THE NEW AFRICAN UNION: WILL IT PROMOTE ENFORCEMENT OF THE DECISIONS OF THE AFRICAN COURT OF HUMAN AND PEOPLES’ RIGHTS?

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I. INTRODUCTION

In July 2006, the first eleven judges of the African Court on Human and Peoples’ Rights (African Court or Court) were sworn in during the Seventh Session of the Assembly of Heads of State and Government in Banjul, the Gambia.1 Even more recently, the African Court found a home in Arusha, in Tanzania.2 The African Court was established in 1998 pursuant to the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (Protocol) and, after achieving the required fifteen ratifications of African nations, entered into force on January 1, 2004.3

The Court’s precursor was the African Commission on Human and Peoples’ Rights (Commission), which was created pursuant to the African Charter on Human and Peoples’ Rights (Charter) in

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3. Lyons, supra note 1.
The Commission was formally inaugurated in 1987, and since its inception, it has served as the sole forum for African countries to bring their grievances under the Charter. The Charter sets forth the rights and duties of member states as well as individuals, focusing upon the protection of human and peoples’ rights on the African continent by establishing bodies for that purpose and passing human rights legislation by the respective member states.

The Commission, which was created to promote human rights and ensure their protection in Africa, has authority to interpret all provisions of the Charter. The Assembly of Heads of State and Government of the Organisation of African Unity (Assembly) choose the Commissioners. Often, the Commissioners also hold important government positions despite the Charter’s provision that they must serve in their personal capacities, which could compromise their independence. Another shortcoming of the Commission is its inability to issue binding orders. Without these orders, the Commission merely pleads with nations to come into compliance with the Charter. Due to the Commission’s lack of independence and lack of power to enforce its determinations...

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under the Charter, the Organization of African Unity (OAU) eventually recognized the need for an independent judicial body with the authority to bind parties under the Charter.\textsuperscript{17} Thus, the OAU conceived the Court to complement, but not replace, the Commission.\textsuperscript{18}

The Protocol gives the African Court the power to order reparations for human rights offenses\textsuperscript{19} committed in violation of the Charter or any other human rights instrument that the parties to a particular dispute have ratified.\textsuperscript{20} When the African Court begins its work, the Council of Ministers, an organ of the OAU, will monitor execution of the Court’s judgments,\textsuperscript{21} and in cases of noncompliance with the Court’s orders, the Court will identify recalcitrant states to the Assembly in its annual report.\textsuperscript{22}

This Note will attempt to analyze the likelihood of compliance with the African Court’s mandates once it begins hearing disputes, in light of African states’ abandonment of the OAU for a new body, the African Union (AU).\textsuperscript{23} The AU provides a new framework for relationships between African nations centered around a more pan-Africanist theme, which the OAU did not emphasize.\textsuperscript{24} Part II provides background information about the AU, the Commission, and the Court. This Part also discusses the new institutions created by the AU, as well as those that were carried over from the OAU, particularly the Assembly and the Council of Ministers. Part II.B discusses the Commission and how the Charter contributed to its failure, and Part II.C identifies features of the Protocol that are significant departures from the Commission’s regime.

\textsuperscript{17}See Frans Viljoen, \textit{A Human Rights Court for Africa, and Africans}, 30 Brook. J. Int’l L. 1, 6-7 (2004).


\textsuperscript{19}Id. art. 27.

\textsuperscript{20}Id. art. 3 (giving the African Court on Human and Peoples’ Rights jurisdiction over disputes arising out of the Charter as well as “any other relevant Human Rights instrument ratified by the States concerned.”).

\textsuperscript{21}Id. art. 29.

\textsuperscript{22}Id. art. 31.

\textsuperscript{23}See Constitutive Act of the African Union, pmbl., art. 2 [hereinafter Constitutive Act] (declaring that “[w]e, heads of State and Government of the Member States of the [OAU] . . . have agreed . . . [that] the African Union is hereby established”).

\textsuperscript{24}Id. pmbl. (declaring that the new AU is determined to “build a partnership between governments”).
Part III suggests that the Court, heralded as a much needed solution to the shortcomings of the Commission, may still face hurdles in enforcing its judgments if the benefits of membership to the AU do not provide enough incentive to ensure compliance. This Part will also discuss how, in cases where the offending party fails to comply with the Court’s judgment, the matter will end up in the same hands as it would have in the days of the ineffective Commission: those of the Assembly. Accordingly, this Part analyzes whether the AU and Protocol offer solutions sufficient to overcome the problems that existed under the old regime. As this Note will argue, the Court and the Commission should be in a partnership with the AU to promote compliance with the Court’s orders. The language of the Constitutive Act of the AU, however, does not provide that the Court and the Commission will be organs of the AU, and thus the relationship between the AU and the Court and the Commission is ambiguous. This Note proposes that the AU should seize the opportunity to refine the Charter, the Protocol, and its Constitutive Act to make compliance more likely. In this vein, Part IV concludes that the Court and the Commission should both be organs of the AU, and the AU should make adherence to the Charter and to the Court’s orders prerequisites for membership in the AU.

The ratification of the Protocol itself is evidence of the member states’ and Assembly’s resolve to be bound by the Court’s judgments in order to eradicate human rights abuses in Africa. On the other hand, they could be merely paying lip service to the international community. Until the African Court opens its doors, one can only speculate.

25. See Protocol, supra note 18, art. 31 (providing that the Court shall submit to the Assembly “the cases in which a State has not complied with the Court’s judgment”).
26. See Constitutive Act, supra note 23, art. 5 (listing the organs of the Union; neither the Court nor the Commission is included).
II. DISCUSSION

A. How the Organization of African Unity Became the African Union

In May 2001, the AU replaced the OAU, which until then, had served as the unifying body on the African continent. The OAU came into being in 1963 and initially set out to eradicate colonial rule by “safeguarding and consolidating the hard-won independence as well as the sovereignty and territorial integrity of [African] states, and [by] fighting against neo-colonialism in all its forms.” Thus, the OAU aimed to deal with the human rights abuses associated with colonialism, rather than the separate issue of human rights abuses committed by Africans against Africans. The OAU successfully supported African nations in their fight to end colonialism, which culminated in the abolition of apartheid in South Africa in 1994.

The OAU failed, however, to respond to serious conflicts between African nations. This failure stemmed from the OAU’s policy of non-interference, adopted in the spirit of anti-colonialism. The OAU Charter enunciated principles by which the member states were to abide, including: sovereign equality among all states; non-interference with the internal affairs of states; and respect for the sovereignty and territorial integrity of states. These principles made the OAU reluctant to become involved when duly-selected or coup governments committed human rights abuses associated with colonialism, rather than the separate issue of human rights abuses committed by Africans against Africans.
abuses within their own countries. For example, in 1980 the president of Liberia was executed by firing squad during a military coup and other members of his regime were executed shortly thereafter. The Council of Ministers of the OAU appealed to the coup leaders to exercise restraint, but affirmed the right of any member state to change its government in any way it sees fit.

