REVIEW OF ACTS OF INTERNATIONAL POLITICAL ORGANS:

THE AFRICAN UNION APPROACH

Prepared By: **Dawit Belay**

Advisor: **Yacob Hailemariam (Dr.)**

A Thesis Submitted to the School of Graduate of AAU in Partial Fulfillment of the Requirement for the Masters of Law (LLM) in Public International Law

November, 2012

AAU

REVIEW OF ACTS OF INTERNATIONAL POLITICAL ORGANS:

THE AFRICAN UNION APPROACH

Prepared By: **Dawit Belay**

Advisor: **Yacob Hailemariam (Dr.)**

A Thesis Submitted to the School of Graduate of AAU in Partial Fulfillment of the Requirement for the Masters of Law (LLM) in Public International Law

November, 2012

AAU

Addis Ababa University

School Of Graduate Studies, College of Law and Governance

Review of Acts of International Political Organs: The African Union Approach

By: Dawit Belay

Approved by Board of Examiners

Advisor sign

_____ _____

Examiner

_____ _____

Examiner

_____ _____

DECLARATION

I _____, hereby declare that this research paper is original and has never been presented in any other institution. To the best of my knowledge and belief, I also declare that any information used has been duly acknowledged.

Name:

Dawit Belay _____

This dissertation has been submitted for examination with my approval as university advisor

Advisor

Yacob Hailemariam (Dr.) _____

ACKNOWLEDGEMENT

My unreserved praise and my heartfelt thanks goes first to the Almighty God for His care and protection during my study as I and only I know the tunnel I passed through. *Ave Maria!* I also extend my thanks to Dr. Yacob Hailemariam who has kindly accepted my late request to supervise this thesis. He also enriched the research from his critical comments.

I am also highly indebted to my sister Amleset Belay for satisfying my financial needs during the study. My mother and father, along with my brother, are the foundations of my present achievements and deserve my sincere gratitude.

EU, Elshu, Rahwi, Biruk, Aleme and Bez as well-thank you so much for being partner, families and friends, respectively, to lean on.

TABLE OF CONTENT

CHAPTER FOUR: REVIEW OF ACTS OF POLITICAL ORGANS OF THE AFRICAN UNION

ACRONYMS AND ABBREVIATIONS

ACHPR	African Commission of Human and People's Rights
ACJHR	African Court Of Justice and Human Rights
Acta U. Danubius Jur.	Acta Universitatis Danubius Juridica
AEC	African Economic Community
AFDB	African Development Bank
Afr. Hum. Rts. L. J	African Human Rights Law Journal
Afr .J. Int'l & Comp. L.	African Journal of International and Comparative Law
AJIL	American Journal of International Law
Am. Soc'y Int. L. Proc	American Society of International Law Proceeding
AU	African Union
Aus YIL	Australia Yearbook of International Law
AUC	Africa Union Commission
B.C Int. & Comp .L.R	Boston College International & Comparative Law Rev.
B. L. J.	Business Law Journal
Brook J. Int'l L.	Brooklyn Journal Of International Law
Brown J. World Affair	Brown Journal of World Affairs
BYIL	British Yearbook of International Law
CA	Constitutive Act of the AU
Cal. W. Int'l L. J.	California Western International Law Journal
CML Rev.	Common Market Law Review
COMESA	Common Market of Eastern and Southern Africa
Crim. L. F.	Criminal Law Forum
EAC	East African Community
EBRD	European Bank for Reconstruction and Development
EC (EEC)	European Community
ECA	UN Economic Commission for Africa
ECE	UN Economic Commission for Eastern Europe
ECJ	European Court of Justice
ECLAC	UN Economic Commission for Latin America and the Caribbean
ECOSOCC	Economic and Social Council of the AU
ECOWAS	Economic Community of West African States
ECSC	European Coal and Steel Community
EctHR	European Court of Human Rights
EJIL	European Journal of International Law

Emory Int'l L. Rev.	Emory International Law Review
Emory J. Int. Disp. Resol.	Emory Journal of International Dispute Resolution
ESCAP	UN Economic Commission for Asia and the Pacific
EU	European Union
EUMETSAT	The European Organization for the Exploitation of Meteorological Satellites
Euratom	European Atomic Community
Eur. Competition J.	European Competition Journal
ExC	Executive Council of the African Union
FAO	Food and Agricultural Organizations
Fordham Int'l L. J	Fordham International Law Review
GA	General Assembly of the United Nations
GAOR	General Assembly Official Records
Harv. Int. L. J.	Harvard International Law Journal
Hofstra L. and Pol'y Symp.	Hofstra Law and Policy Symposium
HRLJ	Human Rights Law Journal
ICC	International Criminal Court
ICJ	International Court Of Justice
ICRC	International Committee of the Red Cross
ICTR	International Crime Tribunal for Rwanda
ICTY	International Crime Tribunal for the Former Yugoslavia
IDA	International Development Associations
IFC	International Financial Cooperation
ILO	International Labor Organizations
IMF	International Monetary Fund
IMT	International Military Tribunal
Intl. & Comp L.Q (ICLQ)	International and Comparative Law Quarterly
I.L.M	International Legal Materials
IO Law Rev.	International Organization Law Review
J. Int'l Econ. Law	Journal of International Economic Law
Maastricht J. Comp. L and	Maastricht Journal Of European & Comparative Law
Max Planck UNYB	Max Planck United Nations Yearbook
McGill L.J	McGill Law Journal
Melb J. Int'l L.J.	Melbourne Journal of International Law
Mich. J. Int. L	Michigan Journal of International Law
Minn. L. Rev.	Minnesota Law Review

N.C. J. Int'l & Comm. Reg.	North Carolina Journal of International Law and Commercial Regulation
Neth. Q. Hum. Rts	Netherlands Quarterly of Human Rights
Nordic JIL	Nordic Journal International Law
N.Y.U.J.I.L	New York University Journal International Law
NYIL	Netherlands Yearbook International Law
OAU	Organization of African Unity
OSCE	Organization for Security and Cooperation of Europe
Pace Int'l L. Rev.	Pace International Law Review
PAP	Pan-African Parliament
PCIJ	Permanent Court of International Justice
PRC	Permanent Representatives Committee
PSC	Peace and Security Council
Rev. Int'l L. & Pol.	Review of International Law and Policy
SADC	Southern Africa Development Community
Santa Clara J. Int'l L.	Santa Clara Journal of International Law
SC	Security Council of the United Nations
STC	Specialized Technical Committee
SYIL	Singapore Yearbook of International Law
TFEU	Treaty on the Functioning of the EU
Toronto Fac. L. Rev	Toronto Faculty of Law Review
U. Botswana L. J.	University Of Botswana Law Journal
UN	United Nations
UNAT	United Nations Administrative Tribunal
UNCLOS	UN Convention on the Law of the Sea
UN DOC.	UN Documents
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
Willamette J Int L. and Disp. Resl.	Willamette Journal of International and Dispute Resolution
WHO	World Health Organization
WMO	World Metrological Organization
WTO	World Trade Organization
WTO DSB	WTO Dispute Settlement Body
WTO DSU	WTO Dispute Settlement Unit
Yale Human Rights and Development L.J	Yale Human Rights and Development Law Journal

YEL	Yearbook of European Law
ZaöRv	Zeitschrift for auslandisches offentliches Recht and Volkerrecht

ABSTRACT

Following the judgment of Reparation for Injuries Suffered case, which acknowledged IOs as bearers of right and obligations in the international plane, the debate about IOs turned to their accountability in control of their acts. Since ICJ asserted, in the case, IOs degree of personality only, the conception that their sphere of activity is strictly limited to the provision of their founding instruments has prevailed. This restriction at times has been relaxed by the implied powers theory. Even here, IOs acts can, to the most, go to those justified by objectives and purposes they pursue. Acts of IOs, thus are required to be within their mandate. Control to legality and validity of IO acts has traditionally managed by the insertion of the doctrinal limitations such as *compétence d' attribution, domaine reserve, ultra virus* etc. however, lately, institutional mechanism are being included within structures of IOs. These institutions take either political or judicial form.

Whichever is preferred, the institution reviews acts of other internal bodies within the organization. Seen from this point of view, the present situation of IOs is not uniform. In some IOs, institutional control is neglected deliberately. In some others the political means is chosen in remaining some others, judicial review is established. This study looks at the review system of the African Union. Specifically control system of the union against acts of the political organs is investigated. It is evident that starting from the eve of the transformation to AU onwards, the continental organization has reorganized itself to reach the goals it aims to achieve. The study thus discusses the review of the system and argues that from the perspective of the revitalized objectives of the union and present state of international law, a number of important elements are dropped from being incorporated though the existence of the system by itself is very radical to the (O)AU.

CHAPTER ONE

REVIEW OF ACTS OF INTERNATIONAL POLITICAL ORGANS: THE AFRICAN UNION APPROACH

1.1 Background of the Problem

Since the last century, international organizations have become the most important devices in regulating interstate relations. In many respects, they have helped to mitigate the defects of traditional international law and relations. Mainly, they have facilitated cooperation among states and advocated respect and adherence to values of the international community. Considerable time has passed for organizations in international relations to attain the present form. Post war international relations have benefited a lot from the rise of IOs. *Jus cogens* and *erga omnes* obligations are fruits of the age of IOs. The turn to soft laws is also highly related to IOs. The proliferation of IOs also increased the number of multilateral treaties. All these developments re-structured international relations and developed international law.

As a result, IOs as mechanisms have been repeatedly resorted to in various fields of inter-state relations. A great number of IOs, with universal membership, have been created by states. This is because international relations are now conducted more on a multilateral basis than in the past. Regionally as well, IOs operate in a huge extent. Two opposing schools of thought exist regarding regional organizations. Both schools uphold regionalism, they differ on the duration of the role of these regional organizations. One of the two insists on the permanent replacement of universal schemes by regional organizations. The other, in contrast, recognizes regionalism as a preliminary stage or forerunner to a more effective worldwide organization in a more propitious political future. The current trend however appears to accommodate, and even integrate, regionalism with universalism. This is the typical situation in relation to peace and security oriented arrangements. The peculiar feature of this field is that a legal framework integrating the regional and universal organizations dealing with the matter is formulated. In general, IOs have become the promising, if not the particular, preference of states to solve common problems they face.

Africa established the first regional organization of its own, namely the Organization of African Unity(OAU), in the second half of the last century. African States organized themselves, following their independence, to tackle common problems they were challenged by. The organization has been structured in a way to achieve its objectives. But, it was realized by member states of the Organizationthat their defective continental body could not and should not represent them in the New Millennium. Thus, they replaced it by the African Union 2002. In this effort, an attemptis made not to make the AU a mere omission of the 'O' from the OAU. Though the latter organization is presented as a continuation of the OAU, significant modifications have been introduced to it. Its objectives are widened and deepened. It is made to be based upon updated and crucial principles to the present Africa. The Union has enlarged its organs and assigned powers of important nature. These internal institutions of the Union have been charged with their own mandate in the direction to achieve the overall purposes and objectives of the Union.

The principal and important organs of the Union, and of course of other IOs, are political organs. The membershipmay comprise all Member States as in the case of the AU and UN General Assemblies or limited number of states as in AU PSC and UN SC. The political organs of the AU have been granted decisive powers. In fact, they are the most powerful internal bodies of the Union. So exercise of their powers is a delicate matter to member states of the Union.

1.2 Statement of the Problem

Although states themselves create IOs, they repeatedly get into conflict with their own off springs.IOs also sometimes affect the interest of third parties in their functioning. Hence, the problem of accountability of IOs has more than one dimension: towards their members, other organs, their staff and third parties. The topic has been the latest issue, in relation to IOs, taking the breath of academics and legal practitioners. The fall of the UN safe area of Srebrenica, the child mortality rate increase in Iraq during the economic sanction, and the use of depleted uranium in Kosovo by NATO has exacerbated the importance of studies on the matter. The factor that makes their accountability more difficult is their immunity from

the jurisdiction of domestic courts. Doctrine based mechanisms and internal institutional approaches have, thus, been adopted to ensure such accountability. And the controlling arrangement has varied with the increase of the number of international organizations. Some organizations have kept silent on any such mechanism particularly relating to control of their political organs. Some others establish a judicial body to inspect legality of the organization. In others, quasi-judicial organs are envisaged.

Like any other IOs, therefore, issues of legality of an act of the African Union or one of its organs may be contested. This would be primarily claimed by the member states. The same may be claimed by one organ over the act of another. Third parties as well may be affected by a decision of an organ of the Union and thus demand remedy. In addition to the insertion of some principles addressing the matter, institutional mechanisms have been envisaged in the Constitutive Act. Exploring this system of review in the Union will be the focus of this study. The main questions to be dealt with include

Why do IOs require control mechanisms?

What type of review mechanisms, and control mechanisms in general, exist in the international plane?

Which of such mechanisms have been incorporated in the AU system?

To what extent has this system been shaped by contemporary developments in international law?

1.3 Objectives of the Study

With this context in mind, it will be attempted to conduct a comprehensive study. The doctrinal approach of assuring legality will not be addressed here. Rather,the paper will aimto examine the institutional mechanisms of the African Union. The nature of the body with controlling mandate will be assessed. As an institution created at the beginning of the new millennium, the extent to which the system incorporates new developments of present international law will be assessed. The specific nature of the African Union will be the guiding factor of determining the effectiveness and efficiency of the AU review System.

As an associated issue to the subject matter of the study, the approach of the OAU in this regard will be described and addressed briefly. Incidentally, the present practice of the system of the Union will be part of the study.

1.4 Research Methods

In this work effort will be exerted to attain the objectives specified fully. In the direction of this, the study will focus on the discussion of the legal framework articulated. Accordingly, documentary analysis will be the basic means employed. The study will utilize primary sources. The Constitutive Act of the African Union, the protocol of the Court of Justice and Human Rights, and various protocols adopted by the Union and relevant Rules of Procedure of organs of the Union will be inspected. In addition to the primary sources, other publications relating to the matter will be consulted. Through out the discussion issues raised will be examined critically. Therefore, all the relevant matters are hoped to be addressed.

Moreover, the study will be colored with some comparative experiences of other IOs. This is justified by two reasons. Firstly, as indicated in the objectives, the evaluation of the update of the system will be highlighted and this demands the knowledge of present feature of the matter in other institutions. Secondly, as it is commanded to the drafting body, on the eve of the drafting of the Constitutive Act of the AU, the new organization has been established with an eclectic approach particularly of the experience of the European Union. This again makes a comparative analysis indispensable to the study. Therefore, comparative study is conducted when deemed necessary.

1.5 Significance of the Study

In its findings, the study will locate the exact type of review mechanisms that have been preferred by the Union. Not being limited to this, the relevance of the mechanisms in the present context of Africa will be pointed out. An attempt will also be made to determine the scope of the review system from the perspective of various factors. Particularly, from the aspect of political and economic integration of the Union to the achievement of which is it is

set up as displayed in the Constitutive Act of the African Union and other relevant documents.

The extent of protection of rights and interests of major actors of within the Union and international law generally will be investigated. As this will also show the current state of international law in the region, a related observation will be made that may depict the changes in the conception of the doctrine of state sovereignty in Africa; if there are any.

Another significance of the study is its address of the interaction of politics and law within with in the organization. As political organs of the AU have been granted crucial powers, their exercise and implementation is expected to raise some issues. Hence, the grounds of review of these political organs will be looked at closely. This would have the effect of indicating the dominating factor in the Union: rule of law or politics.

Consequences of such reviewed acts assume important positions in the review system. In this study, generally the feature of international law with this particular point has been explored. And the African Union position in relation to this has been indicated. In doing so, the research will describe the state of the system as it exists. The study is, in this regard, the first of its kind as far as the knowledge of the present author is concerned.

In the recommendation part of the study, possible resolutive measures will be suggested. In some instances, only interpretational approaches and better understanding of the matter have been recommended. In others, and when it is the way out, legislative, both amending and promulgatory, solutions have been recommended. Organs of the Union, member states and other interested bodies may utilize these solutions to counter the problems when they face. Above all, however, it will open the floor for further examination of the issue.

1.6 Limitations of the Study

This study faces some constraints. The first is the fact that the Court of Justice and Human Rights have not become operational. The discussion is thus limited to analyze the legal framework. This has led the study to be exclusive of the practical aspects of the system apart from the specified set up in the Protocol of the African Court of Justice and Human Rights.

The reader, therefore, should note that the problems that may arise in practice are not dealt with in the present research albeit those attempted to be included with mere speculation.

Furthermore, there is the lack of important research materials and resources particularly those in the possession of the organization only such as full or portions of deliberations conducted on important legal instruments such as the Constitutive Act and protocol of the Court. The Union does not provide information on important progresses in the Union and does not consistently update its website. The present author shares the observation of Max du Plessis who stated, in his Article entitled "'A Court not Found?'"

> *"The AU website is even less helpful when it comes to sourcing up-to-date information concerning the African Court of Justice and Human Rights. The 'archives' only go back a few months and invariably, when one clicks on the icon to read further on the decisions of the AU Assembly of Heads of States and Governments in respect to the proposed merged African Court, one is informed that 'the page cannot be found."*

1.7 Organization of the Study

With this background, the study follows a path classified into three chapters. In the first chapter, general introductory but relevant concepts of IOS will be examined. At the beginning, the status of IOs in the international plane will be discussed with the aim of positioning the African Union in the same. Besides, activities of IOs, as actors in international law, are described. The scope, extent and limits of the actions of IOs are determined. The principal limitation of acts of IOs, i.e. the principle of Ultra vires, and its consequences are illustrated in depth. The purpose of the discussions in chapter one is justified by the importance of elaboration of issues that are presupposed to be known for any review system study.

In the second chapter, focusing on and particularizing the issue, the review system of IOs will be analyzed. Explaining the two broad classifications of review systems, as part of overall dispute settlement system of IOs, critical evaluation of the two approaches will be conducted from the perspective of different factors. Following that, authoritative interpretation of IOs from its aspect of review will be clarified. After identifying the theoretical dimensions of review systems, in the second part of the chapter, illumination of

the experience of IOs, to wit UN and EU, in regard to the matter, will be done in a manner permeating the reader to compare and assess the review system of the AU.

In the last chapter of the study, the discussion will be brought directly to the African Union. The chapter will start with a concise inspection of the structure of the Union. Accordingly, all organs of the Union will be examined with the aim of characterizing which organs are categorized as policy or political organs, administrative organs or judicial organs. This is needed as the study deals with the interrelationship of organs of the Union. After that, the review system of the Union is will be discussed in detail. First, the authoritative interpretation system will be seen. And then, the power of the court as a review body of the Union will be studied.

The research will finish accomplishing its objectives by briefly summarizing the major points of the study and problems identified. The study will be finalized by forwarding conclusions and recommendations relating to the research questions investigated.

CHAPTER TWO

INTRODUCTIONTOBASIC COMMON ISSUES OF INTERNATIONAL ORGANIZATIONS

2.1 International Organizations In The International Setting

With the transition of interstate relation to cooperation from its earlier coexistence feature, the role and number of international organizations evinced significant changes. This is a result of their involvement in numerous aspects of international relations. As one commentator describes

> *" it is clear that international organizations have come to be so common a feature of international life and accepted, as a response to the needs of international intercourse rather than as a fulfilment of a philosophical or ideological desire to achieve world government… Clearly interdependence is increasingly being acknowledged and accepted as a practical reality, which required an organizational structure in international relations."*[1]

Hence, IOs are one of the crucial means of coordination in tackling problems faced by the international community.

As a political approach to international legal problems, international organizations are directed to the attainment of goals set by its own members. Organs endowed with political discretion are, thus, always features of such organizations. In the words of Professor Amerasinghe:

> *" In principle, international organization has at least one organ, namely the plenary assembly, in which all members without exception have representation so that they can be kept informed of developments in and exercise of powers and contribute to giving content in a more detailed fashion to the goals of the organization, possibly interms of its own interests compared with those of other members…"*[2]

However, political organs are not the only composing element of the overall organization.

---

[1]D.W Bowett, The Law of International Institutions, (4th ed.) (1982), p. 1

[2]C.H. Amerasinghe, Principles of the Institutional Law of International Law of Organizations (2nd ed., 2005), pp.132

In a considerable number of organizations, political organs or non-judicial& quasi-judicial or judicial organs are included in the structure. The GA, the SC and the ICJ of the UN system can be cited as an instance of such composition. This composition helps for the effective operation of the organization. It also, in some cases, establishes a check of one organ on another. This interrelation is central the theme of the present study. However, for the accomplishment of this, an overview of general issues regarding international organizations will follow below.

2.2 International Organization as International Legal Person

The conception of states as the only entities under international law with legal effect has been eroded beginning from the second half of the twentieth century. The traditional sphere of international relation could not maintain a states' only approach to international legal personality. This perception of states as the single international person was accurately expressed by Oppenheim in the following words: "Since the law of nations is based on the common consent of states, and not of individual human beings, states solely and exclusively are subjects of international law."[3]During the prevalence of this attitude legal person under international law used to be described in terms of states. Other actors in international relations 'were not considered as subjects, or at best, were analysed in state-centric terms: as gatherings of states, or as derogations from statehood (servitude for e.g.) or as essentially unclassified experiments.'[4] This, however, was penetrated into by Individuals[5]and

[3] Lassa Oppenheim, International Law: A Treatise, I (4th ed., 1928) pp.133-134.

[4] Jan Klabbers, Introduction to International Institutional law (2002), p.42.

[5] Traditionally, international law and the individual were linked via the state availing the device of nationality (Malcom Shaw, International law (5th ed., 2003)). Deviations from this conception were viewed later. In the treaty of 1907, establishing Central American Court of Justice, individuals were provided with rights to bring cases directly before the court (Ibid., p.233).The 1919 Treaty of Versailles had also allowed individuals to bring claims of compensation against Germany directly. (Ibid) The PCIJ had similarly reaffirmed this capacity of individuals in the Danzing Railway Officials case (Ibid). Following this newly developed trend, various universal and regional international human right instruments incorporated provisions entitling individuals to have direct access to international courts and tribunals. (Ibid.) As far as obligations are concerned, a number of international crimes, the commission of which led to liability of the individuals, were created before the turn of the 20th Century. These crimes include piracy *jure gentium* war crimes, injuries to submarine cables, postal offenses and others (Bantekas B. and Nash T., International Criminal Law (2nd ed., 2002) p. 45); see also Shaw, above n 5, p.232). Many believe, however, individual criminal responsibility is established in the Charter of the IMT and subsequent judgments it gave. In the same decade, international conventions specified the responsibility of individuals. With the establishment the *ad hoc* tribunals, the jurisprudence of the

International organizations[6] in the latter phase of international law and international relations: law of cooperation. Sovereign states, though kept their predominance, could not uphold the fact of their singlehood international personality. Other entities, then, began to act in a manner that legal effect would be attached to their activities in international law.

Various scholars, at present, argue that legal personality has become the feature of not only international organizations and individuals but also that of multinational entities or corporations.[7]Accordingly, it is propounded, such entities, as international legal person, have the ability to acquire rights and assume obligations including enforcement of rights through bringing international claims.[8]In fact, it is fundamental in the contemporary international relations, to acknowledge the participation of a number of entities in the international arena. Therefore, propositions that transcend acts of such entities as devoid of legal effect would be ignorant of the reality and futile. This, in particular holds true for international organizations.[9]

---

concept developed. Finally, a permanent court of international nature that deals with, among others individual criminal responsibility was created evincing the status of the individual as a subject of international law. Cf: Alexander Orakhelashvil, The Position of the Individual in International Law, 31 Cal W. Intl. L. J 241 (2000-2001), pp. 241-276 (analyzing the above areas of contact between the individual and international law as insufficient to provide for individuals as legal person in international law.)

[6] International conferences were the dominant mode of diplomacy in the period following the 1648 Westaphilian peace. Among such, the congress of Vienna (1815) and the peace conferences of The Hague (1899-1907) are the popularly known. (See Amerasinghe, above n 2, pp.1-7; Shaw, above n 5, p. 162 and Klabbers, above n 4, p. 171). In the 19th century, other mechanisms such as associations and commissions were employed, for instance, in the case of the Rhine Commission (1815) and the European Commission for Danube in 1956. Within the same century, the World Anti-Slavery Convention, the ICRC and the International Law Commission, non- governmental associations were founded by the earnest effort of private citizens. With the turn of the 20th century, a breakthrough organization the League of Nations was established. This, in turn, was substituted in 1945 by the United Nations whose international personality was declared in 1949.

[7] Robin F. Hansen, The International Legal Personality of Multinational Enterprises: Treaty Custom and the Governance Gap, 10 Global Jurists 1 (2010), pp.1-129 (arguing MNES have state granted international legal personality); OECD Guidelines for Multinational Enterprise as quoted in Shaw, p. 224 (describing international practice dealing with such corporations); *Cf* : Jose E. Alvarez, Are corporations subjects of International law ? 9 Santa Clara J. Int'l L. 1(2011)

[8] Reparations for Injuries Suffered in the Services of the United Nations, Advisory opinion, 1949, ICJ Rep, p.174.

[9] Brownie had indicated the number of IOs in 1990 around 170. After four years, Peter Bekker counted 350 IOs. After similar periodic interval between the above two estimates, their number was claimed to be 7000. (Klabbers, above n 4, p.1 (notes)). According to Amerasinghe, however, their numbers range between 500 and 700 with 3:1 proportion to states. (Amerasinghe, above n 2, p.6 (notes).

2.2.1 Approaches To International Personality of International Organization

As indicated by Professor Shaw, all cooperation between or among states that end up with the establishment of some kind of arrangements should not be taken as if they are bestowed with legal personality.[10]Some of such engagements are not persons in the eyes of international law. Their international status varies from one to another case. This, in turn has resulted in more than one theory of international personality of international organization which will be discussed in the following sections.

I. Will Theory

Pursuant to the proponents of this theory, international organizations operate in the international arena only when states explicitly empower them, in their founding treaties, with legal personality of international nature.[11]States which sign the constitutive treaty determine whether organizations they establish should have legal personality distinct from themselves. Transcending the assertion of state-granted personality, the theory upholds positivism of international law. This proposition is best described in the following excerpt:

> *"Generally, international law is thought to be based on the freely expressed consent of states, and therefore, the same should apply to the creation of international organizations. It is difficult to go against states' wishes in international law, so when states have clear intentions concerning the legal personality of international organizations they have established, then those intentions must be respected."*[12]

Accordingly, personality of international organizations needs to be specified by contracting states expressly. This approach has been employed in the constitutive documents of the

[10] Shaw, above n 5, p.1187; See also Jan Klabbers, Institutional Ambivalence by Design: Soft Organization in International law, 70 Nordic JIL 403, p. 405(He describes that inter-cooperation has increasingly been organized through mechanisms that were deliberately kept at that fringes of international law or even outside it altogether. He cites the OSCE based on the non-binding Final Act of Helsinki, the Arctic Council based on non-binding instrument as examples).

[11]EsaPassivirta, The European Union: From an Aggregate of states to a Legal person?2Hofstra L. &Pol'ySymp. 371, p.4.

[12]Klabbers, above n 4, p. 42.

International Seabed Authority, the International Olive Oil Council, the Western Indian Ocean Tuna Organization and more recently the International Criminal Court.[13]

However, a number of treaties of international organizations that donot expressly endow international personality also exist rendering the will theory insignificant.[14] The influence of this doctrine has also diminished lately due to the collapse of communism.[15]Another problem of the theory lies on the situation where international organization that has secured its personality has been isolated by other subjects of international law from transaction i.e. no international person is "willing to enter into any engagements with it." In such instances, the will theory doesn'tgive any redress rendering its concept of personality empty.[16]Additionally, general international law is deviating from the will and interest of individual states' towards the realization of community interests which undermines the relevance of will of states in international law generally and as a basis if international organizations personality as well.[17]

II. Objective Theory

In contrast to will theory, the theme of this theory lies on the intention of the member states.[18]This intention is not expected to necessarily be crystallized into words. Consequently, even if states do not bestow express legal personality on an international organization, it can be deduced from the powers given to them. As per the analysis of Dr.Passivirta, the

[13] United Nations Convention on the Law of the Sea (UNCLOS), done at Mantego Bay, 10 December 1982 entered into force 16 November 1994, Art. 176 (The Authority shall have international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purpose; International Agreement on Olive Oil and Table Olives, done at Geneva, 29 April 2005, Art. 5(1) (The International Olive Council shall have international legal personality….) ; Convention on the Western Indian Ocean Tuna Organization, done at Mahe, Seychelles, 19 June 1991, Art. 8(1) (The organization shall have international legal personality and such legal capacity as way be necessary for the exercise of its functions & the fulfilment of its purpose…); UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Art.4 (The court shall have international legal Personality.)

[14]Passivirta, above n 11, p. 4.

[15] Ibid.

[16]Klabbers, above n 4, p.54

[17]KarstenNowrot, New Approaches to the International Legal Personality of Multinational Corporations towards a Rebuttable Presumption of Normative Responsibilities, ESIL Research Forum on International Law: Contemporary Issues, Graduate Institute of International Studies(HEI), Geneva, Thursday 26- Saturday 28 May 2005, Workshop No 7, P.8

[18] Shaw, above n 5, p. 1189.

objective theory suggests "If an organization operates in a sufficiently autonomous manner, it may possess legal personality *ipso facto* in addition to that conferred by constitute elements."[19]Therefore, on the basis of objectively viewed criteria international law determines the personality of international organizations. Professor Klabber has clearly expounded what Seyersted, the first exponent of the doctrine, meant:

> *"According to Seyersted, the legal personality of international organization follows the same pattern as that of states: as soon as an entity exists as a matter, i.e. meets the requirements that international law attaches to its establishment, the entity possesses international legal personality. For states, this follows from the acquisition of 'statehood'; for organizations, then, it follows from acquisition of 'Organizationhood.' Importantly, then the will of the founders doesn't decide on personality as a separate matter."*[20]

Elsewhere, Seyersted himself states "International organizations, like states, come into being on the basis of general international law when certain criteria exist, and these necessary criteria do not include a convention."[21]

Personality of international organizations will, thus, be an automatic feature once the entity attains 'Organizationhood'. This level will be inferred the possession of certain attributes by the body itself.[22] Although what these attributes include are not settled, one view contends that the creation of internal organs to discharge the functions on their own is among the criteria.[23]

Nevertheless, likewise the contract theory, the objective theory is considered defective. The major criticism is directed towards the theory's disregard of the will of states. If an international organization will always be clothed with personality, even when states intend to establish an organization devoid of legal personality, it would go against the interest of the

---

[19] Passivirta, above n 11, p. 4.
[20] Klabbers, above n 4, p. 55.
[21] F. Seyersted, International Personality of International organization. Do Their Capacities really depend upon Their Constitutions? (1964) 4IJIL 53 as quoted in Phillipe Gautier, The Reparations for Injuries Case Revisited: The Personality of European Union in Max Planck Year Book of United Nations Law (2000), p.335.
[22] Rosalyn Higgins, Problems and Process: International Law & How We Use It as quoted in Simon Chesterman, Does Asian Exist? The Association of South East Asian Nations as an International Legal Person 12 SYIL 133 2008, p. 203
[23]Gautier, above n 21, p.355 (describing the main criteria of organizationhood, as purported by Seyestered himself, is possession of distinct will.)

founding states. This overruling characteristic [of the theory] in turn, would elevate the theory to *jus cogens*.[24]

III. Presumptive Personality

Included among the approaches to international personality is one what Klabbers calls 'presumptive personality'. As envisaged in this approach, acts of international personality lead to the presumption of those organizations personhoods;[25]thus, a source of international personality. He asserts that a support for this pragmatic approachcan be found in the famous ICJ Advisory opinion: Reparations for Injuries Suffered Case. He summarizes his reasoning as follows:

> *"In an often quoted passage, the court held that 'fifty states representing the vast majority of the members of the international community, had the power in conformity with international law, to bring into being an entity possessing objective international personality recognized by them alone, together with capacity to bring claim.' The surprising element in this passage is that the court left it unspecified whether those fifty states had actually used their power to create an entity with international legal personality. The court merely presumed this to be the case, and as no one bothered to rebut the presumption, it survived."*[24]

The implication of his argument is that preceding acknowledgement of personality of international organization is not material. From their mere operation one may deem personality of such organizations.

Another scholar forwards similar opinion, though in his case international organizations are established subjects of international law and adopts the approach to other entities participating in the international plane. But, his argument relates to international personality and hence relevant for the discussion at hand as it clearly portrays the concept of 'presumption personality.'

According to this researcher, it is not in the interest of international community to exclude 'influential actors' from the ambit of international law.[26] Only those actors that cannot be

[24] Klabbers, above n 4, p. 55.
[25] Ibid.
[26] Nowrot, above n 17, pp.7-13

considered influential–due to their limited participation in the interactions of international arena-will not be beneficiaries of the presumption. Rather, they need to have an express grant of international personality.[27]

It should also be noted that those 'influential actors' will be accorded a rebuttable presumption. When it is demonstrated that a contrary normative expression "Or at least a sufficient uniform practice" of international community exist, the presumption can be refuted.[28]

IV. Implied Powers Theory

The dominating and widely endorsed[29] basis of international personality is the implied power theory. Exponents of this school of thought argue that personality of international organizations is derived from specific powers and functions, which cannot be exercised without a corresponding international status, endowed to them.[30]Personality is, thus, indirectly inferred, in this case, from the bestowed powers and functions. Due to this, it is also known as functional theory.[31]In the Reparation for injuries suffered advisory opinion, the ICJ opined "…by entrusting certain functions to it, with the attendant duties and responsibilities, [member states] have clothed it [the UN] with the competence required to enable those functions to be effectively discharged."[32]

In the analysis of Professor Alvarez, quoted below, the court has touched upon three distinct but correlated points of inference from which UN personality was implied:

> *(1) Necessity (since it was necessary to permit the organization to achieve the expressed goals indicated in the Charter)*
> *(2) Members intent (since they had decided to create an independent entity and not merely a means to harmonize the actions of separate states) and*

---

[27] Ibid.
[28] Ibid., p.14
[29] Passivirta, above n 11, p. 5; Niels M. Blokker and Henry G. Schermers, International Institutional Law: Unity with Diversity (3rd ed., 1995), p.979
[30] Passivirta, ibid.;Blokker and Schermers, ibid.
[31] Jose E. Alvarez, International Organization as Law- Makers (2006) p. 93
[32] Reparations for Injuries Case, [1949] ICJ Rep., p. 179

(3) The practice of the organization (since it had concluded treaties with states)."[33]

Transpired by this case is the fact that overall examination of aspects of IOs activity hints as to their status. International organizations have, thus, become entitled, by virtue of this functional theory, to rights, plainly with their correlative duties, on the international plane. This school of thought adopts a flexible view of international personality with expansive and equally limiting potential.[34]

Nevertheless, this observably influential theory is not immune from critics. For some scholars its defect begins with its failure to clarify the yardstick, as well as organs that determine functional necessity.[35] Its bias to the 'goodness' of international organization is another pitfall. Its assumption of IOs as "a good thing" is not representative of the reality, to some critics.[36]

2.2.2 Preliminary Conclusion on IOs Personality

As it has been discussed above, personality of IOs has been accepted in an almost consensual manner. But the grounds of recognition has diverged scholars. This has primarily resulted from ICJ's advisory opinion itself. Most of the theories trace their origin in the case. Admittedly, in one way or another, the court has touched upon elements of more than two theories. Observing this, Professor Alvarez states:

> *"Because of this mix of arguments, the court didn't clarify whether the legal status of UN arose because its members really intended the result, because such intent could be implied or because of the automatic operation of general international law whenever such institutions are created. While the court's reliance on 'intendment' suggests the first rationale, its conclusion with respect to non-members needs to recognize the objective personality of the organization suggested the second or the third."*[37]

Therefore, this failure of the court and the subsequent dearth of the jurisprudence, to clearly articulate the factors that indicate international personality, have led some authors to

[33] Alvarez, above n 31, p.134
[34] Ibid., p.135
[35] Klabbers, above n 4, p.38
[36] Ibid., p.37
[37] Alvarez, above n 31, p.133

stipulate basic requirements. Pursuant to Professor Amerasinghe, the following should be fulfilled:

(i) An association of states or international organization or both(a) With lawful objects and(b) With one or more organs which are not subject to the authority of any other organized communities than, if at all, the participants in those organs acting jointly;
(ii) The existence of a distinction between the organization and its members in respect of legal rights, duties, power and liabilities etc. (in the Hohfeldian sense) on the international plane it being clear that the organization was 'intended' to have such rights, duties, power and liabilities.[38]

In the opinion of the renowned international law Professor Ian Brownlie, the following must be present

(i) A permanent association of states, with lawful objects equipped with organs.
(ii) A distinction in terms of legal powers and purposes, between the organization and its members
(iii) The existence of legal powers exercisable on the international plane and not solely within the national systems of one more states.[39]

Slomanson, likewise, outlines the following prerequisites:

(i) A permanent association of state members with established objectives and administrative organs
(ii) Possession of some power that is distinct from the sovereign power of its member states and
(iii) Power exercisable on an international level rather than solely within national systems of its members.[40]

[38] Amerasinghe, above n 2, p. 32
[39] Ian Brownlie, Principles of Public International Law (6th ed., 2003), p.649
[40] William R. Slomanson Fundamental Perspective in International Law(4th ed., 2003), p. 163 as quoted in Reluca David, The European Union and Its Legal Personality 1993-2010 available on http://ssrn.com/abstract=1566492

The latter commentators deal with the membership and commonality objectives aspects of IOs almost identically whereas the former one includes IOs to membership not confining it to states. This is a recently observed practice. The suggestion of the first author on the other hand, condenses some elements together.

