union (EU). Inspired by EU's economic successes, Africa is one of the regions that had earlier embarked on this process in the late 80s and 90s outside of Europe. The EU has imparted a model of limited or pooled sovereignty, the creation of supranational institutions, and the institution of rule of law as the foundation of regional cooperation. While Africa desired to replicate the EU in the African soil, the establishment of the African Economic Community through the Treaty of Abuja 1991 has a strong African vision, an offshoot of the Lagos Plan of Action 1980 that aims to present a collective response against the negative impact of globalization on the continent. Despite the ambitious scope of integration in the Abuja Treaty, a continent-wide integration had faltered with massive political conflicts afflicting many countries. Economic integration is not possible without political integration, or that development is achievable in the midst of conflicts and insecurity. The prevalence of major armed conflicts continues to cause massive suffering, displacement and poverty for much of Africa's civilian population.

The revival of African integration through the establishment of the African Union (AU) in 2002 has paved the way for a shift away from rigid interpretation of sovereignty and non-intervention and has made possible the adoption of successive instruments that aim to promote democratic governance, rule of law and human rights. Fostering rule of law as a collective undertaking lies at the heart of the African Union's Constitutive Act and a key pillar in addressing the 'scourge of Africa', the cycle of conflict and violence that has plagued the region for many decades. The African Union has readily embraced the concept of 'sovereignty with responsibility' which underlies the evolving doctrine of responsibility to protect. This doctrine puts primary responsibility on the state to protect its residents from wide-scale grievous harm and loss of life, and allows collective external intervention should the state fails in its duty.

This paper explores the prospects of rule of law in African integration, with the focus on the establishment and functioning of supranational courts and in the context of the emerging principle of sovereignty with responsibility. This paper argues that the institution of rule of law in Africa is only part of the broader project of peace and state building, and hence is subsumed in the competing priorities and interests of member countries. While the shift to 'sovereignty with responsibility' has encouraged opportunities for rule of law initiatives, the impact of supranational courts in instituting rule of law as an authoritative mechanism to resolve conflicts has been so far minimal as

states and key actors continue to prefer the political arena or the use of force to resolve disputes.

### **Emergence of sovereignty with responsibility and rule of law in Africa**

African integration was revived with the establishment of the African Union which took place at a time of soul-searching and deep reflection by African leaders in the aftermath of grave humanitarian disasters that plagued the region. No less than Moamar Gaddafi had pushed the Organization of African Unity to become more relevant and effective.<sup>1</sup> The African Union (AU) was established in 1999 through the Sirte Declaration among the Heads of States and Governments of the Organization of African Unity (OAU) and was formally formed through the Constitutive Act of the African Union which entered into force on 26 May 2001.<sup>2</sup> The establishment of the AU was prompted in large measure by both political and economic challenges facing Africa and launching of a comprehensive regional integration program spanning 'political and socio-economic integration of the continent'<sup>3</sup>, including the establishment of a common defense policy.<sup>4</sup>

On the economic front, the AU was greatly influenced by trends in regional economic integration initiatives that were taking place in many regions. It has re-affirmed the centrality of the African Economic Community 'in order to promote the socio-economic development of Africa and to face more effectively the challenges posed by globalization.'<sup>5</sup> On the political front, African integration is clearly underpinned by strong peace-building and state-building objectives. In exploring various AU instruments<sup>6</sup>, it is clear that member states have declared their commitment to address not only the problem of economic underdevelopment but also that of the 'scourge of Africa' which targets the recurrence of military coups, electoral violence and unconstitutional changes in governments as major causes of conflict in many member countries. Among the political issues that AU seeks to address relate to democratization and human rights, good governance, social justice, condemnation and rejection of

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<sup>1</sup> Evarest Baimm & Kathryn Sturman, 'Amendment to the African Union's Right to Intervene, A Shift from Human Security to Regime Security?', *African Security Review*, Vol. 12(2) (2003); See also Kathryn Sturman, 'The Rise of Libya as a Regional Player', *African Security Review*, Vol. 12(2) (2003).

<sup>2</sup> There are currently 54 countries which ratified the Constitutive Act of the Union 2001, see list at [http://www.au.int/en/sites/default/files/Constitutive\\_Act\\_0.pdf](http://www.au.int/en/sites/default/files/Constitutive_Act_0.pdf), viewed on 13 June 2012.

<sup>3</sup> Art. 3(c), Constitutive Act of the Union 2001.

<sup>4</sup> Art. 4(d), Constitutive Act of the Union 2001.

<sup>5</sup> Preamble, Constitutive Act of the Union 2001.

<sup>6</sup> Such as the Constitutive Act 2001, Treaty Establishing the African Economic Community (Abuja Treaty) 1994, Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights 2004, Protocol Relating to the Establishment of the Peace and Security Council of the African Union 2003, African Union Convention on Preventing and Combating Corruption 2006, Protocol on the Court of Justice of the African Union 2009, African Charter on Democracy, Elections and Governance 2012 (ACDEG), Statute of the African Union Commission on International Law 2009, and the African Charter on Values and Principles of Public Service and Administration (not in force).

impunity and political assassinations, condemnation and rejection of the use of violence, unconstitutional changes in governments (Constitutive Act); accountability, economic justice and popular participation in development (Abuja Treaty); and democratic and electoral reforms (ACDEG). It is clear from these instruments that rule of law seeks to tackle abuse of power from both state and non-state actors. At the same time, the African Union remains underpinned by strong desire for unity and solidarity among African states and its peoples, to develop its own capacities, and to provide an African solution to its problems – a legacy of the vision of Pan Africanism.<sup>7</sup>

While the OAU had fervently guarded the principle of sovereignty and non-intervention, African leaders were the first to acknowledge the emerging doctrine of ‘sovereignty with responsibility’.<sup>8</sup> The principle of sovereignty with responsibility emerged as a sharp criticism of the international community’s apathy towards the humanitarian crisis in Africa in the 90s and was first articulated by Francis Deng as the principle underlying the Responsibility to Protect.<sup>9</sup> The principle departs from the absolutist conception of sovereignty; where the state is vested with the right to govern it carries with it a fundamental duty to protect the basic rights and needs of those living within its territory. The failure to fulfill this mandate obligates the state to call for assistance (or intervention) from the international community, or for the international community to intervene to protect, in lieu of the state, the basic rights of the people.

While the principle of sovereignty and non-intervention remains entrenched, a tacit recognition of sovereignty with responsibility underlies the adoption of AU’s Constitutive Act. There are four major policy developments in the AU that have been reflected in the Constitutive Act’s declaration of its aims and principles: (1) a shift in decision making from unanimity or consensus to majoritarian voting<sup>10</sup>; (2) institution building through more strengthened regional institutions<sup>11</sup>; (3) breakthrough in the right of intervention<sup>12</sup>; and condemnation and rejection of unconstitutional changes of governments<sup>13</sup>. The ‘right of intervention’, which represents a negation of sovereignty is being contemplated more as an exception that is applicable only to grave circumstances involving war crimes, genocide and crimes against humanity and from a request from a member state for intervention in order to restore peace and security.<sup>14</sup> It was further expanded to ‘serious threat to legitimate order to restore peace and stability’<sup>15</sup>, a

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<sup>7</sup> Art. 3(a), Constitutive Act of the Union 2001.

<sup>8</sup> See Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, Brookings Institution Press (2008).

<sup>9</sup> Francis Mading Deng, et al., *Sovereignty As Responsibility: Conflict Management in Africa*, The Brookings Institution (1996).

<sup>10</sup> Decisions of the AU Assembly and Executive shall be made by consensus or failing which, by a two-thirds majority; procedural matters by simple majority (Arts. 7 and 11, Constitutive Act of the Union 2001).