In fact, the OAU’s original goals became moot as African nations gained independence from their colonial rulers and the Assembly recognized the need for a new set of goals emphasizing unity among African nations. Thus, the member states of the OAU signed the Constitutive Act of the African Union in 2001. Although the AU affirmed the principle of non-interference, the Act notes the interdependence of states and encourages international cooperation. Moreover, the Act recognized the AU’s right to intervene in the internal affairs of a member state in the case of grave circumstances such as war crimes, genocide, or crimes against humanity. The AU’s overall objectives are to harmonize the economic and political policies of all African nations in order to improve pan-African welfare and to provide Africans with a solid voice in international affairs.

Thus, the AU is tailored more towards political and economic development of African nations than was the OAU. To achieve its goals, the Constitutive Act envisioned several organs of the AU:

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38. Udombana, supra note 27, at 1209-10.
39. Id. at 1212.
40. Udombana, supra note 27, at 1212.
41. See Nmehielle, supra note 31, at 420-21 (noting that the principle of non-interference “eventually weakened the [OAU’s] resolve to challenge the squandering of the gains of Africa’s hard won independence” and likening the OAU to a “toothless bulldog”); Nsonguru Udombana, The Unfinished Business: Conflicts, the African Union, and the New Partnership for Africa’s Development, 35 GEO. WASH. INT’L L. REV. 55, 57 (2003) (quoting Mammo Muchie, who said “what the OAU was able to do, it has done. What was beyond it has to pass on to the African Union”) (internal quotations omitted).
42. Nmehielle, supra note 31, at 416-17 (pointing out that after the end of apartheid in South Africa, the Constitutive Act was the “culmination of a new feeling and consciousness in the African continent . . . which encapsulates the need for Africa to arise from oppression, neocolonial subjugation, lack of continental accountability, in order to enable the continent to reach its greatest potential”).
43. See Constitutive Act, supra note 23, art. 4(g).
44. Id. art. 4(a).
45. Id. art. 3(c).
46. Id. art. 4(h).
the Assembly of the Union; Executive Council; Pan-African Parliament; Court of Justice; the Commission, also called the Secretariat; the Permanent Representatives Committee; Specialized Technical Committees; the Economic, Social, and Cultural Committee; and Financial Institutions. This list demonstrates the breadth of the OAU’s reformation and metamorphosis into the AU, but as many of these organs are beyond the scope of this Note, they will not be discussed further. Notably absent from the list is the Court and the African Commission of Human and Peoples’ Rights, which were originally “established within the [OAU].”

Interestingly, the African Court of Justice was established by the Constitutive Act, but the Act states that the “statute, composition and functions of the Court of Justice shall be defined in a protocol relating thereto.” The AU has not yet adopted such a protocol, and its Web page dedicated to the Court of Justice contains only a recitation of Article 18 of the Constitutive Act, with a link to the Protocol establishing the African Court of Human and Peoples’ Rights.

49. Constitutive Act, supra note 23, art. 5(a).
50. Id. art. 5(b).
51. Id. art. 5(c).
52. Id. art. 5(d).
53. Id. art. 5(e).
54. Id. art. 5(f). The Permanent Representatives Committee is composed of permanent representatives to the Union, art. 21(1), and takes instruction from the Executive Council. Id. art. 21(2). This note will not discuss the functions of the Permanent Representatives Committee.
55. Id. art. 5(g). The Specialized Technical Committees include: the Committee on Rural Economy and Agricultural Matters, art. 14(1)(a); the Committee on Monetary and Financial Affairs, art. 14(1)(b); the Committee on Trade, Customs and Immigration Matters, art. 14(1)(c); the Committee on Industry, Science and Technology, Energy, Natural Resources and Environment, art. 14(1)(d); The Committee on Transport, Communications and Tourism, art. 14(1)(e); the Committee on Health, Labour and Social Affairs, art. 14(1)(f); and the Committee on Education, Culture and Human Resources, art. 14(1)(g). Every committee is responsible to the Executive Council. Id. art. 14(1). The Specialized Technical Committees will not be discussed in this Note.
56. Id. art. 5(h). The Economic, Social and Cultural Council (ESCC) “shall be an advisory organ composed of different social and professional groups,” art. 22(1), and its powers and functions “shall be determined by the Assembly.” Id. art 22(2). The ESCC will not be discussed in this note.
57. Id. art. 5(i). The Constitutive Act calls for the establishment of three financial institutions: the African Central Bank, art. 19(a); the African Monetary Fund, art. 19(b); and the African Investment Bank, art. 19(c).
58. Charter, supra note 4, art. 30 (emphasis added).
59. Constitutive Act, supra note 23, art. 18(1).
60. Id. art. 18(2).
In 2005, the Executive Council recommended that the Assembly consider merging the two infant courts into one court named the African Court of Justice and Human Rights. Although the Assembly endorsed the Council’s recommendation, it has not adopted any document effectuating the merger as of March 2009. Thus, it remains unclear whether the Court of Justice will ever be formed, and if it is formed, what its jurisdiction will be.

The Constitutive Act carried over two institutions from the OAU: the Assembly and the Executive Council. These bodies are relevant to an evaluation of the effectiveness of the Court, and each will be discussed in turn.

1. The Assembly of the Union

According to the Constitutive Act, the Assembly of the Union “shall be composed of the Heads of States and Government or their accredited representatives,” and “shall be the supreme organ of the Union.” The powers and functions of the Assembly include: determining the Union’s common policies; receiving and considering reports and recommendations from the organs of the Union; considering requests for membership to the Union; establishing any organ of the Union; monitoring the implementation of the Union’s policies and decisions and ensure compliance therewith; adopting the budget of the Union; and directing the Executive Council on conflict management and restoring peace.

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64. Decision on the Draft Single Instrument on the Merger of the African Court on Human and Peoples’ Rights and the Court of Justice of the African Union, Assembly/AU/Dec/118 (VII), Seventh Ordinary Session of the Assembly of the African Union, July 2, 2006. The Decision asks for further recommendations on such a document, but no protocol has been drafted to date. See www.africa-union.org (last visited February 28, 2008).
65. Udomhana, supra note 61, at 870.
66. Constitutive Act, supra note 23, art. 6(1).
67. Id. art. 6(2).
68. Id. art. 9(1)(a).
69. Id. art. 9(1)(b).
70. Id. art. 9(1)(c).
71. Id. art. 9(1)(d).
72. Id. art. 9(1)(e).
73. Id. art. 9(1)(f).
74. Id. art. 9(1)(g).
The Assembly of the AU is essentially the same as the Assembly of Heads of State and Government of the OAU, which likewise was the “supreme organ of the Organization.” Further confirming this connection, upon adoption of the Constitutive Act, the members of the OAU Assembly automatically became the members of the AU Assembly. As the “supreme organ,” the Assembly has ultimate oversight over much of the AU’s work.