For the purpose of this study, thus, and the requirements are:

(i) Establishment of a permanent association of states or IOs or both, for the attainment of lawful objects, with administrative organs.
(ii) A distinction in terms of legal powers and purposes between the organization and its members
(iii) Existence of powers which would enable the organization to act in the international plane.

Another important point worth mentioning here is the consequence of international personality. It should be duly noted that those organizations fulfilling the above requirements are not to be considered as states[41] for all legal persons in the international legal system are not the same. This means: even if their personality is acknowledged, IOs are not to be equated with states- the original subjects of international law. The bare effect of IOs personality would be, then, entitlement to enjoy rights and assume obligations under international law. Therefore, no equivalence should be assumed. Let alone with states, IOs themselves do not acquire identical entitlements. This will depend on the competence of each organization which will be dealt with the coming sections.

Moreover, one needs to distinguish between international personality and personality at non-international level. The attainment of international personality would not imply IOs national legal capacity. The latter will be addressed in other ways. In some cases, constituent instruments of IOs explicitly stipulate the national juridic status of the organization they

[41] Amerasinghe, above n 2, p. 92 (Summarizes the court's view, in the Reparations for Injuries case, as not suggesting that IOs enjoying legal personality are not super- states, states or consider the same rights duties, capacities etc as states.)

create.[42] In such instances, member states would be bound to recognize the organization. States which are not party to the IOs may, in some cases, even be bound.[43] In others, the personality will be governed by the respective laws of national jurisdiction.[44]UK is the prominent example following this way. In UK, parliamentary action declaring the accord of personality to the concerned IO is necessary.[45]

2.3 African Union's International Standing

The African Union is established to attain important objectives common to the states of Africa and their people. The membership is open to states of the African continent only.[46] In reaching the objectives enshrined in the Constitutive Act, none of which appear to be contrary to international law, the principles sets forth there-in must be accorded.[47] These principles guide the Union in its interaction with its members and external parties. The principle depicts the rule of the Union towards the achievement of the Union's objective.

The union is also endowed with various organs, which have their own mandates.[48] These organs are internal bodies of the Union and belong to the organization and 'not to the member states'.[49] They function in accordance with the principles and rules of the Union. No doubt exists as to the fact that the enumerated competences of the Union include those powers exercisable at the international plane.[50] The overall observation of the Union structure indicates that the Union undoubtedly has international legal personality.[51]

---

[42] Id., p.40 (citing Art.IX (2) and VII (2) of FAO Constitution, Art.45 of the EBRD Agreement; Art VII (2) of the IDA Articles of Agreement; Art VI (2) of the IFC Articles of Agreement, Art IX (2) of the AFDB Agreement and Art.48 (1) of the CDB

[43]Amerasinghe, above n 9, p. 71 (explaining Switzerland's admission of UN legal personality due to the sole reason of agreement regarding its headquarters, even if it was not member of the organization.)

[44]Ibid., p. 76; See also Klabbers, above n 4, p. 49 (discussing the freedom of each legal system to develop its own requirements.)

[45]Amerasinghe, Ibid., p.73

[46] Constitutive Act of the Africa Union, Adopted on July 11 2002, entered in to force on May 26 2001[hereinafter Constitutive Act or CA], Art 29(1)

[47] Ibid., Art 3 and 4

[48] Ibid., Art 5

[49] Ibid.

[50] See, for instance, Ibid., Art 9, Art 13, Art 15

[51]NsonguruaUdombana, The Institutional Structure of the African Union: A Legal Analysis, 33 Cal. W. Int'l L.J. 69 2002-03, P. 83

There is also another reason to ascertain the international personality of the Union. The organization of African Unity is the predecessor of the African Union. It used to manage cooperation and coordination of among African states in their common affairs. But due to some limitations in its functions, as discussed in Chapter Three of this study, reconsideration of the organization was felt. African states observed 'the imperative need and a high sense of urgency to rekindle the aspiration of their peoples for stringer unity, solidarity and cohesion in a larger community of peoples transcending cultural, ideological, ethnic and national differences' and committed themselves to revitalize the continental organization [OAU]- in order for it to have a more active role and be more responsive to the demands of the prevailing circumstances.[52] As a reaction they decided to establish an African Union 'in conformity with the ultimate objectives of the charter of the OAU and the provision of the Treaty Establishing the African Economic Community.'[53] Implied in this is then, heads of states and governments of Africa didn't disregard the OAU totally. Rather, having the objectives and purposes of the OAU in mind and keeping it intact, addressed the problem by renovating the institution. Hence, the African Union didn't replace the objectives of the OAU.

Some doubts were raised as to the succession of rights, duties in functions of the OAU immediately after the adoption of the AU CA. the problem would have been solved by the inclusion of a provision stipulating so. But it didn't happen except for assets and liabilities of the OAU.[54] However, assessment of subsequent practice of the Union suggests the succession. Maluwa puts the scenario in the following words: 'where the creators and the members of the new organization are exactly the same as those of the predecessor organization, such succession in practice been granted, even where the constituent

[52] Sirte Declaration, EAHG/Draft/ Decl. (iv) Rev.1 Fourth Extraordinary Session of the Assembly of Heads of State and Governments, 8-9 September 1999, Sirte, Libya (hereinafter Sirte Declaration), paragraph 5
[53] Ibid., Paragraph 8
[54] Constitutive Act, Art 33(1)

instrument of the new entity is silent on the matter. This is certainly the case regarding the succession of the OAU and the AU.'[55]

If it is ascertained that the AU has succeeded OAU in legal terms then it will automatically be an international person with rights and duties as its predecessor.

2.4 Regional Organizations in International Law

Cooperation is being undertaken in international law, both at government or state level, in socio-politics, economy and trade matters as well as in fields of peace and security. Regional organizations' roles are also significant. In some instances, regional mechanisms even yield greater progress particularly where the similarity and interconnection among the members of the region is observable.[56] The establishment of commissions such as ECA, ECE, ESCAP, ECLA, and the UN displays effectiveness of regional approaches.[57]

Regional organizations are loosely regulated by international law except those dealing with maintenance of peace and security. The latter are ones governed by the strong legal regime namely the United Nations Charter which by some scholars has been described as constitution of international community.[58] In this instrument, the criteria that are expected to be met by regional arrangements and agencies have been specified: the link and the consistency requirements.

The link test demands some commonality among the members of the 'to be' established organization. However, as one can be misled from the word 'regional,' territorial proximity is not mandatorily needed.[59] Some degree of spatial proximity cannot be dropped though.[60] If

---

[55] Tiyanjana, Maluwa, From the Organization of Africa Unity to the Africa Union: Rethinking the Framework for Inter-state Cooperation in Africa in the era of Globalization, 9 U. Botswana L.J 49 2009, P.55

[56] Bowett, above n 1, p.166.

[57] Ibid.

[58] BardoFassbender, The UN Charter as Constitution of the International Community, 36 Colum. J Transnational L 529 (1998) p. 529; Pierre –Marie Dupuy, The Constitutional Dimension of the Charter of the United Nations Revisited in 1Max Planck UNYB 1997, p. 33 (describing the charter as the basic covenant of the international community and the world constitution in some aspects.); Nicole J. Schrijver, The Future of the Charter of the United Nations , 10 Max Planck UNYB 2006, P.34

[59] W Hummer and M. Schweitzer, Comment of Art 52, in B. Simma et al (eds.,) The Charter of the United Nations: A Commentary (2nded.,I) (2002) P.822

members share economic, socio-cultural and political factors, they need to be considered as fulfilling the conditions.[61]

The other is the consistency requirement pursuant to this, a regional organization required to adhere to the purposes and principles of the UN Charter. This should be reflected on both the constitution and activities of the organization.[62] Upon the fulfilment of these preconditions, the title of regional organization would be acceptable.

However, as pointed out earlier, Art 52 of the Charter which stipulates the prerequisites deals with IOs established for the purpose of maintaining peace and security or collective self-defense. Thus, the relevance of the provision to inter-state relations, other than maintenance of peace and security, is none except in the case of organizations of a multi-purpose nature. In other words, where a regional organization engages simultaneously in various fields such as economic cooperation, sustainable development, etc. along with peace and security, the above requirements will implicitly apply. Beyond this, organization such as river commissions, fisheries etc. are not to be regulated by the stated provision. What is equally important to be noticed is that there is no provision that underplays the engagement and development of regional organizations in other fields not covered by Art.52 and chapter VIII of the charter in general. Rather, founding constitutions or treaties of such organizations and general principles of international law would primarily be of some avail.

2.5 Power And Competence of International Organizations

Ability to act in the international sphere necessitates the determination of scope and demarcations of such entitlement. International persons are not similar as to their capacity.

---

[60] Ibid.

[61] The Egyptian delegation suggested at the San Fransisco conference the following definition: "There shall be considered as regional arrangements organization of a permanent nature grouping in a given geographical area several countries, which by reason of their proximity, community of interests of cultural or linguistic, historical, or spiritual affinities make themselves jointly responsible for the peaceful settlement of any disputes which may arise… as well as for the safeguarding of their interests and development of their economic cultural relations." But, this definition is rejected for being too restrictive ,12 UNCIO, 850, 957 as quoted in Mutlaq Al – Qahatani, The Shangai Cooperation Organization and the Law of International Organizations, 5 Chinese Journal of International Law 129 (2006), pp. 131-132

[62] Hummer and Schweitzer, above n 59, p.825

Capacity is general in nature in the case of states.[63]This does not, however, hold the same for other international entities. IOs would have ability and capacity to act so long as it is carried out in pursuit of their functions and purposes. This will justify the manner and matter of acts of IOs. To state a concrete example, the International Tin Council can exercise its general 'capacity to contract' concluding contracts relating to tin.[64] Likewise, the OECD, an economic organization, cannot enter into a military pact, which is beyond its competence.[65]

In the contemporary study of IOs, discussions relating to competence and responsibilities dominate by far. The 1970s hot debate on international personality aspect of IOs has given way to matters related to competence. International tribunals have forwarded their opinions. Scholars have investigated the issue repeatedly. For the purpose of this study, some remarks on the matter need to be made. Because, obviously, any review of acts of IOsneed to expound and ascertain the nature, legality and validity of the same. In doing so, examination of powers and competences at both specific organs and overall organizations level will be conducted. Due to the non-comprehensive nature of IOs capacity, specific competences they enjoy need to be assessed in light of the legal basis of their power.

2.5.1 Foundations of Power of International Organizations

A new organization or an existing one can be endowed with powers. States invest powers on IOs mainly through treaties. Treaties destined for this purpose are subdivided into two: Constituent treaties and Contractual treaties.[66]

---

[63] R. Wessel, Revisiting the International Legal Status of the EU, 5 European Foreign Affairs Review 507 (2000), p. 511; see also DapoAkande, The Competence of International Organizations and the Advisory Jurisdiction of the Court of Justice, 9 EJIL 437, p.443

[64] P.H.FBekker, The Legal Position of Inter-governmental organizations: A Functional Necessity Analysis of Their legal status and Immunities (1994) as quoted in Wessel, Ibid., p.510 (note)

[65] Klabbers, above n 4, p.60

[66] DaneshSarooshi, Some Preliminary Remarks on the Conferral by States of Powers on International organizations, 4 New York University Jean Monnet Working Paper 1(2003) available at http://www.centers.law.nyu.edu/jeanmonnet/archive/papers/03/030401.pdf.html; p. 4See also Niels&Schremers, above n 29, p. 23 (Concurring with treaties as the most usual form, they also maintain informal agreements such as decisions of governmental representatives in a conference, as in Asian – African Legal Consultative Committee, Inter-American Defence Boards and International Wool Study Group, establish IOs.

I. Constituent Treaties

In most cases, IOs are created and vested with power by constituent treaties. Beyond expression of consent, such treaties depict the organizations' constitutional order. This dimension of the treaty is derived from its feature ofcreating various organs of the organization.[67] In the words of one commentator, 'such treaties, after giving birth to the organization, undertake 'control of that same treaty at the expense of the parties' authority, and operates on the basis of a *kompetenz-kompetenz*…'[68] Constant practice by the organization itself and contracting states towards it and mode of interpretation distinguish it from multilateral and bilateral treaties.[69]

II. Contractual Treaties

In limited cases, states confer power on IOs by mere conclusion of treaties. Dan Sarooshi, a scholar who has conducted an in-depth study on the matter, cites the post WWII Peace Treaty of the Four Powers.[70] Pursuant to this treaty, the General Assembly was given power to decide on the future of the Italian colonies where the four powers could not reach an agreement within a year of the entry into force of the treaty, on the matter. Unarguably, this was an *ad hoc* power.[71]

Conferral of such power on a permanent basis has also been witnessed. The recent endowment of power of referral and deferral on the Security Council as per Art.13 and Art.16 of the Rome Statute respectively is a case at hand. Accordingly, the Security Council has the power to refer situations to the prosecutor of ICC, in which one or more crimes, within the jurisdiction of ICC, appears to have been committed. In the same manner, investigations may be suspended by the council and prosecutions be stopped for renewable

[67] Brownlie, above n 39, p 657; Blokker N., and Wessel R., Updating International Organizations, 2 International Organizations LR 1 2008, p.1
[68] Catherine Brolmann, The Institutional Veil of Public International Law International Organizations and The Law of Treaties (2007), p.113
[69] Shaw, above n 5, p.1194
[70] Sarooshi, above n 66, p.9 (Note 11)
[71] Ibid., pp.9-10

12 months period. This conferral is made by Rome Statute which is not an establishing document of the Security Council or the UN in general.

It should, however, be noticed that in cases where such power is given to an IO or a specific organ, the establishing instrument or the constituent treaty must allow, or at least not prohibit, the exercise of the newly granted power.[72] In the case stated earlier, had it not been for the chapter VII of the UN charter (enforcement actions of the council), the empowerment would have resulted in *ultra vires*.[73]

2.5.2 Constituent Instruments As A Basis of Competence

Constituent instruments envisage a general competence, designated as capacity, which means activities an organization engages into achieve its functions and purposes.[74] General conditions to act such as to conclude treaties bring international claims etc. are, thus, indicated in these founding documents. Besides, more specific and concrete powers, usually termed as competences, are also described in constituent instruments.[75] In the Agricultural production and conditions of admission case the ICJ has confirmed that constitutions of IOs underpin their power, both general and specific ones.

Such granting of power to act may be made through explicit attribution in the constitution or by implication in the same.

---

[72] Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa, Advisory Opinion of June 7th 1955, Separate Opinion Lauterpacht J, ICJ Rep 1955,p. (stating "organization cannot accept the fulfilment of a task which lies outside the scope of its function as determined by its constitution.")

[73] Prosecutor *vs.*DuskoTadic, ICTY, Appeal Chamber, Decision on the Defence Motion for Interlocutary Appeal on Jurisdiction, 2 Oct. 1995 available at http://www.icty.org/x/cases/tadic/acdec/en/51002.htm accessed on Jun 2011(referring art.41 as the pertinent provision to establish ICTY) see also R. A Kolodkin, 'Ad hoc' International Tribunal for the Prosecution of Series Violations of International Humanitarian Law in the Former Yugoslavia 5 Crm. L. F. (1995); Cf: A. P. Rubin,' An International Criminal Tribunal for the Former Yugoslavia?' 6 Pace int'l L. Rev. 7(1994) pp. 7-17

[74] Sarooshi, above n 66, p.21

[75] Klabbers, above n 4, p.279

I. Attributed Powers

The basic premise of this doctrine lies in its consideration of IOs as offspringof states. It, then, proceeds advancing that member states determine in what manner an IO acts defining its mandate in the constitution of the organization. Any operations of the organization must be grounded on powers specifically given to them; hence, no activity beyond those enumerated in black and white. This doctrine is an aspect of positivist international law. The assertion, in the Lotus case, that restriction on the independence of states was not to be presumed transcends this perception.[76] Formerly judge of the ICJThirlway, though relating to jurisdiction of international tribunals has advocated explicit power stating:

> *"jurisdiction or competence is not, in the sense in which those terms are used in relation to a dispute, a general property vested in the court or tribunal contemplated: it is the power, conferred by the consent of the parties, to make a determination on specified disputed issues which will be binding on the parties because that is what they have consented to."*[77]

IOs, in the case of Thrilway international tribunals, cannot outgrow and remain confined to powers that has been specified in the constituent instruments and sanctioned by the consent of states. The clause of domestic jurisdiction is a dimension of this doctrine.[78] In many IOs, such clauses delineate the scope of IOs activities vis-à-vis its member states. The clauses are features of IOs irrespective of the diverging views as to their current significance.[79]

The demarcation underlined by the doctrine of attributed powers pose some problems. Primarily, it will subordinate IOs to the will of states. The 'stick-to-enumerations' proposition will, in the final analysis, render IOs to be 'vehicles of state members'.[80] Equally

---

[76] Ibid., p.64.
[77] Brown, the Inherent Power of International Courts and tribunals, 76 BYIL, p.209.
[78] Niels and Blokker, above n 29, pp 142-143 (explains the introduction of domestic clause as a guarantee that the organization would stay out from internal affairs of its members.)
[79] Those who consider the provision as obsolete include Brownlie, I., Principles of Public International Law (5th ed., 1998), P.55; Bernhardt, R., Domestic Jurisdiction of States and International Human Rights organs, 7HRLJ 205 1986, p. 205; Leo Gross, Domestic Jurisdiction, Enforcement Measures and the Congo, AustYIL 137 1965, P.140: Cf: The Position of the UN Secretary General in UN Press Release SG/SM/6613, June 26 1998 Thirty-fifth annual Ditchley Foundation Lecture given by Secretary-General Kofi Annan at Ditchley Park, United Kingdom
[80] Klabbers, above n 4, p.66.

again, for it is hardly possible to foresee and exhaustively list powers of IOs, the doctrine of attribution would incapacitate them to deal with progress and development.[81]

II. Implied Powers

The doctrine of implied powers is the heart of IOs. It serves as the basis of both personality and competence of IOs. The perils of the non-comprehensive capacity of IOs, as compared to that of states, and the demise of the principle of attribution are mitigated by virtue of this doctrine. To a great extent, operation of IOs is facilitated by this same doctrine.

A break through assertion of implied powers is made in the famous Reparation for Injuries Suffered Case. The pertinent paragraph of ICJ opinion in the case reads:

> *"Under International Law, the organization [the UN] must be deemedto have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."*[82]

Accordingly, the mission of an IO determines the scope of its acts. Not only have the visible powers mattered, but also the abstract ones as well. In implying powers terms will be read into the organization's statute with the purpose of giving effect to the intention of state parties to the constitutional treaty. Its rationale is, then, both in its original and present version, to ensure the effective operation of IOs.[83] Its application is not, therefore, limited to constitutions that include clauses indicating its use as in the case of EUMETSAT, European Centre for Medium-Range Weather Forecasts or EC. It also governs constitutions that do not employ such 'explicit implied powers provision.[84] This is a result of the fact that implied powers are assumed for the sake of efficiency rather than permission of member states. Consequently, there will be inference of powers so long as it is essential for the performance of duties.

---

[81] Ibid.
[82] Reparations for Injuries Suffered,1949 ICJ Reports, p.182-183.
[83] See the discussions of Klabbers, above n 4, pp.67-73 (he contends two phases of implied powers doctrines i.e. the 'innocent version' of in the 1926 advisory opinion and the wide version of the doctrine envisaged in the Reparations for Injuries case.); See also Alvarez, above n 31, p.92
[84] Niels and Blokker, above n 28, p.175.

Notwithstanding the concurrence on points discussed so far, what the term 'essential' entails has brought division of opinion. One line of argument contends that essentiality should not be taken as meaning 'absolutely essential' or 'indispensable'.[85] It suffices if the power to be implied would enable the organization to function to its full capacity as expressed in its objects and purposes.[86] Where efficiency of the organization justifies the implication of the power, it can be considered as 'essential'. Professor Alvarez, on his part, elaborates the term 'essentiality' as permitting 'any action that is not strictly speaking essential' or 'necessary' but is merely desirable and consistent with the Charter powers or aims.[87]

Proponents of this line of thought list a number of ICJ decisions in their support. The reasoning of the court in the Reparation for injuries suffered case, in which UN's right to bring claims is asserted, is based, for them, on the need to ensure efficient performance and to afford effective support to its agents; and is not rendered, as they argue, on the analysis of the fact whether the non-recognition of the right would make the organization unable to perform its function.[88] The recognition of the presumption, in the certain Expenses case, that acts undertaken, for the fulfilment of one of the stated purposes of the UN, would not be *ultra vires* is also cited in supporting their stance.[89] Similarly, in the Effect of Awards case, the court's acknowledgment of power of the General Assembly to establish a tribunal justifying it as being essential to ensure the efficient working of the secretariat and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity is pursuant to the proponents, evidence of their expansive approach.[90]In general conditions of international life dictate the route of inference of powers.[91]

Inversely, others emphasize on the need of restrictive understanding of implied powers. To them, an in-between-words reading, rather than a functional or purposeful one, serves as a

[85] E. Lauterpacht, The Development of the Law of International Organizations by the Decision of International tribunals; 152 Rdc (1976, IV) IV87 at 430-432 as quoted in Akande, above n 63, p.444
[86] Akande, Ibid., p.445.
[87] Alvarez, above n 31, p.93.
[88] Akande, Ibid., p.445.
[89] Ibid; See also Klabber, above n 4, p.71.
[90] Akande, ibid.
[91] Ibid.

ground of implication. In their opinion, implied powers emanate from concrete provisions of constituent documents.[92]The prominent exponent Judge Hackworth had, in the Reparation case, maintained: "powers not expressed cannot freely be implied. Implied powers flow from a grant of express powers, and are limited to those that are necessary to the exercise of powers expressly granted."[93] Once opinion of minorities,thislimitative construction lifted itself to majority in the Legality of the Use by a State of Nuclear Weapons Case. Therein the court stated:

> *"[i]nterprated in accordance with their ordinary meaning, in their context and in light of the object and purpose of the WHO constitution, as well as of the practice followed by the organization, the provisions of its Article 2 may be read as authorizing the organization to deal with the effects on health of the use of nuclear weapons, or any hazardous activity, and to take preventive measures aimed at protecting the health of populations in the event of such weapons being used or such activities engaged in.*
>
> *The question put to the court in the present case relates, however, not to the effects of the use of nuclear weapons on health, but to the legality of the use of such weapons in view of their health and environmental effects. Whatever those effects might be, the competence of WHO to deal with them is not dependent on the legality of the acts that caused them. Accordingly, it does not seemto the court that the provisions of Art.2 of WHO constitution, interpreted in accordance with the criteria referred to above, can be understood as conferring upon the organization a competence to address the legality of the use of nuclear weapons, and thus inturn a competence to ask the court about that….The reference in question put to the to the health and environmental effects, which according to the WHO the use of a nuclear weapon will always occasion, does not make the question one that falls within WHO's functions."*[94]

Here, the court appears to be oriented to the 'stated purpose' justification of implied powers. A precise link to explicit powers or purposes is required. However, this is an inconsistent one to previous opinions rendered by the ICJ itself.[95]

Even though both threads of arguments equally appeal to many, the liberal interpretation seems to be widely accepted. And this has made IOs adaptive to developments, within or

---

[92] Tunik, Legal Bases of International Organizations Action in R. J. Dupuy (ed.) A handbook of International Organizations (1988) at 265-269 as quoted in Akande, above n 53, p.445.
[93] Reparations for Injuries, 1949 ICJ Reports 174, Hackworth J. Dissenting, p.198; See also Bekker, as quoted in Wessel, above n 64, p. 517 (arguing necessary and essential to be applied literally and strictly).
[94] Legality of the Threat and Use of Nuclear weapons, Advisory opinion, 1996 ICJ Rep., p.72.
[95] Akande, above n 63, p.446.

otherwise, of IOs. However, controls have been set up on implied powers. Actions which are expressly ruled out from the mandate of an organization; acts incompatible with aims and purposes of constitutions of IOs; existence of a proper organ to act and actions directed to states, on which an organization does not have jurisdiction preclude implication of power.[96]

2.5.3 *Vires* Acts of International Organizations

In a manner resembling the confinement of movements of fish to water, activities of international organizations are limited to constitutional mandate. They are expected to remain within the ambit of their constitutive instruments. No matter how deep or high they interact depending on teleological or other modes of interpretation with expansive effects, IOs are not to abuse or misuse such justifications and act contrary to their constitution. The areas envisaged within the governing documents of the organizations are their sphere of activities in the *strictu sensu*. Transgressions of this destined territory will be ruled by the doctrine of *ultra vires*.

I. Parties to Challenge

Objections to *ultra vires* acts may be explained from a number of perspectives. Firstly, the acts may be detrimental to the interests of member states for the accomplishment of some objectives. For this purpose, therefore, states allocate and grant powers and competences to them. Any excessive activities would then encounter this intention of member states.[97] The effects sometimes extend to non-members as well.[98] Categorically, thus, it may be said that states can challenge such *vires* acts. Judge Bustamante, in his dissenting opinion of Certain Expenses case, had highlighted states' right to challenge, for a mistake of interpretation, actions of IOs in order to determine departures from the UN charter.[99] This reasoning

[96] Ibid.
[97] Yoshio Kwashima, Some Aspects of Illegal Acts of International Organization, 16Osaka University Law Review 13 (1968) p. 17 (describing the possibility of arbitrary acts of IOs encroachment on members in the direction of achieving their purpose.)
[98] Alvarez, above n 31, p.93 (maintaining, as indicated in the Reparations Case, UN can claim damages as against non-member states.)
[99] Certain Expenses Case, 1962 ICJ Rep, p.304.

logically and equally applies to constitutions of other IOs. Practically, states also have objected to such acts both individually and collectively. In the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia requested the invalidity of SC arms embargo resolution for it had disregarded its less possession of arms and unwittingly contributed to the genocide of the Bosnian population and in effect, it violated a norm of jus cogens-prohibition of genocide in international law.[100]Portugal and South Africa also contested SC's handling of the Southern Rhodesia situation.[101] IOs had, likewise, objected, and in fact acted contrary to, acts they considered ultra vires. The Arab League invited its members to ease the implementation of SC Resolution adopted in relation to the Lockerbie incident.[102] OAU, on its part, went far and called African Nations to suspend compliance with the Resolution.[103]

Secondly, IOs themselves display vested interest in pronouncing such acts invalid or illegal. Acts that violates competence and separation of powers in general, provides ground for invalidation. The internal legal system of the organization may be affected as a consequence. Organs with power of interpretation of the constitution ascertain nature and extent of powers.[104] This also has implications to organization's right of challenge.

Non-governmental or non-state related parties can also be affected by *vires* acts. Normally, IOs transact with domestic legal persons as in the case of contract for constructing a building or contract to provide supply.[105]*Vires* activities of an organization may, thus, produce negative impacts on such parties. As a consequence, a request for invalidation may

[100] Klabber, above n 4, p.240.
[101] Leo Gross, Voting in the Security Council: Abstention in the Post 1965 Amendment Phase and its Impact on Art.25 of the Charter, 63 AJIL 315 (1968) 316-318 as quoted in David Schweigman, The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice (2001) p.206
[102] Ibid., p.206 (note.)
[103] Ibid.
[104] EbereOsieke, The Legal Validity of Ultra Vires Decisions of International Organizations, 77 AJIL 239 (1983), p.242.
[105] Amerasinghe, above n 2, p.197.

be submitted. Even if presented before domestic courts, which will not be the case always, the applicable law will be international law.[106]

II. Nature of Ultra Vires Acts

Ultra vires acts include decisions and resolutions undertaken in pursuant to constitutional and subsidiary powers spelled expressly or impliedly.[107]Violations of constitutional rules or principles along with subsequent legislations, which are, usually, termed internal law of the organization, clothes the act with a vitiating element[108] Acts that contravene rules of international law and general principles of international law also fall within it.[109]

Ultra vires acts are subdivided into substantive and procedural. Even though the difference between the two is not definitively lined, effect on policies of the organization of the act may highlight their distinction. This is to mean that one may categorize all acts affecting policies of organizations as substantive *vire*s acts.[110] These include acts relating to budget, allocations of functions and powers, appointment of executive heads, amendments to constitutions, admissions and terminations of membership etc.[111] On the other hand, procedural *ultra vires* acts emanate from non-observance of specified procedures.[112] Some examples would include: failure to appoint a committee whose recommendation is required for a decision by a superior organ, adoption of a matter that was not placed on the agenda of an organ in accordance with the prescribed procedure, or adoption of a decision by the wrong organ or by a smaller majority than that laid down in the rules etc.[113]

Vires acts may result in invalid or illegal consequences though usually employed interchangeably. Strictly speaking, invalid acts result from erroneous or misappreciation of

---

[106] Ibid.
[107] Ibid., p.196.
[108] Christian Ahlborn, The Rules of International Organizations and the Law of International Responsibility, ACIL Research Paper no. 2011-03 (SHARES service), finalized 26 April 20111 (www.sharesproject.nl) p.7.
[109]Appeal Relating to the Jurisdiction of the ICAO Council Case, (India v. Pakistan) 18 August Judgment, 1972 ICJ Rep[hereinafter the ICAO Case],p.109
[110] Osieke, above n 104, pp.243-244
[111] Ibid.
[112] Ibid., p.245.
[113] Ibid.

facts.[114] A breach of legal rule is not required in invalid decisions as in illegal ones. The following hypothetical example concerning the SC elaborates the distinction:

> *"An invalid but not illegal decision would be an Art.39 [of the UN charter] determination by the SC that a breach of the peace had occurred following reports that the territory of state A had been violated by an invasion of state B. If it would later turn out that the invasion was conducted by troops of state A in disguise, the decision would be invalid, as it was based on factual assumptions that proved to be erroneous. In this case the decision would not be illegal since the council did not breach a legal rule which is binding on it; it merely made an error in judgment."*[115]

III. Legal Status And Effects Of Ultra Vires

In circumstances where the constitution of an IO deal with consequences of *ultra vires* acts, the respective provisions of the constitution apply. The European Community Treaties, for example, have empowered the CJEC to supervise the acts of the European Council and the European Commission. The grounds of review are a lack of competence (jurisdiction), substantial violation of procedural requirements, infringement of the EEC treaties & related rules and misuse of power. Most unlawful acts appear to be included here. In general, where such a legal framework has been incorporated, *ultra vires* issues will be governed accordingly.

The problem is in the absence of such mechanisms. Though such scenes are handled inconsistently, observations of the prevailing practice suggest some points. To beginwith, ithas been asserted that acts discharged for the purpose of attainment of objectives are not to be presumed *ultra vires*.[116] Judge Bustamante also reiterates that each organs of UN are deemed careful in their actions to comply with the prescription of the UN Charter.[117] Therefore, unless a complaint is lodged, *ultra vires* acts are considered within the law and are accorded the consequent legal effects. *Express verbis*, their legal status is equivalent to those done within power.

---

[114] Schweigman, above n 101, p.205.
[115] Ibid.
[116] Certain Expenses Case, 1962ICJ Rep., p.205.
[117] Kawashima, Above n 97, p.31.

The fate of *vires* acts, against which protest has been voiced, however, is divided between two opinions. Some argue that such acts are null and void *ab initio*. They oppose such things called voidable acts of IOs. Voidability cannot be a solution in international law. Professor Amerasinghe, one of the two major supporters of this stance, argues:

> *"In general invalidity of acts involves the void ability of those acts. This means the act produces all its effects as long as it is not annulled by the competent organ. Thus, the invalidity of the act depends on how effective recourse is to the competent organ. In the case of IOs, however, there is nothing comparable to the remedies existing in national law in connection with administrative acts. Hence, the concept of void ability cannot be applied to the acts of IOs. The act had to be either an absolute nullity or fully valid."*[118]

However, Professor Yoshio Kawashima doubts this aspect of the position. He prefers to abstain from distinguishing voidability and nullity on the sole basis of existence of a review organ. He holds that determination of nullity equally requires evaluation by a review body.[119] In this line of argument, the import of domestic administrative law principle to IOs and the assumption of the need of independent judicial organ are not acceptable:

> *"…it is to be noted, however, that even in the absence of the express provisions (concerning illegal acts) in the basic instrument, it cannot be necessarily maintained… that there is no means of recourse available to the members of the organs of an organization for reviewing illegal acts. The fact that at the present stage of development of international organizations, the problem we have dealt with is only about to emerge as a practical concern of international life."*[120]

Moreover, for Osieke, this proposition produces more problem than it solves. He rejects nullity as a solution except in cases where this is incorporated in constitutions of IOs.[121] Otherwise, *ultra vires* actions of IOs need to be rendered devoid of legal effect from the date of their invalidation. For Osieke, this is evinced in the practice of IOs.[122] Special character of decisions of IOs also demand, as he contends, voidability:

> *"Many of their decisions, such as those relating to the admissionof new members or the creation of committees or subsidiary organs, very often become effective immediately after adoption, and it would be unrealistic to maintain*

[118] Amerasinghe, above n 2, p.212.
[119] Kawashima, above n 97, p.31
[120] Ibid., p.35.
[121] Osieke, above n 104, p.244.
[122] Ibid.