<sup>11</sup> Preamble, Constitutive Act of the Union 2001.

<sup>12</sup> Art. 4(h & j), Constitutive Act of the Union 2001.

<sup>13</sup> Art. 4(p), Constitutive Act of the Union 2001.

<sup>14</sup> Art. 4(h and j), Constitutive Act of the Union 2001.

<sup>15</sup> Art. 4(h), Protocol on Amendments to the Constitutive Act of the African Union 2003.

compromise to the amendment originally proposed by Libya.<sup>16</sup>

I will not discuss here the various conception or meanings of rule of law but would settle on rule of law's basic purpose – as a set of institutional, legal, political and other arrangements that restrain excessive or abusive exercise of power, be it power of the state or of non-state actors.<sup>17</sup> Rule of law also has an instrumentalist function which is to provide stability, predictability and legitimacy; in recent years it has been associated with access to justice, good governance and accountability.<sup>18</sup> The rule of law in African integration is situated within the broader peace-building and state-building function of African integration – which has dominated regional agenda due to the persistence of conflicts, instability and insecurity in many member countries. Countries like Sudan, Mali, Somalia and DR Congo have very loose and tenuous hold on sovereignty itself. The rule of law architecture in the AU is thus found not only in the traditional spheres or institutions such as the courts, quasi-judicial bodies, and parliament. It is likewise embedded in the Peace and Security Architecture (PSA), or in similar peace and security mechanisms at the sub-regional level that are usually tasked with decision-making, monitoring, and enforcing interventions or sanctions.<sup>19</sup> A soft approach to encouraging the observance of rule of law has also been instituted in such instruments as the ACDEG and regional governance initiatives such as the African Peer Review Mechanism (APRM).<sup>20</sup>

### **Regional courts as potential drivers of rule of law in Africa?**

The establishment of judicial oversight is one of the most ambitious programs in the AU to institute rule of law in the region. Indeed it is a flagship program given the amount of resources and capacity needed to run a functioning regional court. As early as 1991, the Abuja Treaty provided for the creation of a Court of Justice.<sup>21</sup> Through the courts, the African Union and Regional Economic Communities (RECs) are to play a lead role in fostering rule of law particularly in the context of weak – or lacking, rule of law practices at the state level. Similar to the supranational courts in the European Union, these courts could play a mediating role between state and international norms. In its adjudicative function, the courts could fulfill an important part in fulfilling AU's vision for

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<sup>16</sup> Evarest Baimm & Kathryn Sturman, above.

<sup>17</sup> See for example Martin Krygier, 'Four Puzzles about the Rule of Law: Why, what, where? And who cares?', University of New South Wales Faculty of Law Research Series 2010, Working Paper 22 (June 2010), <http://law.bepress.com/unswwps-flrps10/art22>, 16-18.

<sup>18</sup> As in indicators used by the World Justice Project at <http://worldjusticeproject.org/rule-of-law-index/>; and World Bank's Worldwide Governance Indicators at <http://info.worldbank.org/governance/wgi/index.asp>, viewed on 17 December 2012.

<sup>19</sup> Such as ECOWAS' Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, [http://www.ecowas.int/publications/en/framework/ECPF\\_final.pdf](http://www.ecowas.int/publications/en/framework/ECPF_final.pdf), 12 November 2012.

<sup>20</sup> There are 30 members as of 31 January 2011 of the APRM initiative launched in 2003; for more information see <http://aprm-au.org/>, viewed 19 December 2012.

<sup>21</sup> Art. 7, The Abuja Treaty 1991.

‘African solution to African problem’ especially in the light of member states’ criticisms of the International Criminal Court (ICC) for singling out Africa.

There are two types of regional court system in Africa – the continent-wide and at the level of the RECs. They are exclusive from the other, and one is not prevented from seeking a remedy or recourse from one mechanism or both. The protocols of the African Court of Justice and Human Rights (ACJHR) and RECs court like the ECOWAS Community Court of Justice show an overlapping jurisdiction – both courts have jurisdiction to try Community treaties and instruments. The ACJHR does not act as an appeal court to the RECs courts or tribunals although it has been constituted as the main judicial organ of the Union with power of review over the AU and members’ actions or decisions.

### **The African Court of Justice and Human Rights as the main judicial organ and criminal court in Africa**

The African Court of Justice and Human Rights is envisaged as the main judicial organ of the Union having power of review over decisions and actions of the Union and its member states.<sup>22</sup> As its name implies, the ACJHR will result from a merger of the African Court of Human and Peoples’ Rights (ACHPR) and the African Court of Justice (ACJ) and will have its seat in Arusha, Tanzania. As a Permanent Court, it will be vested with general jurisdiction to hear cases of administrative, civil, human rights and criminal nature. It is heralded by the AU as a ‘veritable Criminal Court for the Continent.’<sup>23</sup> It will thus be a first for an international court to be constituted to try both state responsibility and individual accountability. The plan to constitute the ACJHR as a criminal court was expected to be adopted during the Summit of the Heads of States in July 2012 but this did not materialize as the election of the AU Chair and trade matters became the priority.<sup>24</sup> The ACJHR is yet to come into operation since its Protocol has not been ratified by at least fifteen countries.<sup>25</sup>

If the ACJHR is realized, it will assume broad judicial competence. It will have jurisdiction involving the interpretation and application of Union instruments such as the Constitutive Act, charters, treaties, and other human rights instruments ratified by states parties, as well as questions of international law, acts and decisions of any organ

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<sup>22</sup> To be merged with the African Court on Human and Peoples Rights (ACHPR), and will be called the ‘African Court of Justice and Human Rights’, pursuant to the decision during the African Union Summit of Heads of State of Governments on 1 July 2008 held in Egypt and is covered by the Protocol on the Statute of the African Court of Justice and Human Rights 2008. The ACHPR which started operations in 2006 will continue to function.

<sup>23</sup> AU’s website description of the African Court of Justice, <http://www.au.int/en/organs/cj>, viewed on 19 June 2012.

<sup>24</sup> At AU Echo, Special Edition for the 19<sup>th</sup> Summit, Issue 06, 16 July 2012, at <http://www.au.int/en/sites/default/files/AU%20Echo%20issue%20July%2016%202012.pdf>, on 12 August 2012.

<sup>25</sup> Only 27 member states have so far signed the Protocol and only three had ratified – Burkina Faso, Kenya and Mali.

of the Union, breach of any obligation owed to a member state or the Union, and reparations for breach of an international obligation.<sup>26</sup> It will have appellate jurisdiction on cases involving Union staff and its organs<sup>27</sup> as well as the power to issue provisional measures<sup>28</sup> and grant appropriate measures including fair compensation in cases involving violation of human or peoples' right.<sup>29</sup> Similar to the complaints process in the European Court of Justice (ECJ), the ACJHR will allow complaints from state parties, the Assembly, Parliament and other organs authorized by the Union, the Commission or a staff of the Commission, and 'Third Parties' to be determined by the Assembly and with consent by the State Party concerned.<sup>30</sup> Pursuant to the 2008 Protocol on the Statute of the ACJHR, 'other entities'<sup>31</sup> can also file a complaint before the court on matters involving the African Charter, regional human rights instruments and other human rights instruments ratified by member states. Under the proposed amendment, an individual or NGO will be permitted access on matters relating to human rights, a mechanism that is similar in some respects to individual access in the European Union.<sup>32</sup> As a criminal court, it will have jurisdiction to hear cases involving genocide, crimes against humanity, war crimes, crimes on unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, crime of aggression and inchoate offences.<sup>33</sup>

The decision to merge the jurisdiction of the Court shows a practical side to it – a first of its kind, given the resource and capacity limitations of the AU and its members who are obliged to contribute for its establishment. It seeks to stand for national courts given the latter's institutional weakness and inability to prosecute their own nationals for crimes that have serious repercussions on the stability of the country and the region. On the other hand, it is being seen as a 'countervailing mechanism' against the ICC for what AU and its members observe as disproportionate focus on Africa. The AU has consistently opposed the issuance of warrant of arrest against Al Bashir of Sudan and against Moamar Gaddafi, and what it perceives as abuse of the principle of universal jurisdiction by the ICC and Western powers. It seems that majority of African states - despite as many as thirty-three members having ratified the Rome Statute, believe that the indictment is politically motivated and see ICC's actions as overt interference in the continent's political affairs and for singling out Africa.<sup>34</sup> 'We support the fight against

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<sup>26</sup> Art. 28, Protocol on the Statute of the Court of Justice and Human Rights 2008.