2. The Executive Council

Under the OAU Charter, the Council of Ministers was composed of “Foreign Ministers or other Ministers as are designated by the Governments of Member States,” and was “responsible to the Assembly of Heads of State and Government.” The Constitutive Act of the AU provides that the Executive Council “shall be composed of the Ministers of Foreign Affairs or other such Ministers or Authorities as are designated by the Governments of Member States.” Like the Council of Ministers, the Executive Council of the AU “shall be responsible to the Assembly.” Moreover, it has responsibilities similar to those of the Council of Ministers. It “consider[s] issues that the Assembly refers to it and monitors the implementation of policies the Assembly formulates.”

Though the Constitutive Act was signed after the Protocol, the Constitutive Act does not explicitly assign to the Executive Council the over-

75. OAU Charter, supra note 29, art. VIII.
76. Tiyanjana Maluwa, The OAU/African Union and International Law: Mapping New Boundaries or Revising Old Terrain?, 98 Am. Soc’y Int’l L. Proc. 232, 235 (2004) (“[W]hile the name of the organization and the operational framework may have changed, the actors – the members – remain exactly the same.”).
77. In addition to the powers and functions enumerated above, the Assembly oversees the Executive Council, Constitutive Act art. 13(2); can restructure the Specialized Technical Committees, id. art 14 (2); determine the functions and powers of the ESCC, id. art. 22 (2); and determines sanctions for noncompliance with payment of dues or decisions of the AU, id. art. 23(1)-(2).
78. OAU Charter, supra note 29, art. XII (1).
79. Id. art. XIII(1).
80. Constitutive Act, supra note 23, art. 10(1).
81. Id. art. 13(2).
83. Udomhana, supra note 82, at 96.
sight of execution of decisions of the Court, which was the responsibility of the Council of Ministers of the OAU.

In addition to these organic institutions, the AU has initiated special programs such as the New Partnership for Africa’s Development (NEPAD), a program that, among other things, proposes a way for member states to pay off major debts that hinder their growth. NEPAD’s primary objectives are to eradicate poverty, promote the integration of Africa in the global economy, and place African countries on the path to sustainable development. Its long-term goal is for Africans to “extricate themselves and the continent from the malaise of underdevelopment and exclusion in a globalizing world.” NEPAD is a long-term debt-relief mechanism whereby African nations partner with industrialized nations, which will provide aid for infrastructure projects, education, and debt relief, as well as eased access for African goods in their markets. In order to take advantage of these programs, African nations must agree to principles of good governance and self-policing.

B. The Failures of the African Commission of Human and Peoples’ Rights

The OAU created the Commission in 1981 “to promote human and peoples’ rights and ensure their protection in Africa.” The Charter sets forth a broad array of human and peoples’ rights that the Commission is to protect. Individuals are entitled to, inter alia, the right to equal protection under the Charter, the right to

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84. Konstantinos D. Magliveras & Gino J Naldi, The African Union – A New Dawn for Africa?, 51 Int’l & Comp. L.Q. 415, 420-21 (2002) (pointing out that it is “noteworthy that the Council has such a focused role to play, while wider issues relating to Union objectives (e.g. protection of human rights . . .) have not been included in its terms of reference”).
85. Protocol, supra note 18, art. 29(2).
86. See NEPAD Framework Document, art. 3 www.nepad.org/2005/files/documents/inbrief.pdf (last visited February 28, 2008) (noting that credit from other countries has led to a “debt deadlock which . . . hinders the growth of African countries”).
87. Id. art. 67(1).
88. Id. art. 1.
90. Justice, supra note 48, 131.
91. Charter, supra note 4, art. 30
92. See id. part 1, ch. I (setting forth Human and Peoples’ Rights); id. ch. II (setting forth the duties of individuals to others).
93. Id. art. 3.
life,\textsuperscript{94} access to courts,\textsuperscript{95} freedom of conscience,\textsuperscript{96} the right to receive information,\textsuperscript{97} freedom of assembly,\textsuperscript{98} freedom of movement,\textsuperscript{99} and the right to education.\textsuperscript{100} In addition, all peoples are made equal under the law\textsuperscript{101} and entitled to the right to exist,\textsuperscript{102} the right to freely use their wealth and natural resources,\textsuperscript{103} the right to economic, social, and cultural development,\textsuperscript{104} the right to national peace and security,\textsuperscript{105} and the right to a satisfactory environment.\textsuperscript{106} Thus, if any of these rights is violated, any member state has a cause of action before the Commission.\textsuperscript{107}

Despite the importance of these rights, the Commission has failed in its role as protector.\textsuperscript{108} The characteristics of the Commission contributing to its inability to curb human rights abuses among member states are: 1) it wields no power to issue binding opinions or to grant remedies; 2) its proceedings are conducted in secret; and 3) it lacks the financial resources necessary to carry out its functions.\textsuperscript{109} A discussion of each of these characteristics follows.

1. Enforcement

The most crippling aspect of the Commission is its lack of enforcement power.\textsuperscript{110} Three major features of the Charter make enforcement unlikely. First, the Charter does not provide for an enforcement mechanism other than a report and an in-depth study

\begin{itemize}
  \item \textsuperscript{94} Id. art. 4.
  \item \textsuperscript{95} Id. art. 7.
  \item \textsuperscript{96} Id. art. 8.
  \item \textsuperscript{97} Id. art. 9.
  \item \textsuperscript{98} Id. art. 11.
  \item \textsuperscript{99} Id. art. 12.
  \item \textsuperscript{100} Id. art. 17.
  \item \textsuperscript{101} Id. art. 19.
  \item \textsuperscript{102} Id. art. 20.
  \item \textsuperscript{103} Id. art. 21.
  \item \textsuperscript{104} Id. art. 22.
  \item \textsuperscript{105} Id. art. 23.
  \item \textsuperscript{106} Id. art. 24.
  \item \textsuperscript{107} Id. art. 47.
  \item \textsuperscript{109} Id. at 31.
\end{itemize}
from the Commission to the Assembly. Second, the members of
the Assembly may have conflicts of interest that prevent them from
actively seeking compliance with the Charter. Finally, the Char-
ter contains “claw-back clauses” that allow member states to limit
the rights that the Charter guarantees by operation of their own
domestic laws.

The Charter simply does not create an enforcement mecha-
nism. A member state may complain to the Commission of sus-
pected Charter violations by any other member state. The
Commission may consider a complaint, or “communication,” only
after all local remedies have been exhausted and after the state
concerned has been notified of the communication. After
obtaining all necessary information from the states parties and try-
ing to reach an amicable solution, the Commission prepares a
report to the states concerned and provides the report to the
Assembly as well. If after consideration by the Commission it
appears that there has been a “serious or massive” violation of
human or peoples’ rights, the Commission may notify the Assem-
by. The Assembly may then request that the Commission
undertake an “in-depth study” of such cases, making factual find-
ings and recommendations. In cases of emergency, the Commis-
sion may notify the Chairman of the Assembly, rather than the
entire Assembly, and the Chairman may request an in-depth
study.