> *that all the actions taken by the organization and its organs, as well as third parties, should be considered as absolute nullities on the basis of the subsequent invalidation of the substantive decisions by a review body. The fact that these acts are only voidable may not be entirely satisfactory, but the alternative [absolute nullity] would lead touncertainties and chaos, which would weaken the effectiveness of IOs."*[123]

In the present author's opinion, similarly, measures taken to redress defects of IOsneed, as much as possible, to be immune from affecting their influencing capacity,because, their effectiveness is paramount to the international community. The state-centric international law loop holes are rectified by IOs. They adhere to values of the international community.[124] Ensuring their orderly operation is crucial. Seen from this perspective, nullity, undoubtedly, jeopardizes their functioning.

Substantive *ultra vires* acts will continue to produce legal effects and lose this feature after invalidation.[125] Procedural irregularities, on the other hand, will vitiate acts only where wrong decision or miscarriage of justice ultimately result.[126] This is astutely reflected in Judge Dillard's separate opinion in the ICAO case: "It is, of course, not impossible to contemplate a situation of gross abuse of procedural requirements leading to a miscarriage of justice. In such a situation the validity of the decision adopted by a subordinate adjudicating body may be legitimately challenged on appeal."[127] Wrong decision or miscarriage of justice will be determined upon the appreciation of specific factual situations.

---

[123] Id., p.245
[124] Manfred Laches, Legal Framework of an International Community, 6 Emory Intl. L. Rev. 329 (1992), p.334.
[125] Osieke, above n 104, p.244.
[126] Id., p.247.
[127] ICAO Case, Separate Opinion Dillard J., 1972 ICJ Rep,p.127

CHAPTER THREE

THE NEED FOR, MECHANISMS AND EXPERIENCES OF REVIEW SYSTEMS IN INTERNATIONAL ORGANIZATIONS

3.1 The Need for Mechanisms of Review

Control of IOs has primarily been achieved through the insertion of limitative doctrines such as conferred powers, implied powers and *ultra vires* in constitutive documents.[1] Such approaches retain their significance. Yet more recently, institutional mechanisms are being incorporated in systems of IOs and receiving better acceptance. The facts that necessitate this development are briefly summarized below.

i) Sovereignty of Members vis-à-vis Independence of the Organization

It is repeatedly witnessed that members end up in conflict with IOs to which they are parties. Since IOs have powers only to affect the surrendered part of states' sovereignty, excessive encroachment would face drastic opposition. A careful analysis needs to be made not to exceed the line. Additionally, organs of IOs should not trespass this territory and scratch the '*domain reserve*' of members. In relation to UN intervention, one UN official has described this sovereignty-independence tension as critical.[2] The frequent plea of domestic jurisdiction clause testifies to it.[3] The swing therefore should be balanced otherwise, as Klabbers describes it, both the members and the organization can take each other hostage for the power of members extends to handling their issue outside the organization and that of the organization to impair cooperation or integration as the case may be.[4]

---

[1] Jan Klabbers, Constitutionalism Lite, 1 International Organization Law Review 31, pp38-41

[2] Christopher Joyner, The United Nations And Democracy, 5 Global Governance 333 (1999), P 336.

[3] For example, regarding the UN Nolte states that Art. 2(7) has been invoked frequently but it has not proved to be an effective tool for denying the United Nations the power to act. He emphasizes that the provision is directed to protect states from acts of the UN and not against acts of other states even though sometimes it has been understood as embodying the general principle of non intervention. See for more, Nolte, Article 2(7) in Simma, B., *et al.* (eds., 2nd ed.), The Charter of the United Nations: A Commentary (2002).

[4] Klabbers, above n 1, p.44

Moreover, the different perspective of states and IOs with respect to what warrants implication of power can be best resolved by naming a watchdog than setting 'criteria or definitions'.[5] Allegation of such kind ought to be determined by a reviewing body.

Not only these, assurance of legitimacy and legality along with certainty demands the same. Most organs of IOs are provided with political discretion. Discretionary powers are not absolute and equivalent to arbitrary.[6] Within the range of the discretionary freedom, the appropriate act only should be selected. As judge Jennings accurately observed in the Lockerbie Case:

> *"All discretionary powers of lawful decision making are necessarily derived from the law, and are therefore governed and qualified by the law. This must be so if only because the sole authority of such decisions flows itself from the law. It is not logically possible to claim to represent the power and authority of the law, and at the same time, claim to be above the law."*[7]

Exploring the matter, Amerasinghe has identified three grounds of illegal discretion exercises: improper motive, substantive irregularity and procedural irregularity.[8] These factors could result in the abuse of discretion and ultimately undermine legality and legitimacy. Assigning a body for such review purpose, thus, establishes and increases legitimacy and certainty.[9]

ii) Staff vis-à-vis Organization's Administration

As any corporate person, IOs perform their day to day activity through natural persons.Organizations, thus, need to employ their own staff. The basis of employment can

---

[5] Schremer H. and Blokker N., International Institutional Law: Unity within Diversity (3rd., 1995), p.159. (They assert that judicial organs are effective to decisively define scope of implied powers)

[6] Ballo v UNESCO, ILO Administrative Tribunal, Twenty-Eighth Ordinary Session, Judgment Nº 191(1972), (English Translation) [hereinafter the Ballo Case], para. F [The Tribunal stated that 'Discretionary power must not…be confused with arbitrary power].

[7] Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, 1998 ICJ Rep.(hereinafter Lockerbie case), Dissenting Opinion , Jennings J., P.110

[8] Amerasinghe, Principle of the Institutional Law of International Organizations (2nd ed., 2005), pp.303-306

[9] Erika De Wet, The Chapter VII Powers of the United Nations Security Council (2004), p.119

be statutes or contractual services.[10] Whatever the source, employee-employer relationships give rise to a number of claims and disputes. Disciplinary measures and discretionary decisions usually constitute grounds of review. As discussed in Carew case by WBAT, in disputes regarding disciplinary powers one must inspect:

> *"(i) the existence of the facts,(ii) whether they legally amount to misconduct,(iii) whether the sanction imposed is provided for in the law of the World Bank(iv) whether the requirements of due process were observed…"*[11]

In discretionary decisions, on the other hand, the assessment focuses on

> *"whether that decision was taken with authority, is in regular form, whether the correct procedure has been followed and as regards its legality under the organizations own rules, whether the administration's decision was based on an error of law or fact, or whether essential facts have not been taken into consideration, or again, whether conclusions which are clearly false have been drawn from the documents in the dossier, or finally whether there has been a misuse of authority."*[12]

Non-fulfillment and non-observance of terms of appointment as in the case of termination of employment, increase of salary, promotion etc. are also susceptible to review.[13]

The above stated factors comprise only the basics and the most generally applicable justifications of control. And its utility is limited to background setting purposes. Peculiar causes of each global or regional organization are not investigated here. If any remains, it will be dealt with in the sections devoted to assessment of selected International Organizations.

3.2 Chauvinism or Messianism?

The immediate issue that emerges from a discussion on the importance of review system is the nature and kind of such review body. The response to this is immensely connected to the

[10] Jan Klabbers, An Introduction to International Institutional Law (2002), p. 27; See also, Amerasinghe, above n 6,p.280 And 308
[11] Carew v IBRD, World Bank Administrative Tribunal, Decision No 142, May 19, 1995, para. 32
[12] Ballo Case, para., F
[13] Amerasinghe, above n 8, p.302

debate revolving around international adjudication. Interpretations of constituent instruments also suffer from such arguments. The morale of the controversy can easily be described as law-politics dichotomy or more specifically as Franck and Lahore address it messianism, belief in the ability of judicial solutions to solve international problems *vs.* chavinism, belief in the superiority of political resolution of disputes.[14]

On the one hand, it is very well known that states naturally propagate their national interest irrespective of the forum. Safeguarding their interest is an attribute of national governments. As emphasized by professor Schachter "governments are expected to take positions in the political organs in accordance with their conception of natural interest and…this conception will embrace considerations based on ties of alliance, friendship or political bargaining."[15] This attitude is also duly noted in the international arena. As reported by one commentator, the policy behind the consent based jurisdiction to the ICJ, which was principally insisted by western powers, is one dimension of protection of national interest.[16] Therefore, when disputes arise, states seek political resolutions. Political solutions are preferred due to the fact that states believe they will control the outcome.[17] It is clear then, as observed by one scholar, 'the more vital the outcomes of the dispute, the less prepared states are to devolve control of its solution to an independent body.'[18]

This position has, as a consequence, resulted in the separation of disputes into legal and political. Exponents of this position advance that only legal disputes are susceptible to judicial settlement as political disputes are to political means. The earlier face of this demarcation was proposed by Imperial Russia in the First Hague Peace Conference of 1899. As suggested back then, those issues immune from vital interests and national honor were

---

[14] Frank and Lehrmann, Messianism and Chauvinism in America's Commitment to Peace through Law in the International Court of Justice at A Crossroads (Damrosch ed, 1987) as quoted in Fred Morrisson, The Future of International Adjudication, 75 Minn. L. Rev. 827 (1990-91), p.829

[15] Oscar Schachter, The Quasi-Judicial Role of the Security Council and the General Assembly 58 AJIL 960 (1964), p. 962

[16] Helmut Steinberger, 'The International Court of Justice' in Max Planck Institute for Comparative Public and International Law, Judicial Settlement of Disputes: International court of justice and Other Courts and Tribunals, Arbitration and Conciliation- An International Symposium(1974) 193, 207 as quoted in Andrew Coleman, International Court of Justice and Highly Political Matters, Melb. J. Int'l Law 29 (2003), pp.37-38

[17] Coleman, Ibid. p.14

[18] Ibid.

taken as ripe for third party compulsory arbitration.[19] The stronger claim in this regard came from the US in the Nicaragua *vs.* US case of 1986. The US, in this case, objected to the admissibility decision of the court and announced the misuse of the court for a political purpose stating "The conflict in Central America…is not a narrow legal dispute; it is an inherently political problem that is not appropriate for judicial resolution. The conflict will be solved only by political and diplomatic means not through a judicial tribunal. The ICJ was never intended to resolve issues of collective security and self- defense and is patently unsuited for such a role."[20]

In the prevalent state, however, this distinction barely receives acceptance in the international community. Professor Lauterpacht once wrote:

> *"All international disputes are, irrespective of their gravity, disputes of a legal character in the sense that, so long as the rule of law is recognized, they are capable of an answer by the application of legal rules….All conflicts in the sphere of international politics can be reduced to contests of a legal nature…[T]he only decisive test of the justiciability of the dispute is willingness of the disputants to submit the conflict to the arbitrament of law."*[21]

What he meant was every dispute comprises both legal and political facet and no matter how the political aspects outweighs, it can be subjected to judicial scrutiny. No provision of the Statutes and Rules of procedure of ICJ, for instance, prohibits the court from entertaining legal disputes which also display political dimensions.[22] Affirming this, the ICJ stated:

> *'legal disputes between sovereign states by their very nature are likely to occur in political contexts, and often only one element in a wider and high standing political disputes between the states concerned….[and] never has the view been put forward before, that because a legal dispute*

---

[19] Edward McWhinney, Judicial Settlement of International Disputes: Jurisdiction, Justiciability and Judicial Law-Making on the Contemporary International Court (1999), P.43

[20] "Statement of Department of State on US Withdrawal from Nicaraguan Proceedings, 18 January 1985, 79 AJIL 438, p.441

[21] Lauterpacht H., The Function of Law in the International Community (Oxford: Clarendon Press), p.158, 164

[22] SohnL.B., The UN System as authoritative Interpreter of Its Law in (Schacter O., and Joyner C., eds.) United Nations Legal Order (1995), p.181

> *submitted to the court is one aspect of a political dispute, the court [ICJ] should decline to resolve for the parties the legal issue between them. … If adopted this view would create far reaching and unwarranted restriction upon courts and peaceful solution of international disputes."*[23]

Apart from this, judicial mechanisms are rejected for their undemocratic feature. This argument was originally raised in the US in connection with courts and constitutional interpretation.[24] It asserts that judges are unelected, unaccountable and uncontrollable unlike the executive and legislature which are directly responsible to the people.[25] It is, thus, an anti-majoritarian organ to interpret the constitution, pursuant to the advocates of this position. But this understanding of the courts is characterized as an exaggeration for judges are appointed and confirmed by elected officials, and the federal judiciary may be more capable of adapting to changes in the political consensus than the notion of an independent judiciary would immediately suggest. Although this argument is not without strong points, in the context of international law it is less persuasive since the selection process of judges is more democratic.[26]

In sum, in the direction of securing national interest, and also other possible grounds such as legal /political distinction of disputes as disguise, states favor political mechanisms including political organs of IOs, in which they are well represented and can influence the outcome, as dispute settling, interpreting and review bodies.

On the other hand, there is judicial disposition of international disputes. Notwithstanding its inherent problems, adjudicatory settlement has the following merits. Firstly, it ends disputes at some point.[27] Leaving the quality of the solution aside, it any how leads to termination of a dispute. The institutional impartiality also counts significantly. Because decisions arrived at by a neutral process enhances acceptability and legitimacy between or among the parties or

---

[23] Case considering United State Diplomatic and Consular Staff in Tehran (United States of America v. Iran) 1980 ICJ Rep,[hereinafter Consular Staff in Tehran case] para. 37

[24] Geoffrey Watson, Constitutionalism, Judicial Review and the World Court, 34 Harv. Int'l L.J. 1 (1993), pp. 28-33

[25] Ibid., p.28

[26] Ibid., p.31

[27] Richard B. Bilder, International Dispute Settlement and the Role of International Adjudication, 1 Emory J. Int'l DispResol. 131 (1986-87) p.146

international community in general.[28] Its application of neutral and equitable principles and norms of international law adds more value.[29] The structured adjudicative process again ensures a careful handling of the case and attainment of constructive solution. The parties will scrutinize their arguments and positions before they stand in front of a third party body which induces restraint and reasonableness in both parties.[30] This creates opportunities for a better understanding of the case.

In one study published in 1999 around 13 international judicial bodies were identified.[31] The present figure also shows an ascending tendency of judicial institutions.[32]

As review bodies' judicial forums have been integrated in the framework of some IOs. Art.37 of the ILO Constitution establishes a mechanism in which reference can be made to the International Court of Justice for the pronouncement of interpretation.[33] Holding the apex, ICJ has, therefore, the final say. Art.75 of the WHO constitution similarly provides that "[a]ny question or dispute concerning the interpretation or application of this constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree upon another mode of settlement." This has formulated a means that if a party to a dispute is not satisfied with the decision of the Health Assembly appeal lies to the court. The involvement of judicial institutions may vary from as in the case of WMO where the president of ICJ appoints an independent arbitrator to the case of WHO

---

[28] Ibid.

[29] Ibid., 148

[30] Ibid., 149

[31] Cesare Romano, The Proliferation of International Judicial Bodies: The pieces of the Puzzle, 31 N.V.U.J Int'l L. & pol. 709 1998-1999 pp.715-717 (His data considered only those judicial bodies that fulfilled his five elements of a judicial organ. For him an international judicial body must be permanent; it should be established by an international legal instrument; must apply international law; the rules of procedure it follows need to predate the case and it is required to render legally binding decision. He followed strict requirements. *Cf.* Stephen Schwebel, The Reality of International Adjudication and Arbitration, 12 Williamette J. Int'l L. and Dis. Res. 359 (2004) p. 362 (he adds the ICTY and ICTR, the Iran- US Claims Tribunal and the UN Compensation Commission. All these are excluded by Romano due to their *ad hoc* existence)

[32]Since 1999 a number of judicial bodies have been established. To name few: the African Court of Justice; the African Court of Human Rights, the Appellate Body of the WTO, International Criminal Court etc.

[33] Art.37 of the Constitution of ILO. It reads: "Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice."

where a judicial body, namely ICJ, is an optional mechanism of settlement.[34] It is not also a problem that the interpretation is delivered in advisory jurisdiction. For the procedure is enshrined in the constitution of the respective organizations, it would be binding on organs of the organization and member states.[35]

Recently, controlling roles of courts have received more attention in the field of International Economic Law. Thus, one author observes that in the cooperative economic regimes"the subjugation of politics into law" has occurred.[36] This achievement may be explained in reference to various factors. One is the benefit accruing to states following reciprocal trade liberalization. The result from such trade engagements is a *'positive sum game'*.[37] Therefore, states will not hesitate to be parties to compulsory adjudication. In fact, they essentially require judicial protection as the field is dominated by package deal negotiations.[38] Another important reason for the expansion of such judicial activism is the democratic legitimacy and political support it enjoyed.[39] Guarantee of individual freedom, non-discrimination and rule of law ensures such legitimacy.[40] Legal mechanisms are not also the sole ways.[41] For example, in WTO, though adjudication is given primacy, consultation, good offices, conciliation, enquiries and arbitration are presented too.[42] In a study conducted in 1999, more than 20% of the WTO dispute settlement proceedings are out of court with a DSB ruling.[43] This politico-legal integration has contributed to the effectiveness.

In conclusion, the 1990s American Scholars chauvinism-messianism debate was observatory of the reality and pragmatically articulated. It is unwise to pick and side with one of the two. In the opinion of the author, review mechanisms of international character ought to consult

---

[34] For more explanation see Amerasinghe, above n 8, pp.29-31
[35] Ibid., p.30
[36] Yuval Shany, No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary, 20 EJIL73 2009,p.90
[37] Ernst-Ulrich Petersman, Dispute Settlement in International Economic Law-Lessons for Strengthening International Dispute Settlement in Non-economic Areas, 2 J. Int'l Econ. Law 89 (1999), p.230
[38] Ibid., 231
[39] Ibid.
[40] Ibid.
[41] The WTO DSU offers Consultation (Art 4), Good office (Art, 24), Conciliation (Art, 24), Mediation (Art, 24), Enquiries (Annex 4 of the DSU) and International Arbitration (Art, 25)
[42] Petersman, above n 37, p. 209
[43] Ibid.

both legal and political approaches. That is what international economic law teaches. Political endeavors to ascertain legality must be encouraged. But the ultimate position must be reserved to judicial bodies. This is particularly true in IOs where there is no clear principle of separation of powers and judicial activism insanely looked for.[44]

3.3 Authoritative Interpretations and Review system

3.3.1 AuthoritativeInterpretation of ConstituentInstruments

Simply stated, interpretation means clarification of an unclear text. It is one of many ways to understand the text of atreaty or document.[45] This is the predominant usage of the concept.[46]And it is when such clarification texts demonstrate a governing aspect that an interpretation would be authoritative. In other words, authoritative interpretation refers to 'the adoption of interpretation that is intended to bind subsequent cases that arise under the [respective] regime.'[47]This is to be contrasted to the determination of interpretational disputes resulting in a ruling that are short of binding non- parties to a dispute.

The act of interpretation is more particularly crucial in the case of constitutional treaties. Many faces of constituent treaties make the task of interpretation difficult. A representative statement of most constitutions of IOs was made relating the UN Charter:"first, it is highly political treaty, in the second place, it is multilateral and thirdly, it is like many treaties- often faulty in its drafting. Finally, it is signed in five authoritative versions."[48]

Therefore, the task of interpretation is a critical act. Even though the prime Constitution of IOs, the United Nations Charter, leaves interpretation to each organ, subsequent constitutions of IOS have followed different mechanisms. Basically, the mechanisms can be classified in to two.

---

[44] Ibid., 231
[45] Ulf Linderfalk, On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties (2007), p.10
[46] The term interpretation is sometimes confused in the concept of interpreting a text and understanding it. But, the authoritative sense of the term is the understanding than the task of interpretation see ibid., p.10
[47] Stephan Zamora, Authoritative Interpretation and Enforcement of International Economic Law, in Schachter and Joyner(eds.) United Nations Legal Order (1995), P. 554
[48] [pollux], Interpretation of the Charter, 23 BYIL54 (1946), p.55

According to the analysis of one author, authoritative interpretation, in the sense of IOs, must be provided by an internal but non-adjudicatory organ.[49] To this person, the need for internal means arises from the importance of ensuring the participation of members of the organ and the closeness to the policy making process.[50] He also prefers non- adjudicatory mechanism as they also look for interpretation that is a product of consultation and compromise.[51]Again in this way, a party is not required to produce 'an accusation of wrongdoing' and present a formal argument regarding the facts of the dispute.[52]A supplementary position to this is Henxner's 1959 appraisal of the then innovative interpretation mechanism of the IMF, the International Bank for Reconstruction and Development and the International Finance Corporation:

> *"When compared with the arrangements of other public international organizations, the machinery for final interpretation of the basic instruments of these three organizations is remarkable and unusual; first because the function of authoritative interpretation rests with the ordinary executive organs of these institutions and not with any tribunal external to them; second because the exercise of interpretive function is not limited to decisions on actual disagreements, but is used also to resolve doubts in interpretation and thus to prevent controversies and to assure uniform application of operative arrangements; third because the executive organs have exclusive jurisdiction to decide on questions of interpretation of the instrument that may arises between members themselves; and fourth because the persons exercising the interpretive function represent interested parties and their votes are weighted according to certain defined criteria."*[53]

Such attitude has led the expansion of the system in other IOs.The Coffee Organization, established by the International Coffee Agreement, had reserved authoritative interpretation to the plenary organ.[54] The WTO grants its Ministerial Conference exclusive authority to

---

[49] Eric J. Pan, Authoritative Interpretation of Agreements: Developing More Responsible International Administrative Regimes, 38 Harv. Int'l .L.J. 503 1997, p.517
[50] Ibid.
[51] Id.,p.518
[52] Id., p.519 (note 69)
[53] Ervin P. Hexner, Interpretation by Public International Organizations of their Basic Instruments, 53 AJIL 341 1959, pp.343-344
[54] International Coffee Agreement, 1962 reprinted in 1 I.L.M.236, 1962, Art. 39(1)

adopt interpretations of the WTO Agreement.[55] This body comprises representatives of all State Parties that convene at least once in two years.[56] The decision of interpretation must be sanctioned by a three-fourth majority of the members.[55]The Africa Union also endows the General Assembly with power of interpretation albeit on an *ad hoc* basis.[57]

In some others, interpretation is reserved to judicial organs. This is directed to insulate the activity from political manipulations. In relation to the Cartegna Agreement, for example, it has been said that "the court is organized ina manner that is independent of the governments of the member countries and from other bodies of the Cartegna Agreement with the authority to define communitarian law [norms which comprise the judicial structure of the Cartegna Agreement], resolve the controversies which arise under it, and to interpret it uniformly."[58]This approach is also proper to resolve questions of interpretation involving the organization and its members as an impartial body is required.[59] Furthermore, judicial organs are suitable to afford better protection to states havingminority status in plenary organs.[60] The doctrine of separation of powers also magnifies the need for judicial interpretation.[61]

The present author also recurs to the latter view. As mentioned earlier, it is unwise to detach politics frominternational law and relations. Therefore, all possible efforts must be exerted to gain the positive outcomes. This can be done, for example, by letting political organs of an IO to decide the appropriate meaning of a term in discharging its activity. However, judicial solutions of such activities, like authoritative interpretations, must be maintained at least at final stages. This is warranted by self-oriented behavior of states. In such instances, justice

---

[55] Agreement Establishing the World Trade Organization available at www.wto.org/english/docs_e/legal_e.htm#wtoagreement, Art IX (2)

[56] Ibid., Art IV

[57] Art. 27 of the Constitutive Act of the African Union. The provision states: "The Court shall be seized with matters of interpretation arising from the application or implementation of this Act. Pending its establishment, such matters shall be submitted to the Assembly of the Union, which shall decide by a two-thirds majority."

[58] Treaty of the Court of Justice of the Cartegna Agreement, May 28 1979, English version reprinted in 18 I.L.M, 1203 1979, Preamble

[59] Schremmers and Blokker, above n 5, p.846

[60] Ibid.

[61] KaiyanHomiKaikobad, The International Court of Justice and Judicial Review: A study of the Court's Power with Respect to Judgments of the ILO and UN Administrative Tribunals (2000), p.58

will only be served by an impartial body. All the benefits forwarded in favor of the first type authoritative interpretation can be incorporated to the latter in a manner that doesnot jeopardize the independence and impartiality of the judicial organs.

From the foregoing, it is comprehendible that authoritative interpretations have a binding effect on subsequent cases emerging within the regime. Irrespective of the organs or state parties involved, the interpretation is expected to be adhered to. An aspect of this conclusion is also that once such interpretation is rendered no one can act contrary to it and this even presumably indicates that acts giving rise to the rendition of the interpretation need to be rectified as continuation of the challenged act amounts tocontradiction to the binding interpretation. In this regard, authoritative interpretation, particularly given by judicial bodies, has an implication of reviewing the challenged act.

3.3.2 Power of Annulment:Is it a Prerequisite for Review?

It may be a wonder of many how interpretive pronouncements of judicial organs that are not clothed with power annulment be considered to have a review effect. To put it in interrogative form: Is annulment power required for review systems?

Inspection of experiences of IOs shows that only the Court of Justice of the European Union possesses such annulment power. Most other IOs, do not grant similar power.

However, absence of an express annulment power may not deny an interpretation,in the form of judgment or else, a review aspect. The reason for such assertion relies on practical and logical explanations than clear cut rules. Pragmatically, the legal consequences would bring about effective annulment. In his study of judicial Review, professor Kaikobad writes, relating to the ICJ:

> *"…where the court finds in its contentions proceedings that an act of an international body is invalid in terms of ultra vires, the act will, of course, continueto exist in law or fact because in contentions cases the decision is final and binding only on the litigating states, and no other entity, state or otherwise. For that very reason, however, the disputing affected state may be heard to argue that act is not any more opposable to it. It could be argued in such circumstances that*

the act in question cannot create or affect or has ceased to create or affect legal obligations for the disputing state. In short, the act will almost certainly be void interpartes, as opposed to being null and void erga omness …. In empirical legal terms, where an act of an international body has been declared null and void by way of a judgment of the highest judicial organ of the UN system, the act will lose its presumption of legality and validity. It will then cast doubt over most, if not all, subsequent acts adopted on the basis of the invalid act."[62]

What he says is that even if not annulling in *strictu sensu*, the declaration of invalidity or illegality will extract out the bindingness of the challenged act. Mann, by his proposition of 'relative nullity' also shares this view of professor Kaikobad.[63]

Similarly, an advisory opinion given against validity of an impugned act will make continuation of any situation 'legally and politically intolerable.'[64]Some writers even dare to assert that "an advisory opinion holding a UN decision illegal will have the same effect as annulment."[65]

Observing the asymmetryof judicial review systems in municipal laws, professor Kaikabod also suggests not to strictlyadhere to annulment as a prerequisite.[66]

3.4 Experiences of Judicial Review in Some Selected IOs

Some basic theoretical foundations of review of acts IOs have been illuminated above. The reactions to international judiciaries and the increasing role of the latter in non-municipal arena have been raised. A point logically worth elucidation next, thus, will be experience of IOs with respect to judicial reviews. Here, however, only the UN and EU practices will be illustrated. The UN will be discussed due to its prominent status among IOs and its recognizable constitutional influence on other non-state institutions. Any study of IOs that fails to address the UN will not be taken complete. Since its establishment, some six decades

[62] Ibid., P. 46
[63] Ibid.
[64] Ibid.
[65] Schremer and Blokker, above n 5, p576
[66] Kaikobad, above n 61, p. 49-50

ago, huge developments have been made. Hence, considering its influential position, investigation of its judicial review system will be crucial.

Following that the European Union will be examined. The Union has formed the most effective review system. Even though, there is controversy as to the exact juridic nature of the union, no body denies its IO aspect which makes the study of its judicial review system most relevant. In addition, the European Union has served as a guide during the establishment of the African Union which makes its study most relevant for this research.

3.4.1 Judicial Review in the United Nations Systems

3.4.1.1 *Trauvax preparatories* and Text of the charter

Repeated attempts to vest the ICJ, the principal judicial organ, with significant roles in the UN system at the age of establishment, proved a failure. First the court was proposed to hold advisory powers to states.[67] The exponent, the Belgium delegate, later modified its proposal urging amendment of the chapter on Pacific Settlement of Dispute to include that:"[a]ny state party to a dispute brought before the Security Council, shall have the right to ask the Permanent Court of International Justice whether a recommendation or a decision made by the SC or proposed in it infringes on its essential rights. If the court considers that such rights have been disregarded or are threatened, it is for the council either to reconsider the question or to refer the dispute to the Assembly for decision."[68] In the belief of the delegates, this would "strengthen the juridical basis" of the SC decisions.[69] In the same conference Belgium called for the naming of the court as an established procedure to handle disagreements on interpretation on the Charter between organs. But it was agreed that United Nations is unfit to be set up with a judicial organ at the summit.[70]

---

[67] Belgium at the beginning urged that whenever the SC intervened to settle a dispute, its action should become final after the parties had an opportunity to "ask an advisory opinion from the ICJ as to whether the decision respected its independence and vital rights." Doc. 2, 6/7 (k), 3 UNCIO Docs. as quoted in Watson, above n 23, p.8

[68] Ibid., p.9

[69] Ibid.

[70] The Sub Committee concluded: "Under Unitary forms of national government the final determination of such a question may be vested in the highest court or in some other national authority. However, the nature

However, these events in the preparation stage and the absence of express power permitting the court to engage itself in review activities in the present texts of the Charter have been considered as not excluding judicial review. Watson, thus, concludes from his survey of the Charter, *travaux preparatories* inclusive:

> *"the report on interpretation did not rule out judicial review altogether; it held instead that if an organ produced an interpretation that was not'generally acceptable'it would be without 'binding force.'Plainly, this statement implies that the court would not be required to give effect to a Security Council decision based on an interpretation that was not 'generally acceptable' and therefore 'without binding force.' Moreover, the report clearly stated that the court might be called on to resolve disputes over interpretation and implied that the court's word would be final, at least in that particular dispute and with respect to those parties."*[71]

Another scholar similarly stated the effect of the text assertions reached at the San Francisco Conference on the role of the court as not explicitly supportive of "the notion of judicial review by the court of the Security Council's decisions" only.[72] He then continues to argue that '[t]his would not, however, necessarily mean that the Charter precludes the court from examining the validity of the decisions of the political organs of the UN should such a question arise in proceedings duly brought before the court."[73] Appreciating the lack of an express prohibition against judicial review, this personality asserts that 'Judicial review mechanisms may be developed through practice.'

3.4.1.2 Development through case-law

a) Certain Expenses case

And it is true as well that the ICJ has engaged itself in review of acts of some organs of the UN. In the Certain Expenses case of 1961, for instance, the court was asked its opinion whether expenses of the 1950s operations of the Congo and the Middle East Falls under Art

---

of the organization and its operation would not seem to be such as to invite the inclusion in the Charter of any provision of this nature." Ibid., p.364

[71] Watson, above n 23, p.13

[72] Karmul Hossain, Legality of the Security Council Action: Does the International Court of Justice Move to take up the Challenge of judicial Review? 5 Rev. Int'l L. & Pol. 133(2009), p.148(Citation omitted)

[73] Ibid.

17(2) of the charter which provides that "[t]he expenses of the organization shall be borne by the members as apportioned by the General Assembly." Before the resolution was adopted by the Assembly, France had requested the Assembly to frame the legal question, to be presented to the court which the opinion was to deal with, to include examination of the fact that the expenditures were decided in conformity with provisions of the charter thoughthe Assembly rejected it finally.[74]

In delivering its opinion, then, the court took the French question into consideration and stated that it could not be precluded from assessing whether "the expenditures were decided in conformity with the provisions of the charter, if the court finds it appropriate" and "it is in full liberty to consider relevant data available to it forming an opinion on question posed to it for advisory opinion."[75] Finally, the court held "the operations were taken to fullfill the prime purpose of the United Nations that is to promote and to maintain peaceful settlement of the situation."[76] In doing so, the court validated the act of the Assembly. In the following passages of the decision however, the court confusingly stated that it "does not have the ultimate authority to interpret the Charter…As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction."[77]

b) Namibia Case

The Namibia (South West Africa) caseis another occasion wherean activity of judicial review is conducted by ICJ. Following the decision of the General Assembly, the Security Council in its consecutive resolutions declared thatSouth Africa had violated its Mandate in Namibia, the then South West Africa, and the Mandate had been terminated and also ordered South Africa to withdraw.[78] However, South Africa failed to comply which led the SC to request an

[74] Certain Expenses of the United Nations Case, 1962 ICJ Rep [hereinafter Certain Expenses Case], p.156 (The amendment was rejected by 47 votes to 5 with 38 abstentions.)
[75] Ibid., p.157
[76] Ibid.
[77] Ibid., p. 168
[78] See: SC Res 264(1969) ; SC Res 269 (1969); SC Res 276 (1970); SC Res 283 (1970) SC Res 284 (1970)

advisory opinion on the legal consequences of the continued presenceof South Africa in Namibia not withstanding Resolution 270.[79]

One of the objections pleaded by the government of South Africa was that the advisory requesting resolution 284 of the council was invalid.[80]It, along with France, also contested the validity of the General Assembly Resolution which terminated the Mandate of Namibia and alleged the presence of South Africa there illegal as ultra –vires.[81] In addressing this, the court first stressed its lack of judicial review powers and continued stating that

> *"[t]he question of validity or conformity with the Charter of the General Assembly Resolution 2145 XXI or related Security Council resolution doesn't form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions."*[82]

Rejecting the objections, then, the court concluded that decisions made by the Security Council had been adopted in conformitywith the purposes and principles of the charter and in accordance with its Art.24 and 25. Here again, the court assessed the contestation and upheld the validity of the resolutions.

c) Lockerbie case

The explosion of Pan Am Flight 103 over Lockerbie, Scotland became an important case in international law. Home states of the victims, US and UK, conducted investigation and uncovered the involvement of two Libyan intelligence officers whom they demanded to be extradited.[83] Libya, for its part, regarded the claims falling within the scope of application of the Montreal Convention to which all three were parties. Basing its argument on the

---

[79] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276(1970), 1971 ICJ Rep[hereinafter the Namibia Opinion], p 19

[80] De Wet, below n 9, p.35

[81] Ibid.

[82] The Namibia Opinion, p.45

[83] The Joint Declaration by the US and the UK on 27 November 1991 reprinted in 31 I.L.M. 723(1992), p. 724

convention, Libya brought an applicationbefore the ICJ requesting, among others, provisional measures to enjoin the US and UK from taking any action against the state of Libya directed to surrender its accused nationals to jurisdictions external to Libya.[84]

The provisional measurers and preliminary objections stage of the Lockerbie case suggested the possibility that the court might be willing to review the validity of the underlying Security Council decisions. In the provisional measures, as noted by one author, "the bench exhibited near consensus regarding the *prima facie* validity of resolution 748(1992)."[85]In the separate opinion of the judges however, disagreement on the ultimate validity of resolution 748 was viewed. It varied from judge Oda's opinion that "[t]here is certainly nothing to oblige the Security Council, acting within its terms of reference, to carry out a full evaluation of the possibly relevant rules and circumstances before proceeding to the decisions it deems necessary,"[86] to the statement of Judge EL-Kosheri, who went far to examine the validity the Security Council resolution 748, in his dissenting opinion and ended up stating that 'it ispossible to consider that the Security Council, when adopting paragraph one of resolution 748 (1992),impeded the court's jurisdiction freely to exercise it, inherent judicial function with regard to issues on which the argument had been heard just a few days before and that by doing so the Security Council committed an act of*excess de pouvoir* which amounts to a violation of Art 92 of the charter."[87] Finally, before the court proceeded to entertain merits of the case. Libya agreed for the transfer of its nationals to the Netherlands for trial.