<sup>27</sup> Art. 29(c), Protocol on the Statute of the Court of Justice and Human Rights 2008.

<sup>28</sup> Art. 35, Protocol on the Statute of the Court of Justice and Human Rights 2008.

<sup>29</sup> Art. 45, Protocol on the Statute of the Court of Justice and Human Rights 2008.

<sup>30</sup> Art. 18, Protocol on the Statute of the Court of Justice and Human Rights 2003.

<sup>31</sup> Referring to: African Commission on Human and Peoples' Rights, African Committee of Experts on the Rights and Welfare of the Child, African Intergovernmental Organizations, African National Human Rights Institutions, Individuals or Non-Government Organizations accredited to African Union or its organs. Art. 30, Protocol on the Statute of the ACJHR 2008.

<sup>32</sup> Art. 30, Protocol on the Statute of the ACJHR 2008.

<sup>33</sup> Draft Protocol on Amendments to the Protocol on Statute

<sup>34</sup> Although three members have actually requested ICC indictment in the case of Condo, Uganda and Central African Republic). The AU has since 1999 continuously passed resolutions not to

impunity, we do not support impunity, we are not even against the Criminal Court...We are against the way justice is being rendered because ... it looks as if this ICC is only interested in trying the Africans,' said former AU Commission chairman Jean Ping.<sup>35</sup>

If and when the ACJHR would be constituted, the Bashir and similar cases would serve to test its avowed resolve to bring to justice those who have been suspected of committing war and humanitarian crimes, or those other crimes that have destabilized national and regional security. The Court obviously faces a potential clash of jurisdiction with the ICC over cases involving war crimes and crimes against humanity over AU's membership, either by preempting ICC's indictment process or by rendering contrary decisions. This could lead to dilemma among AU members who are also signatories to the Rome Statute and potentially diverge from the expectations of international community. As it stands however, AU's demonstrated response to African conflicts, through the Assembly of Heads of States, has shown confusion and indecisiveness that prevented its institutional mechanisms from providing effective and timely response to the conflicts, and thus allowed instead 'foreign intervention'.

Whether the ACJHR could play a 'countervailing' measure to international pressures in Africa will depend much on how it can build a credible and effective African rule of law system. Moreover, there is a question of resources in establishing a criminal court, the same key argument put forward to merge the ACHPR and the African Court of Justice which is to save resources.<sup>36</sup> Given the staggering cost in establishing an international criminal tribunal however,<sup>37</sup> there is a perception that the AU may be less interested in establishing an effective judicial institution than doing it as a pretext to frustrate its functioning.<sup>38</sup> There is no way however to test the efficacy or resolve of the ACJHR as it has not been formally set-up since the Protocol been constantly amended even before it can operate. Only 27 members signed the new protocol while three countries had ratified – Burkina Faso, Kenya and Mali. The long delay in constituting the ACJHR only

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implement the ICC's arrest warrant against Bashir and requested deferral of the proceedings involving Sudan and Kenya. Some members however vowed to arrest Bashir while others defied the ICC order; see Malawi's decision to host the 15-16 July 2012 AU Summit, see 'Malawi cancels AU summit over Sudan's Bashir', <http://www.aljazeera.com/news/africa/2012/06/20126974132905285.html>, viewed 25 June 2012.

<sup>35</sup> In 'African Union refuses to arrest Gaddafi', <http://www.globalpost.com/dispatches/globalpost-blogs/africa-emerges/african-union-refuses-arrest-gaddafi>, viewed on 25 June 2012.

<sup>36</sup> For a historical review of the decision on merger see Dan Juma, 'Lost (or Found) in Translation? The Anatomy of the New African Court of Justice and Human Rights, Max Planck United Nations Yearbook 13 (2009), 267-306, 276.

<sup>37</sup> The International Criminal Tribunal for Rwanda has a budget of US\$90 million with over 800 employees and 3 chambers presided by 9 judges. See International Crisis Group, International Criminal Tribunal for Rwanda, Justice Delayed, Africa Report n. 30, (7 June 2001).

<sup>38</sup> See Franz Vijoën, 'AU assembly should consider human rights implications before adopting the Amending Merged African Court Protocol,' *AfricLaw*, 23 May 2012, <http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/>, viewed on 4 July 2012.

lends credence to the view suspecting AU's sincerity in fighting impunity and fostering the rule of law.<sup>39</sup>

### **The role of African Court of Human and Peoples' Rights in fostering rule of law**

It is only through the African Court on Peoples' and Human Rights that we can get an insight of a functioning continent-wide judicial organ through its role in upholding rule of law in the context of human rights protection. Established pursuant to the Protocol to the African Charter on Human and Peoples' Rights 1998, the ACPHR became operational only in 2006. Composed of 11 judges who are nationals of member states, the ACHPR has both judicial and advisory functions, has a complementary mandate with the African Commission on Human and Peoples' Rights (hereafter the African Commission), and has jurisdiction to hear cases or disputes involving the African Charter on Human and Peoples' Rights, its Protocol, and human rights instruments ratified by member states.<sup>40</sup> States and non-state parties are entitled to initiate proceedings in the Court, such as the African Commission, African Intergovernmental Organization, accredited Nongovernmental Organizations (NGOs), and individuals.<sup>41</sup> However, only countries that made specific declaration to receive complaints by NGOs and individuals are permitted to file cases directly to the Court. As of March 2011, there are 51 signatories to the protocol establishing the ACHPR and 26 ratifications.<sup>42</sup> Since it finalized its rules of procedure in June 2008, the ACHPR has, and considering numerous grave human rights issues faced by member states, received only 20 complaints against 13 member countries and against the African Parliament and the African Union as an organization.<sup>43</sup>

In understanding the functioning of the ACHPR, it is likewise important to understand the dynamics of relationship among the AU Assembly, African Commission, and the Court; they are the main organs tasked with promoting and protecting human rights in the continent. The Peace and Security Council could be added to this triumvirate as the central mechanism to manage and respond to major conflicts in the region which often involve large scale human rights abuses. It should be noted that the African Commission is an autonomous quasi-judicial body that can issue recommendations to the AU Assembly and has standing to file complaint before the Court.<sup>44</sup> Members of both the

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<sup>39</sup> See for e.g. Chacha Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights', *Journal of International Criminal Justice* (Vol. 9, 2011), 1067-88.

<sup>40</sup> Arts 2-4, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (Protocol to African Charter) 1998.

<sup>41</sup> Art 5, Protocol to African Charter 1998. Under the Art. 34(6) of the Protocol, the Courts' competence to receive complaints from NGOs and individuals applies only to those ratifying states making a declaration to be bound by such competence.

<sup>42</sup> At [www.au.int/en/sites/default/files/992achpr.pdf](http://www.au.int/en/sites/default/files/992achpr.pdf), viewed on 3 July 2012.