But the Charter does not provide any enforcement mechanisms
to implement the Commission’s recommendations after the report
is made to the states involved as provided for in Article 52 or after

111. See Charter, supra note 4, arts. 52, 58.
112. Arthur E. Anthony, Beyond the Paper Tiger: The Challenge of a Human Rights Court in
Africa, 32 Tex. Int’l L.J., 511, 517 (1997) (pointing out that the Commission is controlled
in large part by the Assembly, the members of which are often the targets of human rights
claims, negates the independence of the Commissioners that is provided for in Articles 31
and 38 of the Charter).
113. Udombana, supra note 12, at 62 n.91 (2000) (citing Professor Rosalyn Higgins’
coining of the phrase “claw-back clause,” which means a limitation clause that “permits, in
normal circumstances, breach of an obligation for a specified number of public reasons”)
(internal quotations omitted).
114. Nmehielle, supra note 108, at 34-35 (“In fact, the Charter does not offer signifi-
cant remedies.”).
115. Charter, supra note 4, art. 47.
116. Id. arts. 50, 52, 56(5).
117. Id. art. 57.
118. Id. art. 52.
119. Id. art. 58(1).
120. Id. art. 58(2).
121. Id. art. 58(3).
it conducts an in-depth study pursuant to Article 58. Enforce-
ment appears to be in the hands of the Assembly, but the Charter
does not set forth guidelines describing how the Assembly must
implement a solution to the problem reported in the communica-
tions either. Thus “there is in fact no remedy within the
Charter.”

In practice, the Assembly has never ordered an in-depth study, and has been unable to prevent or curtail any human rights abuses that the Commission has called to its attention. For example, when the military regime of General Abacha detained members and leaders of the Ogoni tribe in Nigeria in the mid-1990s, the Assembly condemned the violation of human rights, urging the military government to respect the rights of minorities and take immediate steps to return Nigeria to democratic rule. Nonetheless, the military government executed the detainees despite the Assembly’s admonitions. Another more publicized conflict, the Rwandan Genocide, also proceeded despite the deployment of human rights monitors to Rwanda by the Assembly. Evidently, these African governments and regimes have not taken the Commission or the Assembly seriously enough to heed their exhortations, despite their being parties to the Charter.

The Assembly’s failure to successfully influence member states after referral of matters by the Commission may be due to unwillingness among members of the Assembly to crack down on other nations for abuses that they themselves may have committed or might commit. This conflict of interest may make it less likely that the Assembly will speak out against a member state, lest the finger be pointed at them next. For example, two senior govern-

122. The Protocol is silent as to these matters. See Protocol, supra note 18.
HUMAN AND PEOPLES’ RIGHTS, NIGERIAN INSTITUTE OF ADVANCED LEGAL STUDIES 25 (1992)).
124. Id.
125. Id. at 35.
126. African Commission on Human and People’s Rights Res.16(XVII)95: Resolution
128. See ACHPR, supra note 126; Udombana, supra note 27, at 1224.
129. Udombana, supra note 12, at 67-68.
130. See Anthony, supra note 112, at 517.
131. See Chidi Anselm Odinkalu, The Individual Complaints Procedures of the African Com-
misson on Human and Peoples’ Rights: A Preliminary Assessment, 8 TRANSNAT’L L. & CONTEMP.
PROBS. 359, 365-66 (1998) (noting that “the process of nomination and election to the
Commission minimizes the likelihood of the body being composed of persons who may be
ment officials from the Congo, a state rampant with human rights violations, served as Commissioners.\footnote{Udombana, supra note 12, at 71.} Because the Assembly is permitted to review communications before the Commission does, the Assembly has the discretion to determine the validity of complaints submitted under the Charter.\footnote{See Anthony, supra note 112, at 517.} In this way, the Commission is made dependent upon the political control of the Assembly, which is composed of the member states whose actions the Commission is set up to consider.\footnote{Nmehielle, supra note 108, at 31.} Thus, a communication alleging a violation of the Charter by one of the Assembly members’ own nations could be swept under the rug without much controversy.

Member states have also devised means of circumventing the force of the Charter by taking advantage of its “claw-back clauses.”\footnote{Udombana supra note 12, at 62.} Claw-back clauses are provisions in the Charter that permit member states to act in contravention of the Charter to the extent that such conduct is in accordance with that nation’s own laws.\footnote{See Charter, supra note 4, arts. 6, 8, 9(2), 10(1), 11, 12(1), 12(3), 13, 14.} For example, Article 14 provides that individuals have the right to own property, subject to domestic laws that may encroach upon that right in the “general interest of the community.”\footnote{Id. art. 14.} Similarly, individuals have the right to receive information\footnote{Id. art. 9(1).} and the right to express and disseminate their opinions, but only within the restrictions set forth by domestic law.\footnote{Id. art. 9(2).} Thus, a member state effectively can deprive individuals of these rights by passing a national law limiting them.\footnote{J. Oloka-Onyango, Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons? 6 BUFF. HUM. RTS. L. REV. 39, 55 (2000) (noting that in some cases, the law to which a right is subjected completely negates the right guaranteed by the Charter).} Such actions are permitted by the plain language of the Charter. Therefore, neither the Commission nor the Assembly can condemn encroachments upon these rights if such encroachments are in accordance with a nation’s laws.\footnote{Id.} In this way, the power of the Assembly and the Commission are limited, and the guarantee of human and peoples’ rights is never absolute.\footnote{Id.} These claw-back clauses, lack of enforcement power, and


132. Udombana, supra note 12, at 71.
133. See Anthony, supra note 112, at 517.
136. See Charter, supra note 4, arts. 6, 8, 9(2), 10(1), 11, 12(1), 12(3), 13, 14.
137. Id. art. 14.
138. Id. art. 9(1).
139. Id. art. 9(2).
140. J. Oloka-Onyango, Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons? 6 BUFF. HUM. RTS. L. REV. 39, 55 (2000) (noting that in some cases, the law to which a right is subjected completely negates the right guaranteed by the Charter).
141. Id.
142. Id.
potential conflicts of interest among members of the Assembly therefore seriously reduce the degree to which the Commission can effectively curtail human rights abuses in Africa through its interpretations of the Charter.