The significance of this case begins with its contentious nature which has "greater precedential value."[88] Watson, further astutely states:

> *"….it also suggests that the court does not thinkjudicial review should be exercised only when implicitly or explicitly endorsed by a UN organ seeking an advisory opinion on the effect of that*

[84] Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, 1992 ICJ Rep. (Provisional Measures Order of Apr.14) [hereinafter Lockerbie case], p.8
[85] David Schweigman, The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice (2001), p.268.
[86] Lockerbie Case (Prov. Measures), Declaration of Oda, p.129
[87] Lockerbie Case (Prov. Measures), Dissenting Opinion of El-kosheri, p.210
[88] Watson, above n 23, p.27

organ's acts. The decision implies that the international community is moving toward a broader acceptance of judicial review than the framers of the UN Charter perhaps envisioned the subsequent practice under the Charter may have altered its interpretation. Such a shift is permissible under treaty law, at least if the world community acquiesces, and this aspect of the Libya decision has not been widelyrejected by states as of yet."[89]

It is also observed by another writer that the judgment on preliminary objections in which the court joined the question of Libya's claim to the merits "implies that the court will further examine the arguments by the parties related to the validity and reviewability of Security Council Resolutions 748 (1992) and 883 (1993)."[90]

The case studies above transpire an apparent conflicting stands of the court as far as judicial review is concerned. In the two instances, the court in effect tested the contested acts and affirmed their validity. In deed, due to factual elements of the cases the court pronounced their validity. And the possibility of their invalidity or nullity had been hanging there. Therefore, actual exercise of reviews was involved there despite the court's acknowledgement of its lack of review power. Some limits the effect of this self-preclusionassertion as suggesting that "it has no right to judicial review in the sense where thisis a separate or special institution as known in national law."[91]TheLockerbie case pushed the development of the case law one step forward in that the majority judges concededthe validly of Resolution 748(1998) relying on the presumption of validity in contentious case. The modest conclusion one can arrive at, from the surveyed practices of the court, is that the court can engage in an implied power of judicial review on the part of the court to the exercise of its judicialfunctions.[92]

---

[89] Ibid.,pp.27-28

[90] Schweigman, above n 84 ,p.840

[91] DapoAkande, The International Court of Justice and The Security Council: Is There Room for Judicial Control of Decisions of The Political Organs of The United Nations?, 46 Int'l & Comp. L.Q. 309 1997, p.333 (stating ICJ lacks power to quash decisions of UN political organs); See also Bernd Martenczuk, The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie? 10 EJIL 617 1999, PP.526-27(Propounding that the Charter does not foresee a specific means or procedures by which decisions of political organs will be scrutinized by the court)

[92]Schweigman, above n 84 , p.271

3.4.1.3 Some Factors that can serve as aground for Review

Once we are convinced pertaining of the existence of power of review by the ICJ, save its limited scope, exploration of the grounds of review stands next in the study.Many researchers have devoted their ink to the matter in particular with regard to activities of the Security Council. A number of them adhere limits have to be, and in fact have been established, on the powers of the SecurityCouncil amid carrying out its mandate of maintaining peace and security. It is forwarded, therefore, that there are some factors that cannot be contravened by actions of the Security Council as dealt with below. It should be noted also these constraints apply similarly to other organs, both subsidiary and principal, of the organization.

a) Purposes and Principles of the UN

Art 24(2) of the Charter expressly limits the Council to perform its activities "…in accordance with the purposes and principles of the United Nations." These purposes of the UN are maintenance of peace and security, respect for self-determination of peoples, promotion of human rights and resolution of socio-economic and humanitarian problems. These principles of the system include sovereign equality of states, the obligation to act in good faith, peaceful settlement of disputes, prohibition of use of force, the principle of cooperation and non-interference in the domestic affairs of member states.

Judge Weeramantary in the *Lockerbie* and judge *ad hoc* Lauterpacht in *the Genocide* case expressed that this phrase in Art 24(2) sets limits on the Council.[93] It, therefore, means that the Security Council cannot discharge its duties at the expense of any of them. Some,

[93] Lockerbie Case, Declaration of Weeramantry J., ICJ Rep 1992, 3, p.61.[Judge Weeramantry stated: "Art 24 itself offers us an immediate signpost to such a circumscribing boundary when it provides in Art. 24(2) that the Security Council in discharging its duties under Art 24(1), 'shall act in accordance with the purposes and principles of United Nations.' The duty is imperative and the limits are categorically stated."]; See also Convention on the Prevention and Punishment of the Crime of Genocide (Provisional Measures), Bosinia and Herzegovina vs. Yugoslavia (Serbia and Montenegro), ICJ Rep. (1993)[hereinafter the Genocide Case], Dissenting Opinion, Lauterpacht ad hoc J, ICJ Rep. 1993 325,440. [Similarly Judge *ad hoc*Lauterpach remarked: "Nor should one overlook the significance of the provision in Art 24(2) of the Charter that, in discharging its duties to maintain international peace and security, the Security Council shall act in accordance with the purposes and principles of the United Nations."]

however, doubt their utility as limitations since they are too vague to be implemented and end up giving broader powers to the Council than limiting it.[94]

Though true that the inherent vagueness in principles and purposes display perils, the Council needs to balance the realization of its primary goal with the realization of secondary goals contained in the Charter.[95] Therefore, when the Security Council resorts to enforcement measures, the principle of sovereign equality, which typically include territorial sovereignty demands the council not to change the borders of a state against its will or transfer one part of a state territory to another.[96] Again, the council cannot impose settlement on parties to a dispute as disputes have to be settled in accordance with the principles of justice and international law.[97] Thus, the principles and purposes stipulated in the Charter substantively bar acts of the Council and other organs of the UN.

b) Peremptory Norms of International law

The VCLT is the first formal document that dealt with the concept of jus *cogens*. Art 53 of the convention reads:

> *"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present convention a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as anorm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."*

Therefore, norms of jus *cogens* underlie international law. They cannot be deviated at any rate except they have been superseded by other rules of the same genre.Their barring effect is not limited to treaties; it extends to any legal act or situation inconsistent with *jus cogens*

[94] De Wet, above n 24, p.192
[95] Ibid., p.193
[96] Derek Bowett, "The Impact of Security Council Decision on Dispute Settlement Procedures," 5 EJIL 94(1994), p.107
[97] Art. 1(1) of the UN Charter

requirements.[98] It follows, therefore, any act of the Security Council in conflict with norms of jus *cogens* necessarily becomes of no effect.

In *the Genocide* case this was one dimension of the dispute. Being incapacitated, due to the arms embargo imposing Resolution 713 of SC, to defend it self against the genocidal acts of Yugoslavia, Bosnia contended to construe such a Resolution as assisting the commission of genocide in Bosnia by theSerbs who had access to the arms stock of former Yugoslavia and argued that any resolution that served this purpose is without effect.[99] Judge *ad hoc* Lauterpacht also admitted Resolution 713 as an 'act contrary to a rule of *jus cogens.*'[100] With respect to the consequence of the Resolution also he wrote:

> *"in strict logic, when the operation of paragraph 6 of security council resolution 713(1991) began to make members of the United Nations accessories to genocide it ceased to be valid and bindingin its operation against Bosnia Herzegovina and that members of the United Nationsthen became free to disregard it."*[101]

Though the namedjudge did not conclusivelydesignate the resolution invalid, he, in effect, had influenced actions of states individually and collectively.[102] Some states were induced to act in non-compliance.[103] The recent decision of the Court of First Instance of the European Union in the, Kadi case, is more firm and concordant to the position of the judge *ad hoc* Lauterpacht.[104]

---

[98] Christopher Ford, Adjudicating *Jus Cogens*, 13 Wis. Int'l L.J 145 (1994-95), p.146
[99] The Genocide case, p. 332
[100] Ibid., 325
[101] Ibid., 441
[102] See Akande, above n 91, p.322.[Malaysia and Croatia Showed their readiness to supply arms to Muslim led Bosnian Government. The US Congress issued a bill lifting the arms embargo on Bosnia. The Organization of Islamic Conference declined the SC's arms embargo invalid and illegal].
[103] Ibid.
[104] Yassin Abdullah Kadi*v.* Council of the European Commission and Commission of the European Communities, Case T-315/01, 21 September 2005, para. 235 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009A0085:EN:HTML. The Court stated: "International law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, they must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, however improbable that may be, they would bind neither the member states of the United Nations nor in consequence the community."

c) Human Rights

Respect for human rights is at the corner stone of the United Nations system. Art 1(3) of theCharter stipulates, as its purpose, that cooperation of international community be based in promoting and encouraging the respect of human rights and fundamental freedoms. Organs of the UN also share this obligation with member states.In the *Namibia advisory opinion* and *Diplomatic and Consular staff cases*, the ICJ had mentioned that violation of human rights and fundamental rights, by state members, amounts to contravention of the purpose and principles of the organization.[105] It would be then illogical to claim the promoter of respect to such rights may act *acontrario*. Thus, substantive obligations emanate from the purpose of promoting observance of human rights and organs of the organization including the Security Council, cannot be exempted from this obligation.[106]

However, as limitation on acts of theSC, human rights are sub-divided into derogable and non-derogable rights. Art 4(2) of the ICCPR lists the right to life, prohibition of torture and degrading the treatment, prohibition of slavery and servitude or civil imprisonment, the impermissibility of non-retroactive punishment, the right of recognition before the law and freedom of thought, religion and conscience as rights from which no deviation even in times of emergency is allowed.[107]The Security Council itself cannot stray away in itsactivities.The fact that most of these non-derogable rights have attained the Status of *jus cogens* strengthens their limitative aspect.

Nonetheless, this should not in any way imply that the derogable rights category of human rights are easily escapable.Primarily, the principle of proportionality applies, as the

[105] The Namibia Case, p.37 ; In the Namibia advisory opinion ICJ stated that "denial of fundamental human right is a flagrant violation of the purposes and principles of the charter." Again, in the Diplomatic and Consular Staff case, the Court ruled: "wrongfully to deprive human beings of their freedom and to subject them to physical constraints in conditions of hardship is in itself manifestly incompatible with the principles of the charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights"[The Consular Staff in Tehran case, p. 39]

[106] De wet, above n 23, p.201; Gill T.D, Legal and some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter, 26 NYIL 33 (1995) p.72 (asserting that duty of SC to respect essential human rights and be derived from Art 24(3), 55 and 56 of the Charter)

[107] De Wet ibid., p.201

Committee on Economic, Social and Cultural, affirmed.[108] The committee derived this conclusion from the "commitment in the Charter to promote respect for all human rights".[109] The SC, thus, cannot avoid the protection of at least the core contents of the right.[110]

d) General International law

Whether general international law is a constraint on the activities of the Security Council is controversial.On the one hand, enforcement measures of the SC allow infringement upon and restriction or suspension of the rights of states which the exercisable under both customary and conventional international law. And this is what is done in the case where trade and communication embargos, maritime blockades or 'no fly zone' are imposed on perpetrators of international peace the security.[111] The grounds which constitute a threat to peace include acts such as civil unrest, arms buildups, failure to surrender suspects of terrorism, which are not basically violations of international law.[112] This, however, does not exclude them from matters in which the Security Council can take measures.[113] It is submitted, therefore, the Council need not base its determination upon considerations of international law.[114]

An aspect of this view, limits the effect of international law to measures of the SC in the context of peaceful settlement and adjustment of disputes. This argument underlies Art 1 of the Charter which divides the path to achieve international peace and security in to two. Pursuant to the proponents, from between the two roles of the SC relating to the international peace and security, namely maintenance and restoration of peace and adjustment and settlement of breaches of the peace, only in the case of the latter is the

[108] United Nations Committee on Economic, Social and Cultural Rights, General Comment 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights UN Doc. E/C.12/1997/8 para. 7
[109] Ibid.,
[110] Schweigman, above n 8, p. 171
[111] Gill, above n 105, p. 63
[112] Ibid., 62
[113] Ibid.
[114] Ibid.

Council required to conform to international law.[115] They also add the supremacy clause, in Art.103 of the Charter vis-à-vis other treaties as implicating that the SC is unbound by international law.[116]

In contrast, it is argued by some, that international law governs acts of the SC. One premise for such assertion is the nature of the organization which is established by states. Therefore, states are undoubtedly limited by international law and it would be less acceptable than ever that sovereign states should have created an international organization equipped with broad powers of control and sanction vis-à-vis themselves but itself exempted from the duty to respect both the Charter which gave birth to it and international law.[117]Akande also denies that the San Francisco conference limited the application of international law on the peaceful adjustment of disputes only. His survey of the *travaux preparatories* supports the limitation of the SC by international law though not conclusively.[118] The similar attributes of both the UN and its members have i.e. their equal subjection to international law, also shows, as Akande suggests, that they have obligations under it.[119]

Therefore, unless the Charter specifically allows the council not to be limited by international law, it is required to act in compliance with international law.[120] Where the grant of power is general, the mere fact that it is subject to international law, obliges it to accord with general international law.[121]

3.4.1.4 Review of Judicial Actions

In the UN, judicial actions are also reviewable. The organ under discussion here is the United Nations Administrative Tribunal. In its original form, the statute of the Tribunal under its Art 10(2) provided that the tribunal's decisionswere'binding and without appeal' denying any possibility of revision. But the 1955 amendment included the present Art 11(1)

---

[115] Hans Kelsen ,The Law the United Nations: A Critical Analysis of its Fundamental Problems (1951), p. 294
[116] Akande, above n 91, p.319
[117] Bedajoui ,The New World Order and the Security Council – Testing the Legality of its Acts (1994), p.7
[118] Akande, above n 91, pp. 319-320
[119] Ibid.
[120] Ibid.
[121] Ibid.

of the Statute that acknowledges a special system of review by which member states, the Secretary General and a person in respect of whom a judgment has been rendered by the tribunal may request review.[122]Pursuant to this system, a request is forwarded to the committee on Applications for review of judgments of the Administrative Tribunal to decide whether there is a substantial basis for the application and if so, requests an advisory opinion of the ICJ.[123]

The grounds of review under the statute of the tribunal are confirmation or excess of jurisdiction or competence, errors on questions of law, failure to exercise jurisdiction and fundamental errors of procedure occasioning a failure of justice.[124] This seems to suggest that the challenges are generally procedural in nature. However, as judge Oda indicated, "the court is [at times] expected…to function in substance similarly to an appellate court vis-à-vis UNAT, to review the actual substance of the Secretary General's decision and, if necessary, to substitute its own opinion on the merits of that of UNAT."[125]

3.4.1.5 Legal consequences of the Invalidity Pronouncements of the Court

It is a wonder of many what the effect of decisions or opinions of the court that rendered acts of the organs invalid would be. The solution for this relies on the premise of the following points. The court is, even through one among the principal organs, notsuperior; hence no hierarchy is envisaged in the charter.[126] Second, decisions of the court in contentious cases oblige the parties to that particular case only.[127] Advisory opinions are also advisory and lack binding effect.[128] But as stated elsewhere in this study before, the single effect of this feature of the judgments of ICJ is absence of annulment power as in the most municipal judicial review systems.

---

[122] GA Res.957(X), UN GAOR,10th Sess., Procedure for the Review of United Nations Administrative Tribunal; amendment to the Statute of the Administrative Tribunal, UN Doc .A/3116(1955) P.31

[123] Statute of the Administrative Tribunal of the United Nations, adopted by the GA/Res. 351 A on 24 November 1949 and last amended by GA/Res. 52/166 on 15 Dec 1997, Art 11(2)

[124] Ibid., Art. 11(1)

[125] Application for the Review of Judgment No. 333 of the United Nations Administrative Tribunal, 1987 I.C.J. 18, 89(May 27)(Separate Opinion of Judge Oda), Para., P. 75

[126] Kaikobad, above n 61, p. 45

[127] Statute of ICJ, Art. 59

[128] Akande, above n 91, p. 333

Still, however, the pronouncement of the court in any case is not without impact. Firstly, non-compliance may be witnessed following the invalidity of the court's decision or opinion.[129] Compliance in the UN is strongly correlated with validity of a resolution.[130] This is also viewed in the Namibia Opinion where the court asserted, after examining the validity of the SC resolution, that "the decisions are *consequently* binding on all states members of the United Nations, which are thus under obligation to accept and carry them out."[131] In other words, the court maintained that those resolutions in conformity to the purpose and principles of the charter give rise to binding obligations on member states. Otherwise, compliance cannot be expected. The Security Council would also be influenced by pronouncements of the court. Within the council, deliberations and positions of member states are molded by the arguments of the court and receive immense acceptance.[132] It, therefore, will inevitably direct the activities of the council. In addition, it prevents similar illegal decisions from being undertaken in the future.[133] Needless to say, other subsidiary and principal organ would be pressured to follow the path set up by the pronouncement of the court.

3.4.2 Judicial Review and the EC Law

The Maastricht Treaty stipulates under its Art. 6(2) that "[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 Nov 1950 and as they result from the constitutional traditions common to the member states, as general principles of community law." A right incorporated within in this convention is the right to a fair trial. The ECtHR in the *Golder case* emphasized that this provision implies a right of access to a court for every person wishing to commence an action in order to have his civil rights and

[129] Ibid., p. 322 (Stating the analysis of Judge *ad hoc* Lauterpacht in the Genocide Case was accepted, in effect, by certain states and Organizations.
[130] De Wet, above n 8 ,p. 55 (arguing advisory opinions Clarify law which creates greater chance of compliance)
[131] Akande, above n 91, p.335
[132] De Wet, above n 8,p. 57
[133] Gill, above n 105, p.124

obligations determined.[134] Moreover, individual's entitlement to effect judicial protection of rights they derive from the community legal order has been asserted by the ECJ.[135]Consequently, the European Court of Justice holds the widest review power against acts of political organs of the Union in distinct manner from other IOs. The system is so broad as to include citizens of Members States of the EU as applicants. Interpretation of the primary laws, EC treaties and validity of subsidiary legislations are checked by the court. Binding and non-binding acts or omissions of the internal bodies are subjected to scrutiny of the court. And significantly, the fact that the ECJ's judgment has the effect of annulling the contested act evinces the unique aspect of the system compared to other IOs as described below in depth.

3.4.2.1 Structure of the Community Courts

The Court of Justice of the EU consists: the Court of Justice[136], the General Court[137] (used to be called the court of first instance before the Treaty of Lisbon of 2009) and Specialized courts.[138] The mission of the court is to ensure that "the law is observed in the interpretation and application of the treaties.[139] Presently, the court has the mandate to deliver a preliminary opinion as to whether an agreement envisaged is compatible with the founding treaties.[140] This also includes giving opinion on the question whether the Union or any Union institutions has the mandate to enter into that agreement.[141] This has led some to think that the court has a constitutional court facet.[142] The legal frameworks governing the

---

134 Golder v United Kingdom, Serie A 18 (1975), Judgment of 21 February 1975, EctHR (1975) available at http://www.robin.no/~dadwatch/echr/golder.html, Section 25

135 Corthaut and Frederick, ibid., p.489

136 Art 19 of TFEU

137 Ibid

138 Ibid,; The only such court established is the 2004 Civil Service Tribunal.

139 Ibid

140 Art 218 of the TFEU. It reads "A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice. Where the opinion of the Court of Justice is adverse, the agreement envisaged may not enter into force unless it is amended or the treaties are revised."

141KaterinaYocheva, Specific Acts of the Court Justice of the European Union Opinion of the Court of Justice 2011, Acta U. DanubiusJur. 75 2011, p. 76; See also Case 8/55 Federation Charbonnier de Belgique v ECSC High Authorty, Opinion of AG Langrage, delivered on 12 June 1956.[Former Advocate Langrage has describing the Treaties as Constitution]

142 Yocheva, ibid., p.

activities of the court are the founding Treaties, rules of procedure of the courts and the statute of the Court of Justice of the EU. The Rules of procedure of the Court of Justice distinguishes among the following acts of the court: judgments,[143] decisions,[144] orders,[145] opinions[146] and opinions and views of the Advocate General.[147] The court with all its three jurisdictions has, as stated by one academic, delivered 15,000 judgments as of 2011.[148] This shows the importance of the court in the Union.

The court has assumed roles that allow it to balance the power of the community institutions with member states.[149] Protection of citizens' rights is also one of goals of the court's activities. In the interpretation of the general and unclear written rules of the community, the court has safeguarded rights of individual citizens.[150] Enhancement of transparency accountability and democratic decision making has been achieved by the court's power of review, which is employed in two various means.[151]

a) Action for Annulment

Pursuant to Art 230 of the treaty, an action contesting any binding or secondary law may be lodged. This is a direct judicial control mechanism stipulated in EC law. And the following requirements need to be fulfilled.

---

[143] Judgments of the Court are rendered Pursuant to Art.63 *et seq* of the Rules of Procedure of the Court of Justice on reference for a preliminary ruling, direct action (as in actions for failure to fulfill an obligation & action for annulment) and appeals see ibid,p.78

[144] The Court gives Decisions under Art 123b of the Rules of Procedure of the Court of Justice in ibid P.78

[145] Orders may be delivered in the form of Terminating proceeding by judicial determinations or orders made following an appeal against an order concerning interim measures or intervention or orders terminating the case by removal from the register, declaration that there is no need to give a decision of Referral to the General Court for instance according to Art 43 of Rules of Procedure of the Court of Justice, in ibid., 79

[146] This is to be done under art 107 and 108 of the Rules of Procedure and Art 30(6) of the TFEU

[147] The Advocate General may act in accordance with Art 59 of the Rules of Procedure; Art 123e of the same(in the procedure for review of decision of the General Court) and Art 104b of the Rules of Procedure

[148] Yocheva, above n 141,P 77

[149] JurgenSchwarze, Judicial Review in EC Law- Some Reflections on the Origins and the Actual Legal Situation, 51 ICLQ 17(2002) P.22 P.18

[150] Ibid., P.22

[151] Keon Lenarts and Tim Corthaut, Judicial Review as a Contribution to the Development of European Constitutionalism, 22 YEL1 2002, P.

i/ *Locus standi*

As to the parties permitted to file action for annulment three categories are distinguished. The first type of applicants often referred to as 'privileged applicants,' include the Council, the European Parliament, the Commission and Member States.[152] The 'quasi-privileged' group[153] consists of the Court of Auditors, the European Central Bank and recently the Committee of Regions,[154] an advisory body of EU. All these bodies are allowed to bring actions for annulment for the purpose of protecting their prerogatives.[155]

A somewhat implied right is given to Member States parliaments that act through their states. By virtue of this, proceeding for annulment can be brought on grounds of infringements of the principle of Subsidiarity by a legislative EU act.[156] The formal applicants here are member states though their real authors would be parliaments and their chambers.[157]

The last category 'non-privileged' applicants are natural or legal persons as enshrined in the fourth paragraph of Art 230 EC. Individual regions of the member states, unlike the Committee of Regions, also fall within the non-privileged applicants as implied in Art 263 (4) of the TFEU. From among the three categories, the latter two have rights. While the semi-privileged applicants utilize the action relating to their prerogatives, the non-privileged ones need to show their 'direct and individual concern'. This requirement has given rise to fierce debate.[158]

---

[152] Art 263(2) of the TFEU. The European parliament was not originally a privileged applicant as confirmed in the cosmetology judgment *European Parliament v. Council*. It is only following the Nice amendments to the EC Treaty that it joined the group of privileged applicant.

[153] Art 263 (3) of TFEU

[154] Art 263 (3) of TFEU; See also, AgneLimante, Actions for Annulment Before ECJ After the Lisbon Treaty: Has the Access to Justice Improved? Available at http://egpa-conference2011.org/documents/PSG10/Limante.pdf last accessed on June 19 2012

[155] Art. 263 of the TFEU

[156] Protocol No.2 on the Application of the Principles of Subsidiarity and Proportionality, Annex 2 to the TFEU, C 115/201, O. J. 9. 5. 2008, Art. 8

[157] Ibid.

[158] To cite some: A. Arnull, Private Applicants and the Action for annulment since Codorniu, Common Market Law Review48 (2001); Cigam, Protecting the Interest of Civil Society in Community Decision-Making-The Limits of Art 230 EC,52 ICLQ 995; X., Goursott, The EC System of Legal Remedies and

An act would be of 'direct concern' where it does not leave room for any discretion, or some but purely theoretical discretion is left, to the addressee as to the implementation of the measure.[159] The implication of the term 'direct' can easily be shown by proving a direct causal link between community measure and its effect.[160] On the other hand, the test of 'individual concern,' as stated in the *Plaumman* case, will be met when " that [the contested]decision affects them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed"[161]. This criteria has been considered strict and 'an insurmountable obstacle for access to community courts'.[162]

Some lesser standards have been, thus, suggested. An influential proposal is maintained by Advocate General Jacobs advancing that "a person is to be regarded as individually concerned by a community measure where by reason of particular circumstances, the measure has, or is liable to have a substantial adverse effect on his interests."[163] This standard deems the applicant be differentiated, in the same way as an addressee, unnecessary. The degree of the harm of the act only counts.

Again, the Court of First Instance also adopted other criteria than the *Plaumman* formula. Pursuant to the CFI, in the *JegoQuere* case of 2002:

Effective Judicial Protection: Does the System Really Needs Reform?, Legal Issues of Economic Integration 221(2003); AlbertinaAlbors-Llorens, The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat? 62 Cambridge Law Journal 72(2003); Jose Manuel and Cortes Martin, *Ubiius, Ibi*Remedium?- Locus Standi of Private Applicants under Art.230(4) EC at a European Constitutional Crossroad , 11 Maasticht J. Eur. and Comp. L 233 (2004) and others more.

[159] See *International Fruit Company v ProduktschapVoorGroenten en Fruit,* Joined cases 21-24/72, Judgment of 12 December 1972 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61972CJ0021:EN:PDF Para. 6

[160] Ibid.

[161] *Plaumann Co. v Commissionof the European Economic Community* - Case 25-62, Summary of Judgment 15 July 1963 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61962J0025:EN:HTML#I2, para. 4

[162] Manuel and Martin, above n 158, pp.234-235

[163] Opinion of Advocated General Jacobs *Union de pequenosAgricultores (UPA) v Council* C-50/100, delivered 21 March 2002 available a http://curia.europa.eu/juris/document/document.jsf?docid=47224&doclang=EN&mode=&part=1, p. 60

> *"[an individual] is to be regarded as individually concerned by a community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard."*[164]

The last statement of the CFI'S position abandons the 'closed class' test of the *Plaumann.* The 'closed class' approach of the *Plaumann* was born in the *Codorniu* case in which the *Plaumann* was considered fulfilled when the applicant proves that it belongs to a closed group of persons affected by the legal act and the institution which adopted it had a duty to take in to account the effects of this act to the closed group.[165]

But none of the above two refinements were absorbed by the Court of Justice which insisted in consistent application of the*Plaumann* formula as criteria for *locus standi* of private parties.

ii/ Reviewable Acts

Nature of the challenged act also matter. Applicants of annulment proceedings need to ascertain that the act the context is susceptible to review. The reviewability of an act also correlates to the categories of applicants. This is to mean that among the categories of applicants, difference exists as to the acts they can lodge application against.

The cumulative reading of paragraph 1 and 2 of Art 230 transpires that the fully and semi privileged applicants may demand annulment of any regulation, directive, decisions, recommendations and opinions or any other kind of measure.[166] The range is wide to include almost every act of the institutions whether they are binding or not. Moreover, the Treaty of Lisbon has, as some scholars contend, expanded the acts to be reviewed by adding instruments such as conclusions of the European Council or international agreements.[167]

---

[164] *Jègo-QuèrèetCie SA v Commission,* Case T-177/01, (2002) available at http://eiop.or.at/eiop/texte/2005-017.htm, Para. 22
[165] Anthony, above n 158, p.34
[166] Art 288 cum Art 263(1) of the TFEU
[167] Limante, above n 153, p. 7

Non–privileged applicants, in contrast, are allowed to bring actions against decisions addressed to the plaintiff, or a decision addressed to another person, or a regulation which is of direct and individual concern to the plaintiff.[168] The Treaty of Lisbon has relatively relaxed the position of private applicants in proceedings of annulment. The notable innovation of the abandonment of the 'individual concern' test is in the case of regulatory acts which do not entail implementing measures.[169] All delegated and implementing acts of non legislative character, be it regulations, directives or decisions, fall within regulatory acts of Art 263 paragraph 4 of the TFEU.[170] To determine whether an act is subject to review, it is material to examine the context of the act than the form of issuance.[171]

It should also be noted that the late extensive use of delegation of power to various bodies of the Union has led the Court to assert that community bodies established to produce legal effects on third parties can not escape judicial review.[172] This opinion of the Court has been incorporated to the Treaty of Lisbon in a form amendment. Therefore, legal acts of Union bodies, offices and agencies intended to produce legal effects *vis-a-vis* third parties have now beenbrought under the power of the Court.[173] The implication of this amendment is that legal effects of an act, rather than the organ or body issuing the act, matters most.

iii/ Grounds of Review

Thirdly, illegality of the measure must be shown. Lack of competence vitiates the legality of a measure.[174] Obviously, an act of an organ of the Union must be performed within the area of its competence. An act of the Commission which according to the Treaties should be adopted by the European Council would be susceptible to annulment as upheld in France v.

---

168 Art. 230(4) of the EC Treaty
169 Art. 263(4) of the TFEU
170 Limante, above n 153, p. 8
171 Klabbers, above n 9 p.17
172 *Sogelma v. EAR,* Case T- 411/06, Judgment of the Court of First Instance, 8 October 2008 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006TJ0411:EN:HTML, para. 36-37
173 Art 263 of the TFEU. The new insertion reads "…It[the Court of Justice] shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-s vis third parties."
174 Art 263 of TFEU

Commission.[175] Needless to say, institutions of EU must engage in activities falling within the competence of the Community. In Germany v European Parliament and Council, the court annulled a directive on grounds of lack of competence of the community as such.[176]

Infringements of procedural requirement may include omission of procedure contained in the relevant legislation and breach of a fundamental procedural principle such as the rights of defense.[177] This occurs, for example when the Council adopts something without consulting the EU Parliament or the Economic and Social Committee while such duty was prescribed.[178] In Schneider Electric v. Commission, the court held that the infringement by the Commission of the applicant's right of defense errs the Commission's decisions.[179]

Only contraventions to procedural requirements that are essential constitute illegal measure. Thus, a procedural requirement would be essential "if it may exercise an influence on the content of the act or deprive the applicant of the possibility to control its legality. If an irregularity has no impact on the act itself, it will be insufficient to establish the invalidity of the decision concerned."[180]

Another ground is infringement of the [EC] treaties or any rule relating to its application.[181] Included in this are the founding Treaties the ECSC Treaty, the EEC Treaty and the Euratom Treaty; the first amending treaties, Merger Treaty of 1967 and Single European Act of 1987; the Maastricht Treaty, the Amsterdam Treaty, Nice Treaty and finally the Lisbon Treaty. Therefore, acts of EU institutions are checked against these primary sources of EU law. In addition, any rules relating to its application are also check points.[182] Contradiction to all these laws of EU produces illegal and invalid acts. Interpretation of the Court has also

---

[175] Klabbers above n 9, pp.243-244(note)
[176] Federal Republic of Germany v European Parliament andCouncil of the European Union, C-76/98 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41049TJ0411:EN:HTML, para. 165
[177] Malcolm Nicholson et al, The Scope of Review of Merger Decision under Community Law, 1Eur. Competition J. 123 (2005), p. 124
[178] Klabbers, above n 9, p.244
[179] *Schneider v Commission*, Case T-310/01 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002TJ0077:EN:HTML par 440 and 462
[180] Nicholson *et al*, above n 176, p.126
[181] Art 263(2) of the TFEU
[182] Ibid.

extended to international treaties to which the Union is party to be watched as law against which EU institutions cannot act.[183]

Misuse of power also renders an act of EU organs or bodies illegal. Any use of power by the organs of the union for purposes other than those for which the power is formulated will result in annulment.[184] One example can be the writing of job descriptions so as to fit specific individuals at the exclusion of others.[185]The rendition of an act as misuse depends much on the original purpose of a power granted and will principally be ascertained by inference or conjecture.[186]

iv/ Time Limit for Action

Annulment proceedings must be instituted within two months of the notification or publication of the challenged act.[187] This is peculiar to action for annulment and no time limit is provided for other review mechanisms of the Union. The two months period will begin to count starting from the publication of the measure or its notification to the plaintiff or from the day it came to the knowledge of the latter.[188]

b) Preliminary rulings

Through preliminary ruling an indirect control over political organs of the Union has been established. Courts of member states avail this mechanism. Following the request of parties to litigation, national courts determine whether questions of EC laws be referred to community courts. This unifies the interpretation of EC laws in all member states. This procedure, retaining the independence of courts member states, prevents 'a body of national case law not in accord with the rules of [Union] law from coming to existence in any

[183] *International Fruit Company v ProduktschapVoorGroenten en Fruit,* Joined cases 21-24/72, Judgment of 12 December 1972, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61972CJ0021:EN:PDF Para. 6
[184] Klabbers, above n 9, p.244
[185] Ibid.
[186] Ibid.
[187] Art 263(6) of the TFEU
[188] Ibid.

member state.[189] And indeed, this has been proved. As noted by some writers 'almost all the major principles established by the ECJ were decided in the context of a reference to that court for a preliminary ruling… and plays a central part in the development of and enforcement of [EU] law.' As published in one study, more than 200 requests of preliminary rulings are submitted to the ECJ per annum.[190] This figure echoes the importance of the mechanism in the EU system.

i/ Who can seek Rulings

As enshrined in Art 267 of the TFEU "any court or tribunal of a member state can request the ruling of the ECJ." The phrase 'courts or tribunals' has, in practice, been understood in its expanded sense than the mere notion of courts law. In *Broekmeulen v HuisartsRigistratie Commission* case, the appeals committee of a professional body above which there is no opportunity of appeal was considered as permitted to refer questions involving EC law.[191] Industrial arbitration board was taken as 'court or tribunal' in *Handels–og Konfurfunktionaerernes Forbund/ Denmark v Dansk Arbejdsgirerforening acting on behalf of Danfoss.*[192] Generally, the ECJ examines the following points[193] to ascertain that an institution would fall within the phrase 'any court or tribunal':

- Has the body been established by law?
- Is its jurisdiction compulsory?
- Is it permanent?
- Does it have an adversarial procedure?
- Does it apply rules of law?

---

[189] Fairhust J., Law of the European Union (8th ed., 2010), p. 177

[190] Steiner J., Woods L. and Twigg- Flesner C., EU Law (9th ed., 2006), p. 193

[191] *Broekmeulen v HuisartsRegistraiteCommissie* ,Case 246/80, Judgment of 6 October 1981 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61980CJ0246:EN:PDF, para., 8

[192] *Handels –ogKontorfuktionaerernesrForbund/ Danmark v Dansk Arbejdsgiverforenig acting on behalf of Danfoss* ,Case C-109/88, 1989 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61988CJ0109:EN:PDF, para. 9

[193] Fairhust, above n 188, p. 175(note 2); Steiner et al, above n 190, p. 204. Similarly Steiner et al asserts that the ECJ identified five criteria to determine an institution as a court a tribunal: statutory origin, permanence, *inter partes* procedure, compulsory jurisdiction and the application of rules of law.