<sup>43</sup> Countries against whom the cases had been filed: Senegal, Algeria, Malawi, Libya, Mozambique, Cote D'Ivoire, Morocco, Nigeria, Tanzania, Gabon, Burkina Faso, South Africa and Sudan. See full list of cases at [www.african-court.org/en/index.php/2012-03-04-06-06-00/list-cases](http://www.african-court.org/en/index.php/2012-03-04-06-06-00/list-cases), viewed on 3 July 2012.

<sup>44</sup> See Rule 3, Rules of Procedure of the African Commission, [www.achpr.org/english/ROP/Rules%20of%20Procedure.pdf](http://www.achpr.org/english/ROP/Rules%20of%20Procedure.pdf), viewed 4 July 2012.

Court and the African Commission are elected by Heads of States or the governments and whose budgets are determined by the Union.<sup>45</sup> Both organs do not have independent enforcement mechanisms and rely on the AU Assembly to enforce their recommendations or decisions. On the part of the Court, it will submit an annual report to the AU Assembly on those states that did not comply with their orders or decisions while the AU Executive Council monitors enforcement on behalf of the Assembly.<sup>46</sup>

The African Commission has a major role in fostering rule of law in the context of human rights promotion and protection. Through its power to receive and examine communications, it clarifies human rights norms at the national, regional and international levels. In the case concerning the Zimbabwean government's regulation for accreditation of journalists, the African Commission went so far as to consider the prevailing norms in the Americas in recommending the repeal of the regulation.<sup>47</sup> Since 2011, it has decided 196 communications out of 400 received but only ten countries implemented, fully or partially, its recommendations.<sup>48</sup> As noted, the relationship between the African Commission and ACHPR is based on complementarity and cooperation. Its ability or inability to examine communications and complaints, and conduct fact-finding missions to verify allegations of violations impacts on the ability of the African Court to perform its functions. In the absence of initiative by the African Commission, very few cases could reach the African Court which remains largely unknown in the continent. As in the EU, states are known to desist from filing cases against fellow members. It is only through the African Commission that indirect individual access to the African Court can be made since only six countries made the declaration to receive NGO and individual complaints (Ghana, Burkina Faso, Malawi, Mali, Tanzania, and recently on April 2012 Rwanda<sup>49</sup>).

All the cases brought to the ACHPR were driven by individuals and NGOs, except for the case initiated by the African Commission against Libya in 2011. Since it commenced operations in 2008, it has not received sufficient amount of cases that may thoroughly test its capacity and competence. Of the 21 cases received, most were thrown out summarily for lack of jurisdiction and/ or referred to the African Commission.<sup>50</sup> The only case that stands a good chance of being decided on its merits, and provided the Court will be satisfied that applicants had exhausted local remedies, is the consolidated case

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<sup>45</sup> Art. 30, 31 African Charter; Art. 13, 14 Protocol to African Charter 1998.

<sup>46</sup> Art. 29 & 30, Protocol to African Charter 1998.

<sup>47</sup> Considering the Advisory Opinion of the Inter-American Court of Human Rights on the question of registration of journalists in Costa Rica, in Communications 297/05: Scanlen and Holderness/Zimbabwe, [www.achpr.org/communications/decisions/297.05/](http://www.achpr.org/communications/decisions/297.05/), viewed on 4 July 2012.

<sup>48</sup> International Service for Human Rights, African Commission on Human and Peoples Rights, Marking the 30<sup>th</sup> anniversary of the African Charter, [www.ishr.ch/document-stuff/.../1393-regional-focus-hrmq1-2012](http://www.ishr.ch/document-stuff/.../1393-regional-focus-hrmq1-2012), viewed 4 July 2012.

<sup>49</sup> See table of ratification at [www.au.int/en/sites/default/files/992achpr.pdf](http://www.au.int/en/sites/default/files/992achpr.pdf), viewed on 4 July 2012.

<sup>50</sup> See list of all cases and decisions at [www.african-court.org/en/index.php/2012-03-04-06-06-00/list-cases](http://www.african-court.org/en/index.php/2012-03-04-06-06-00/list-cases), viewed on 4 July 2012.

against Tanzania concerning the incumbent government's move to prevent non-party members from participating in national and local elections.<sup>51</sup> Inadequate human and financial resources are often cited for the African Commission's lackluster performance, or sometimes its 'invisibility' in times of major human rights crises such as in Sudan, Somalia, Rwanda and Sierra Leone.<sup>52</sup> It is emblematic however of disconnect between the lofty aspirations of the Union and individual state practice,<sup>53</sup> the proclivity of majority of AU members for long-drawn political solution, and wide divergence among member states. AU political organs largely ignored the African Commission and its recommendations and at times deplored its actions.<sup>54</sup>

The ACPHR itself has not shown an inclination for judicial activism to broaden access of NGOs and individuals in the absence of action by the African Commission and member states. With its repeated dismissal of individual access cases, the Court does not see a way out of the express injunction in the Protocol enjoining the Court from receiving 'any petition under article 5(3) involving a State Party which has not made such a declaration'<sup>55</sup> - other than tossing the cases back to the African Commission. This was precisely the challenge in *Femi Falana v African Union*<sup>56</sup> where a Nigerian human rights activist asked the Court to declare invalid that provision against the substantive rights guaranteed under the African Charter. He argued that he has been denied access to justice because of Nigeria's refusal to make the necessary declaration. Again, the Court took the procedural route to dismiss the case on the ground that the African Union is not the proper party to the proceeding as it is not a signatory to the African Charter and its Protocol.<sup>57</sup>

The *Libya* case<sup>58</sup> however has opened up an opportunity for cooperation between the African Commission and the ACPHR that can potentially enhance judicial oversight in the continent. This is the first case the African Commission filed a complaint and where, for the first time, the African Court issued an unprecedented provisional measure. The African Court, even in the absence of a request for provisional remedy from the African

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<sup>51</sup> Application 009/2011 & 011/2011, Tanganyika Law Society and the Legal and Human Rights Centre & Reverend Christopher Mtikila v. the United Republic of Tanzania.

<sup>52</sup> See for example *African Commission on Human and Peoples' Rights Marking the 30<sup>th</sup> anniversary of the charter*, Human Rights Monitor and Quarterly, Issue 1 (2012), at [www.ishr.ch/document-stuff/.../1393-regional-focus-hrmq1-2012](http://www.ishr.ch/document-stuff/.../1393-regional-focus-hrmq1-2012), 12 October 2012.

<sup>53</sup> Manifested by reduction of the African Commission's funds in 2011 and inability of the AU and member states to implement the recommendations of the Commission.

<sup>54</sup> See Andreas Stensland, Walter Lotze and Joel Ng, *Regional Security and Human Rights Interventions, A Global Governance Perspective on the AU and ASEAN*, Norwegian Institute of International Affairs (NUIP Report, 2012), 34-42.

<sup>55</sup> Art. 34(6), Protocol to African Charter 1998.

<sup>56</sup> Application No. 001/2011, *Femi Falana v African Union*.

<sup>57</sup> Judgment in the Matter of *Femi Falana v African Union*, press release on the decision at [www.african-court.org/en/index.php/news/press-releases/195-judgment-in-the-matter-of-femi-falana-v-the-african-union](http://www.african-court.org/en/index.php/news/press-releases/195-judgment-in-the-matter-of-femi-falana-v-the-african-union), viewed on 4 July 2012.

<sup>58</sup> Application No. 004/2011, *African Commission on Human and Peoples' Rights v Great Socialist Peoples' Libyan Arab Jamahiriya*.