2. Secrecy

The second feature of the Charter that hinders its successful implementation is the confidentiality of Commission proceedings.\textsuperscript{143} Despite the provision for diplomatic immunity and non-liability for the Commissioners in Article 43, Article 59 provides that all measures taken within the provisions of the Charter shall remain confidential until the Assembly decides to publicize them.\textsuperscript{144} Additionally, the reports of the Commission will only be published after the Assembly considers them.\textsuperscript{145} Perhaps due to the conflicts of interest that members of the Assembly may have had, the Assembly did not readily authorize the publication of any report of the Commission until the inception of the AU.\textsuperscript{146} This has diminished confidence in the Charter’s effectiveness and, in turn, has reduced the number of appeals to the Commission for help.\textsuperscript{147}

3. Resources

Lack of financial resources also has contributed to the Commission’s lackluster performance.\textsuperscript{148} The Commission is supposed to be financed with dues from member states of the AU, but most are delinquent in paying.\textsuperscript{149} As a result, the Commission must rely on donations from abroad.\textsuperscript{150}

\begin{itemize}
\item \textsuperscript{143} See Charter, \textit{supra} note 4, art. 59.
\item \textsuperscript{144} Id. at art. 59(1).
\item \textsuperscript{145} Id. at art. 59(3).
\item \textsuperscript{146} Nmehielle, \textit{supra} note 108, at 31.
\item \textsuperscript{147} Id.
\item \textsuperscript{148} See Udombana, \textit{supra} note 27, at 1250 (noting that “[t]he Commission is operating against the background or reiterated failure and incessant peril,” because it “is suffering from chronic financial incapacities”).
\item \textsuperscript{149} Nmehielle, \textit{supra} note 108, at 59.
\item \textsuperscript{150} Udombana, \textit{supra} note 12, at 72 (2000); see also Udombana, \textit{An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?}, 28 \textit{BROOK. J. INT’L. L.} 811, 862 (2003) (stating that “many existing OAU/AU institutions constantly carry their bowls to look for crumbs from the table of European institutions in the form of grants”).
\end{itemize}
Without adequate resources, the Commission cannot perform its promotion function, which the Charter mandates in Article 30. This lack of resources also may be responsible for the Assembly’s failure to order publication and dissemination of the Commission’s reports and activities. Thus, financial weakness also has contributed to the infrequent use of the Commission by member states who may have grievances under the Charter.

In summary, the inability of the Commission and possible unwillingness of the Assembly to enforce decisions regarding Charter violations, coupled with the secrecy of the Commission’s proceedings and lack of resources to conduct and promote the Commission’s functions, led to the realization that the Commission is an insufficient solution to the myriad of human rights abuses in Africa. A stronger, more independent body with enforcement power was needed if improvements were to be made and abuses curtailed.

C. The Features of the African Court of Human and Peoples’ Rights Intended to Address the Commission’s Failures

On October 6, 1998, the OAU issued the Protocol to the African Charter of Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights. The Protocol appears to address the major failures of the Commission by arming the Court with the power to issue binding orders and remedies, creating a judicial body with stringent rules intended to prevent conflicts of interest, and providing that the Court’s proceedings

151. Udombana, supra note 61, at 862 (noting that as of 2003, the Commission still did not have a permanent building; rather it was located in a rented apartment in The Gambia).
152. Viljoen, supra note 17, at 21-22.
153. Id. at 21.
154. See Nmehielle, supra note 31, at 423-26 (calling the adoption of the Protocol part of an African “renaissance” after repeated scholarly criticisms of the Commission’s many weaknesses).
155. See Nmehielle, supra note 108, at 28 (arguing that, “for an effective African regional human rights protection and enforcement mechanism to exist, the African system must be made more effective and supplemented with a court of human rights”).
156. See Chart, supra note 28, item 21.
157. Protocol, supra note 18, art. 28(2) (providing that the judgment of a majority of the Court shall be final); art. 27(1) (providing that if a violation of human rights is found, the court “shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation”).
158. See id. art. 16 (providing that the judges shall take an oath of office, solemnly declaring that they will discharge their duties “impartially and faithfully”); art. 17(1) (providing that the independence of judges shall be “fully ensured in accordance with international law”); art. 17(2) (requiring recusal of a judge who has previously taken part in case, whether as agent or advocate for any party); art. 18 (providing that “[t]he position of judge
will be conducted publicly. The enabling document theoretically provides a solution to many of the Commission’s deficiencies. The Court has not yet begun hearing cases, however, so it is uncertain whether it will have any more success in implementing its decisions than the Commission.

1. Effect of the Court’s Orders

Because the absence of an enforcement provision in the Charter was arguably its greatest weakness, the Protocol’s provision for binding orders shows the greatest promise. The Protocol provides that if “the Court finds that there has been a violation of human or peoples’ rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.” The Court may do this even without first attempting to settle the matter amicably between the states parties as required of the Commission; rather, the Protocol grants the Court discretion in this respect. The decisions of the Court must be read publicly, thereby giving notice to the states parties and to the world that a judgment has been made. Moreover, the Protocol demands that states parties “shall undertake to comply with the judgment” and do so within the time period set forth by the Court. Finally, the Council of Ministers, on behalf of the Assembly, shall monitor the execution of the Court’s orders. This increased pressure to comply with the judgments may give member states more incentive to rectify human rights abuses.

159. Id. art. 28(5)-(6) (requiring that the judgment of the court and the reasons therefore shall be given in open court).
160. See Nwobike, supra note 110, at 25 (stating that by drafting the Protocol, “the stage has been set” to solve the problem of the Commission’s ineffectiveness).
161. See Nwobike, supra note 110, at 25.
162. Protocol, supra note 18, art. 27(1).
163. Id. art. 9 (stating that “the Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter”) (emphasis added).
164. See id. art. 28(5).
165. Id. art. 30.
166. Id.
167. Id. art. 29(2).
168. Udombana, supra note 12, at 111 (predicting that while the Protocol will not end human rights abuses overnight, it will strengthen the African system and provide an important deterrent to human rights abuses).
2. Greater Judicial Independence From the Assembly

The Protocol also provides several assurances that the judges of the Court will be neutral decision-makers. First, the Court itself decides which communications to consider.\textsuperscript{169} This stands in contrast to the Charter in that the required communications previously had to be submitted to both the secretary general of the OAU and to the chairman of the Commission.\textsuperscript{170} Second, the Protocol requires the recusal of any judge who: a) is a national of any state party to the case to be heard;\textsuperscript{171} or b) has previously taken part in the case in any capacity.\textsuperscript{172} Finally, the Court must establish its own rules of procedure setting forth a list of activities in which judges may not engage due to potential incompatibility with judicial duties.\textsuperscript{173} One feature borrowed from the Charter, however, was the procedure for selecting judges, who, like selection of the Commissioners,\textsuperscript{174} must be elected by the Assembly.\textsuperscript{175} The judges’ independent judgments as well as the Court’s independence from the Assembly in deciding which cases to hear are potential solutions to the problems that paralyzed the Commission’s effectiveness.