- Is it independent?

Where the court finds all these criteria fulfilled, the ECJ would receive the application of such institution for its ruling.

But it should be noted that these courts and tribunals are not obliged to refer matters involving EC law. As suggested by Lord Denning in *Bulmer V Bollinger*, only issues of EC law which are conclusive to a judgment should be forwarded to the ECJ.[194] If it is not 'necessary' as in the case where the ECJ had already ruled on the matter or it was reasonably clear and free from doubt or the ruling of the court would not affect the outcome of the case, no obligation exists for the courts and tribunals.[195] Even though this trend predominates, in one case presumption in favor of referral to the ECJ on points of Union law has been pronounced recently.[196]

Again, however, there are courts or tribunals that are mandatorily expected to refer. This obligation is imposed on 'courts of last resort.'[197] Concrete obligation to refer, thus, lies on most supreme courts or constitutional courts or national courts against the decision of which no judicial remedy remains. There will not be discretion to not refer where no superior courts or bench exits and a decision on the question of EC law is necessary to enable the national court to give judgment. The national court, however, retains discretion as to the determination of referral like courts in discretionary referral procedure.[198] The distinction between mandatory and discretionary procedure, which lies on the availability of superior judicial remedies, may misleadingly imply that preliminary rulings are appeal procedures. But, it is not. As assessed by Hartley:

---

[194] *Bulmer v Bollinger* [1974] *available at* http://law-uk.info/2012/06/bulmer-v-bollinger-1974-2-all-er-1226/, para.23

[195] *Ibid.*

[196] *R v International Stock Exchange of the UK and the Republic of Ireland, ex parte else* (1993) available at http://www.justcite.com/Document/b2qZnYedoSaaa/r-v-international-stock-exchange-of-the-united-kingdom-and-the-ireland, para.87

[197] Art 267(3) of the TFEU

[198] Steiner et al, above n 190, p. 214

"[t]here are two major differences between an appeal and a reference. First, in the case of an appeal the initiative lies with the parties: the party who is dissatisfied with the court's judgment decides whether to appeal and then take the necessary procedural steps. The court a quo normally has no further say in the matter and can not prevent the appeal being lodged. Secondly, the appeal court decides the case, even though the appeal may be on limited grounds only, and it has the power to set aside the decision of the court a quo; normally it can then substitute its own decision for that of the lower court. These features are not found in the procedure for preliminary reference the court a quo decides whether the reference should be made and only specific issues are referred to the European Court. Once it has decided these, the European Court remits the case to the national court for decision."[199]

ii/ Objects of the Ruling

As provided under Art 267of the TFEU, the Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretations of acts of the institutions, bodies, offices and agents of the Union. Accordingly, there are three issues for the purpose of this provision: interpretation, effect and validity. In case of interpreting the law, the object of referral is not limited to constitutive treaties but includes annexes and protocols as well as the acts of the community institutions or international agreements concluded by European communities.[200] Effect of law is also closely related to interpretation of law.

Regarding assessment of the validity of community law, the object covers all deeds of the community institutions.[201] The term acts of institutions include both binding and non-binding acts.[202] Unless it is to uphold the validity of community acts, invalidity issues must

[199] Hartley T., The Foundation of European Community Law (7th ed., 2010), P. 287

[200] SRLCILFIT and others v Ministry of Health and Lanficio di Gavardo SPA, Case 283 /81, Judgment of 6 Oct 1982 available at http://www.cvce.eu/obj/judgment_of_the_courtof_justice_cilfit_case283_81_october_1982-en-d3cb219e-2606_4ae9_b37c-2b2e4c42c60d.html, para. 20

[201] Oana Mariuca Petrescu, Procedural Aspects Regarding for Preliminary Rulings, 8 Romanian Journal of European Affairs 33 (2008), P. 38

[202] Ibid., p.39

be referred to ECJ. As ruled in the *Foto Frost case*, national courts are not competent to establish the invalidity of derived community law acts.[203] In investigating validity the court in substance assesses lawfulness. It has been stated that the Court of Luxemburg (ECJ) noticed that it has to perform a lawfulness exam both from a formal and a material stand point by assimilating validity with lawfulness.[204] Another author also observes "the jurisprudence of ECJ has emphasized that the recourse regarding the validity of the community acts represents a lawfulness control modality regarding the said similar to recourse for annulment."[205]

The proposition that 'preliminary ruling presupposes direct effect i.e. the possibility interested party to invoke Union rules in national courts and the obligation for the national judges to uphold any right resulting from those rules'has been forwarded.[206] However, the ECJ has held that an act need not be directly effective to be subject to interpretation under Art 234.[207] In the opinion of the present writer as well, it is not commendable to stress on the 'direct effect' approach as the primary purpose of the preliminary ruling mechanism relates to the preservation of the community character of law establishing by the treaty and has the object of ensuring that in all circumstances the law is the same in all the states of the Union.[208] Therefore, for the purpose of ensuring uniformity of EC law, the direct effect requirement would not be relevant. Rather, since the mechanism is a 'public remedy' broader approaches would make it effective.[209]

---

[203] *Foto Frost v HauptzollantLubeck –Ost*, Case C- 314/85, Judgment of 22 October 1987 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61985CJ0314:EN:HTML, para. 11

[204] Petrescu, above n 201, p.39

[205] OvidiuTinca, Drept Communitar general, edita a III-a, Publishing House Lumina Lex, Bucuresti, 2005, pp. 381-400 as quoted in Ibid.

[206] Mathijsen, P.S.R. F., A Gudie to European Union Law (10th ed., 2010), P.142

[207] Impressa Cosruzioni Comm Quirino Mazalia v FeroviadelRenon, Case 111/75(Preliminary Ruling), Judgment of 20 May 1976, Summary of Judgment available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61975CJ0111:EN:PDF Para. 7-9

[208] Steiner et al, above n 190, p. 202

[209] Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union, Luxembourg, May 1995

From the paragraphs in the above it is obvious that matters of national law, application of EU law and issues regarding when a national court should make reference would be excluded from the jurisdiction of ECJ with respect to Art 267 of TFEU.

iii/ When to Refer

The courts of Member States decide the appropriate stage at which to refer the matter to ECJ. The national courts, however, are required to establish the factual and legal contexts of the question so that the ECJ would have the necessary information.[210] This, in fact, presupposes the hearing of both sides.[211]

3.4.2.2 Effects of Declaration of Invalidity

In contrast to the annulment proceeding, effects of declaration of invalidity pursuant to Art, 267 of TFEU have not been dealt with in the treaties. In the former, the court has been empowered to declare an act null and void.[212] And this nullity operates absolutely i.e. *ex tunct*.[213]

The silence with respect to effects of preliminary references has forced the ECJ to deal with the matter with case by case approach. Undoubtedly, the ruling of the court in preliminary references binds the referring court.[214] Beyond *inter partes,* the general effect of a declaration of invalidity is also recognized in *International Chemical Corporation v Amministrazionnedelle Finanzedellosato case* in which the court held

> *"although a judgment of the court given under Art 177 of the treaty declaring an act of an institution, in particular a council or commission regulation, to be void is directly addressed only*

[210] Gerhard Bebr, Direct and Indirect Judicial Control of Community Acts in Practice: The Relation between Articles 173 and 177 of the EEC Treaty, 82 Mich. L. Rev. 1229 (1983-1984), p. 1230.
[211] ChristanGanj, References for a Preliminary Ruling under Art 267 TFEU, Quick EU Law Series http://www.ganj.ro accessed on Dec 27 2011, Section Three
[212] Ibid.
[213] Art 264 of the TFEU: It reads "If the action [instituted pursuant to Art 263] is well founded, the Court of Justice shall declare the act concerned to be void. However the court shall if it considers this necessary state which of the effects of the act which it has declared void shall be considered as definitive."
[214] *Commission of the European Communities v. Council of the European Communities,* Case No 22/70, Judgment of March 31,1971 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61970J0022:en:HTML, para. 34

to the national courts which brought the matter before the court, it is 'sufficient reason' for any other national court to regard that act as invalid for purposes of a judgment which it has to give."[215]

Therefore, declaration of invalidity is 'sufficient reason' for later cases in national courts. This suggests then that invalidity rulings of the ECJ have general effect but not 'absolute.'[216]

Regarding the *'ex tunc'* or *'ex nunc'* effect of declaration of invalidity, however, the ECJ did not yet adopt a single position. In a number of instances, it has given declaration of invalidity without notifying the temporal effect of such declaration.[217] In some others, it has demanded the relevant institutions "to take the necessary measures compatible with community law."[218] One author deduced from the observation of the practice of the court that the ECJ court seems to let the concerned community institutions draw the necessary conclusions as to the effect of invalidation.[219]

3.4.2.3 Judicial Review: A Comparison of UN and EU

The experience of judicial review in international organizations particularly in the UN and EU displays a wide distinction since the objectives they are setup to achieve differ. In the former, the existence of judicial supremacy is doubtful when seen from the angle of

---

[215] Bebr, above n 208, p. 1240

[216] SPA International Chemical Corporation v AmministrazioneDelleFinanzeDelloStato, Case No 66/80, Judgment of May 13 1981 available at eur-lex.europa.eu/LexUriServ.do?Uri=CELEX:61980C5006:EN:PDF, Para 13

[217] See, for example, *Express Dairy Foods v. Intervention Bd. for Agricultural Produce* (Case No.30/79), 1980 E. Comm. Ct. J. Rep. 1887, 1899 (Preliminary Ruling); *S.A. Buitoni v. Fondsd'Orientation et de Regularisation des Marches* (Case No.122/78), 1979 E. Comm. Ct. J. Rep. 77, 685 (Preliminary Ruling); *Yoshida GmbH v. Industrie- und Handelskammer Kassel* (Case No. 114/78), 1979 E. Comm. Ct. J. Rep. 151, 169 (Preliminary Ruling); *Yoshida Nederland B.V. v. Kamer van Koophandel en Fabriekenvor Friesland* (Case No. 34/78), 1979 E. comm. Ct. J. Rep. 115, 136 (Preliminary Ruling); *Firma Milac, Gross-und AussenhandeAlrnold Noll v. HauptzollamtSaarbrtlcken* (Case No.131/77), 1978 E. Comm. Ct. J. Rep.041, 1051 (Preliminary Ruling) as quoted in Bebr, above n 208, p.1242

[218] See *Royal Scholten-Honig Ltd. v. Intervention Bd. for Agricultural Produce* (Nos. 103, 145/77), 1978 E. Comm. Ct. J. Rep. 2037, 2081 (Preliminary Ruling) (ground No. 86); *SA Moulins et Huileries de Pont-a-Mousson v. Office National Interprofessionnel des Cereales*(Nos. 124/76 and 20/77), 1977 E. Comm. Ct. J. Rep.1795, 1813 (Preliminary Ruling) (ground No 28); *Albert Ruckdeschele& Co. v. Hauptzollamt Hamburg St. Annen* (Nos. 117/76 and 16/77), 1977 E. Comm. Ct. J. Rep. 1753, 1772 (Preliminary Ruling) (ground No. 13) as quoted in Ibid.,

[219] Ibid., P. 1243

authoritative interpretation where as in the European Union the court has power to give authoritative interpretation in preliminary rulings and other instances.

As a derivative of this assertion, in the UN the ICJ is only allowed to review acts of political organs incidentally in discharging its other functions. The Court of Justice of the European Union, in contrast, ensures the legality of acts of EU bodies as one of its principal functions. The grounds of review regarding acts of the Security Council, and of course other UN bodies, are violations of international law, international custom, human rights, *jus cogens* and purposes and objectives of the UN . In the EC law, on the other hand, the factors are lack of competence, violation of the Treaties and other laws enacted to the application of the treaties, misuse of power and infringement of procedural requirement. It is observable, then, that the grounds in both institutions depict scope difference for those in the UN system are more of substantive limitative grounds.

In relation to the entities that are entitled to bring actions, there is also difference between the UN and EU. In the latter, member states, organs of the union and persons, though in limited aspect, are entitled to contest legality of acts. In the UN, in contrast, it seems that member states, and considering advisory opinions, organ of the UN can only indirectly raise review questions.

Regarding consequences of impugned acts, the Court of Justice of EU has both annulment and illegality declaratory powers while nothing is stated in this respect in connection to the ICJ.

CHAPTER FOUR

REVIEW OF ACTS OF POLITICAL ORGANS OF THE AFRICAN UNION

4.1 The African Union: Its Transition from OAU

For almost the last four decades of the 20th century, continental matters of Africa had been handled by the OAU. Since its establishment in 1963, OAU had represented the continent before the international community. Directed to tackle the then African problems, the OAU listed the following objectives:

> *"to promote the unity and solidarity of African states; to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa; to defend their sovereignty, their territorial integrity and independence; to eradicate all forms of colonialism from Africa; and to promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration on Human Rights."*[1]

Back then, the focus of OAU and of course individual African states too, was ascertainment of the avoidance of foreign interference as it can be implied from the objectives above. In fact, this had been clearly articulated in the 1945 Pan African Congress convened in Manchester. The proclaimed African visions, there, were: achievement of independence from colonial rule throughout the continent so that Africans could rule themselves and achievement of continental unity in order to bring about faster economic growth and development and make Africa a strong continent within the international system.[2] It was, thus, search of solutions for these problems that preoccupied the activities of OAU.

In pursuance of these purposes, the organization adhered to the principles of sovereign equality of all member states; non-interference in the internal affairs of member states; respect for sovereignty and territorial integrity of each state and for its inalienable right to

[1] Charter of the Organization of Africa Unity, adopted on May 25,1963, entered in to force on September 13,1963, 2 I.L.M 766 1963 [Hereinafter OAU charter], Art.2

[2] Susan Waiyego Mwangi, 'From the OAU to AU: The Experience, Promise and Expectation, in (Adejumobi S. & Olukoshi A., eds., 2009) The Africa Union and New Strategies for Development in Africa, p. 29

independent existence, peaceful settlement of disputes by negotiation, mediation, conciliation and arbitration, unreserved condemnation, in all its forms of political assassinations as well as subversive activities on the part of neighbouring states or any other states, absolute dedication to the emancipation of African territories which are still dependent and affirmation of a policy of non-alignment with regard to all blocks.[3] Again, the critical observation of the principles proves the emphasis African states paid to their sovereignty. Practically as well, organs of the OAU and their compartments had been devoted to the respect of this principle. This strict protection of sovereignty has earned the Organization a 'regime-protective' feature.[4]

From the perspective of its objectives, OAU's achievements are recognizable. It has successfully abolished colonialism and related racist rules in the continent.[5] It has also voiced the common interest of the member states.[6] This was evinced by the adoption of the UN Declaration on the rights of peoples to Self-determination.[7] In relation to economic matters also, a number of accomplishments were scored. The prominent one is the establishment of the African Economic Community.[8] Moreover, at its late days, the OAU had begun to deal with human rights, rule of law and good governance. Most of such issues were addressed in the form of Declarations.[9]

---

[3] OAU Charter, Art.3

[4] Yassin El- Ayouty, An OAU for the Future: An Assessment in the Organization of African Unity After Thirty years (E1-Ayouty ed., 1994), p. 179 as quoted in Jonathan Rechner, From the OAU to AU: A Normative shift with Implications for Peace Keeping and Conflict Management, or Just a Name Change?, Vand. J.Tran snat'l L 543 2006, p. 557

[5] Tiyanjana, Maluwa, From the Organization of Africa Unity to the Africa Union: Rethinking the Framework for Inter-state Cooperation in Africa in the era of Globalization, 9 U. Botswana L.J 49 2009, P.55; See also Pierre Buyoya, Toward a Stronger African Union, 12 Brown J. World Affair 165 2005-06, p. 165

[6] Mwangi, above on 2, p, 31

[7] Ibid.

[8] Ibid.

[9] See for e.g. Declarations on the Framework for OAU Response to Unconstitutional Changes of Government, AHG/ Decl. 1 (XXXVIII)adopted at the 36th Ordinary Session of the OAU Assembly Heads of States and Government, Lome, Togo, July 2000; Declarations on the Principles Governing Democratic Elections in Africa, AHG/Decl.1(XXXVIII), 38th Ordinary Session of OAU Assembly of Heads of States and Governments, 8 July 2002, Durban, South Africa; OAU Declarations on Democracy, Political, Economic and Corporate Governance, AHG/ 235(XXXVIII) Annex I, 38th Ordinary Session of the OAU Assembly Heads of State and Government, 8 July 2002, Durban, South Africa,

Nevertheless, the Organization had been born with defects. Its objectives had missed important points such as rule of law and sustainable development.[10] The rigid interpretation of sovereignty, which is attributable to the text of the OAU charter, incapacitated the organization and forced it to stand and see atrocities and human rights violations in the territories of its member states.[11] As the states denied their consent to the OAU to intervene, the principle of non-intervention of the Charter had tied the hands of OAU in many devastating conflicts.[12]Any action without states' consent would directly contradict the OAU Charter. This necessitated a 'conceptual shift'.[13]

The various obstacles that impeded the activity of the OAU used to be corrected in sporadic and uncoordinated ways primarily through *ad hoc* decisions and arrangements like the Cairo Declaration, establishing the Mechanism for Conflict Resolution and Declaration.[14]

In 1999, the Assembly of Heads of African States and Governments of the OAU called, following the invitation of the Libyan leader, Colonel Qadaffi, an extra-ordinary meeting in Sirte, Libya. The theme of the summit was 'Strengthening OAU Capacity to enable it to meet the Challenges of the New Millennium.'[15] In the summit the need to effectively address the new social, political and economic realities were realized and the active role of a continental organization was underlined.[16] Finally, in the Sirte Declaration, African Heads of States and Governments decided to establish an African Union in conformity with the ultimate objectives of the Charter of their continental organization and the provisions of the Treaty establishing the African Economic Community.[17]After reviewing the proposal

[10] OAU Charter, Art 3; Constitutive Act of the Africa Union, Adopted on July 11 2002, entered in to force on May 26 2001[hereinafter Constitutive Act or CA], Art 3
[11] Rechner, above n 4, P 557
[12] Ibid.
[13] Ibid.
[14] Mwingi, above n 2, p 33
[15] Sirte Declaration, EAHG/Draft/ Decl. (iv) Rev.1 Fourth Extraordinary Session of the Assembly of Heads of State and Governments, 8-9 September 1999, Sirte, Libya paragraph 6 (hereinafter Sirte Declaration)
[16] Ibid., paragraph
[17] Ibid., paragraph 8(i)

presented by Libya, in Sirte, the Legal unit of the OAU produced a draft constitutive Act of the AU, which was adopted in Lome, Togo in 2000, and launched in Durban in 2002.[18]

4.2 Structure of Organs of the African Union

With the turn of the 21st century, which was proclaimed by former president of the South Africa, Thabo Mbeki, as the will be 'African Century', the third institutionalization of Pan Africanism has been witnessed: the African Union (AU).[19] The Union has huge ambitions on the African continent. Art 3 of the Constitutive Act of the Union sets forth broader list of purposes compared to the OAU's:

> *(a) to achieve greater unity and solidarity between the African countries and peoples of Africa; (b) to defend the sovereignty, territorial integrity and independence of its Member States; (c) to accelerate the political and socio-economic integration of the continent (d) to promote and defend African common positions on issues of interest to the continent and its people (e) encourage international cooperation, taking due account of the charter of the United Nations and the Universal Declaration on Human Rights (f) promote peace, security and stability on the continent (g) promote democratic principles and institutions, popular participation and good governance (h) to promote and protect human and peoples' rights and other relevant human rights instruments (i) establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations (j) to promote sustainable development at the economies (k) to promote cooperation in all fields of human activity to raise the living standards of African peoples (l) to coordinate and harmonize the polices between the existing and future regional economic communities for the gradual attainment of the objectives of the union (m) to advance the developments of the continent by promoting research in all fields, in particular science and technology and (n) work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent.*

An observation of this long enlistments suggest that some are re-affirmation, some others emphatic and a few others new introductions to the objectives of the OAU. Achievement of greater unity and solidarity among Africans, respect for sovereignty, territorial integrity and independence of African states, encouragement of international cooperation were also goals

---

[18] Durban Declaration in Tribute to the Organization of African Unity on the Occasion of the Launching of the African Union, Ass/AU/Decl. 2(I), adopted at the First Ordinary Session of Assembly of the Union 9-10 July 2002, Durban, South Africa, para. 3

[19] T Murithi and A. Ndinga, Introduction- Building an Africa Union for the 21st Century in the African Union and Its Institutions (Akokapri J. & Angela Ndinga & Tim Murithi eds., 2001), P.1

that were being pursued by the OAU.[20] The AU has also committed itself to attain them. Those related to economic and politico-social integration and economic development, pulling up the living standard of Africans are elaborated purposes of the Union inherited from the OAU.[21]Advancement of research with particular focus on science and technology, promotion of human and peoples' rights of Africans and democratic principles and institutions along with good governance and population participation and maintenance of peace, security and stability on the continent are additional insertions to the objectives of the Union.[22]

Actualization of these into actions, therefore, requires the establishment of a number of institutions. The renewed commitments and the additional endeavours must be coordinated and necessitate structural development and creation of organs in the Union. The present organs of the African Union are the General Assembly, the Executive Council, the Pan African Parliament, The Peace and Security Council, the African Court of Justice and Human Rights, the African Union Commission, the Economic and Social Council, the Permanent Representatives' Committee, the African Commission on Human and Peoples' Right, the Specialized Technical Committees and the Financial Institutions.'

A. The General Assembly

The Assembly, the supreme organ of the Union, comprises all African Heads of States and governments or duly accredited representatives.[23] The fact that this organ is entrusted with crucial power has compromised the AU's supranational character.[24] The principal functions of the Assembly are determination of common polices of the Union, monitoring the implementation of policies and decisions of the Union and ensuring compliance by all member states; acceleration of the political and socio-economic integration; giving decisions on intervention in a member state, when recommended by the PSC, or when a state requests intervention; determination of sanction to be imposed on member states that disregard

[20] Compare: OAU Charter, Art. 2 and Constitutive Act, Art.3
[21] Ibid
[22] Maluwa, above n 5, P 75
[23] Constitutive Act, Art 6(1)
[24] See the enlisted powers of the GA under Art. Art 9(1) of the Constitutive Act

principles and decisions of organs of the Union; consideration of membership requests, appointment of principal officers of the Union and establishment of the STC or any other organ when deemed necessary; interpretation of the Constitutive Act of the Union till the establishment of the African Court of Justice and Human Rights; and giving directives to a concerned organ on matters of conflict management, wars, acts of terrorism, emergency situations and the restoration of peace.[25]

The Assembly meets twice a year in ordinary session as it has increasing responsibilities.[26] Its decisions are taken, failing consensus, by two-thirds majority of the member states of the Union. Procedural matters, including questions whether a matter is one of procedure or not, is decided by a simple majority vote.[27]

As specified in Rule 33 of the Rule of Procedure of the Assembly, its decisions may take one of the following three forms: regulations, directives and recommendations, declarations, resolutions and opinions.

B. The Executive Council

Another significant organ of the Union is the Executive Council. It is composed of Foreign Affairs Ministers of Member states of or such other ministers or authorities as are designated by the governments of member states."[28] Thus, the delegation would be bound by the instructions of their government and act accordingly.[29]

As a policy organ, ExC coordinates and takes decisions on policies in areas of common interest to member states including:

---

[25] Ibid. Art 6(3)

[26] Decisions on the Periodicity Ass/AU Dec 53 (111), Ordinary Session of the Assembly of Heads of State and Government of the African Union, July 2004, Addis Ababa, Ethiopia as quoted in Girmachew Alemu, Introduction to the Norms and Institutions of the African Union, www.nyulawglobal.org/globalex/African_Union.html, p. 12

[27] Constitutive Act, Art.7(1); Rules of Procedure of the Assembly of the Union, First Ordinary Session, 9-10 July 2002, Durban, South Africa (hereinafter procedure of the Assembly), Rule 18 (1)-(2)

[28] Constitutive Act, Art 10(1)

[29] Nsongurua Udombana, The Institutional Structure of the African Union: A legal Analysis, 33 Cal. W. Int'l L.J. 69 2002-03, P. 94

> *"foreign trade, energy, industry and mineral resources, food, agricultural and animal resources, livestock production and forestry; water resources and irrigation; environmental protection, humanitarian action and disaster response and relief; transport and communication; insurance; education, culture, health, human resources development; science and technology; nationality, residency and immigration matters; social security including the formulation of mother and child care policies, as well as polices relating to the disabled and the handicapped and establishment of African awards, medals and prizes.*[30]

In its supervisory mandate, the ExC monitors the implementations of policies formulated by the Assembly and considers project proposals from the Specialized Technical Committees.[31] It has also the power to recommend establishment of other offices of the Union to the Assembly or amendment or revision of the CA.[32] Again, it is endowed with the power to request, on matters relating to its competence, advisory opinions from the African Court of Justice and Human Rights.[33]

The Council requires the approval of its two-third members to arrive at decisions, where consensus cannot be reached.[34] The two-third majority requirement is strict when compared to the simple majority vote of the Council of Ministers of the OAU.[35] This was related to the recommendation power of the Council of Minister.[36] But now, being empowered to give binding decisions, the requirement is greater than simple majority.

C. The Pan African Parliament

The Constitutive Act of AU has also established the PAP.[37] This reflects the evolving commitment of Africans towards democratic values and principles. Its establishment ensures the full participation of African peoples in the development of economic integration of the

[30] Constitutive Act, Art 13 (1)
[31] Rules of Procedure of the Executive Council of the African Union, First Ordinary Session, 9-10 July 2002, Durban, South Africa (hereinafter Procedure of the Council), Rule 5(1) (0)
[32] Constitutive Act, Art 24(2) and 32(3)
[33] Protocol on the Statute of the African Court of Justice And Human Rights, adopted 1 July 2008 Ass/AU/Dec. 196(XI)[hereinafter Protocol to the New Court], Art 53(1)
[34] Constitutive Act, Art 11(1)
[35] Udombana, above n 29, p 95
[36] Ibid.
[37] Constitutive Act, Art 5(1)(c)

continent.[38] It would enable Africans to particpate in discussions and decision-makings. Ultimately, the PAP aims to be an organ with full legislative powers whose members will be elected by universal adult suffrage.[39] As outlined in the protocol, the PAP will pursue the direction:

> *to facilitate the effective implementation of the policies and objectives of the (O)AU/AEC and, ultimately the African Union; to promote the principles of human rights and democracy in Africa; to encourage good governance transparency, accountability in member states; to familiarize the peoples of Africa with the objectives and policies aimed at integrating the African continent within the frame work of the establishment of the African Union; to promote peace, security and stability to contribute to a more prosperous future for the peoples of Africa by promoting collective self–reliance and economic recovery; to facilitate cooperation and development in Africa; to strengthen continental solidarity and build a sense of common destiny among the peoples of Africa and to facilitate cooperation among Regional Economic Communities and their parliamentary fora.*[40]

With these objectives, the first term of PAP has been inaugurated in 2004 and is now at the mid of the second term. The PAP structure consists of the plenary, the bureau, the permanent committees and the secretariat.[41] The plenary is composed of five members of national parliaments of each member state.[42] Among the five members, two need to be from opposition parties and one must be a woman.[43] Even though they are appointed, the parliamentarians will vote independently and in their personal capacity once they administer an Oath.[44] Each member shall have an equal vote and will represent peoples of Africa.[45] They will also enjoy privilege and immunities in accordance with the General Convention on the privileges and immunities of the OAU and the Vienna Convention on Diplomatic Relations.[46]The term of a member of the PAP concurs with the tenure of membership in

---

[38] Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament, adopted on 2 March 2001, entered into force (December 2003), [hereinafter PAP Protocol], Preamble paragraph 5; see also Art.2(2) of the same

[39] PAP Protocol Art, 2(3)

[40] Ibid., Art. 3

[41] Strategic Plan 2006-2010 'One Africa, One Voice' (online) available at http://www.panafricanparliament.org (accessed on Feb 28 2012), [hereinafter the 2005 Strategic Plan] p.3

[42] PAP Protocol, Art 4(1); the 2005 Strategic Plan, ibid.

[43] PAP Protocol, Ibid., Art 4(2)

[44] Ibid., Art. 6

[45] Ibid., Art.12(2) and Art.2(2)

[46] Ibid., Art. 8 and Art .9

national parliaments. Meaning, at the time where a PAP member is recalled or ceases to be member of his national parliament,[47] the seat he holds in the PAP will be considered vacant.

The protocol of the PAP prescribes two sessions per year at the minimum.[48] The same two-third majority rule, except the simple majority, regarding procedural matter, including the question whether an issue is a matter of procedure, governs the decision making process.[49] As it exits, the PAP has consultative and advisory mandates only.[50] In other words, its decisions do not have binding power a fact which has been considered a weakness of the current system.[51] Nevertheless, upon its own motion or at request from any organ, the PAP can examine, discuss or express opinions and forward its recommendations on any matter such as human rights, democracy, good governance, and rule of law or budgetary issues.[52] It has also power to request officials of the (O)AU/AEC to attend its sessions and produce documents and assess its duties.[53] Representatives of policy organs may be requested, by the PAP, explanations on issues affecting, or likely to affect the life of the African Union.[54] Furthermore, via its President, the PAP may invite and demand explanation from the Chairperson of the Assembly regarding decision taken by the Assembly.[55] This poke system on the Assembly, the supreme organ, is expected to grow to a full Check system in later ages of the PAP.

D. The Peace and Security Council

Though not originally an organ of the Union, the African Peace and Security Council (PSC) is incorporated, pursuant to Art 22 of the PSC protocol, as an organ of the Union. The protocol replaced the Cairo Declaration and its Central Organ OAU Mechanism for Conflict

[47] Ibid., Art. 5(3) and 4(e)
[48] Ibid., Art. 147 (1)-(3)
[49] Ibid., Art. 12(12)
[50] Ibid., Art. 11(1)-(9)
[51] Gerhard Hugo, The Pan African Parliament: Is the Glass Half full or Half Empty? ISS Paper 168 (2008) available at http://www.issafrica.org/uploads/paper168.pdf.html accessed January 20 2012, p.8
[52] Ibid., Art. 11(1)-(9)
[53] Ibid., Art. 11(5)
[54] African Union (Pan African Parliament) Rules of procedure (Midland 2004) [here in after Procedure of PAP], Rule 2(2) as quoted in Girmachew, above n 26, p 22
[55] Ibid., Rule 67 (1)-(4), Rule 74 (1)-(2)

Prevention, Management and Resolution.[56] Succeeding the Central Organ, the PSC is accorded with principal powers to anticipate and prevent disputes and conflicts; to authorize the mounting and deployment of peace support missions; to recommend intervention in Member States; to institute sanctions whenever an unconstitutional change of government takes place; to implement the Common Defence Policy of the Union, to examine and take appropriate actions when independence and sovereignty of a Member State is infringed upon to support and facilitate humanitarian action in situations of armed conflicts or major natural disasters.[57] In discharging these and other related duties, the PSC will take the principles, enumerated under Art 4 of the protocol, into consideration. These include, among others, peaceful settlement of disputes and conflicts, respect for the rule of law, fundamental human rights and freedoms, the sanctity of life and international humanitarian law, respect for the sovereignty and territorial integrity of Member States, non-interference in the internal affairs of one state by another and the right of the Union to intervene in Member States in grave circumstances, namely war crimes, genocide and crimes against humanity.

Structurally, the PSC consists of fifteen member states, five elected for three years term and ten for the term of two years.[58] The principle governing membership is 'equitable regional representation and rotation.' The five regions of the continent submit candidates for election.[59] The protocol stipulates the criteria that the Assembly shall consider in electing members of the PSC. Rough observation of these criteria appears to suggest that members of the PSC are expected to have exemplary behaviour.[60] Admittedly, this might urge or induce Member States to fulfil their due obligation and will also earn the Council legitimacy in addition to the acknowledgment of the international community the principal purpose of which African states usually tend to target.

---

[56] Protocol Relating to the Establishment of the Peace and Security Council of the African Union, adopted 2 March 2001, entered into force 14 December 2003,[hereinafter Protocol of PSC], Art. 7
[57] Ibid., Art. 7
[58] Ibid., Art. 5(1)
[59] Ibid., Art. 5(2)
[60] Ibid., Art. 5(2) Most of the requirements deal with compliance to the principles & rules of the CA and adherence to Democracy and good governances doctrines.

In its activities the PSC utilizes the support of various bodies. The panel of the Wise,[61]the Continental Early Warning System (CEWS),[62]the African standby force (ASF),[63]the military staff[64] and the peace fund[65] are subordinate organs of the Council and of much help to the latter. The AU commission is also expected to work together with the PSC.[66]

As a permanent decision-making organ, the council shall meet, as often as necessitated by circumstances, at Permanent Representatives level, with two sessions in a month at least.[67] The Ministers and HSG of members of the PSC are also obliged to meet at least once a year.[68] The chairperson position will follow the alphabetic order of the existing members for the term of one month.[69] Each member has an equal vote.[70] Simple majority for procedural issues and two-third for the remaining is required to adopt a decision when consensus cannot be reached.[71]

E. The Permanent Representatives Committee

This organ is the forum in which permanent representatives of the Union and other duly accredited plenipotentiaries of member states meet.[72] The PRC handles the routine works of the Executive Council, to which it is accountable.[73] As an advisory to the Executive Council, the PRC shall prepare the agenda and draft decisions.[74] It discusses the program and budget

[61] Protocol of the PSC, Art.11(1)-(8)
[62] Ibid., Art. 12(1)-(7)
[63] Ibid., Art. 13(1)-(7)
[64] Ibid., Art. 13(8)-(12)
[65] Ibid., Art. 21
[66] The Chairperson of the Commission brings matters of peace, security and stability in the continent to the attention of the Council and to the panel of the wise. S/he may employ his good offices relating to affairs of conflicts. Besides, s/he ensures and follows up implementation and decisions of the Council and the Assembly. Ibid., Art. 10(2) and(3)
[67] Protocol of the PSC, Art.8(2)
[68] Ibid.
[69] Ibid., Art. 8(6)
[70] Ibid., Art. 81(12)
[71] Ibid., Art. 8(13)
[72] Rules of Procedure of the Permanent Representatives Committee Ass/AU/2(I)-c, adopted at First Ordinary Session of Assembly of the African Union, Durban, South Africa 9-10 July 2002,[hereinafter Procedure of PRC], Rule 3
[73] Ibid., Rule 2
[74] Ibid., Rule 4(1)(c)

of the Union, the financial report of the Commission and the Board of External Auditors.[75] It also monitors the implementation of the budget of the Union and the policies, decisions adopted and agreements concluded by the Council.[76] Additional matters may also be refereed, by the Council to the PRC for consideration and implementation.[77]An auxiliary aspect of its activities is also facilitation of communication between the Commission and Member States.[78] This covers power to make recommendations on areas of common interest of member states.[79]

The permanent representatives will meet at the headquarters at least once in a month.[80] The quorum will be satisfied where two-third members attend the session.[81] In the absence of consensus, procedural matters, including determination of an issue as procedure, will be taken by simple majority.[82] All other matters need the consent of two–third majority members.[83] Assessed from the perspective of the PRC's advisory power, the requirement of two-third majority appears strict and unwarranted.