Commission *motu proprio* issued a provisional order requiring Libya to ‘refrain from any action that would result in the life or violation of physical integrity of persons’ and to report to the Court within 15 days from receipt of the Order on measures taken to implement the Order.<sup>59</sup> This case is path-breaking in the African court system for an indirect access originally submitted to the African Commission by an Egyptian NGO, the Egyptian Initiative for Personal Rights (EIPR), and two foreign NGOs, the Human Rights Watch and International Centre for the Legal Protection of Human Rights (INTERIGHTS). The African Court was clearly emboldened in issuing the provisional relief citing the declaration of condemnation by the Peace and Security Council of the African Union, the suspension of Libya by the Arab Council, and UN Security Council Resolution referring the matter to the ICC.

AU’s reaction to the *Libya* decisions showed one of indifference – and reflects the political barrier to the rule of law. It also further dented the Union’s credibility and capacity to offer ‘an African solution to an African problem.’ The AU Assembly, despite the escalation of violence against civilians in Libya, refrained from making any criticism and the Court’s decision did not even merit mention during the Extraordinary Session of the Assembly on 25 May 2011.<sup>60</sup> As the unfolding events showed, AU’s political roadmap had been rejected or brushed aside by the opposition in Libya and by other regional players and precipitated the United Nations Security Council’s authorization for the use of force by the international coalition. Both the African Commission’s complaint and the Court’s provisional order could have provided the legal justification for AU intervention authorized in the Constitutive Act and may have thwarted the full NATO military intervention that was so feared from Western powers.

### **Judicial activism of sub-regional courts in Africa**

The establishment of sub-regional courts in Africa reflects the different trends in rule of law development in Africa’s regions. The two REC courts discussed here have shown a tendency for independence and judicial activism than the continent-wide ACPHR. However, REC courts also experience the same problem of resource and capacity that hamper institution building as well as weak political commitment and leadership at the national level in the acceptance and enforcement of judgments. These tribunals are highly dependent on the political support of member states that ultimately determines their capacity for independence - or their very survival. The ECOWAS Community Court however proves that an independent tribunal can thrive in the face of member states’ reluctance or defiance of Community decisions.

### **The SADC Tribunal – political control versus judicial activism**

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<sup>59</sup> Application No. 004/2011, Order for Provisional Measures, 5 March 2011.

<sup>60</sup> Declaration on the State of Peace and Security in Africa, Addis Ababa, Ethiopia, 25 May 2011, [www.nepad.org/system/files/Declaration%20on%20the%20State%20of%20Peace%20%20Security%20\\_Eng%20\\_.pdf](http://www.nepad.org/system/files/Declaration%20on%20the%20State%20of%20Peace%20%20Security%20_Eng%20_.pdf), viewed on 4 July 2012.

The South African Development Community (SADC) was originally formed in 1980 as a counter-balance to South Africa's economic hegemony in the region and initially rejected economic integration based on market liberalization and free trade principle preferring instead a balance trade strategy based on technical and economic co-operation.<sup>61</sup> Since its re-establishment in 1992, SADC has committed to the values of human rights, democracy and the rule of law.<sup>62</sup> The SADC Tribunal was, in many respects, patterned after the ECJ. It was established 'to ensure the adherence to law in the interpretation and application of the Treaty'<sup>63</sup> pursuant to Article 16 of the SADC Treaty and where its composition, powers, functions, and procedures would be provided under its Protocol. It was inaugurated on 18 August 2005 in Windhoek, Namibia. The Tribunal, composed of ten members appointed by the Summit, was guaranteed judicial independence by giving its members immunity in the performance of their duties, appointment to a fixed term, a procedure for removal, as well as a requirement for the members to take a solemn oath to fulfill their functions, independently, impartially, and conscientiously.<sup>64</sup> It was also given broad jurisdiction<sup>65</sup> to hear disputes between the states, between individuals and member states, and between individuals and the Community.<sup>66</sup> The Protocol also provides for preliminary reference procedure from national courts or tribunal.<sup>67</sup>

The SADC Tribunal received its first case in 2007, a labor complaint filed against the SADC Secretariat. It had since decided around 21 cases until its operations were suspended in August 2010.<sup>68</sup> The SADC Tribunal rendered a variety of cases that involve labor, commercial, human rights, and deportation issues.<sup>69</sup> It has clearly provided opportunity for individuals to seek redress against arbitrary exercise of state powers or agencies, particularly when municipal mechanisms offer no effective remedies.<sup>70</sup> The Tribunal was finally dissolved on 21 May 2012 during the Extraordinary Summit of the

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<sup>61</sup> G.G. Maasdorp, 'Economic and Political Aspects of Regional Cooperation in Southern Africa', 95-6.

<sup>62</sup> SADC's forerunner was the Southern African Development Co-ordination Conference (SADCC) and its 15 member countries are: Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia, Zimbabwe, Madagascar, Seychelles, Democratic Republic of Congo, Seychelles, Namibia, and Mauritius.

<sup>63</sup> Art. 16, SADC Treaty.

<sup>64</sup> See Arts 3-10, SADC Protocol on Tribunal and the Rules of Procedure Thereof.

<sup>65</sup> Art. 14, Protocol on Tribunal and the Rules of Procedure Thereof.

<sup>66</sup> Art. 15 and Article 18, Protocol on Tribunal and the Rules of Procedure Thereof.

<sup>67</sup> Art. 75(1,2), Protocol on Tribunal and the Rules of Procedure Thereof.

<sup>68</sup> The Tribunal's first case was *Ernest Mtingwi v The SADC Secretariat*, SADCT 1/07; also cited in Oliver Ruppel and Francois Bangamwabo, 'The SADC Tribunal: a legal analysis of its mandate and role in regional integration,' *Monitoring Regional Integration in Southern Africa Yearbook* (2008), at [http://www.nepu.org.na/uploads/media/Chapter\\_8\\_-\\_The\\_SADC\\_Tribunal.pdf](http://www.nepu.org.na/uploads/media/Chapter_8_-_The_SADC_Tribunal.pdf), viewed on 13 July 2009, 3-4.

<sup>69</sup> See list of decided cases at [www.sadc-tribunal.org/pages/decisions.htm](http://www.sadc-tribunal.org/pages/decisions.htm), viewed 18 July 2012. Most cases were filed against Zimbabwe but there are cases against SADC Secretariat, the SADC Parliamentary Forum and cases filed against Lesotho and Congo.

<sup>70</sup> *Mike Campbell (PVT) Ltd v The Republic of Zimbabwe* SADC (T) 2/2007, 21, restated in *Bach's Transport (Pty) Ltd v Democratic Republic of Congo*, 14/2008, Judgment dated 11 June 2010.

Heads of States with a view to replacing it with a new tribunal that political leaders believe would 'allow the Tribunal to be more effective, and to respond to our expectations.'<sup>71</sup> The dissolution was done with a view to forming a new less-intrusive body where individual access is restricted and whose jurisdiction will be limited to resolving disputes between member states.<sup>72</sup>

The controversial decision to dissolve the SADC Tribunal manifests the confrontation between rule of law and assertion of sovereign authority. The Tribunal's ruling on its second case, *Mike Campbell (PVT) Limited and William Michael Campbell v The Republic of Zimbabwe*<sup>73</sup> did not, obviously, meet the expectations of many SADC heads of states of a pliant judiciary. This case precipitated the Tribunal's demise which also granted an interlocutory relief to the private applicant to prevent the Government of Zimbabwe from evicting the landowner from his land pending the determination of the main issue with the regional court. Zimbabwe did not only defy the order by prosecuting and evicting the applicant,<sup>74</sup> its ruler also derided the decision calling it 'nonsense and of no consequence.'<sup>75</sup> This led the Tribunal to directly confront Zimbabwe's authority by issuing a contempt order and forwarding its decision for non-compliance to the SADC Summit in accordance with Article 10 of the SADC Treaty. In response, the Summit, instead of deciding on Zimbabwe's non-compliance, effectively suspended the operations of the Tribunal by not re-appointing four of its members and ordering a review of the Tribunal's jurisdiction by an independent expert, whose recommendations it also consequently ignored.<sup>76</sup>

The decision to dissolve the Tribunal was instigated by Zimbabwe's lobbying but it clearly demonstrates the position most SADC member states have in defending their 'sovereign' prerogatives. It also represents a clash between controversial policies of land

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<sup>71</sup> AllAfrica, <http://allafrica.com/stories/201105230449.html>, viewed on 4 July 2012.