3. Publicity

The Protocol provides that the Court shall conduct its proceedings in public.\textsuperscript{176} The Court must also explain the reasoning behind its judgments.\textsuperscript{177} By reporting its activity openly, the Court is more likely to attract media attention as well as generate more interest and awareness.\textsuperscript{178} Thus, the abused may be more likely to take their grievances to the Court if they know that the offending state will be publicly recognized and condemned.\textsuperscript{179} Moreover, the fear of public condemnation will ideally deter future human rights

\textsuperscript{169} Protocol, supra note 18, art. 6(2).
\textsuperscript{170} Charter, supra note 4, arts. 47, 49.
\textsuperscript{171} Protocol, supra note 18, art. 22
\textsuperscript{172} Id. art. 17(2).
\textsuperscript{173} Id. art. 18.
\textsuperscript{174} Charter, supra note 4 art. 33.
\textsuperscript{175} Compare Protocol, supra note 18, art. 14(1) with Charter, supra note 4, art. 33.
\textsuperscript{176} Id. art. 10(1).
\textsuperscript{177} Id.
\textsuperscript{179} See Nmehielle, supra note 108, at 58 (noting that African states are more willing to publicly condemn human rights abuses due to the continent’s desire “not to be left behind in the new world order of things, especially in the areas of human rights and democratization, which have increasingly become the basis of international relations”).
In this way, the Protocol demonstrates a recognition of and potential solution to the problems that the Commission’s secrecy created. Furthermore, the Protocol’s provisions safeguarding the independence of the Court’s judges and the binding nature of its judgments hopefully will bode well for African citizens who could be affected by human rights abusers.

In summary, the AU and the Court demonstrate African nations’ move toward global acceptance of Africa through rejecting human rights abuse. Notwithstanding this ideological shift, the Assembly retains oversight of both the ultimate implementation of the Court’s decisions and the economic programs that could benefit African nations. Therefore, it is uncertain whether the new ideology will manifest itself through adherence with the Charter and compliance with the Court’s decisions. This uncertainty arises from the Assembly’s continuing role in addressing human rights, despite its failures under the OAU and the Commission. The next Part will attempt to analyze whether the new system will have increased success despite the retention of the Assembly’s supervisory role.

III. Analysis

One scholar has termed the creation of the Human Rights Court and the transition from the OAU to the AU an “African Renaissance” providing great hope that the failures of the old OAU are coming to an end. Indeed, many scholars agree that the AU provides a stronger normative framework than the OAU. Others point out, however, that “good initiatives do not implement themselves,” and that there is doubt as to the “capacity of the [AU] to achieve any of those goals beyond what its predecessor, the [OAU],

180. Udombana, supra note 12, at 95 (“Public exposure and authoritative condemnation of human rights violations is an extremely effective tool in the promotion and protection of human rights.”)
181. See Constitutive Act, supra note 23, pmbl. (stating that the AU is “Determined to take up the multifaceted challenges that confront our continent and peoples in the light of the social, economic and political changes taking place in the world”).
184. See e.g., Packer & Rukare, supra note 33, at 379 (noting that “the importance of the entry into force of the [Constitutive Act] establishing the new Union may lie mainly in its symbolism”).
This Part will analyze the distinguishing features of the Court and the Commission as between the OAU and AU, as well as address whether these changes are sufficient to ensure compliance with the Court’s orders. Assuming they are sufficient, the AU should make membership contingent on adherence to the Charter and compliance with Court decisions.

A. Potential Effects of the Protocol’s Characteristics on the Enforcement of Court Decisions

1. The Court’s Potential Shortcomings

Although the Court has power to issue binding judgments and the increased independence of the decision-making body and publication of its judgments are direct attempts to remedy the shortcomings of the Commission, several glitches still may exist. In addition, some of the factors that prevented the success of the Commission, such as lack of resources and apathy on the part of the Assembly, continue to exist. The effectiveness of the Court remains uncertain as the world awaits its inauguration. But the following problems are potential obstacles to its complete success.

First, the Court may face the same financial difficulties as the Commission. A preliminary report on the financial implications of the Court already indicates that the Court will have inadequate resources to meet its needs. Moreover, the Protocol calls for complementarity between the Court and Commission, indicating the need for the Court to have appropriate funding to avoid the financial predicament of the Commission.

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187. See Nmehielle, supra note 108, at 58-59 (arguing that while the court could make a great difference in human rights enforcement, the Protocol “will need further refinement to realize its potential,” including assurance of a stable infrastructure and recognition by African leaders of the effect of being branded an abuser of human rights).

188. See Oloka-Onyango, supra note 140, at 71-72 (noting that “[i]t is likely that the Court will be plagued by the very same problems that hampered the work of the Commission. Even if by some miraculous occurrence the infrastructural issues were to be tackled, the paramount issue of political will remains an outstanding one”).

189. See Mashood A. Baderin, Recent Developments in the African Regional Human Rights System, 5 HUM. RTS. L. REV. 117, 148-49 (2005) (advising that “[i]t is important to provide the Court with appropriate funding to avoid the financial predicament of the [Commission]”).


191. Protocol, supra note 18, art. 8 (2).
ing that the Court is *not a replacement* for the Commission. Thus, the Court is an added expense to an already insufficient budget.192

Second, the ability of the Court and Council of Ministers to actually effectuate the Court’s judgments is questionable.193 Although the Protocol provides more power to compel compliance with the Court’s judgments than the Charter did for the Commission,194 the consequences of continuing refusal to comply with a judgment are unclear.195 The Protocol states that the Court shall submit an annual report to the Assembly identifying the states that have not complied with its decisions.196 Therefore, an offending state may avoid its duty to comply by simply waiting out the Council of Ministers. If a state does this, then the matter is in the hands of the Assembly,197 the same body that previously hampered the Commission’s effectiveness. Thus, there must be some benefit in abiding by the Court’s judgments that will provide incentives for states to obey.

2. The Protocol’s Potential to Increase Compliance with the Charter

The Protocol has some features that might successfully address the Assembly’s conflicts of interest. These include an added buffer between the Court and the Assembly that did not exist between the Assembly and the Commission,198 as well as the provision that the Court’s proceedings will be publicized.199 First, the role of the Council of Ministers ensures that the Court’s orders are carried out. Although the Assembly is the ultimate arbiter of compliance

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192. *See* Udombana, *supra* note 27, at 1255 (recommending that the [AU] needs to “trim down its existing institutions,” but instead it has created new ones “to add to those that are already moribund”).

193. *See* Nmehielle, *supra* note, 108 at 58 (noting that while this enforcement mechanism is an improvement over the Charter’s provisions, “the Council of Ministers is a political body that may sometimes allow political considerations to interfere with its supervisory role”).

194. *Id.*

195. *Id.* (noting that it remains to be seen whether offending states will be concerned with the stigma of not complying with the order of a human rights tribunal).


197. *Id.*

198. *See id.* art. 29 (inserting the Council of Ministers into the enforcement procedure by providing that the “Council of Ministers shall also be notified of the judgment and shall monitor its execution”).