F. The Specialized Technical Committees

Other bodies that are accountable to the Executive Council are the Specialized Technical Committees (STC's).[84] Ministers or officials of various sectors of member states make up the STCs.[85] These committees, with in the ambit of their mandate, shall:

> *"prepare projects and programs of the Union and submit it to the Executive Council; ensure the supervision, follow up and the evaluation of the implementation of decision taken by the organs of the Union, ensure the coordination and harmonization of projects and programs of the Union; submit to the Executive Council either in its own initiative or at the request of the Executive Council, reports and recommendations on the implementation*

[75] Ibid., Rule 4(1)(f)-(h)
[76] Ibid., Rule 4(1)(h)
[77] Ibid., Rule 4(1)(o)-(p)
[78] Ibid., Rule 4(1) (e)
[79] Ibid. Rule (d)
[80] Ibid., Rule 5(1)
[81] Ibid. Rule 6
[82] Ibid. Rule 13(2) and (3)
[83] Ibid. Rule 13(1)
[84] Constitutive Act, Art.14
[85] Ibid., Art 14(3)

of the provisions of [the] Act; and carry out any other functions assigned to it for the purpose of ensuring the implementation of the provision of [the] Act."[86]

Currently, operating STCs are the Committee on Rural Economy and Agricultural matters; the Committee on Monetary and Financial Affairs; the Committee on Trade, Customs and Immigration matters; the Committee on Industry Science and Technology, Energy, Natural Resources and Environment; the Committee on Transport, Communications and Tourism; the Committee on Health, Labour and Social Affairs; and the Committee on Education, Culture and Human Resources. These Committees will meet as often as demanded by their work but subject to any directives given by the Executive Council.[87]

G. The Economic, Social and Cultural Council (ECOSOCC)

Another organ of the union with advisory capacity is the ECOSOCC. Within this organ, the General Assembly, the Standing Committee, Sectorial Cluster Committees and Credentials Committee exist.[88] The General Assembly is the highest decision making body of the ECOSOCC.[89] Members of the General Assembly are One hundred fifty (150) Civil Society Organizations (CSOs).[90] COSs include Social groups, Professional groups, Non-Governmental Organizations (NGOs), Community Based Organizations (CBOs), Voluntary Organizations and Cultural Organizations.[91] CSOs of the African Diaspora, as defined by the Executive Council, are also accorded membership.[92] The 150 seats will be apportioned, among, 2 CS0s of each Member State, 10 operating at regional and 8 at continental level, 20 African Diaspora Organizations, and 6 of ex-officio capacity nominated by the Commission.[93] This distribution of seats will also balance gender equality and representation of the youth between the ages of 18 and 35.[94] With this composition, the intention is to

[86] Ibid., Art. 15
[87] Ibid., Art. 14(1)
[88] Statute of the Economic, Social and Cultural Council of the African Union ASS/AU/Dec. 48(III), adopted at Fifth session of the Assembly of the African Union, Art 8
[89] Ibid., Art. 9(1)
[90] Ibid., Art. 1
[91] Ibid., Art. 3(2)
[92] Ibid., Art. 3(3)
[93] Ibid., Art. 4(1)
[94] Ibid., Art. 4(2)

allow the broad participation of Africans through representative CSOs and professional groups in the activities of the Union. One writer, commenting on the implication of the establishment of ECOSOCC, says:

> *"[t]he African Union, unlike its predecessor OAU, seems determined to graduate from 'politicians club' to a people centred and driven regional organization. The ECOSOCC process is a historical opportunity for the formulation of a new social contract between African governments and their people. Involving CSOs in African Union endeavours is a positive move and is a way of involving ordinary citizens of Africa in decision and policy making processes of issues that concern their daily lives."*[95]

Observed from the statute, the ECOSOCC will, indeed, voice the interest of African peoples.

For the accomplishment of this aim, the ECOSOCC is given the floor to contribute: to the translation of the objectives, principles and policies of the Union to concrete programs, in the promotion of popularization, popular participation, human rights, the rule of law, good governance, democratic principles, gender equality and child rights and sharing of best practices and expertise; to foster and consolidate partnership between the Union and the CSOs through effective public enlightenment, mobilization and feedback on the activities of the Union and to undertake studies, when requested or by its own initiative and make recommendations.[96]

Each member of the ECOSOCC General Assembly is provided with an equal vote.[97]All decisions of the Assembly need to be sanctioned by two-third majority members' approval.[98]

H. The African Commission on Human and People's Rights

Established under Art 30 of the African Human and Peoples' Charter (the Banjul charter), the African Commission on Human and Peoples' Rights, a treaty based mechanism, is

---

[95] Charles Mutasa, Is the African Union ECOSOCC a New Dawn and a New Deal? , www.sarpn.orgza/documents/d0001191/p1321-ECOSOCC_AU_Mutasa_March2005.pdf.html , P.5
[96] ECOSOCC Statute, Art.7(1)
[97] Ibid., Art. 16
[98] Ibid.

integrated in to the African Union System in 2002.[99] The functions it assumed, as per Art. 45 of the Banjul Charter, can be generically classified in to three: Promotional mandate, in which the commission is particularly empowered to collect documents, undertake studies and research and make recommendations to governments, formulate principles to solve legal problems and cooperate with continental and international institutions;[100] Protective mandate exercised through interstate communication and other communication procedures, examination of state reports and individual complaints on human rights violations in limited cases;[101]and Interpretive mandate.[102] Additional tasks may also be referred to it by the Assembly of the African Union.[103]

The Commission is composed of eleven members called Commissioners chosen from among African personalities with the highest reputation known for their high morality, integrity, impartiality and competence in human and peoples' rights.[104] The Commissioners also serve in their individual capacities.[105] The Commission meets twice a year for fifteen days.[106] In a recently developed trend, the Commission also appoints Rapporteurs and uses fact-finding missions.[107] The technical and administrative work of the commission is handled by the Secretariat.[108]

The commission, thus, organizes reports and forwards recommendations to state parties and the Assembly of the Union.[109]

---

[99] Decision on the Interim period ASS/AU Dec. 1(I), adopted at the First Ordinary Session of the Assembly of the African Union, 9-10 July 2002, Durban, South Africa, Paragraph XI

[100] African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered in to force 21 October 1986 [hereinafter African Charter], Art. 45(1)

[101] Ibid., Art. 45(1)

[102] Ibid., Art. 45(3)

[103] Ibid., Art. 45(4)

[104] Ibid., Art. 31(1)

[105] Ibid., Art. 31(2)

[106] _____, The African Commission on Human and peoples' Rights, The Danish Centre for Human Rights (1998)[hereinafter Danish Centre on African Commission] available at http://www.google.com/url?sa=t&rct=j&q=the%20african%20commission%20on%20human%20and%20peoples2Fwww.humanrights.dk%2Ffiles%2Fpdf%2FPublikationer%2Fafr.commmanus.pdf8w P. 11

[107] Vincent Nmehielle, The African Human Rights System: Its laws, practice and Institutions (Maritnus Nijhoff, 2001) as quoted in Girmachew, above n 26, p.

[108] Danish Centre on African Commission, above n 106, p.13

[109] Ibid.

I. The AU Commission

The AU commission is the 'Secretariat of the Union'.[110] In other words, the AU Commission constitutes the 'engine room' of the Union. The Commission consists of a Chairperson, Deputy Chairperson and eight Commissioners.[111] And as a permanent organ, it will have the necessary staff. Art. 3(2) of the Statutes of the AU Commission provides for the following major functions:

> *"to represent the Union and defend its interests under the guidance of and as mandated by the Assembly and the Executive Council, to initiate proposals for consideration by other organs; implement the decisions taken by other organs; to organize and manage the meetings of the Union; act as the custodian of the CA, its protocols, the treaties, legal instruments, decisions adopted by the Union and those inherited from the OAU; prepare the Union's program and budget for approval by the policy organs; prepare strategic plans and studies for the consideration of the Executive Council and strengthen cooperation and coordination of activities between member states in fields of common interest."*[112]

Recently a step has been taken to transform the commission to Authority by the Assembly, though it did not enter into operation.[113] This will make the to-be African Union Authority "the main Pan African body driving African integration.[114] With its rise to authority, it is being suggested that the AU Commission should be provided with the right of enforcement, power to implement decisions and to enforce treaties so as to gain credibility.[115]

J. African Court of Justice and Human Rights

An invention in the third institutionalization of Pan Africanism is the African Court of Justice, which is now merged with the African Court of Human Rights (ACHR) and formed the African Court of Justice and Human Rights. This organ is positioned as one of the

---

[110] Constitutive Act, Art.20(1)
[111] Statute of the Commission of the African Union Ass /AU/2(I)-d, adopted at First Ordinary session of the Assembly of the African Union, 9-10 July 2002, Durban, South Africa, [hereinafter Statutes of AU Commission], Art.2 (1) and Art.6; see also Constitutive Act, Art. 20(2)
[112] Ibid., Statues of AU Commission, Art. 3(2)
[113] AU/Dec 233 (XII) as quoted in Babatunde Fagbayibo, The (Ir)relevance of the Office of the Chair of the African Union Commission: Analysing the Prospects for Change, 56 Journal of African Law 1 2011, P .5
[114] Geert Laporte and James Mackie(eds.),Building the African Union: An assessment of Past progress and Future prospects for the African Union's Institutional Architecture(2010), P. 21
[115] Ibid.

principal organs of the Union.[116] The principle of rule of law seems to get acceptance among African states for the court upholds the supremacy of law.[117] This organ, a focal point of this paper, will be explored in further details in the coming sub-topics of this chapter.

K. The Financial Institutions

The constitutive Act of the AU also enshrines the creation of three financial institutions to wit the African Investment Bank (AIB), the African Monetary fund (AMF) and the African Central Bank (ACB).[118] These institutions have common purpose of facilitating trade within the continent to achieve accelerated economic integration in Africa.[119]

The African Investment Bank promotes investment activities, and utilizes available resources for the implementation of investment projects, mobilizes resource from capital markets inside or outside of the continent and provides technical assistance to investment projects.[120]

The African Monetary Fund, in its part, provides financial assistance to AU member states; coordinates monetary policies of member states and encourage capital flow among African states.[121]

Thirdly, the African Central Bank promotes international monetary cooperation ascertainment of exchange stability and work for the elimination of foreign exchange restrictions.[122]

Preliminary Remarks on Internal Structure of the AU

The institutions of the AU can be categorized differently. Abdul Mohammed divides the institutions into the group of Governing Institutions, Executive Institutions, Accountability

[116] Protocol on the Statute of the African Court of Justice and Human Rights, ASS/AU/Dec. 196(XI) adopted on July 1 2008 [hereinafter protocol of New Court], Art. 2
[117] Udombana, below n125, p.818
[118] Constitutive act, Art.19
[119] www.au.int/en/organs/fi
[120] Ibid.
[121] Ibid.
[122] Ibid.

Institutions and Technical and Financial Institutions.[123] The Pan African Strategic Plan, on the other hand, structures the Pan African Parliament as legislature, the Court of Justice and the African Court of Human and peoples' rights as judiciary and the Executive Council, the STCs, the Financial Institutions, the AU Commission, the PSC, the PRC and the 'ECOSOCC as compartments of the Executive branch but putting the General Assembly at the peak of all the three arms.[124] Due to scope considerations, no comment will be made on categorization of AU institutions. Rather, basis of classification employed in this study will be defined. For the purpose of this study, internal organs of the Union will be grouped in to three: Policy organs, Judicial or Quasi-judicial organs and Non-policy organs.

Policy Organs are internal institutions of the Union, irrespective of the number of the membership, where the members are delegates of states, and in which political decisions are made or recommended. In the context of the African Union such organs are the GA, the ExC, the PRC and the PSC.

Judicial or Quasi-Judicial organs: These are bodies composed of independent and impartial individuals so as to ensure institutional independence from political bias, and resolve disputes between concerned parties, states or otherwise, rendering binding and non-binding pronouncements. The African commission on Human and peoples' Rights and the African Court of Justice and Human rights belong within this group.

Non-policy Organs: These are institutions, such as the Executive organs, that cannot be classified as neither of the two above. Here fall the ECOSOCC, the AU commission, the PAP and the Financial Institutions.

[123] Abdul Mohammed, Toward an Effective African Union: Participation, Institutions and Leadership in the African Union and Strategies for Development in Africa (Adejumob: & Olukoshi: eds., 2009), p.45
[124] The 2005 strategic plan, above n 41, p.2

4.3 Evolution of the African Court of Justice and Human Rights

4.3.1 Towards Judicial Organs

The African customary laws have been described as being dominated by non- adversary dispute settlement systems.[125] Confrontation is alien to the system. As Udombana notes 'traditional African dispute settlement places a premium on improving relations between the parties on the basis of equity, good conscience and fair play rather than on strict legality.'[126] The African system is one of forgiveness, conciliation, open truth, not legal friction or technicality.[127] African procedures favour consensus and amicable dispute settlement, frowning upon the adversarial and adjudicative procedures common to western legal systems.[128] The collective interactions of African States have fallen under the influence of this thinking. As a flow from this trend; members of the OAU have preferred non-adjudicatory commissions at continental level.[129] It appears that the fourth principle of the OAU provides for the settlement of disputes by negotiation, mediation, conciliation and arbitration. This stipulation omits adjudication, which is basically litigation, deliberately. The stringent advocacy of states regarding their sovereignty has also contributed to the preference of OAU members to quasi-judicial mechanisms.[130]

The principal organ in the OAU's dispute settlement architecture was the Commission of Mediation, Conciliation and Arbitration.[131] The commission comprised twenty-one individuals of recognized professional and legal qualification elected by the Assembly Heads

---

[125] Taslim O Elias, The Nature of African Customary Law (1962) as quoted in Nsongurua J. Udombana, An African Human Rights Court and An African Union Court: A Needful Duality or A Needless Duplication?, 28Brook J. Int'l L 811, 2002-03, p.318

[126] Nsongurua J. Udombana, Toward the African Court of Human and Peoples' Rights: Better Later Than Never, 3 Yale Human Rights and Development L.J. 45 2000, p.47

[127] Ibid.

[128] Udombana, above n125, p.818

[129] Gino Naldi, and Konstantinos Magliveras, The Proposed African Court of Human and Peoples' Rights: Evaluation and Comparisons, 8 Afr. J. Int'l & Comp. L 949 (1996), p.946

[130] Udombana, above in 126, p.74 [He states that the insufficient political will of the governments for a regional court was another argument pleaded against a judiciary]; see also, Udombana, above in 125, p.818

[131] Protocol of the Commission of Mediation, Conciliation and Arbitration, 3 I.L.M. 1116 (1964) [herein after Protocol of the Commission of Mediation], Art.1; OAU Charter, Art.16

of States and Governments for a term of five years with eligibility to a re-election.[132] Proceedings could be triggered by the parties jointly by one of the parties to a dispute, by the Council of Ministers and by the Assembly of Heads of states and Governments.[133] Once set in motion, the Bureau, which administers the daily work of the commission, would consult the parties as to the appropriate mode of settling the dispute.[134] The ultimate decision as to the medium of settlement lies on the parties to a dispute. As it can be easily understood from the designation of the commission, the available patterns of settlement are: Mediation Conciliation and Arbitration.[135] In each medium, the parties to dispute participate in one way or another.[136] In situations where a party to a dispute, referred to the commission, rejects the jurisdiction of the commission, the matter will be returned to the Council of Ministers and awaits political decision.[137] All these speak to the fact that adjudication was hardly resorted to by the African states.

The same reluctance of African states was also witnessed when the opportunity to establish the Africa Court of Human Rights was suggested. In a ministerial meeting of OAU majority of the delegates considered that then was 'untimely to discuss the possibility of a court.'[138] The prescription of judicial settlement in the African charter had worried the drafters that it will hamper and delay ratification of the charter.[139] Such frustrations commenced in the

---

[132] Ibid., Art.2 (1) cum (3)
[133] Ibid., Art.8
[134] Ibid., Art.7
[135] See Ibid., Part III (Art.20-21) for Mediation; Part IV (Art.22-26) for Conciliation and part V (Art.27-31) arbitration.
[136] Basically, the Parties to a dispute have power on the process of appointment of the mediator(s), Conciliator(s) or Arbitrator(s) (Protocol of the Commission of Mediation, Art.20, Art .23 & Art.27 (1)). In some of the mediums, the parties retain the power to submit themselves to the outcome of the settlement. ((Ibid., Art.21 (2); Art.28).
[137] Ibid., Art.14(2)
[138] The 1981 Guinea proposal of an amendment to the Draft Charter, for the inclusion of a tribunal that adjudicates violations of crime against humanity and protection of human rights, which was an apparent attempt to hold South Africa accountable, was rejected without substantial reason and/or discussion.(Annex I CM/1149(XXXVII) Rapporteur's Report CAB/LEG/67/Draft Rap Rpt (II) Rev 4 at paragraph117) as quoted in Gina Bekker, The African Court on Human and Peoples' Rights: Safeguarding the Interest of Member States, 51 journal of African law 151, 2007, pp 154
[139] Ibid., pp.153-4

establishment of the African Commission on Human and peoples' Rights-another quasi-judicial body with recommendatory power only.[140]

Nevertheless, this attitude of the African states was changed in unprecedented manner with the establishment of the African Economic Community (AEC). A novel idea of the AEC, regarding institution-building, is its incorporation of a Court of Justice.[141] The court has been empowered to interpret and apply the Treaty established AEC and adjudication of disputes therein submitted to it.[142] Due to the Washing away of African shyness to compulsory judicial settlement in this way, the OAU General Assembly, surprisingly, called for the consideration of the establishment of an African Court of Human rights and peoples' Rights.[143] While the turn of African states position to adjudication in relation to the AEC can be explained by the benefit that could accrue from the economic integration, there can barely be concrete justification, regarding the human rights court, other than public pressure at national and international levels.

By hook or by crook, Africa observed the existence of two judicial institutions with permanent and compulsory jurisdiction. Though Africa crawled to reach it, the establishment of a judiciary has been a huge development for the continent. The traditional view of Africans towards judicial settlement of disputes converted optimistically. The used to be 'Sacred Sovereignty' of African states has begun to be subjected to non national judiciaries.

---

[140] Ibid., p.155

[141] Treaty Establishing the African Economic Community, adopted 3 July 1991, entered into force 12 May 1994, 30 ILM 1241(1994), Art.7 (1) and Art. 18(1); Udombana, above in 126, p.76 [He states that the plan to establish AEC under the eye of an African Court of Justice avoided the argument that Africans are averse to judicial litigation].

[142] Ibid., AEC Treaty, Art.18(2)

[143] Resolution on the African Commission on Human and Peoples' Rights, Assembly of Heads of States and Governments, 30th ordinary Session Res. AHB/ Res 230 (XXX) p.212 4 as quoted in Udombana, above in 126, p.76

4.3.2 The Merger of the Two Courts: The African Court of Justice and Human Rights

No matter how radical the establishment of the two courts is, their coexistence posed some difficulties to the Union. Thus, it did not take long for the Assembly to decide for the integration of the two courts.[144] The prime premise of this decision is unavailability of sufficient recourses to maintain two courts.[145] In support of this position, Kindiki asserts 'a single court would avoid splitting of resources, both human and financial, towards maintaining two courts.' The significance of this saving on financial and human resources will be appreciated if one takes into consideration the fact that existing institutions in Africa notably the African commission, face severe underfunding and understaffing problems, and this affects their effectiveness.[146]

However, Juma views the funding limitation argument as being selective to the judicial arm as the same has not been applied to the duplicity of executive and legislative organs of the Union. But, this shortage of finance and resources was a clear problem of the OAU that continues for the AU.[147] Therefore, this resource related limitation is an inescapable reality of the Union than a manipulative ground. In the words of Udombano, 'Africa must act cautiously in light of the AU's present reality. Establishing two courts seems overly ambitious given the serious financial challenges of the AU.[148]

Moreover Udombana forecasted that the simultaneous existence of the two courts might produce conflicting interpretations and result in departed legal norms.[149] Absence of hierarchy between the courts contributes to the fragmentation that may ensure from the dual existence of the courts.[150] Viljoen and Baimu, concurring with Udombano, also suggest that

---

144 Decisions of the AU Assembly of Heads of state and government Doc. ASS/AU/ Dec 45 (III), Third Summit held in Addis Ababa, Ethiopia 6-8 July 2004
145 Ibid., Paragraph II
146 Kithure Kindiki, The Proposed Integration of the African Court of Justice and the African Court of Human and People's Rights: Legal Difficulties and Merits, 15 Afr. J. Int'l & Comp. L. 138 2007, p.144
147 Dan Juma, Lost (or) Found in transition? The Anatomy of the New African Court of Justice and Human Rights, 13 Max Planck UNYB 267 2009, p.267
148 Udombana, above in 125, p.863
149 Ibid., p.859
150 Ibid.

a single court will offer a ground for development of a unified, integrated, cohesive and hopefully indigenous jurisprudence for Africa.[151]

However, Jamu is skeptical as to whether the courts' coexistence would amount to proliferation and prefers to consider it as 'a process of institutional growth to meet emerging needs.'[152] He reaches this conclusion relying on the differences of mandate and philosophical basis of the courts.[153] But again, the interpretive mandate of the African Court of Justice includes treaties made within the ambit of the Union.[154] A number of these treaties[155] are of human rights. Therefore, the overlapping jurisdiction of the two courts is undeniable. Though the philosophical basis of the Human Rights Court differ from that of the court of Justice, this alone, would not avoid the resultant confusion from the judgments of the courts. Whatever care had been undertaken in the allocation of the mandates, the two courts would have intruded in the territories of each other. This may occur, for example, in human rights and economic matters, fields which cannot be isolated successfully from one another.[156]

The integration of the Courts is, therefore, persuasive for the above practical and theoretical factors. The decision has also been reached after the extensive scrutiny of other options of achieving the integration.[157] Ultimately, however, the General Assembly of the Union decided the merger of the two through the adoption of a single legal instrument designated

---

[151] Frans Viljoen and Evarist Baimu, Courts for Africa: Considering the Co-existence of the African Court on Human and Peoples' Right and the African Court of Justice, 22 Neth. Q. Hum. Rts. 241 2004, p.253
[152] Jamu, above n 147, p.277
[153] Ibid.
[154] Protocol of the New Court, Art.19 (1) (b)
[155] See below Section 3.5.1
[156] Viljoen and Baimu, above n 151, p.253
[157] Report of the PRC and Legal Experts on Various Legal Matters Ex-CL/195/VII adopted at 7th ordinary Session of the Executive Council of the AU 28 June-5 July, 2005, Sirte Libya, pp. 2-8.Three alternatives had been forwarded. Option one was the adoption of a single instrument to establish a new integrated court. This was appraised as allowing the taking into account of all legal requirements, though complex and time consuming. Interim arrangements were required. Option two was the adoption of a short and simple amending protocol that charts the way forward and accelerating the establishment of the merged court and avoiding problems that may follow the operationalization of the Human Right Court early. Option three was adoption a decision by the Assembly which would decide the operationalization of the Human Rights Court and provide that once both protocols have entered into force harmonization of both protocols would be conducted.

'The protocol on the Statue of the African Court of Justice and Human Rights.'[158] This protocol replaced the 1998 Protocol to the African Charter on Human and peoples' Right on the establishment of an African court of Human Rights and peoples' Right, which entered into force on 25 January 2004 and the Protocol of the Court of Justice of the African Union, entered in to force February 11, 2008.[159] This new protocol merged the two former courts to establish the 'African Court of Justice and Human Rights.'[160]

The court shall have two sections: Human Rights Section dealing with cases concerning human and/or peoples' rights issues and General Affairs Section hearing all other matters outside the competence of the Human Rights Section.[161] Each section has, again, the power to form one or several chambers.[162] The decision of any section or chamber would be considered as rendered by the Full Court.[163] When members of either section deemed may engage in the jurisdiction of the other for one of the sections can refer a case before itself to the Full Court,[164] the quorum for the deliberation of which shall be nine judges.[165]

4.4 Present Role and Status of the African Court of Justice and Human Rights

Art 5 of the CA names the African Court of Justice and Human Rights as one organ of the union.[166] In the Protocol [statute] of the new court, the status of the court is indicated more clearly as the 'main judicial organ' of the union.[167] In fact, this is a reiteration of the status of the African Court of Justice as principal judicial organ of the Union.[168] The change from the term 'principal' to 'main' does not show a substantial difference of meaning.

---

158 Protocol of the New Court, Art.2
159 Ibid., Art.1
160 Ibid., Art.2
161 Ibid., Art.16 cum 17 (1) and (2)
162 Ibid., Art.19 (1)
163 Ibid., Art.19 (2)
164 Ibid., Art.18
165 Ibid., Art.21 (1)
166 Constitutive Act, Art.5 (d); See also AEC Treaty, Art.7 (1) (c)
167 Protocol to the New Court, Art.2 (2)
168 Protocol of the Court of Justice of the African Union, adopted 11 July 2003,entered into force on 11 February 2008, AU Doc. Ass./AU/Dec. 25(II) (hereinafter protocol of the ACJ), Art.2

Incorporation of a judicial body, as a principal organ, into the system of international organizations has become indispensable to political organizations directed to achieve peace and Security. As mentioned by Rosenne, in his observation of the UN,'… the world political organization, already possessed of executive, deliberative and administrative organs, would be incomplete unless it possessed a fully integrated judicial organ of its own."[169] Subsequent international organizations seem to follow this line of institution building.

Though the OAU had been created a decade and something later after the establishment of the UN, the time in which inclusion of judicial bodies into international organizations have began to be propagated loudly, African states turned deaf ears to such system of organization. Let alone to include a principal judicial organ, adjudication as dispute settlement mechanism had been avoided deliberately from OAU's peace and security management.[170] Therefore, the grant of 'main judicial organ' status to the ACJHR is a radical jump. This at least testifies to the fact that African states endorsed adjudication as a pacific dispute resolution means.[171]

Again the recognition of the Court as main judicial organ shows the hierarchical equality of the court with other political, administrative and advisory organs of the union. The court can entertain a matter brought before its table regardless of the fact that it is pending before any organ of the Union. The Assembly, the supreme organ of the Union, itself cannot take or suspend matters being heard before the court, due to the sole reason that it is engaging on the same issue, so long as the court handless it in its judicial function.[172] No power of deferral is given to the Assembly and conversely no prohibition has been stipulated on the

[169] Shabati Rosenne, The World Court: What It Is and How It Works (4th ed.,1999), pp.27-28
[170] See Section 3.3.1.
[171] Even though peaceful resolution of conflicts among member states of the Union is a principle of the AU, the means for that is not indicated in the Constitutive Act. The appropriate means to be employed depends upon the decision of the Assembly (Constitutive Act, Art.4)
[172] Nowhere in legal documents of the Union has the Assembly be given power to do so. See Art 9 of the CA and Rule 4 of the procedure of the assembly. More importantly also, no specific matter has been pre-determined as purely political, non-justiciable and unsuitable for judicial determination. In quite contrast, the ACJHR is granted jurisdiction 'over all cases and legal disputes.' (See Art. 28 of the Protocol of the New Court)

court, i.e. not to simultaneously handle issues with other organs in the AU system. Observation of the UN system appears also to suggest similar finding.[173]

Moreover, the court is not subject to any control relating to its judicial function and is kept independent in the exercise of its substantive mandate.[174] The election of members of the court and approval of the court's budget by the Assembly do not constitute control and imply no hierarchical priority of the Assembly.[175] Quite rather, the court has been accorded power of review relating to the activities of all other organs either principal or subsidiary. And when the court finds the act invalid or illegal, unlike the Assembly, it has the power to rectify.[176] This may imply hierarchical superiority of the Court.

Furthermore, the impact of this status of the court also has a ripple effect on human rights matters. Firstly, it avoids the marginalization of human rights cases to the periphery of the AU.[177] Thus, therein forth issues of violations of human and peoples' rights would be dealt by the main judicial organ of the Union. This, in turn, creates the situation in which "human rights issues will now be mainstreamed into the conversation of other organs of the Union, through the provisions, for instance, on the enforcement of judgments."[178]

Another repercussion of the mainstreaming of human rights issues to the Court relates to compliance as Jamu contends. His argument is that there could no more be selective non-compliance to human rights judgments.[179] For him, a state, accepting the interpretation of the General Affairs Section cannot reject the judgment of the human rights.[180] Therefore, the mainstreaming induces compliance to human rights judgments.

In general, the AU system has accorded the court a prominent position which allows it to play huge roles in relation to the adherence to rule of law. And, of course, this must be

---

173 Rosenne, above in 169, p.33
174 Art. 12(1) and (2) Protocol of the New Court
175 Rosenne, above n 169, p.30
176 Protocol to the New Court, Art.28 (e)
177 Jamu, above in 147, p.280
178 Ibid.
179 Ibid., 281
180 Ibid. [He states: "… if states comply with the decision of the court on the interpretation of general legal issues, their non-compliance with the court's human rights decisions would be seen to be selective.]

accompanied with the election of active personalities on the judgeship so that the court could prove itself effective and efficient. This largely depends on how creatively the mandate and jurisdiction of the court will be interpreted.

4.4.1 Composition of the court

The court consists of sixteen (16) judges whom shall be nationals of state parties to the court's Protocol.[181] From among the sixteen judges, each region of the continent will be represented by three judges except the western region that shall be represented by four judges.[182] No more than one judge from a single country sits on the court.[183] The protocol thus, stresses geographical representation more than individual member states. One member, one judge approach is not the rule.[184] It is also explicitly stated that gender and principal legal traditions representation need to be ensured in the election process.[185]

Members of the court are required to discharge their functions and duties impartially and independently.[186] They shall act in their personal capacity.[187] Meaning, the judges must not be subject to the direction or control of any person or body. Institutionally as well, the court is demanded to act impartially, fairly and justly.[188] The judges are also expected to be persons of high moral character who possess the qualifications required in their respective countries for the appointment of the highest judicial offices, or be juris consults of recognized competence and experience in international law and/or human rights law.[189] A judge will in principle, stay in office for six (6) years in the court once elected with the possibility of a re-election.[190] But, four judges from each section, whom will be determined by a lot drawn,

[181] Protocol to the New Court, Art.3 (1)
[182] Ibid., Art.3 (3). These regions are North Africa, South Africa ,West Africa, East Africa and Central Africa. [Art. 1(d) of the AEC Treaty]
[183] Ibid., Art.3 (2)
[184] Konstantinos D. Magliveras & Gino J. Naldi, The African Court of Justice, 66 ZaoRV 187 2006, p.194
[185] Protocol to the New Court, Art.7 (4) and (5)
[186] Ibid., Art.13 (1) first paragraph
[187] Ibid., Art.12 (3)
[188] Ibid.
[189] Ibid., Art.4
[190] Ibid., Art.8 (1) first paragraph

shall terminate after four years of service.[191] The president and vice president of the court, elected for three years, will be elected at the first ordinary session of the court.[192] Except the president and the vice president, all remaining judges will serve on part-time basis.[193] Another permanent appointee of the court is the Registrar.[194] As required, other officers may also be appointed.[195] The judges will enjoy all the privileges and immunities accorded to diplomatic agents in international law.[196] In particular, they will be immune from legal proceedings for any act or omission committed in their official capacity and the immunity will extend after cessation of their term for acts performed in carrying their judicial functions.[197]

4.4.2 Jurisdiction of the Court

The court constituted in the stated above manner shall assume jurisdiction over all cases and legal disputes regarding the interpretation and application of the CA, the interpretation, application and validity of Treaties and all other subsidiary legal instruments adopted within the (O)AU legal framework; interpretation and application of the African Charter, the Charter on the Rights and Welfare of the child, the protocol to the African Charter on Human and Peoples' Rights on Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the state parties concerned; any question in international law; all acts, decisions regulations and directives of the organs of the Union; all matters specifically provided for in any other agreements that state parties may conclude among themselves, or with the Union and which confer jurisdiction on the court; the existence of any fact, which if established would constitute a breach of an obligation owed to a state party or to the Union; and the nature and extent of the reparation to be made for the breach of an international obligation.[198]

---

[191] Ibid., Art.8 (1) second paragraph and Art.8 (2)
[192] Ibid., Art.22 (1) first paragraph
[193] Ibid., Art.8 (4)
[194] Ibid., Art.22 (4)
[195] Ibid.
[196] Ibid., Art.15 (1)
[197] Ibid., Art.15 (2)
[198] Ibid., Art.28

Basis of the new court's jurisdictions are the above instances only. One source of jurisdiction but lost in transition from ACJ to ACJHR is the referral of disputes by the General Assembly.[199] In the Protocol establishing ACJ, the Assembly had been empowered to confer power over any dispute not covered by the jurisdiction of the court as specified under Art 19(1) to the Court. This, however, was deleted in the protocol of the new court. A possible reason for the omission may be the broadened jurisdiction of the court with the transition of the ACJ.[200] No matter how broad judicial power is given to the new court, unpredicted scenarios may still arise. Yet it would have created an opportune occasion of expansion of the court's jurisdiction without amending the protocol. It might have become helpful to address new developments, such as standing of persons before the court, on which African states have not reached an agreement today.

In resolving the dispute at hand, the court shall have regard to the constitutive Act, general or particular international treaties ratified by contesting states, customary international law, general principles of law recognized universally or peculiar to African states, judicial decision, writing of publicists and regulations, directives and decisions of the Union to determine rule of law subsidiarily, and any other law relevant to determination of the case.[201] The court has also power to decide *ex aequo et bono* case but only when the parties consent so.[202]

4.5 Authoritative Interpretation in the AU System

4.5.1 The Legal Frame Work

To recall our discussion in the previous chapter, the task of interpretation is clarification of meanings and favouring one sense of meaning from among many different possibilities of understanding.[203] When such rendered clarification is meant to bind others, it will be called authoritative interpretation.[204] Usually, an organ would be invested with such power of

[199] Protocol to the ACJ, Art.19 (2)
[200] Protocol of the New Court, Art.28 (1). The provision is a new addition to the court of Justice of the Union. And it is a consequence of the merger of the former African Human Rights Court.
[201] Ibid., Art.31 (1)
[202] Ibid., Art.31 (2)
[203] See Section 2.3.1.
[204] Ibid.

interpretation as distinct from the routine activity of giving meaning of most organs of international organizations.[205]

The OAU Charter had given this mandate of interpretation to the General Assembly of the OAU.[206] This plenary organ, where in all members of the Unity had seats, was given this task as states would be enabled to control any interpretation threatening their sovereignty. Hence, the interpretation scheme of the Unity may be characterized as political. Any pronouncement of interpretation was required to be sanctioned by the two-third majority of the states in the Assembly.[207]

With the succession of AU, this task of interpretation was depoliticized; the Court of Justice and Human Rights being endowed with power of interpretation.[208] The major difference between the system of interpretation in the OAU and AU is "… unlike the Assembly, the ACJ (now ACJHR) would have to give reasons for its findings, issuing considered judgments in a judicial setting.[209] In the opinion of Viljoen and Baimu, a court's role is less political and could serve to depoliticize conflict.[210] Establishing the ACJHR will also ensure an element of independence from a more political body, the AU Assembly." In the present setting of the Union, interpretation is the most important activity of the court. It is only this competence of the court that is granted in verbatim in the Constitutive Act of the Union while the other mandates of the court are left to a protocol.[211]

This mandate of the court is to be exercised relating to three different legal instruments: the Constitutive Act, the Union Treaties and subsidiary legal instruments.[212]

---

[205] In the UN, for example, each organ of the UN is free itself to interpret the Charter as and when circumstances require.
[206] OAU Charter, Art.27; Note that the Rules of Procedure of the OAU Assembly did not list 'interpretation of the Charter' as function of the Organ.
[207] Ibid.
[208] Constitute Act, Art.26
[209] Protocol of ACJ, Art.35 (1)
[210] Viljoen and Biamu, above in 151, p.256
[211] Constitutive Act, Art.26
[212] Protocol to the New Court, Art.28

i) The Constitutive Act of the Union: This is the constitutional instrument of the African Union. The Act is made up of thirty-three articles which can be roughly segmented into normative and institutional parts and the preamble. The normative portion includes the objectives and purposes of the Union, the governing principles and others substantive and procedural provisions. The remaining provisions relate to matters of institutions of the Union. Compared to constitutive instruments of other IOs, the CA is short.[213] All these magnify the importance of interpretation of the Act. Needless to say, interpretation of constitutions of IOs is at core of their well-functioning, and so is the case in the AU. In fact, it would be paramount in the case of AU whose members are very protective of their sovereignty in a manner that could incapacitate the adaptation of the Union to future contingencies on the continent. Hence, interpretation of the CA must be undertaken with the utmost care to balance the interests of the member states and proper functioning of the Union. With this regard Udombana suggests that the court should lean towards the teleological and functional approach of interpretation.[214] When the issue of interpretation relates to the AU Act, he adds, "…a flexible and effective approach will be justified."[215] The preamble and purposes and objectives part of the Act will, definitely, be consulted and serve as a guide.