<sup>72</sup> See Nicole Fritz, *Up in Smoke: The SADC Tribunal and Rule of Law in the Region*, South African Foreign Policy Initiative Policy Brief No. 11 (September 2012), [www.safpi.org/sites/default/files/publications/SAFPI\\_Policy\\_Brief\\_11\\_0.pdf](http://www.safpi.org/sites/default/files/publications/SAFPI_Policy_Brief_11_0.pdf), at 19 December 2012.

<sup>73</sup> Case No. SADCT: 2/07, *Mike Campbell (PVT) Limited and William Michael Campbell v The Republic of Zimbabwe*, Ruling on 13 December 2007, at <http://www.saflii.or/sa/cases/SADCT/2007/1.html>, viewed 18 April 2008. The case concerns the highly controversial policy of Zimbabwe to expropriate lands owned by its white population. Intervention by 77 other farmers was granted in *Gideon Stephanus Theron & Others v Zimbabwe*, SADC (T) 02/2008; SADC (T) 03/2008; SADC (T) 04/2008; SADC (T) 06/2008.

<sup>74</sup> Ruling in Case SADCT No. 11/08, <http://www.sadc-tribunal.org/page.php?p=decisions>, viewed on 13 July 2009.

<sup>75</sup> Case No. SADC(T) 03/009, 5 June 2009, at <http://test.saflii.org/sa/cases/SADCT/2009/1.html>, viewed on 13 July 2009.

<sup>76</sup> Since August 2010, the SADC Tribunal was unable to hear any pending cases on 'order' from the Summit. Even if the Tribunal wanted to, it could not conduct its work due to lack of required number of judges and lack of resources. For legal arguments on the validity of suspension/dissolution of the Tribunal see Derek Matyszack, *The Dissolution of the SADC Tribunal*, [www.idasa.org/media/uploads/outputs/files/the\\_suspension\\_sadc\\_tribunal\\_final.pdf](http://www.idasa.org/media/uploads/outputs/files/the_suspension_sadc_tribunal_final.pdf), viewed on 9 July 2012.

reform and nationalization in Africa as a measure for ‘black empowerment’ and the right to property especially of ‘white’ or foreign nationals. It was not simply a move to shield Zimbabwe from embarrassment but that many of them also fear that their national policies would increasingly be scrutinized and stricken down.<sup>77</sup> ‘We have created a monster that will devour us all’, a remark attributed to Tanzanian President Jakaya Kikwete referring to the Tribunal.<sup>78</sup> While very few countries had spoken openly of their views, it is understandable that they would have been unsettled by the Tribunal’s rulings since many other African countries are beset with colonial land policies and may be contemplating similar affirmative measures.<sup>79</sup> In many ways, SADC member states have not foreseen the consequences of their actions when they created an independent tribunal.

The SADC leaders and members of the SADC Tribunal have different expectations of a functioning independent court. The SADC Tribunal was, following ECJ’s footsteps, strived to be an ‘activist court’ whose ruling in *Campbell* interpreted broad provision of SADC treaty on human rights, democracy and the rule of law. ‘This means that SADC as a collectivity and as individual member States are under a legal obligation to respect and protect human rights of SADC citizens. They also have to ensure that there is democracy and the rule of law within the region.’<sup>80</sup> It was also actively involved in disseminating information about the Tribunal and its work, and encouraging discussion of its decisions having produced the SADC Tribunal Review. In fact the establishment of the Tribunal has fuelled the beginning of a discourse on SADC integration and evolution of a regional jurisprudence.<sup>81</sup> Despite Zimbabwe’s non-recognition of the Tribunal’s decision, South African courts have recognized the SADC ruling.<sup>82</sup> On the other hand, the Tribunal also went into collision course with Zimbabwe leaders without the benefit of a ‘dialogue’ which isolated it further from the political decision makers. Perhaps in hindsight, the Tribunal members may have underestimated the camaraderie of SADC leaders or their interests in defending their political interests. The SADC Tribunal’s short existence shows the promise but also the limits of developing the rule of law in African sub-

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<sup>77</sup> Catherine Sasman, *Kawana defends SADC Tribunal suspension*, the Namibian, 15 July 2011, [www.namibian.com.na/index.php?id=28&tx\\_ttnews\[tt\\_news\]=84492&no\\_cache=1](http://www.namibian.com.na/index.php?id=28&tx_ttnews[tt_news]=84492&no_cache=1), viewed 10 July 2012.

<sup>78</sup> In *Killed off by “kings and potentates”*, Mail & Guardian, 19 August 2011, <http://mg.co.za/article/2011-08-19-killed-off-by-kings-and-potentates/>, viewed 10 July 2012.

<sup>79</sup> See for example discussion on land issues in Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods, Framework and Guidelines on Land Policy in Africa, Revised Version (March 2009), [www.pambazuka.org/aumonitor/images/uploads/Framework.pdf](http://www.pambazuka.org/aumonitor/images/uploads/Framework.pdf), viewed 10 July 2012.

<sup>80</sup> Case No. SADCT: 2/07, *Mike Campbell (PVT) Limited and William Michael Campbell v The Republic of Zimbabwe*, 3.

<sup>81</sup> See SADC Law Journal, Vol. 1 (2011), [www.kas.de/wf/doc/kas\\_23107-1522-2-30.pdf?110721140859](http://www.kas.de/wf/doc/kas_23107-1522-2-30.pdf?110721140859), viewed on 10 July 2012.

<sup>82</sup> Applicants in *Campbell* have successfully applied for recognition at a Pretoria High Court to seize Zimbabwe-owned government properties to pay for litigation costs, see [www.businesslive.co.za/incoming/2011/06/07/farmers-win-battle-to-sell-zimbabwe-state-assets](http://www.businesslive.co.za/incoming/2011/06/07/farmers-win-battle-to-sell-zimbabwe-state-assets), viewed 10 July 2012.

regional integration.