199. *See id.* art. 28(5) (providing that the judgment of the Court “shall be read in open court”).
with the Court’s orders when the Council’s efforts fail, the added scrutiny of this separate body could serve as a check on the Assembly’s performance, making the Assembly less likely to turn a blind eye toward Charter violations.

In addition to inserting the Council of Ministers between the Court and Assembly, the Protocol requires the Court to submit fewer reports to the Assembly than the Charter requires of the Commission: The Protocol only commands the Court to report to the Assembly once per year. In its report, the Court must specify “the cases in which a State has not complied with the Court’s judgment.” In contrast, the Charter requires not only that the Commission submit a report of its activities to the Assembly after each ordinary session, but also that the Commission submit a report of its findings in every case that did not reach an amicable solution. In transmitting these reports, the Commission “may make to the [Assembly] such recommendations as it deems useful.” Thus, the Commission may advise the Assembly, but the Assembly is charged with seeking a resolution to the case. Finally, the proceedings and recommendation of the Commission must remain confidential, unless the Assembly decides otherwise. Therefore, if the Assembly does not want to enforce the Charter in a particular case, it can simply refuse to declassify the Commission’s reports.

The Protocol provision requiring publication of the Court’s proceedings, orders, and reasons therefore precludes the Assembly from keeping the Court’s activities secret. In this way, the Assembly is not in fact the ultimate authority for ensuring compliance with the Court’s orders. Rather, the international community will be aware that a judgment has been made and a remedy ordered. Presumably, the world will likewise bear witness to a nation’s compliance failures despite the Council of Ministers’

200. See id. art. 31 (providing that if a State does not comply with the judgment of the Court, the Court shall notify the Assembly).
201. See Protocol, supra note 18, art. 31 (stating that the Court shall provide the Assembly with a “report on its work during the previous year”).
202. Id.
203. Charter, art. 54.
204. Id. art. 52.
205. Id. art. 53.
206. Id. art. 59(1)-(2).
207. See Protocol, supra note 18, art. 28(5)-(6).
208. See Akinseye-George, supra note 127, at 172 (suggesting that because the Court will do its work openly, it will attract media attention and raise awareness about the human rights system in Africa).
Finally, the international community, aware of the judgment and a state’s noncompliance, can exert pressure on the Assembly not to resort to its old ways.\textsuperscript{210}

B. The AU’s Potential Ability to Ensure Compliance With Court Orders

The OAU’s transformation into the AU marks an ideological change from non-interference in sovereign affairs to cooperation and pan-Africanism,\textsuperscript{211} with the intent of delivering the continent from poverty and marginalization from the international community. While the Constitutive Act and the mechanisms it created to achieve these goals are inspiring on paper, it remains to be seen whether the new AU will effectuate the ideological differences that distinguish it from the OAU.

The Constitutive Act of the AU envisioned several institutions and programs intended to promote economic growth in Africa that could compel African nations to comply with the Court’s orders.\textsuperscript{212} In particular, NEPAD’s promise of sustainable development in the long-term could encourage African governments to comply with Court decisions and also promote the success of the Court as an institution through its debt-relief program.\textsuperscript{213} In addition, the AU’s relaxation of the OAU’s staunch policy of non-interference is a step toward reducing human rights abuses in Africa.

The Assembly adopted the Constitutive Act of the AU at its Thirty-Sixth Ordinary Session on July 11, 2000.\textsuperscript{214} By signing the Act, fifty-three nations\textsuperscript{215} bore witness to the African nations’ determination to “promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments.”\textsuperscript{216} More-

\textsuperscript{209} See id.
\textsuperscript{210} See Udombana, supra note 27, at 1260 (noting that civil society must “pressurize the AU to ensure that human rights are given due consideration”).
\textsuperscript{211} See Constitutive Act, supra note 23, pmbl. (noting that while the OAU played an “invaluable role in the liberation of the continent,” there is a “need to build a partnership between governments and all segments of civil society”).
\textsuperscript{212} Id. art. 22(1)-(2) (establishing the Economic, Social, and Cultural Council), art. 22(1)-(2) (establishing the Economic, Social, and Cultural Council); see id. art.19(a)-(c) (establishing three financial institutions: the African Central Bank, the African Monetary Fund, and the African Investment Bank).
\textsuperscript{213} See Udombana, supra note 41, at 72 (noting that NEPAD’s blueprint for sustainable development requires “political measures to address the political and social vulnerabilities of conflicts,” and in order to manage conflict, efforts “must focus on strengthening existing regional . . . institutions”).
\textsuperscript{214} Constitutive Act, supra note 23.
\textsuperscript{215} Id.
\textsuperscript{216} Id. art. 3(h).
over, these nations agreed that the AU shall recognize 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.”217 Such provisions suggest that in forming the AU, the Assembly recognized that the policy of non-interference hindered achievement of the Commission’s objectives. Despite this marked change in values, the same Assembly of the OAU that failed to enforce the Charter became the “supreme organ of the Union,”218 just as it was the “supreme organ of the Organization.”219 Likewise, the Council of Ministers of the OAU continues under the Constitutive Act as the Executive Council.220

The Constitutive Act also states that the AU aims to “promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights,”221 but does not name the Commission or the Court on its list of organic institutions.222 Moreover, the Act does not place the responsibility of ensuring compliance with Court’ orders with the Executive Council.223 It also provides for the imposition of sanctions for both defaults in payment and noncompliance with the decisions of the Union,224 and that “governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.”225 Finally, the Act provides for amendment and revision of its provisions.226

Thus, although the OAU transformed into the AU, the Assembly continues to be the ultimate enforcer of decisions made pursuant to the Charter, whether the initial decision was made by the Commission or the Court. This raises a question as to whether the statement of renewed ideals in the Act is enough to overcome the

217. Id. art. 4(h).
218. See id. art. 6(2).
219. OAU Charter, supra note 29, art. VIII.
220. See Constitutive Act, supra note 23, arts. 10-13 (describing the composition, procedures, and functions of the Executive Council).
221. Id. art. 3(h).
222. See id. art. 5 (listing the organs of the AU; neither the Court nor the Commission is included).
223. See id. arts. 10-13 (describing the Executive Council, its decisions, its procedures, and its functions).
224. Id. art. 23(1)-(2).
225. Id. art. 30.
226. Id. art. 32.
Assembly’s demonstrated apathy concerning enforcement of the Commission’s recommendations. 227

As noted above, the Assembly has never ordered an in-depth study as provided in the Charter, even when presented with extrajudicial executions by a military coup and the Rwandan Genocide. 228 Nonetheless, requiring a member state to comply with an order of the Court seems a much more forceful act than merely looking into a situation more closely. 229 Thus, the conflicts of interest that made the Assembly unwilling to order these studies could likely limit its resolve to require an affirmative act on the part of a member state to comply with an order of the Court.