Regarding the scope of interpretation, Naldi and Magliveras have noticed discrepancy between Art 19 of the ACJ Protocol and Art 28 of the Constitutive Act. The former refers to "interpretation and application of the Act" whereas the latter subject all "interpretation arising from the application and implementation" of the same to the jurisdiction of the court. This latter clause embraces wider situations than the former and has a broader scope.[216] The same disparity has been repeated in the Protocol of the new Court.[217] The protocol, thus, has a restricting effect of the scenarios envisaged under the Constitutive Act.

---

[213] For example, the UN Charter has more than a hundred provisions. The EU Treaties has more than 200 provisions.
[214] Udombana above in 29, p.107
[215] Ibid.
[216] Magliveras and Naldi, above in 184, p.198
[217] Protocol to the New Court, Art.28 (2)

The important dimension of the Court's interpretation of the CA is its binding effect on parties beyond disputants to the case and arguably up on subsequent cases.[218] Unlike other decisions of the court, the rendition of the court relating to the interpretation of the CA binds all organs of the Union. This is an exception to the rule that binding force of the decision of the court is limited to parties to the case.[219] The relevant provision Art 50(3) of the Protocol of the new court reads:

> *"The decision of the court concerning the interpretation and application of the CA shall be binding on Member States and organs of the Union, notwithstanding the provisions of paragraph 1, of Art 46 of this statue."*

This provision marks the authoritative feature of the court's interpretive decisions. It is due to this extensive obligatory aspect of the decision of the Court that member states and organs of the Union are allowed to present their argument and position intervening in a case involving interpretation of the CA.[220] This procedure aims at securing the say of states and organs of the Union on the constitutional document of the Union. This may be assimilated to the right to be heard. Before the court gives judgments that are final upon all states and organs, it is expected to listen to the views of the latter. To intervene in a case, member states are required to express their interest following which the Registrar of the court will notify the remaining states and organs.[221] State Parties and organs notified in this manner have the right to intervene in the proceedings. It should be observed that Art 50 of the new Protocol envisages the possibility of expression of interest by Member States only.[222] Organs of the union, however, are not allowed to manifest their interest, which, pursuant to the protocol, appears to initiate the procedure

[218] Constitutive Act, Art.50 (3). The decision on subsequent cases will be binding arguably. Because, any section of the court is required to refer cases in which it wants to change its earlier positions. Otherwise, it may not change the interpretation it rendered once.
[219] Constitutive Act, Art.46 (1)
[220] Protocol to the New Court, Art.50 (1)
[221] Ibid.
[222] Ibid. It reads: "Whenever the question of interpretation of the Constitutive Act arises, in a case in which Member states other than the parties to the dispute have expressed an interest, the Registrar shall notify all such states and organs of the Union forthwith.

of the intervention so that the Registrar will notify other organs and state parties.[223] In the opinion of the present writer there is no convincing reason not to grant this initiation power to organs of the Union. It is not hard to imagine manipulative behaviour of Member states relating to the interpretation of the Act. The effect of this distinction is, thus, that organs of the Union will be denied standing where they observe interpretational concern in disputes they are not parties to and no member state has expressed interest in the same dispute. One possible mechanism for the organs of the Union to escape this limitation would be to utilize Art 49 of the new protocol.[224] Under this provision, any state member or organ is allowed to submit its request to be permitted to intervene in a case where it considers "it has an interest of a legal nature which may be affected by the decision of the case." But, in this provision the requesting organ is expected to prove their threatened interest of a legal nature, unlike the wide standard of 'interest' under Art 50(1) which includes other interests than those of legal nature. The outcome of the case also must have a huge impact on the decision of the court to permit the intervention. The utility of this provision as redress to the mentioned problem, thus, depends to a large extent on the judicial activism of the court.

Still, the organs may avail themselves of the provision which allows the court to invite member states, organs of the Union and any person concerned to take part in the case where effective administration of justice requires.[225] In this instance as well, all things depend on the meaning the court gives to the phrase "effective administration of justice." This forces us to await the jurisprudence of the court yet to develop.

Though the Rules of procedure of the Court will indicate the various forms of the court's decisions, in the protocol of the new court, two common forms have been implied: decisions and opinions. One question, then pop–ups to the scene: Are all interpretive pronouncements of the court given in the form of either decisions or opinions authoritative?

---

[223] Pursuant to the provision, Expression of interest precedes the notification to be made by the Registrar. In other words, it is only when the states express their interest that the registrar contacts the concerned states and organs.

[224] Protocol to the New Court, Art.49 (1)

[225] Ibid., Art.49 (3)

In my opinion, no, they are not; because, the obligatory sense is limited to interpretations rendered in the form of decisions. The term 'decisions,' in Art 50(3) of the protocol, discerns opinions of the court that do not oblige extra-disputant parties. In fact, strictly speaking, advisory opinions are not even binding or decisive by their nature. This, however, should not be taken as suggesting that advisory opinions are not binding upon advice requesting parties.

The decision of the court in connection with interpretation of the Act need to be sanctioned by a qualified majority of at least two votes and the presence of at least two-thirds of the judges. This means at least 6 of the 9 judges must be present and interpretive decisions must be made by 9-7 vote at each Sections.

The last associated issue that needs to be addressed with regard to the CA interpretation is whether the court would be bound by its own decision. On the one hand, the articulation of Art 50 (3) of the Protocol states that organs of the Union are bound by interpretive pronouncement of the Court. This may suggest the inclusion of the court itself as being bound by the decision. On the other hand, judicial decisions are to be regarded by the court as subsidiary sources of law, being subject to Art 46 (1) of the new protocol that limits the binding force of the court's judgment to parties to the dispute. Otherwise put, this provision declares that judicial decision can be consulted by the court albeit such decisions will not have obligatory force other than on those to that particular case concerning which the judgment is given. This far the status of the former decision of the court is clear, therefore, the decision of the court is short of precedential effect.

But still the court cannot easily disregard its former decisions. They have strong persuasive force over subsequent cases. They ought only to be changed by the rendition of the Full Court.

ii) Treaties of the Union: The second category up on which the court will give its interpretive opinions and verdicts are the numerous treaties concluded under the Union or the organization of African Unity. In the protocol of the replaced ACJ, the court's treaty

interpretation mandate has been limited to the Union Treaties.[226] It remained doubtful whether Art 19 (1) (b) of the ACJ protocol endowed power of interpretation over treaties entered in the aegis of the OAU. This thinking emanated from the clause "the interpretation, application and validity of Union Treaties." Some had suggested that the treaties entered in to under the OAU are also included within the term Union Treaties since AU has succeeded the OAU.[227]

Nevertheless, this confusion has disappeared for good due to the new Protocol of the court. There in, it has been clearly stated that the court interprets treaties concluded before the transition to the AU. The respective provision reads:

> *" The court shall have jurisdiction over all cases and all legal disputes submitted to it in accordance with the present statute which relate to … (b) the interpretation application and validity of other Union Treaties … adopted within the framework of the Union or the Organization of African Unity"*

The treaties presently in force, *inter alia* are, Treaty Establishing the African Economic Community (1991), the African Charter on Human and peoples' Rights (1981), the Convention on the Ban of the Import into Africa and the Control of Trans-boundary Movement and Management of Hazardous Wastes Within Africa (1991), the Convention on the Prevention and Combating of Terrorism (1999). Some of the treaties include stipulations that their interpretation may be brought before the court. The Non- Aggression and Common Defence pact of the African Union is an example of such treaties.[228] The various protocols adopted by the Union also fall within the term 'Union Treaties'. To name a few, the Protocol relating to the Pan-African Parliament, Protocol establishing the Peace and Security Council and the Protocol on the statue of the African Court of Justice and Human rights.[229]

---

[226] Protocol of the ACJ, Art.19 (b). It states that the court would have jurisdiction over "the interpretation or Validity of the Union treaties..."

[227] Magliveras and Naldi, above in 184, p.198

[228] The African Union Non-Aggression and Common Defense Pact, adopted on July 1 2005 and entered into force on Dec 18 2009, Art. 16

[229] Statute of the African Union Commission in International law is a recent addition to this category. It entered into force on Feb 04 2009.

Both sections of the court will be seized with interpretation of treaties and issues falling within their respective competencies. However, in contrast to interpretations involving the AU constitution, decisions of the court on interpretation of other treaties do not end up binding state parties and organs of the Union.[230] Rather, the parties to the case will only be obliged by the judgment.[231] But, if a state party or organ intervened in a case involving treaty interpretation after being notified by the Registrar, the outcome of the proceeding in which it took part will bind it.[232] The rationale for this approach is assurance of "collective enforcement" of resulting judgments in issues where state parties and AU organs have an interest.[233] The power of the Registrar, under Art 51 is more expansive than that of Art 50 of the new protocol. In the latter case, the notification to all state parties and organs, by the Registrar occurs after the expression of interest by at least one non-disputant state.[234] But in Art 51, whenever a question of interpretation of other [than the Constitutive Act] treaties ratified by member states besides the parties to a dispute arises, the Registrar will send its notifications.[235] Therefore, the Registrar initiates the intervention proceeding. Empowering the Registrar similarly in cases concerning the interpretation of the CA would have been justified more as the Registrar will also plays a key role in the facilitation of representation of all concerned states.

One point that must be made in this regard is the inapplicability of the intervention proceeding specified under Art.51 to cases presented to the court pursuant to Art.29 and 30 of the Protocol. The two provisions deal with alleged violation of human and peoples' right. When read conjunctively, the three provisions imply that the intervention procedures enshrined under Art.51 apply in pure interpretation cases of human rights treaties.[236] As Jamu contends, the exclusion of human rights, which impose obligation *erga omnes*, from matter to be intervened by state parties or organs of the Union is not clear for all states have

[230] Protocol to the New Court, Art.51 (2)
[231] Ibid., Art.49 (1)
[232] Ibid., Art.51 (2)
[233] Jamu, above in 147, p.296
[234] Protocol to the New Court, Art.50
[235] Ibid., Art.51
[236] Ibid., Art.51 (1), Art.29 and Art.30 cum Art.51 (8)

legal interest in their protection.[237] But still when read conjunctively what the three provisions imply is that Art.51 will apply in pure interpretation cases of human rights.

The vote of the court required in the interpretation of treaties is different from the qualified majority vote system applicable in case of interpretation of the CA.[238] The decision of such issues must be made by the normal vote of the court, i.e. a majority of the judges present with a casting vote of the presiding judge in the event of equality of votes.[239]

iii) Subsidiary Legal Instruments: The definition of this term is not provided in the Protocol of the new court. But the meaning may be implied. Activities of the AU Organs are not specified on the CA, protocols and other treaties of the (O) AU only. Beyond these, legal documents such as Rules of procedures are utilized significantly.[240] Almost every organ adopts or presents its rules of procedure for adoption to the ExC.[241] This legal instrument, thus, squarely falls within the notion subsidiary legal instrument of the statute. They are subordinate to protocols or statues establishing Union Organs.[242]

In addition a number of internal bodies of the Union give binding decisions.[243] In 2000, the decisions of AU Organs have been reported as reaching over two-thousand.[244] The legal force of resolutions, now is agreed upon by scholars, depends on the subject matter of the resolution. Former Legal Counsellor of the OAU, Maluwa, agrees with Szazs's proposition:

> *"For most part the legally effective decisions of IO's are those that relate to the organization itself; thus competent representative organs can establish regulations and rules of the organization, adopt programs and*

---

[237] Jamu, above n 147, p.296
[238] Cf: Constitutive Act, Art.50 (4) and 42 (1)
[239] Protocol to the New Court, Art.42 (1)
[240] See Rules of Procedure of the General Assembly, the Executive Council the PSC, the Pan African Parliament.
[241] The Executive Council (Constitutive Act, Art.12) & The Pan African-Parliament (PAP Protocol, Art.12 (1) adopt their own procedures. The ECOSOCC (ECOSOCC statute, Art.17), the PRC (Procedure of PRC, Rule 29) and STCs (procedure of the council, rule 5 (1) (p)) are required to get the approval of the executive council to adopt their own Rules of Procedure.
[242] For example, Constitutive Act, Art.8 and Art.12; See also ECOSOCC Statute, Art.17
[243] See Section for more Rule 33 of Procedure of the Assembly, Rule 34 of procedure of the Executive.
[244] Tiyanjana Maluwa, International Law-Making in the Organization of African Unity: An Overview, 12 Afr. J. Int'l and Comp. L. 201 2000, p.214

budgets etc. All such decisions are internally and legally binding effective and therefore 'law' within and for the organization.[245]

One important Resolution of this kind of the OAU is Resolution AHG/Res.16(I)on Border Disputes Among African states.[246]

4.5.2 The *Ad Hoc* Interpretive Mandate of the General Assembly

The protocol of the new court and its annexed statute of the court have not entered into force yet.[247] Consequently, no interpretation by the court has been rendered so far. However, the CA has entrusted the General Assembly with temporary interpretation mandate till the court stands on its own. Second statement of Art.26 states "…Pending its establishment, such [interpretation of the CA] matters shall be submitted to the Assembly of the union, which shall decide by a two-third majority."[248]

As a matter of fact, the protocol of the ACJ had entered in to force in 2008 after the ratification of the 15th state.[249] But, this event was followed by the decision of the Assembly to merge the courts. An issue that may arise here is thus whether the entry into force of the protocol of the ACJ ends the *ad hoc* interpretation power of the Assembly.

The mentioned provision empowers the Assembly with competence to interpret CA "pending the establishment of the court.' Therefore, the question will turn to whether the ratification amounts to the establishment of the Court. In my opinion, no it does not. Because, the establishment of the court requires further steps than the mere entry into force of the protocol. Such steps are presentation of candidates to the Assembly,[250] the election of the qualified judges[251] and administrating oath and making a solemn declaration[252] on the

---

[245] Ibid., p.214
[246] Ibid., pp.214-216
[247] Since the date of adoption, 1 July 2008, only 27 States have signed the Protocol. From among these signatories, Burkina Faso, Mali, and Kenya only have ratified the protocol and deposited their ratification with the Commission. www.au.int/en/sites/default/files/protocol on statute of the African Court of Justice and HR_1.pdf.html
[248] Constitutive Act, Art.26
[249] It entered into force on 11 February 2008.
[250] Protocol to the New Court, Art.5
[251] Ibid., Art.7

one hand and the appointment of the Registrar and employment of other staff of the court,[253] on the other hand. All these remaining, it cannot be said that the court has been established. The single effect of the protocol's entry into force is, thus, giving breath to the stipulations regarding the remaining steps and making them applicable. As a result, the General Assembly still retains the provisional mandate of interpreting the CA.

The Act's preference of the Assembly for this purpose emanates from its position at the apex of the organs of the union.[254] All states are also represented in it so that any act threatening, when observed from the perspective of states, would be controlled. Realizing this, thus Udombana asks whether the member states of the Assembly would have the independence of thought and action to give an unbiased interpretation of matters arising from the application and implementation of the Act."[255] The Rules of procedure of Assembly do not prescribe the procedure how the Assembly reaches at interpretive decisions except stating it as power and function of the Assembly.[256] It appears from here that the Rules of Procedure assumes that no different procedure is required and it will be undertaken in a similar pattern to other mandates of the Assembly. And this, as Udombana has feared, might subject interpretation mandates to political consideration.

This *ad hoc* function of the Assembly, however relates to interpretation of the CA only. In other words, the Assembly is not given power of interpretation of treaties and other legal instruments.[257] Pending the establishment of the new court, therefore, interpretation of human rights related treaties will be the jurisdiction of the African Human Right Court. All cases and disputes "concerning the application of the Charter [African Human and peoples'

---

[252] Ibid., Art.11
[253] Ibid., Art.22 (4)
[254] Constitutive Act, Art.6 (2); See also Procedure of the Assembly, Rule 2
[255] Udombana, above in 29, p.108
[256] The Procedure of the Assembly Stipulates various procedures for decision making of the Assembly, among these are sanctions for unconstitutional change of government (Rule 37); Elections of the members of the commission (Rule 38 (2), sanctions for Non-compliance with decisions and policies (Rule 36). However, no procedure of such sort is prescribes for the interpretation of the CA. It only list it as one function of the Assembly (Rule 4)
[257] Art.26 of the constitutive Act deals with the ad hoc interpretation of the Assembly regarding the Act.

Right charter]..."are to be brought to the Human Rights court.[258] Except such treaties, interpretation of other treaties and subsidiary legal instruments is not mandated to any organ of the Union. In default, thus, the interpretation of these instruments lies with in the domain of member states. The basis for this assertion is the *Jaworzina* advisory opinion of the PCIJ in which it is stated "it is an established principle that the right of giving an authoritative interpretation of a legal rule belong solely to the person or body that has power to modify or suppress it."[259]

4.5.3 The Practice of Interpretation of the Constitutive Act by the Union

Exactly ten years have passed since AU succeeded the OAU. In this journey of the organization, many activities have been undertaken. Since the Court has not been established now, the Assembly is still supposed to interpret the CA. Yet, not a single authoritative interpretation has been pronounced by the Assembly.[260] To the surprise of many, no authoritative decision on interpretation has been given since the establishment of the OAU.

Rather, most interpretive concerns end at discussion level of the respective organs in which the issue has been raised.[261] In the present trend, points of disagreements on interpretation of the CA or any other legal document will be submitted to the legal department of AU Commission. The Department, then, will present its opinion and it will be finalized there.[262]

Perhaps, one problem leading to this trend of interpretation is the non-regulation of the matter within the organization clearly. Even though the OAU Charter stipulates it as function of the Assembly, the procedure was not specified surely being left to be specified by the Rules of Procedure. But the rules of procedure of the OAU Assembly as well failed to indicate any point with this regard.

---

[258] Protocol to the African Charter on Human and Peoples' Rights on the establishment African court on human and Peoples' rights on the establishment of an African court on human and people's right adopted June 26 1998, entered into force 25 January 2004, herein after Protocol to the African Court, Art.3

[259] *Jaworzina* Advisory opinion of 6 Dec. 1923, PCIJ Rep. Series B, No. 8, p.37 as quoted in Efthymios Papastavridis, Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisi, 56 Int'l & Comp. L. Q. 83 2007, p.91

[260] Interview with Mr. Bright Mando, Legal Counsel of AU Commission Legal Department, on Feb. 17, 2012

[261] Ibid.

[262] Ibid.

Similarly, the absence of a judicial body with advisory and contentions jurisdiction was another cause. As mentioned earlier, no judicial body existed in the aegis of the OAU from which states and organs of the organization could avail themselves on matters of interpretation. The attempt to establish the Commission on Mediation, Conciliation and Arbitration as a quasi-judicial body, regardless of its significance on points of interpretation, was never operational.[263]

Even if a judicial or quasi-judicial organ existed, one will hardly dare to assert that it would have been utilized. To date, no advisory opinion has been requested from the African Court of Human and peoples' Rights despite its expanded advisory jurisdiction than any other international human rights organ.[264]

4.6 The Power of The Court to Review Acts of Political Organs of The African Union

4.6.1 Introduction

Mention has been made that among the composing organs of the Union are policy organs in which political decisions will be taken. Organs of the Union with such characteristics are the General Assembly, the Executive Council, the Permanent Representatives' Committee and the Peace and Security Council. In these organs, delegates of states are not expected to act in their individual capacity. They are presumed to advance interests of their home states or at most as stated by Blokker, "the task of representatives of member states is broader than that of [being] simply champions of pure self-interest for the organ in which they sit has

[263] The Commission of Mediation did not have any interpretation mandate as the OAU General Assembly had assumed that function. Therefore, except for its interpretation in settling disputes through the three means, it could not have given decision on pure interpretation matters. Whatever the case, the organ did not operationalize. (Udombana, above in 128, p.820

[264] AP Van der Mei, The Advisory Jurisdiction of the African Court on Human and People's Rights, 5 Afr. Hum. Rts. L. J. 27 2005, p.31[asserting that the African Court has the widest advisory mandate than any other regional human rights court]

collective international responsibility."[265] Either way, however, the acts undertaken in such organs will barely be undiluted by political considerations.

In the present context of the Union, political organs have assumed crucial responsibilities that may affect the interest of member states. To cite some, the Assembly determines appropriate sanctions on member states for default of payment of their share of the budget of the Union.[266] Similarly, the Assembly may subject any state that fails to comply with polices and decisions of organs of the Union, to sanction.[267] Again governments that come to power through unconstitutional means are to be suspended.[268] This power has been exercised repeatedly. The most innovative, yet controversial, concept of the Union i.e. the Union's rights of intervention is also to be decided by the political organs of the union.[269] Such and similar other acts of the Union are to bring the relationship of member states and the Union to sharp confrontation. Expressing the IOs and Member States relationship, Blokker says "[t]hey [states] not only create it [an IO]; they are also its biggest fans at times. The paradox- and this field is full of paradoxes- is that at other times, the members are afraid of the organization and are its fiercest opponents."[270] This is particularly true of African states which repeatedly consider their sovereignty as 'sacrosanct.'

At the present state of international law, unless a treaty provision exists, states themselves define the legality of acts of their own or those of other subjects of international law.[271] This means where a state consensually transfers this power to an organization or specific organs there in, it will be done accordingly. The European Union and the African Union are the

---

[265] Niels Blokker, International Organizations and Their Members: International Organizations Belong to All Members and to None-Variations on a Theme, 1 Int'l Og. L. Rev. 139 2004, pp.149-150
[266] Constitutive Act, Art.23 (1)
[267] Ibid., Art.23 (2)
[268] Ibid., Art.30
[269] Three organs may involve in this regard. The PSC to recommend intervention and approve mode of intervention of the Union (Art.7 of PSC Protocol); The General Assembly in deciding to intervene(Rule 4 of the procedure of the Assembly) and the Executive Council as may be delegated by the Assembly (Rule 3 (1) (d) of the Protocol.
[270] Niels Blokker, Exploring the Evolution of Purpose Methods and Legitimacy: Accountability of Intergovernmental Organizations: 94 Am. Soc'y Int'l L. Proc. 204 2000, p.204
[271] David Schweigmann, The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice (2001), p.207

latest instances of such systems.[272] In fact, one among the many functions of the OAU's General Assembly was reviewing the structure, function and acts of all organs of the organization.[273] But, likewise the interpretive mandate, the detailed procedures of the review system had not been indicated. Though constitutionally granted, the consequence of a reviewed act by the OAU's Assembly was not described. The absence of the procedure might seem to suggest that the Assembly follows its ordinary proceeding in reviewing acts. However, practically no decision has been given on matters of review of organs as far as the knowledge of the present author is concerned.

The African Union review system, as in the case of authoritative interpretation, has evinced two major developments: it brought the subject from political body to the hands of judicial institutions and regulated the matter in an in-depth manner. Accordingly, the court entertains all cases and legal disputes relating to acts, decisions, regulations and directives of the organs of the Union.[274] As learnt from the jurisprudence of the ICJ, a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.[275] In its broadest sense, an international dispute can be said to exist whenever such a disagreement involves governments, institutions, juristic persons (corporations) or private individuals in different parts of the world.[276] The basic elements of a dispute, thus, are specificity and existence of claims and assertions.[277] And such a dispute will qualify as a legal dispute when "the claim is based on treaties, legislations and other sources of law and if remedies such as restitution for damages are sought."[278]

As it is comprehendible from the jurisdictional clause, any claim or assertion of legal nature brought in connection with acts of the Union's organ, are subject to the judicial function of

---

[272] Protocol of the New Court, Art.28 (1): Art.2
[273] Procedure of the Assembly, Rule.3 (iii)
[274] Protocol of the New Court, Art.29 (d)
[275] *Mavrommatis Palestine Consessions (Greece V. Great Britain)*, Judgment of 30 August 1924 PCIJ (Ser. A) No.2, at 11 as quoted in Christopher Schreuner, 'What is a Legal Dispute?' in International Law Between Universal and Fragmentation (Isabelle B. *et al* eds., 2008), p.983
[276] J.G. Merills, International Dispute Settlement (4th ed., 1984), p.1
[277] Richard Bilder, International Dispute Settlement and the Role of International Adjudication, 1 Emory J. Int'l Disp Resol. 131 (1986-87), pp.45
[278] Schreuner, above n 275, p.978

the court.[279] This provision embraces whatever claim that may be brought including issues of legality or validity of acts of the organ. Otherwise stated, if a claim is made as to the fact that a certain decision is illegal or invalid, the court will have jurisdiction to render a verdict on it. When read in context, the phrase "all cases and legal disputes" in the jurisdictional clause shows the commitment African states are exerting to resolute any conflict through adjudication.[280]

In general the new court's protocol enshrines that any [legal] dispute relating to acts of the Union's organ are justiciable and the latter would be held accountable for their acts. The illegality or invalidity of their acts is one issue under the scrutiny of the court.[281] In addition to this, the Court also examines the validity of the treaties of the (O) AU.[282] Through this, the Court controls the conformity of treaties, one of the secondary legislations of the Union, to the Constitutive Act. This establishes a judicial review system within the AU though arguably. In the following section an attempt will be made to assess the judicial review system of the Union as it exists presently.

4.6.2 Reviewable Acts of the Union

International organizations express their activities in various ways. Some forms, for example of the UN, are Resolutions, Statements by the President, Note of the President, Letter from the President and Press Statements.[283] Recommendations, Declarations and Opinions are among the most common modes employed by various IOs. Organs of the Union also utilize such means in discharging their responsibilities. Regulations, directives, decisions, resolutions, declarations, opinions and recommendations are some of the instruments being and to be used by AU organs.[284] Elucidating these acts as subjects of review is the theme of this section.

---

[279] Protocol of the New Court, Art.28 (e)
[280] Protocol of the New Court, Art.28 (e)
[281] Ibid.
[282] Ibid.
[283] _____, Handbook on the WorkingMmethods of the Security Council (2006), p.54 available at www.un.emb-japan.go.jp/p/handbook.pdf(last accessed on July 20 2012)
[284] Procedure of the Assembly, Rule 33; Procedure of the Council, Rule 34

i) Regulations: - Regulations are legal acts of organs of the Union in which decisions of the Union are made.[285] Regulations are not common in all international organizations. They are instruments of international integration organizations which "essentially are organizations that do not merely purport to establish cooperation between their member states, but aim to go beyond this cooperation by establishing integration in one or more policy areas."[286] They target at harmonization of legal systems of member states which transferred competence, to them, to set rules in accordance with the scheme of integration.[287] Being established for this purpose, the African Union as well stretches to accelerate the political and socio-economic integration of the continent.[288] In this direction, coordination and harmonization of the policies between the existing and future regional economic communities and also African states will be instilled by the Union's organs.[289]

The principal organs mandated with this mission are the General Assembly and the Executive Council. The main reason behind granting the Assembly power to issue regulations is its mandate to determine the common polices of the Union.[290] This organ has power comparable to the European Council with in EU.[291] Similarly, the Executive Council shares these responsibilities of the Assembly which refers tasks to the former, on the one hand, and itself is given large competences to take decisions on polices in wide areas of common interest to member states.[292] Therefore, these desires to tackle such matter at continental level demands typical tool: Regulations.

Regulations, under the Rules of procedures of the Assembly and the Council are defined as decisions "applicable in all member states which shall take all the necessary measures to

---

[285] Ibid.
[286] Ige F. Dekker and Ramses A. Wessel, Governance by International Organizations: Rethinking the Normative Force of International Decisions, in(Dekker I. F., and Werner W. G., eds.) Governance and International Legal Theory (2004), p.216
[287] Ibid.
[288] Constitutive Act, Art.3 (1); Rule 4 (1) (c)
[289] Ibid., Art.3 (e)
[290] Constitutive Act, Ibid., Art.9 (1) (a); Procedure of the Assembly, rule 4 (1) (a)
[291] Udombana, above in 29, p.88
[292] Constitutive Act, Art.13 (1)

implement them."[293] The fundamental element of this form of decisions is that its addressees are Members States only.[294] They oblige and bind member states of the Union. They are also applicable, once rendered, for all member states equally.[295] Decision concerning some states, thus, cannot be made in the form of Regulations. But, the manner of applicability is not indicated in the definition. In EC law, in contrast, regulations are envisaged as directly applicable in national legal systems.[296] This direct applicability notion has been understood as regulations will take effect in all member states without national parliaments or governments having to re-enact them.[297] Whether AU's regulations have similar effect is not certain. The phrase "… shall take all the necessary measures to implement" seems to accommodate some variations in members states. Because what constitutes a necessary measure is to be decided by members states themselves. If so, AU regulations may not have identical applicability as solely desired and decided by the issuing organ and, in such instances, cannot be said that they do have direct applicability. One thing that is sure is, though, regulations do not leave discretion to member states as to their implementation and this cannot be taken as implied in the 'necessary measure' phrase.[298] However, to tell definitively whether AU regulations have direct applicability or not, it must be waited to the practical meaning given to the clause.

Since the transformation to the AU, quite a bit decisions have been made by the Assembly and the Council. But neither the organs have classified their decision as Regulation nor have the member states considered a decision of the organs as in the form of Regulation.[299]

ii)Directives:- Another form of decision, peculiar to international integration organizations is directive. The provisions of the Rules of Procedures elaborating the term reads:

---

[293] Rule 33 of the procedure of the assembly
[294] Ibid., Rule 33 cum 34
[295] Ibid., Rule 33
[296] Art.189 EEC Treaty
[297] Gordon Slynn, Judicial Review of Community Administrative Acts, 18 B.L.J 38 1986, p.40
[298] The Rule of Procedure of the Council and the Assembly has expressly stated that directives leaves discretion to members states (Rules 33 (1) (b), Rule 34 (1) (b). But this is not stated in relation to Regulations.
[299]Interview with Mr. Bright Mando, Legal Officer(Inter African Matters), Office of the Legal Counsel, AU Commission on February 13, 2012

> *"… these are addressed to any or all member states, to undertakings or to individuals. They bind member states to the objectives to be achieved while leaving national authorities with power to determine the form and the means to be used for their implementation."*[300]

The subjects encompassed, here, include States, undertakings and individuals. The implication is that the positions of these entities may be affected by the organs of the Union. Directives, thus, reach wider than regulations.

Directives may also be issued regarding one or more members of the Union.[301] They are not to be applied necessarily at continental level. The addressed states are also bound by the 'objectives the directive pursues' only.[302] It is specifically stated that member states have the freedom to choose the form and method of implementation.[303] Even though in both the EU and AU, member states determine the implementation mechanism, the obligations of the states seem to be dissimilar.[304] In the EU, states are imposed with 'obligation of result' in implementing directives whereas those of AU are only bound with respect to the objectives of the directives. In my opinion, objectives are ultimate ends or results and are designed generally, thus, they grant wider room to member states than in the case of 'obligation of result' which may indicate an immediate outcome. In short, what I meant is the discretion of member states of AU appear to be leniently regulated, relative to the case in EU. The ECJ can also restrict the discretion of EU member states in this regard.[305]

Plainly, AU directives cannot be directly applicable in domestic jurisdiction. Unlike, regulations, directives request the promulgation of internal law or informal incorporation to national legal systems in specific legislation or a general legal context in a sufficiently and

---

[300] Rule 33 (1) (a) of the Procedure of the Assembly; Rule 34 (1) (a) of Procedure of the Council
[301] *Cf.* The definition of Regulation, Rule 33 (1)(a) of the Procedure of the Assembly and Rule 34(1)(a) of the Procedure of the ExC.
[302] Procedure of the Assembly, Rules 33 (1) (a); Procedure of the Council, Rule 34 (1) (2)
[303] Ibid.
[304] *Cf.*, Art.189 of EEC Treaty and Rule 33 (1) (b)& Rules 34 (1) (b) of the Procedures
[305] Ellen F. McCauley, Member State Implementation of European Economic Community legislation and Judgments, 11 B. C. Int'l & Comp. L R. 161 1988, P.164

clear manner.[306] The non-implementation of directives will be followed by sanctions as indicated in Art.23 of the Constitutive Act.[307]

The General Assembly and the Executive Council only have the competence to issue directives.[308] But again, no decision of this form has been made so far.[309]

iii) Decisions: - Decisions are the common mode of expression of the Union's Organs' acts. Although the General Assembly and the Executive Council have powers to give decisions in the form of regulations and directives, it is not envisaged as to their capability to render their respective collective will in the form of 'bare' decisions. However, in practice, the organs have only communicated their determination of any kind in the form of decision.[310] Other organs, however, are allowed to make decisions. One such organ is the Peace and Security Council.[311] The crucial powers of this organ include authorization of mounting and deployment of peace support missions, recommending intervention in a member state, approving the modalities of intervention, instituting sanctions whenever an unconstitutional change of government occurs and inviting or prohibiting any member state to take part in discussions relating to matters affecting the interests of the member states.[312] On these and other similar issues the council may take decisions.[313]

The term decision is not defined in the AU legal framework. In EC law, in contrast, decisions are made binding in their entirety unless they specify the entities they address in which case their effect will be limited to the named addressees.[314] Regardless of the absence of definitions, AU organs' decisions will also create obligations- hence bindings-on their

---

306 Kurt Riechenberg, Local Administration and the Binding Nature of Community Directives: A Lesser Known Side of European Legal Integration, 22 Fordham Int'l L. J. 696 1998-9, p.705
307 Constitutive Act., Art..23
308 Rule 33 (1) (b) of Procedure of the Assembly; Rules of Procedures of the Council, Rule 34 (1) (b)
309 Interview with Mr. Bright Mando, Legal Officer(Inter African Matters), Office of the Legal Counsel, AU Commission, in February 13, 2012
310 Rule 33 (1) (b)
311 PSC Protocol, Art. 5(1)
312 Ibid., Art. 7
313 Ibid., Art. 8
314 EEC Treaty, Art.189

addresses.[315] The obligatory scope will depend on the content of the decision. The consequence of non–implementation of a decision is not stated in the Rules of Procedure unlike regulations and directives; obviously for the Rules do not display decisions as legal acts of the organs. However, Art 23 of the CA allows the Assembly to sanction member states that fail to comply with the decisions and policies of the Union. This can be utilized for decisions made by the GA and the ExC in the form of regulations and directives or decisions of other organs.