### **ECOWAS Community Court of Justice (ECCJ)**

The Economic Community of West African States (ECOWAS) was founded in 1975 through the Treaty of Lagos, and puts economic integration at the center-stage of regional integration with a view to achieving economic development and sustainability. With more than half of its members belonging to the category of least developed countries and continuously beset by internal armed conflicts, ECOWAS is gradually transforming itself and is considered one of the prime engines of regional integration in Africa.<sup>83</sup> ECOWAS was given a boost in 1993 by adopting the Revised Treaty of ECOWAS (or Treaty of Cotonou) to accelerate economic integration that will culminate in economic union and enhance political cooperation. In this treaty, member states expressly agreed to surrender part of their sovereignty acknowledging the need for 'partial and gradual pooling of sovereignties to the Community within the context of a collective political will.'<sup>84</sup> It gave rise to the establishment of supranational organs, in particular the ECOWAS Community Court of Justice (ECCJ) and the Community Parliament.<sup>85</sup>

The ECCJ is the prime judicial organ in the Community and provides an important integrative function. Through Articles 6 and 15 of the Revised Treaty, the ECCJ has been set up as the main legal organ of the Community where its decisions shall be binding on member states, Community institutions, individuals and corporate bodies.<sup>86</sup> It is invested with broad jurisdiction to hear disputes among member states, community institutions and officials, the validity of Community acts and decisions as well as individual complaints involving human rights violations.<sup>87</sup> Through the Protocol in 2005, individual access was granted without recourse to exhaustion of local remedies and a procedure for preliminary reference by national courts or individuals was made.<sup>88</sup> While the Court's decision is binding and not appealable, its enforcement will be carried out by

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<sup>83</sup> ECOWAS members are Ghana, Burkina Faso, Cabo Verde, Cote d'Ivoire, Gambia, Ghana, Guinee, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togolese Republic. ECOWAS, SADC and EAC are considered by AU as forming the nucleus for continent-wide integration. Many ECOWAS member countries have suffered long years

<sup>84</sup> Preamble, Treaty of ECOWAS 1993 (Treaty of Cotonou) 1993, [www.comm.ecowas.int/sec/index.php?id=treaty&lang=en](http://www.comm.ecowas.int/sec/index.php?id=treaty&lang=en), viewed 11 July 2012.

<sup>85</sup> Other organs are: The Authority of Heads of States, Council of Ministers, Economic and Social Council, Executive Secretariat, Fund for Cooperation, Compensation and Development, and Specialized Technical Commissions. There is also provided an Arbitral Tribunal which is yet to be constituted.

<sup>86</sup> Article 2, Protocol of the Community Court of Justice A/P.I/7/91, 6 July 1991, [www.courtecowas.org/site2012/pdf\\_files/protocol.pdf](http://www.courtecowas.org/site2012/pdf_files/protocol.pdf), 19 November 2012.

<sup>87</sup> Article 3(1) & 4, Supplementary Protocol A/SP.1/01/05, 19 January 2005, at [www.courtecowas.org/site2012/pdf\\_files/supplementary\\_protocol.pdf](http://www.courtecowas.org/site2012/pdf_files/supplementary_protocol.pdf), on 19 November 2012.

<sup>88</sup> Non-exhaustion of remedies on human rights cases has been affirmed by the Court, see *Etim Moses v Gambia* 14/03/07, Suit No. ECW/CCJ/APP/05/05.

a ‘competent’ authority which will be determined by the member state.<sup>89</sup> The Court can also be seized of advisory opinions on any matter that requires interpretation of Community law. In 2001, the ECCJ was formally established composed of seven independent judges and sits in Abuja, Nigeria.

Since it commenced operation in 2001, the ECCJ has decided 92 cases composed of 47 rulings and 45 judgments, with 40 cases pending as of March 2012.<sup>90</sup> More than half of the cases were initiated by individuals against member states, mostly against Nigeria, while nine cases concern suit by and among Community organs and personnel.<sup>91</sup> These cases relate mostly to issues of human rights, labor rights, and contractual obligations. There are very few cases that can be classified as having a commercial character or involving questions of economic integration or harmonization of economic policies. The Court’s jurisprudence has affirmed direct individual standing to sue on human rights violations without exhaustion of local remedies<sup>92</sup> and the legal standing of an association to sue.<sup>93</sup> It has delivered landmark decisions on human rights such as the right against torture and inhuman punishment,<sup>94</sup> right against slavery,<sup>95</sup> and right to education as an enforceable right.<sup>96</sup>

The Court has also given a controversial decision in the case filed by Hissene Habre, a former Chadian dictator in the 80s indicted for crimes against humanity, who questioned the competence of a Senegalese court to try him.<sup>97</sup> Any attempt to prosecute Habre has been delayed far too long and the ECOWAS decision further complicates and thus delay the setting up of the tribunal that will try the case. In fact Senegal now uses the ECOWAS judgment to defer any proceeding on the case.<sup>98</sup> In the decision, the ECOWAS Court prevented domestic court in Senegal from finally trying Habre, a solution that had come after tedious negotiation between the AU and Senegal to prosecute Habre ‘in the name of Africa’; instead it prescribed an ‘ad hoc special

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<sup>89</sup> Art. 24(4) Supplementary Protocol A/SP.1/01/05 amending Protocol A/P1/791 of the Court of Justice of ECOWAS states: *All Member States shall determine the competent national authority for the purpose of receipt and processing of execution and notify the Court accordingly.*

<sup>90</sup> Press release at ‘West Africa: Ecowas Court Decides 92 Cases in Nine Years’, allAfrica.com, <http://allafrica.com/stories/201203110048.html>, viewed 17 July 2012. Website listing is not updated.

<sup>91</sup> See Decided Cases, [www.courtecowas.org](http://www.courtecowas.org), viewed 12 July 2012.

<sup>92</sup> *Etim Moses v Gambia* 14/03/07, Suit No. ECW/CCJ/APP/05/05; *Mousa Keita v Mali* 22/03/07, Suit No. ECW/CCJ/APP/05/06.

<sup>93</sup> National Coordination of Departmental Delegates of the Cocoa Coffee Sector (CNDD) v Republic of Cote d’Ivoire 17/12/09, Suit No. ECW/CCJ/APP/02/09.

<sup>94</sup> *Chief Ebrimah Manneh v The Republic of the Gambia*, 5 June 2008, Judgment No ECW/CCJ/JUD/03/08.

<sup>95</sup> *Hadidjatou Mani Koraou v. The Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08.

<sup>96</sup> *Socio-Economic Rights and Accountability Project (SERAP) v the Federal Government of Nigeria and the Universal Basic Education Commission (UBEC)*, Suit No. ECW/CCJ/APP/0808.

<sup>97</sup> *Hissène Habré v. Senegal*, Judgment No. ECW/CCJ/JUD/06/10.

<sup>98</sup> See *Senegal: ‘Belgium V. Senegal’ - The International Court of Justice Hears Habré Dispute*, allAfrica, 29 March 2012, <http://allafrica.com/stories/201203290885.html>, viewed 17 July 2012.

procedure of an international character<sup>99</sup>, an ambiguous description of a body that is subject to further discussions and negotiations among the interested countries involved in the case.

On its tenth year in 2011, the ECCJ has shown considerable achievement in terms of consolidating its role as the Community judiciary. It has turned itself into a pragmatic court while strengthening its judicial mandate progressively. While its jurisdiction was at first only limited to cases brought by ECOWAS member states and institutions, the Court took a lead part in opening discussion to broaden access which culminated in the provision for individual access and express competence to rule on human rights.<sup>100</sup> It has embarked on popularizing the Court through its sensitization program aiming to increase awareness of and access to the Court by ordinary people.<sup>101</sup> It has engaged with other officials of member states and Community organs and has engaged with the other regional and national courts of member states.<sup>102</sup> In particular, it has worked with the ECOWAS Commission in devising its work plan and budget and also in finding ways to implement Court decisions.<sup>103</sup> Through the publication of its decisions and activities, the Court has started to disseminate its evolving sub-regional jurisprudence as well as its place in regional integration.<sup>104</sup>

Through its other non-judicial activities the Court has strengthened itself institutionally and gained the support of judicial and non-judicial actors. The Authority of the Heads of States had approved the Judicial Council of the Community responsible in recruiting judges to the Court and to handle other judicial matters. Through the Court's initiatives, member states also agreed to establish the Association of West African Judges to serve as a framework for mutual judicial exchange and cooperation in developing regional policies and jurisprudence.<sup>105</sup> Even as the Court gave adverse decisions against member states, it has kept a relationship of amity, rather than of confrontation and antagonism

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<sup>99</sup> See Human Rights Watch's Chronology of the Habre case at [www.hrw.org/news/2012/03/09/chronology-habr-case](http://www.hrw.org/news/2012/03/09/chronology-habr-case), viewed 16 July 2012; also Valentina Spiga, Non-retroactivity of Criminal Law, A New Chapter in the Hissene Habre Saga, *Journal of International Criminal Justice* (2011), 1-19.