The Assembly’s continuation as the ultimate enforcer of Court orders may dampen the Protocol’s promise that the Court’s decisions will be binding in practice. 230 The Protocol provides that, upon finding a human rights violation, the Court shall issue orders to remedy the violation, 231 that such orders shall be final, 232 and that the Council of Ministers shall monitor their execution. 233 Despite these safeguards, the Court must report a failure to comply with its orders to the Assembly in its annual report. 234 The Protocol does not describe how the Assembly is to respond to a report of noncompliance. 235 Similarly, it fails to provide the Court with any “authority to take effective enforcement action if its judgments are

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227. See Nmehielle, supra note 31, at 446 (opining that “[w]ith the necessary political will and a strong AU, it is more likely than not that a new human rights era is in the offing” assuming that the AU can “battle the legacy of the [OAU] – the failure to adopt a proactive human rights stance that characterized the past 40 years of its existence”).

228. Id. at 440-41.

229. See Anthony, supra note 112, at 518 (noting that the reluctance of the Assembly to order an in-depth study was due to an unwillingness to “undertake to embarrass a fellow Member State given that African heads of state have in the past ‘comport[ed] themselves like a club or a trade union in their solidarity’”) (quoting B. Obinna Okere, The Protection of Human Rights in Africa and the African Charter on Human and Peoples’ Rights: A Comparative Analysis with the European and American Systems, 6 Hum. RTS. Q. 141, 159 (1984)).

230. See Udombana, supra note 27, at 1258-59 (commenting that “the AU Treaty is an old wine in a new wineskin; and the AU is a reincarnation of the OAU. . . . it is not likely to take human rights seriously – even though that is greatly desired – for the simply reason that a married woman does not recover her virginity by divorce”).

231. Protocol, supra note 18, art. 27(1).

232. Id. art. 28(2).

233. Id. art. 29(2).

234. Id. art. 31.

235. See id. art. 31 (providing that the Court shall notify the Assembly of States that fail to comply with its judgments). Notwithstanding that provision, there are no provisions describing what the Assembly will do to rectify such noncompliance. See id.
not implemented.”

Given the Assembly’s lackluster performance in the past and the more forceful nature of a binding order, it is questionable whether the Assembly will become any more effective under the Protocol. As noted above, however, the Protocol’s provisions for publicity and oversight by the Council of Ministers could discourage the Assembly from being complicit in violations of the Charter.

These two features invite pressure from the international community. Indeed, due to the fact that the AU and its economic programs are still in their infancy, peer pressure could be a significant incentive to adhere to the Charter and the Court’s orders, since “[t]he threat of being branded a violator of human rights can damage a nation’s well-being and the personal prestige and monetary rewards of a corrupt or oppressive regime.”

Recently, an inverse relationship between human rights violations and development aid has become apparent. Thus, the more abuses committed and the continued defiance of court orders will make it less likely that impoverished African nations will receive aid from other countries.

The AU’s new initiatives, specifically NEPAD, may promote compliance with the Court’s orders and facilitate the success of the Court as an institution. NEPAD requires African leaders’ pledge in promoting the principles of “peace, security, democracy, good governance, human rights, and sound economic management” because they are “conditions for sustainable development.” The promise of long-term financial self-sufficiency may promote adherence to the Charter today. Moreover, NEPAD’s debt-relief program will enable African nations to put less money toward foreign debt and more toward their own people and the Court.

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237. See Udombana, supra note 12, at 104 (recommending that for the Court to be effective, pressure from civil society is needed for the Protocol’s reforms to become a reality).


239. Id.

240. See id.

241. See Nnemhielle, supra note 31, at 417, 445 (arguing that while one commentator does not believe that the AU will bring with it any meaningful advancement in the arena of human rights, he views the reincarnation of the OAU to the AU as an African “renaissance” and that the Constitutive Act and NEPAD promises a “new Africa”).

way, the Commission’s chronic problem of underfunding can be alleviated.

NEPAD has been described as “the most dynamic instrument among the collection of development-oriented blueprints for African regional development.” By offering much-needed debt relief to African nations, they will be more capable of meeting their obligations not only to their own people, but also to the AU and the African human rights institutions. Since participation in NEPAD is voluntary and predicated on good governance, its effects will improve Africa both intra- and inter-nationally.

Assuming that NEPAD is a viable program, debt relief for African nations could resolve the financial deficiency of the Commission and the Court, but only if they are both organs of the AU and supported by it, financially as well as morally. To do this, the AU must amend its Constitutive Act to include the Human Rights Court as one of its organs and condition membership to the AU upon adherence to the Charter and compliance with Court decisions. Thus, nations that do not respect their obligations under the Charter and the Protocol could not benefit from the opportunities for development that the Constitutive Act and NEPAD have to offer.

IV. CONCLUSION

The births of the AU and the Court are steps in the right direction for developing the African continent and protecting human rights. The Court still faces some of the challenges the Commission faced in enforcing the Charter in the days of the OAU. These challenges include the resolve of the Assembly to assist the


244. See Justice, supra note 48, at 131 (pointing out that “most African governments still spend up to three times more on debt repayments than on health care and education combined”).

245. See id. at 129 (noting that Denmark recently refused to assist developing countries that misused funds to support dictators, namely Robert Mugabe in Zimbabwe). Thus the principles of good governance that NEPAD espouses will attract aid from outside, and the debt relief will allow African countries to support educational health care programs. Id.

246. See Doebbler, supra note 236, at 31 (surmising that “NEPAD is a framework by which the international community can provide Africa with the resources to protect Africans’ basic human rights, but only if it is used with due respect to the international human rights instruments and mechanisms that already exist”).

247. See Baderin, supra note 189, at 148-49 (noting the importance of proper funding to avoid the financial problems faced by the Commission); see also Oloka-Onyango, supra note 140, at 71-72 (noting that the Court will likely experience the same problems as the Commission, most notably political will).
Court in enforcing its orders in human rights disputes and the likely meager resources on which the Court will have to operate.\textsuperscript{248}

The Protocol, the Constitutive Act of the AU, and the AU’s special program, NEPAD, offer potential solutions to these challenges. One solution lies in the Constitutive Act’s ambiguity regarding the relationship of the Commission and the Court with the AU. Further, NEPAD provides a potential way to alleviate the financial difficulties that the Court is bound to face.\textsuperscript{249}

The door is still open for clarification of the relationship between the AU, the Court, and the Commission. This clarification should ensure that the Court and the Commission are organs of the AU effectuated by an affirmative merger of the Court and the elusive Court of Justice. In turn, the Assembly should amend the Constitutive Act to condition membership upon respect for the values the Charter mandates. This sanction can be meaningful through the success of the NEPAD program, and may ultimately reduce human rights abuses in Africa.

\footnote{248. \textit{Id.}}
\footnote{249. \textit{See} Justice, \textit{supra} note 48.}