<sup>100</sup> IHRDA, Court of Justice of the Economic Community of West African States, [www.ihrda.org/court-of-justice-of-the-economic-community-of-west-african-states/](http://www.ihrda.org/court-of-justice-of-the-economic-community-of-west-african-states/), viewed 12 July 2012.

<sup>101</sup> The ECOWAS Court concludes sensitization programme in member states, [www.courtecowas.org/site/index.php?option=com\\_content&view=article&id=128%3Asensitization edostate&Itemid=15&lang=en](http://www.courtecowas.org/site/index.php?option=com_content&view=article&id=128%3Asensitization%20edostate&Itemid=15&lang=en), viewed 12 July 2012.

<sup>102</sup> See ECOWAS Community Court of Justice, Final Communique – 10<sup>th</sup> anniversary, [www.courtecowas.org/site/index.php?option=com\\_wrapper&view=wrapper&Itemid=61&lang=en](http://www.courtecowas.org/site/index.php?option=com_wrapper&view=wrapper&Itemid=61&lang=en), viewed 12 July 2012.

<sup>103</sup> See ECOWAS Court Activities Report 2011, <http://www.courtecowas.org>, viewed 12 July 2012.

<sup>104</sup> Through the publication of its Annual Report, Communiqués, Official Journal, LAW Report and Newsletters, aside from its regular engagement with the media.

<sup>105</sup> ECOWAS to establish West African Judges' Association, 12 July 2011, [www.ghanabusinessnews.com/ecowas-to-establish-west-african-judges-association/](http://www.ghanabusinessnews.com/ecowas-to-establish-west-african-judges-association/), viewed 12 July 2012.

that had beset the defunct SADC Tribunal. This could be explained partly by the policy of engagement of the Court but also by the fact that it adopts caution and tact in the enforcement of its decisions. For instance in responding to Nigeria's designation of its national authority tasked to enforce Court's decision, a long-overdue obligation of member states, the Court had remarked:

The Court acknowledges this act and would like to express its joy upon receiving the information, which comes at a time when the Court is celebrating its 10th anniversary. The Court wishes that the other Member States will emulate this example and honour their commitments to the Community.<sup>106</sup>

The ECCJ however has to address the challenge of effective implementation to ensure its long-term relevance and sustainability to the broader Community. The Court acknowledged poor implementation of its decisions as its greatest challenge.<sup>107</sup> Only three countries – Nigeria, Guinea-Conakry and Niger, have designated their national authority tasked to enforce the Court's decisions. As enforcement is dependent on national mechanisms, the Court has no power to enforce its own rulings. If the member state against whom judgment was made does not act, the ECOWAS Authority of Heads of States may decide to impose sanction against it for failure to fulfill its obligations,<sup>108</sup> an option that has not been used to enforce a Court judgment. Among the three countries (Gambia, Nigeria and Niger) that received an adverse decision from the Court, only Niger implemented the decision in *Hadidjatou Mani Koraou v The Republic of Niger* by paying the applicant 10 Million CFA Francs on 17 March 2009 and amidst the specter of ECOWAS warning to suspend the country.<sup>109</sup> The designation of the Attorney General as Nigeria's implementing body could boost enforcement as Nigeria is the Community's biggest, and arguably, most influential member.

### Conclusion

In redefining the notion of sovereignty to sovereignty with responsibility, the AU and its RECs has facilitated to enact rule of law as means and end-goal of economic and political integration. The rule of law program in Africa, though not denominated as such, has robust regional and domestic components comprising promotion of regional norms, institutions building, judicial oversight, intervention and soft approach to promoting the rule of law. There has been progress in these areas, considering enormous obstacles in

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<sup>106</sup> *The Republic of Nigeria Designates the Competent National Authority Responsible for Implementing Decisions of the Court*, at [www.courtecowas.org](http://www.courtecowas.org), viewed 12 July 2012.

<sup>107</sup> *ECOWAS court laments implementation challenges*, [www.nigeriadailynews.com/latest-additions/32514-ecowas-court-laments-implementation-challenges.html](http://www.nigeriadailynews.com/latest-additions/32514-ecowas-court-laments-implementation-challenges.html), viewed 17 July 2012.

<sup>108</sup> Art. 77, ECOWAS Revised Treaty 1993.

<sup>109</sup> ECOWAS Community Court of Justice Press Release at [www.courtecowas.org/site/index.php?option=com\\_content&view=article&id=105%3Arepublicnigeria&Itemid=15&lang=en](http://www.courtecowas.org/site/index.php?option=com_content&view=article&id=105%3Arepublicnigeria&Itemid=15&lang=en), viewed 17 July 2012. The compliance also came at a time of political turmoil in Niger when then incumbent president Mamadou Tandja changed the constitution to allow him to extend his term of office.

restoring and upholding rule of law in many countries, in particular the recurrence of conflicts and unconstitutional change of governments in many countries. It has strong peace-building and state-building dimensions that often pose tensions and contradictions in rule of law commitments, practices and operations by member states and regional institutions. This is manifested in the response by state leaders and other regional institutions in the *Libya* and *Campbell* cases. Despite considerable efforts at norm-creation and institution building in dealing with member states' internal conflicts, the political approach through diplomacy remains the preferred method of dealing with contentious issues in member states than allowing rule of law 'take its own course'. Political settlement to create conditions for peace and reconciliation is often heavily favored and finds AU and members in direct confrontation with their accountability towards international law.

The judicial program in the AU and RECs, through the establishment of independent courts or tribunals, shows the promise – but also the limits, to creating independent supranational institutions to foster rule of law. Supranational courts even in the African context have the capacity to become autonomous institutions. Sub-regional courts particularly the ECCJ has shown more progress than others; they have shown their capacity for integration and fostering rule of law through their function to harmonize rules and policies, develop regional jurisprudence, encourage national courts and institutions, stimulate legal discourse, and provide access for individual redress of grievances. The courts have also shown courage in articulating and interpreting human rights that are in accord with international standards and broadening the space for individual access. These supranational courts however suffer from similar obstacles – their independence and effectiveness constrained by member states' adverse actions or inaction. From an institutional perspective, they do not have independent enforcement mechanisms or strong support at the domestic level. The dissolution of the SADC Tribunal thus highlights the continued salience of sovereignty – un-tempered by the principle of sovereignty with responsibility, among African countries.

The rule of law as part of broader peace-building and state-building mechanism means that there are other competing priorities - or preferred measures to resolve conflicts, more often through political settlement or negotiation and sometimes even through the use of force. The state of fragility and lack of cohesiveness of the state means that domestic support for rule of law is also weak or fragmented – and thus the necessity for some form of regional or global authority or networks to support initiatives of rule of law at both state and regional levels. The experience of African supranational courts however highlights the critical need for domestic support and importance of political commitment and leadership of key state actors in fostering rule of law. The rule of law, as an alternative and authoritative means of dispute resolution, remains a long term goal for African states, though its importance has clearly been acknowledged by African leaders and its peoples. In this sense, initiatives to foster respect for the rule of law in African integration is not a myth – although it is far from being realized. The condition in Africa shows that traditional rule of law institutions can only be effective when there is a

measure of peace and stability and that conflict prevention is perhaps the best form of intervention in many of these conflicted states. The establishment of supranational courts is a costly endeavor with little impact in the short term; however it offers hope and space to continuously work on building the foundations for rule of law in many countries in Africa and where peace and justice can be attained through reason.