These three categories of legal acts are, thus made, in the new court's protocol, subjects of review.[316] One issue remains worthy of clarification regarding decisions. This is whether interim decisions i.e. non- substantive decisions, are susceptible to review by the court. Instances in which such decisions may be taken are, for example, in times of applications to hold opened or closed meetings,[317] on issues of point of order,[318] on a motion for suspension and adjournment of a meeting[319] etc. If one understands the term "all acts" in Art. 29 of the Protocol as it is, he or she may arrive at the conclusion that interim decisions as well are reviewable. This may be inferred from the fact that reviewability is determined, as per the approach of the protocol, based on the nature of the act rather than at the point of time it is taken.

However, categorizing all decisions as reviewable appears, in my view, unwise for two major reasons. First, it will jeopardize the well-functioning of the organization. Permeating any decision to be challenged will severely hamper the proper functioning of the institutions. Secondly, the court will be over loaded with unnecessary applications if all significant and insignificant complaints are to be received. A strict approach must, therefore, be structured in this regard. Such serious standards must, in my opinion, relate to the effect of the decision on the concerned party. Accordingly, only those decisions with substantial effect on the party should be allowed to be challenged. The remaining with effects that do not amount

[315] This is to be deduced from the fact that non-compliance to them results in sanctions. See Constitutive Act, Art 23 (2)
[316] Art.28 (e)
[317] Rule 13 of the Procedure of the Assembly, Rule 14 of the procedure of ExC
[318] Rule 21 of the Procedure of ExC; Rule 21 of the Procedure of Assembly
[319] Rule 24-25 of the Procedure of the Assembly; Rule 25-26 of the procedure of the ExC

substantially such as decisions on point of order need not be reviewed. In fact, the substantiality of an ensuing effect should be left to the determination of the court which decides on the basis of each particular case on hand.

iv) Non–Binding Acts: The Rules of Procedure of the GA and the ExC enlist other forms of decisions.[320] These are Recommendations, Declarations, Resolutions and Opinions. This enumeration is not exhaustive and the legal effect of these acts is expressly mentioned as non–obligatory.[321] But regarding their significance the Rules state that they are intended to guide and harmonize the view-points of member states.[322] The practical need of such acts or instruments has become more essential to African states and third world countries in general.[323] Third world countries have been credited for the emergence, recognition and acceptance of resolutions as a new source of law within the UN.[324] In their regional organizations as well, particularly of African states, a quite number of matters have been handled via these acts.[325] Maluwa even notes that almost all OAU treaties have resulted from a chain of resolutions of OAU's political organs.[326] It is also a recent fact that recently non-binding acts are being transformed in to hard laws. Mentioning the incorporation of parts of the Declaration on the Framework for an OAU Responses to Unconstitutional change of Government into the Rules of procedure of the Assembly suffices.[327]

---

320 Rules 33 (1) (c) & Rule 34 (1) (c) of the Procedures of the Assembly and the Council; Rule 14 (1) of the Procedures of the PRC and Art.7 of the Statutes ECOSOCC

321 Rule 33 (1) (c) & rule 34 (1) (c) of the Procedures of the Assembly and the Council

322 Ibid.

323 Mark E Ellis, The New International Economic Order and General Assembly Resolution: The Debate over the Legal Effects of the General Assembly Resolutions Revised: Comment, 15 Cal. W. Int'l L. J. 647 1985, pp.656-657

324 M. Bedjaoui, "Un point du vue vu Tiers monde sur l'Organisation internationale," in G. Abi-Saab, Le concept d'organisation internationale, (Paris: UNESCO, 1980), p.268 as quoted in Maluwa, above n 252, p.212

325 See note 9 above.

326 Maluwa, above n 244, p.218

327 Procedure of the Assembly, Rule 37

The Permanent Representatives' Committee and the Pan Africana Parliament are other political organs with capacity to issue such non-binding acts.[328] Are non-binding acts reviewable? This is the proper question to be posed here.

As implied in the term 'all acts' not a single act appears to have been dropped from the jurisdiction of the court. Irrespective of their obligatory forces, all acts are categorized as reviewable. So neither express nor implied distinction is made between binding and non-binding acts as subjects of review and, thus, all are reviewable.

Nevertheless, there are reasons to argue the reverse. Firstly, non-binding acts by their very nature do not create legal obligations. They do not directly affect the interests of any concerned party. Secondly, allowing non–binding acts to be contested will only undermine their subsequent effect: harmonizing view-points.[329] Thirdly, as a primary means of activity of IOs, their unfolding to contestation reduces significantly the impact of IOs. Fourthly, from a practical point of view as they usually get adopted by consensus, or at least great majority, naming them as a reviewable act would have minimal relevance.[330] And finally, it would create an unnecessary case load on the court without adding value. Therefore, it is commendable to undertake the term 'all acts' as referring to binding acts only.

4.6.3 Grounds of Review

The acts discussed above are the types that can be put before the table of the court in contestation of legality or validly. After settling which acts, the basis of such as a challenge has to be addressed and the wonder will be why they are challenged. The conclusion we reach to these queries will constitute grounds of review. This means the grounds are factors that vitiate the legality or validity of an act.

In the Protocol of the new court or other legal instruments adopted following the CA, no vitiating element of a legal act is stipulated. It is left to the court itself, I suppose, to

[328] Procedure of the Permanent Committee, Rule 26. It reads: "Decisions of the PRC shall be recommendations until adopted by the Executive Council." See also in general Art 11 of the PAP Protocol.
[329] Rule 33 (1)(c) of the Procedure of the Assembly; Rules 31(1)(c) of Procedure of the Council
[330] Tadeusz Gruchala-Wesierski, A Framework for Understanding "Soft Law," 30 McGill L.J. 37 1984-85. p.53

determine what vitiates an act. This indicates that grounds of review are specified, in the AU system, in broad manner. This style of the AU is even expanded than the EU system, which has been described as embracing almost all possible situations as it is discussed in the last chapter.[331]

Some guidelines, however, are also found in the AU system. The important provision in this regard is Art.18 of the AEC Treaty. This provision which established a court of Justice of the Community empowers the court to "decide on actions brought by a member state and the Assembly on grounds of violations of the provisions or of a decision or a regulation or on the grounds of lack of competence or abuse of powers by an organ, an authority, or a member state."[332] Here are the implications of the provision.

Firstly, any violation of the AEC Treaty is contestable. The substantive or procedural dimension of the provision makes no difference in this respect. Violations depicting either aspect are infringements. Even though it is not pointed out in the Treaty, legislations which are subsidiary but enacted in relation to the applicability of the Treaty as well cannot be violated.[333] Prohibition of infringement of secondary acts should be considered as speculated by the above provision. Thus, any infringement in this regard forms a point of review. This approach has also been followed by the practice of the EU.[334] The AEC Treaty, in fact, goes beyond this and renders acts that contradict decisions or regulations reviewable.[335] The new court will not also be limited to these acts and should ascertain the illegality of infringement of any legal instrument.

Lack of competence also spoils legality of an action. For internal institutions are designed in a form to act in conformity to each other to achieve the objective of the organization, in their activities, accordingly, organs of the AU/AEC need to be limited to their own

[331] See section 2.4.2.1.
[332] AEC Treaty, Art.18 (3) (a)
[333] It is logical to assert that if there is an intention to keep the integrity of a treaty intact, besides violations of the treaty, infringement of subsidiary legislations enacted to facilitate the implementation and enforcement of the treaty must be looked at attentively.
[334] TFEU, Art. 263 Second Paragraph
[335] AEC Treaty, Art.18 (3) (a)

sphere.[336] Otherwise, an act will be out of one's mandate and will be challenges for lack of competence.

Thirdly, there is abuse of power. Any act that features such a defect will be declared illegal or invalid. Misuse of power is also included within this ground of review.

The ACJHR can use these grounds in examining and assessing acts of the Union. Despite its establishment with in the AU Constitutive Act, the court is at liberty to use these factors to check the illegality of an act for the Treaty of AEC is not impaired unless it contradicts the former.[337] Besides, since the court is not also restricted to any ground in this regard, it can review the legality of the Union's organs act on the basis of other standards such as infringement of an essential procedural rule.

The court can also consult the jurisdictional clauses of some sub-regional organizations courts to develop its own jurisprudence. In these regional organizations, the courts are provided with review powers.[338] Along with this mandate, the basis of review has been stipulated within the instruments establishing the courts. The Treaty establishing COMESA is one such instrument. It provides that the court decides on matters involving "the legality of any act, regulation, directive or decision of the council on the grounds that such act, regulation, directive or decision is *ultra vires* or unlawful or an infringement of the provisions of this Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power."[339] The East African Community Treaty on its part enshrines that its Court of Justice may adjudicate "the legality of any act, regulation, directive, decision or action on the ground that it is ultra vive or unlawful or an infringement of the provisions of this Treaty or any rule of law relating to its application or amount to a misuse or abuse of power."[340] Albeit the

[336] AEC Treaty, Art 7 (2)
[337] Constitutive Act, Art 33 (2)
[338] Treaty establishing the Common Market for eastern and Southern Africa reprinted in 33 I. L. M. 1067 1994 [hereinafter Treaty of COMESA],. Art 26; The Treaty for establishment of the Economic Community of East African States, signed on 30 Nov 1999 and entered in to force7 July 2000 [hereinafter treaty of EAC], Art 30; Revised Treaty of the Economic Community of West African States (ECOWAS), 24 July 1993 available at: http://www.unhcr.org/refworld/docid/492182d92.html accessed 15 Nov 2012 [hereinafter ECOWAS Treaty], Art 10(c)-(d)
[339] Treaty of COMESA, ibid.
[340] EAC Treaty, Art 30.

insignificant disparities between the articulations of the provisions exist, essentially, both rules are similar. This highlights the fact that member states of such communities are familiar with such principles of law and the court may derive some points of review from such regional courts.

4.6.4 *Locus Standi* of Contestants

Entities that present cases to the court are, under the Protocol, divided into two. The members of the first group can submit any dispute to the court, thus, they sort of have general eligibility.[341] The remaining ones are given specific entitlement i.e. in cases of any violation of a right guaranteed by human rights instruments of the region and in certain cases, beyond that.[342] But, for the purpose of review of acts those which have standing are the following:

i) States: The principal and non-controversial entities are African states as the court is an organ of a regional organization. The court is open only to states which are members of the Union.[343] This protocol by stating the obvious limits litigations before the court to African States only. A state that does not belong to the land of Africa, thus, cannot submit disputes of review of acts or any other kind. Beyond characterizing the court as a 'regional' one, the provision displays repellence of any non-African activity in this regard. For example, if a European state challenged an act of a member state or an organ of the Union, it cannot use the court directly due to the African state requirement. The verbatim stipulation of this also prohibits any such interpretation by implication.

This, however, does not mean that all the 54 African states are entitled to submit cases or requests of review. They are, in addition to being an African state, demanded to ratify the protocol. Otherwise as stated expressly, the court shall have no jurisdiction to deal with a dispute involving a member state that has not ratified the protocol.[344]Consequently, upon

[341] Constitutive Act, Art.29(1)(b)&(c)
[342] Ibid., Art.30
[343] Contra: Constitutive Act, Art.29(2) first paragraph
[344] Ibid., Constitutive Act, Art 29(2)

the entry into force of the protocol, the term state parties to the protocol will mean the fifteen states only. Of course, this is expected to increase with time.

In the protocol, nothing is said about the interest member states are required to prove when claiming illegality. This means all applications of member states contesting an unlawful act are acceptable regardless of the fact that their claim proves their personal affected interest. This may be justified by the fact that review systems are formulated not only to remedy loses but also to ensure the prevalence of rule of law.[345] Every state is supposed to have an immense interest in the lawful activity of the organization. In other words, unlawfulness in one way or another affects all members of an organization. The same is true in the AU. Therefore, member states of the Union do not have to be required to prove direct effect ensuing on them in review proceedings. The mentioned earlier intervention mechanism in authoritative interpretation matters is also based on similar grounds that any matters concerning the CA is in the interest of all AU members. This is also equally valid in infringement matters of the CA and similarly applicable to review cases. Besides, even outside the CA, some issues are common concern to all African states such as environment and human rights.[346] Then proof of direct interest would not be sound in such matters. In this regards, the protocol's silence on the matter is correct.

ii) Organs of the Union: The internal bodies of the Union are the second most concerned parties in the legal functioning of the Union. An organ's mandate might be trespassed by another. A mandatory procedure may be discarded. Therefore, organs of the Union are accorded the right to request review. [347] However all organs of the Union do not

[345] Art. 4(m), Constitutive Act. One of the principles of the Union, on the basis of which the Union discharges its function, is 'respect for democratic principles, human rights, the rule of law and good governance.' In the preamble of the CA alike African states have expressed their determination to promote and protect human and peoples' rights, consolidate democratic institutions and culture and ensure good governance and the rule of law. The ACJHR is also designed to assist the achievements of the goals pursued by the African Union. Protocol of the new court, Preamble Paragraph 5

[346] Constitutive Act, Art 3(d)

[347] Ibid., Art.29(1)(b)

have equal status in this regard. Two of the organs of the Union are capable to contest acts as a right while the remaining requires the approval of the general assembly to do so.[348]

The General Assembly and the Pan African Parliament are the two bodies which can go direct to the court to challenge the vitiated act. As the Summit the Union, the General Assembly is entrusted with tasks which necessitate this ancillary review power. It follows up the implementation of policies[349]and decisions of any form, by states and, without the need to say it, organs of the Union. This and similar duties of the assembly put it in a typical position to ensure the healthy activity of the Union. Over-all control of the business of the Union is one of its mandates. And review request power is a corollary of such powers. In doing so the Assembly acts in the interest of both the member states and the Union.

The Pan African Parliament is also another important body of the Union for such functions. It has power to discuss and make recommendations on issues relating to human rights, democracy, and good governance.[350] As an accountability body as well, the Parliament can question AU or AEC officials.[351]Not being limited to this, the Parliament performs other functions as it deems necessary to achieve its objectives.[352] An organ endowed with such broad powers and more particularly that of challenging officials of AU cannot be denied the competence to question acts of the Union's organ. This will be done in representation of the African peoples.[353]

The rest of the organs of the Union are, however, expected to secure the prior authorization of the Assembly to access the court in applications of review. [354] The reason for this approach is not outlined clearly. Nevertheless, whatever reasons are premised upon, the objectives of review, the main being ascertainment of rule of law, does not warrant this stance. It may be said that the protocol did not prohibit organs of the Union to contest but only lengthened the short track they could have taken. Yes I agree, the problem rather in my

[348] Ibid.
[349] Ibid., Art. 9(1)
[350] PAP protocol, Art.11 (1)
[351] Ibid., Art. 11(5)
[352] Ibid., Art 11 (9)
[353] Ibid.,Art.2(3)
[354] Protocol of the New Court Art.30 (b)&(c)

perspective, is that such inclinations subject advocates of legality in the Union to the detriment of the Assembly, a political organ.[355] Suppose, for example, the ECOSOCC believes there is an illegal aspect in an act of the Union and wishes to contest it. For it is denied direct access, the ECOSOCC is required to satisfy the Assembly, which basically decides upon political considerations, in order to be authorized to reach the Court. Thus authorization requirements may be manipulated and undermine the rule of law. This may diminish the impact of some organs of the Union such as the ECOSOCC.

A narrow contesting power of the African Commission on Human Rights and the Africa Committee of experts may be inferred from their mandate to submit any application on violations of human rights.[356] They are allowed in matters of human rights only. Although the provisions seem to be applicable in situations of violations of human rights by states, there is no valid reason why the provision will not be extended and be utilized to transgressions by Union Organs regardless of the fact that the violations pertains to actual injuries or mere disregard of human rights provisions. More importantly, nothing in the provision precludes such use.

iii) Others: African Intergovernmental Organizations and National Human Rights Institutions are also allowed to submit applications challenging an act of any Union Organ.[357] Yet, their applications need to be related to human rights.[358] This is to mean that since they have standing in connection with human rights issues only[359]but on any violation of a right guaranteed by the Union, including those committed by Union's organs, they can seek the review of such acts they consider infringing upon human rights.

Any African intergovernmental organization needs to be accreted to the Union or are of its organs to do so, though.[360] The protocol to the statute defines these entities as organizations established with the aim of ensuring socio-economic integrations or have been ceded, by

[355] Udombana, above n 29 , p .87
[356] Protocol of the New Court, Art.30 (b)&(c)
[357] Ibid.
[358] Ibid.
[359] Ibid.
[360] Ibid.

states, certain competences to act on their behalf.[361] Any sub-regional, regional, inter-African organization which falls out of these definitions is also considered an African intergovernmental organization.[362] They are also expected to be accredited to the Union[363]

Human rights institutions of each member states also have similar "inferred' power on challenging Union's acts so long as it relates to human rights. By national human rights institutions, the protocol means, any public institutions established by state to promote and protect human rights.

iv) Individuals: International integration organizations deepen the scope of their regulatory mandate to the extent of reaching the individual. The direct effect and direct applicability doctrines of EU are examples of such features. In the African Union System as well there are decisions of the Assembly, in the form of directives that may be employed to address individuals.[364] This may affect interests concerned by such directives. This is a clear and significant departure from the OAU frame work.

In front of the new Court, individuals do not have capacities to challenge acts of the Union. Let alone in applications for review of acts, in human rights matters the standing of the individual is very limited. Only individuals accredited to the Union or one of its organs are allowed to instigate proceedings of review.[365] Put in context, individuals do not have power to lodge applications in which Unions acts are contested. Sadly, this is done despite the fact that the Union's organs directives alter the position of individuals. This means the individual is left outside the protection of the judiciary. Apart from this Oppong notes that the absence of locus standi of the individual would push 'the most important players in the integration process including consumers, traders, corporate bodies and investors' to the periphery.'[366] Plus, to him this would mean abandonment of the principal medium through which the

[361] Ibid., Art.1
[362] Ibid.
[363] Ibid., Art.30(d)
[364] Procedure of the Assembly, Rule 33(1)(c)
[365] Protocol to the New Court, Art.30(f)
[366] Richard F. Oppong, The African Union, The African Economic Community and Africa's Regional Economic Communities: Untangling A Complex Web, 18 Afr. J. Int'l and Comp. L. 92 2010, P. 101

community-state relationship is strengthened in economic integration.[367] As Udombana points out if the AU is to protect the 'state of law', as the principal organ of the Union-with its all ambitious goals, the assurance of direct action by individuals against an act of one of the institutions of the Union that infringes upon their basic rights is indispensable.[368]

Perhaps, this approach is opted to attract member states of the Union to ratify the protocol. But, this has relegated the development of judicial settlement of the disputes in the continent. Many of the sub-regional organizations have ensured individual's protection from acts of the organization to varying degrees. The COMESA Treaty entitles any person who is resident in a member state to question and institute applications contesting the legality of any act, regulation, directives, decision of the council or a member state "on grounds of unlawfulness or infringement of treaty provisions."[369] Similarly Art.30 of the ECA Treaty accords any person who resides in a partner state, power to apply for determination of the legality of any act, regulation directives, decision or action of a partner state or an institution of the community on ground of unlawfulness or infringement of treaty provisions.[370] The ECOWAS protocol also granted access to the court to individuals and corporate bodies for the determination of an act or in action of a community official which violates their rights.[371] The SADC Tribunal again has exclusive jurisdiction over all disputes between persons and the community referred to the tribunal by either side.[372] These important sub-regional organizations assure locus standi to individuals to challenge acts the respective communities within the time between 1991 and 2005. Despite these crucial developments, the protocol to the statue of the ACJHR which is adopted in 2008 failed to follow the approaches of the sub-regional organizations and disturbed the development.

---

[367] Ibid.
[368] Udombana, above n 29, P.110
[369] COMESA Treaty, Art 26
[370] EAC Treaty, Art 30
[371] The ECOWAS Treaty, Art 10(c)-(d)
[372] The Treaty of the Southern African Development Community, signed on 17 August 1992, entered in to force on September 1993 as Last amended in August 2001, Art 14 and Art 15

In fact, the new protocol basically follows the protocol of the ACJ.[373] But the latter protocol had some conciliatory provisions. The first of such mechanisms was the power of referral of the Assembly.[374] The Assembly had been granted competence to confer any dispute other than those referred in Art.19 of the protocol. The view that through this provision individuals and any other non-state parties would be allowed standing before the Court was shared by many.[375] Another one is Art.18 (1) (d) of the protocol which made third parties, under conditions to be determined by the Assembly and with the consent of the state party concerned, eligible to submit cases to the court.[376] As there was no restriction as to the matter in which third parties are applying before the court, review of acts is believed to be included. Magliveras and Naldi, whose view I share, analyze the provision and suggest that natural or legal persons were intended to be covered with in the term.[377] Regrettably, even these limited circumstances in which the standing of the individual might have been accommodated were lost in the transition of ACJ to ACJHR.

As it exists now, on an individual's basis only staff members of the Union can submit to the new court-pursuant to the Rules and procedures of the Union.[378] Whether political appointees are included within this is dubious. However some political appointees namely the chairperson, deputy chair-person and commissioners may appeal to the court on the decision of termination by the Assembly on grounds of incompetence, gross misbehavior or inability to function permanently due to incapacity.

Some possible mediation can be suggested to accommodate the individual to lodge review applications. The court may allow individuals to litigate before the African Court of Justice and Human Rights with the special leave of the court.[379] Granting of national courts with

[373] Protocol of ACJ, Art 18(1)(a)-(c); Cf: Art 28 of the new Protocol
[374] Ibid., Art 19(2)
[375] Viljoen and Baimu, above n151, P.251 ;Naldi & Malgivera, above n184, P. 198; and Udombana, above n 29, 110
[376] Protocol of the ACJ, Art 18(1)(d)
[377] Maglivera & Naldi, above n 184, p 198
[378] Protocol to the New Court, Art. 29(1)(c)
[379] Oppong, above n 367, P.101

power to refer cases to the court is also one way to establish standing of the individual even albeit indirectly.[380]

v) NGO's: Non-governmental organizations are also dealt with by the protocol in association with their standing. In identical manner to individuals, NGOs are provided with power to instigate proceedings in human rights matters.[381] Even here, the NGOs must be accredited to the Union.[382] The Union, on its part, requires to accredit NGOs be registered in a member state, being restricted to act at regional and continental level, for three or more years; that they should have headquarters with an executive body; a constitution; a representative structure and a mechanism of accountability to its members; a management with a majority African citizens or African diasporas; and a non-discriminatory policy.[383] However, no organization has been granted accreditation by the Union through this system[384]

For the purpose of review of acts, such NGOs will only have an inferred power to submit review issues like individuals. They are excluded from any proceedings before the court in non-human right affairs, including reviewing acts of the Union.

To sum up, the triggerers of review proceedings range from those with automatic application rights to entities with inferred powers. African states individually and collectively dominate the initiation state. Non state actors, albeit subject to strict conditions, are not left without significant any role in the review of acts of political organs of the Union.

4.6.5 Power of Annulment: Does the Court Possess it?

There is no express stipulation as to the fate of an impugned act. It is not provided in the protocol or any other legal instrument of the Union whether the court has the power to annul an illegal or invalid act. This has forced Magliveras and Naldi not to confidently speak

[380] Ibid.
[381] Protocol to the New Court, Art.30(d)
[382] Ibid.
[383] Criteria for Granting Observer status and for A system of Accreditation within the African Union Ex.CL(VII) Annex IV, Art.5&6
[384] Interview with Mr. Adewale E Lyanda, Legal Officer, Codification Office of the Legal Counsel, AU Commission, on June 2, 2012.

of AU's judicial review system. In their opinion, two possibilities exist for the court: to annul the act or pronounce illegality of the same.[385]

It is admitted that annulment power is not granted to the court. But, the important point is that it is not prohibited either. More essentially, the court is positioned in a manner where it can check the legality of acts of political organs. Being established with this aim, denying or considering that the court lacks, competence to annul community [AEC, and also AU] legislations would undermine the rule of law and marginalize the court to the point of irrelevancy.[386] Such a power therefore must be implied.[387] However, all these require active personalities on the judgeship position.

Even where it is assumed that the court only has power of declaring illegality, it should not be deemed that such pronouncements have no review aspect. To the minimum, it binds the parties to the case. Besides, the declaration of illegality may be accompanied by an order to the original author of the act to remedy its impugned act. This has been suggested by Lauterpacht in the Genocide case:

> *"It would seem sufficient that the relevance here of jus cogens should be drawn to the attention of the Security Council, as it will be, by the required communication to it of the court's order, so that the Security Council may give due weight to it in the future reconsideration of the embargo."*[388]

In the practice of the EU preliminary rulings as well, the concerned organs have been required to take the necessary measures.[389]

Therefore, though the court cannot remedy the contested act by itself, it might bring the matter to the attention of the authors of the act to redress the problems they created themselves.

---

385 Magliveras and Naldi, above n 184, p.200
386 Gino J.Naldi and Konstantinos D. Magliveras, The African Economic Community: Emancipation for African States or Yet Another Glorious Failure? 24 N.C.J. Int'l & Comm. Reg. 601 1998-99, p.611
387 Ibid.
388 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugo. (Serbia and Montenegro)), (separate opinion of Judge Lauterpacht)1993 ICJ Rep, pp. 437-38
389 See section 2.4.2.2.

CONCLUSIONS AND RECOMMENDATIONS

In the four chapter long survey we conducted, many points have been discussed. It has been established that the Orthodox conception of international personality of entities has given way to new thoughts. States have ceased to be the only international persons. International organizations and individuals have penetrated the international area. The former, particularly, following the Reparation for Injuries Suffered Case, have been recognized as bearers of rights and responsibilities, correlative to their powers and competences, in the international plane. But again, the various attempts to develop a theoretical approach to international legal personality of IOs have not proved fruitful. The prevailing trend, to determine IOs international legal personality, is to check whether the concerned IO fulfills the following points:

(i) Establishment of a permanent association of states or IOs or both, for the attainment of lawful objects, with administrative organs.

(ii) A distinction in terms of legal powers and purposes between the organization and its members

(iii) Existence of powers which would enable the organization to act in the international plane.

It should be remembered, however, those IOs that satisfy the above conditions are not to be equated to states. Unlike the latter, IOs' sphere of activity is quite limited to those prescribed in their founding instruments. IOs have usually been provided with specific competences and general powers to conduct their business. This limited plane of activity is highly relaxed by the implied powers theory, which has proved to be the heart of international organizations. From the two divergent views as to the scope of implied powers, this study has favored the more expanded one that upholds only acts ruled out expressly from the mandate of an organization, acts incompatible with aims and purpose of IOs, existence of a proper organ to act and actions which are beyond the jurisdictions of IOs are prohibited from being implied. The rejection of the other view, i.e. the one which limits

implication of power to those that are necessary for the exercise of powers granted expressly, has been justified by the necessity of well-functioning of IOs.

Nevertheless, the need for relaxed space of activity of IOs does not mean they are not to be controlled. Any transgression of the limits would automatically be governed by the doctrine of *ultra vires*. Member states of IOs, organs of international organizations, individuals and other legal persons may challenge *ultra vires* acts for various reasons as discussed in the study.

Ultra vires acts are sub-divided into substantive, acts that affect policies of an organization, and procedural, acts that emanate from the non-observance of specified procedures. It has been asserted that till the moment a complaint is lodged, *ultra vires* decisions are to be considered as done within power. As indicated in the study, however, the fate of those acts complained upon is not certain. Some suggest they should be considered null and void while others argue that they should be voidable. This study has supported voidability as a preferable remedy due to the fact that nullity significantly jeopardizes the functioning of IOs.

But now, such doctrine based control mechanisms are being supplemented with institutional means. As a means of control, review powers and interpretation mandates, and dispute settlement systems in general, have been granted to either political organs or judicial organs of international organizations. The debate whether political bodies or judicial bodies should lead dispute settlement or perform review of acts of IOs is unsettled. In the opinion of the present author, however, the final say should be left to judicial bodies. This position of the author takes the fact that politics should not be delineated from the law in international relations. And it has also been propounded that all efforts must be exerted to produce the best possible outcome from the integration of the two. I suggest that when result cannot be achieved from the consolidation of the two, judicial bodies must be resorted to as ultimate solution providers.

Review of acts may be accomplished in two ways: by employing authoritative interpretation systems and/or by conducting direct reviews of legality or validity of acts. The prime difference between the two lies in the existence of power of annulment in the latter. However, in the belief of the present author, the existence of power of annulment is not a

requirement in review cases as evinced in the practice. Declaration of invalidity results in effects that have equal status with annulment as discussed in the study.

While investigating the experience of the UN with regard to review of acts,it has been described that each organ of the UN is empowered to interpret the UN Charter in its day to day activity. There is no centralized or authoritative interpretation system. In direct review of acts of political organs, the role of the ICJ to date is limited to incidental reviews occurring amidst performing its judicial function. Regarding the issue whether the SC is bound by any factor that can serve as a ground of review, the study has asserted that:

i) Purposes and principles of the UN charter,

ii) Norms of *jus cogens*

iii) All non-derogable rights and the core contents of derogable rights as recognized by international law and

iv) Rules of general international law unless the UN Charter allows the SC to disregard

serve as a standard of review. Organs of the UN and member states of the UN are the only possible actors that may involve in review cases.

On the other hand, the Court of Justice of the European Union is endowed with interpretation power. Acts of organs of the union are also susceptible to review by the Court of Justice of the Union. The two major systems of review are proceedings of annulment and preliminary rulings. In the former, the actors or applicants vary from organs of the Union and Member States, which have the broadest power, to natural and legal persons in cases they show 'direct and individual concern'. All acts are reviewable except for non-privileged applicants, which are allowed to contest decisions or regulations and all regulatory acts that do not entail implementing measures. The grounds of review are lack of competence, infringement of procedural requirement, contradictions to the EC Treaties and any rule relating to its application and misuse of power. In preliminary rulings, courts of member states refer cases to the Court of Justice of the Union. The Court of Justice has the mandate of pronouncing the invalidity of community acts. In preliminary rulings the court of justice does not have annulment power unlike in actions of annulment.

With the transition of OAU to AU, the role of law increased. The principle of pacific dispute settlement of the AU is made open to include judicial means. The quasi-judicial organ of dispute settlement turned to pure judicial organ. Authoritative interpretation by judicial organ is established. And judicial review of acts of political and other organs of the AU is incorporated.

The ACJHR is given the ultimate interpretation powers of the constitutive act. The interpretational decision of the court rendered in this respect binds all organs of the Union. Due to this character of the decision, states thatare not original parties to the disputeare allowed to intervene in a case wherein concern of constitutional interpretation is viewed. This procedure aims at consulting member states in matters involving interpretation of the CA. The Registrar of the court notifies member states and organs of the union when a state expresses its interest to intervene in cases depicting matters of interpretation of the CA. However, organs of the Union are excluded from expressing their interest in a similar vein. This has been opposed by the present author as being an unsound distinction. The decision must be sanctioned with a majority of at least two votes. It has also been asserted that only decisions, and not opinions, of the court have authoritative nature.

All treaties concluded under the auspices of both OAU and AU are also subject to interpretation power of the court. Moreover, rules of procedure of various organs, protocols and decisions of organs of the Union, as implied in the term other 'subsidiary legal instruments' are also included under the court's interpretation mandate.

The General Assembly of the Union has the interim interpretation power, though relating to the CA only, till the court is established. So far no such decision is rendered by the Assembly. Except human rights related treaties which will be brought to the African Human Rights Court forinterpretation, other treaties and subsidiary legal instruments lie within the interpretation domain of Member States. And, presently the legal department of the AU Commission presents its opinion where the situation arises in which disagreements on interpretation occur.

The ACJHR also has judicial review power. The court is empowered to entertain all cases and legal disputes relating to acts, decisions, regulations and directives of organs of the Union. The phrase "all cases and legal disputes" include contestation of validity and legality of acts of the Union. Therefore, when a certain decision is claimed as illegal or invalid, the court is entitled to review it. Moreover, the court examines the validity of treaties of the (O)AU. It controls the conformity of treaties to the constitutive act.

The reviewable acts, as per the protocol of the new court, are all acts. This seems to imply that reviewable acts are based on the nature of the act than other considerations. Plainly, regulations, directives and decisions are reviewable. But the present author has suggested that all decisions should not be taken as reviewable. Interim decision such as those on point of order, decisions to hold opened and closed meetings, on motion for adjournment of meetings should not as a rule be reviewable. Only those decisions with substantial effect on the rights of the applicant should be reviewed. The author has also argued against the reviewability of non-binding acts.

Although the protocol of the new court does not list any ground of review, the AU system has already got some guidelines as discovered by the study. Art 18 of the AEC Treaty is very crucial in this regard. Violation of the CA or any subsidiary legislations relating to the implementation of the CA, lack of competence, misuse and abuse of power are standards of review. These have also become principles of law of a number of sub-regional organizations. As the protocol is silent on this matter, other factors such as infringement of essential procedural rules and more others may be employed as a ground of review.

With regard to standing of contestants, Member States of the Union are given absolute right to challenge acts. Any application of review, thus, may be brought. There is no need of proof of individual or direct interest of applicant Member States. Organs of the union are sub-divided, in connection with their footing as contestants, in to two. On the one hand, the General Assembly of the Union and the PAP have been positioned equal to states and granted full rights to challenge. On the other hand, the remaining organs of the Union are required to get prior authorization of the Assembly to lodge applications of review before the court. This subjection of the organs to a political institution is a drawback observed by

the author. In matters of human rights however, the African Commission onHuman Rights and the Committee of Experts have competence to submit applications relating to violations of human rights by states. But it is believed that violations of human and peoples'rights by Union organs are also contestable before the ACJHR. African intergovernmental organizationsaccredited to the Union and national human rights institutions are given rights to challenges, but limited to matters of human rights,of Union's acts.As an applicant looking for judicial review, individuals accredited to the Union or one of its organs are allowed access. Despite incorporating directives that can alter the position of the individual, the individual such as consumers, traders and investors- significant actors of the integration process- are kept outside the category of applicants. Some possibilities that could have granted persons access to the Court are lost in the transition from ACJ to ACJHR. NGOs are also victimized to the same problems faced by natural and legal persons.

Even though nothing is stated as to the effect of impugned acts, the court is not prohibited from annulling illegal and invalid acts of the Union. Apart from the non-prohibition, the Court is expected to ascertain the lawfulness of any Union act by both declaring their invalidity, illegality and/or revoking the same.

With the findings outlined in the study, the author recommends the following points as redress to these problems:

i. The protocol of the Union needs to be amended so that it will allow organs of the Union to express their interests to intervene even where no member state has called for intervention

ii. Amendment of the protocol of the new court should grant the Registrar of the court power to notify states and organs of the Union, at its own initiation, that concern of interpretation has been witnessed in a dispute

iii. Any amendment of the protocol must cloth organs of the Union full right to contest acts of the Union, without any requirement to prove direct interest in the act to be challenged

iv. African intergovernmental organizations, particularly those engaged in trade mattes, must be accorded standing to contest vitiated acts.

v. In the amendment of the protocol, actors of the African integration process- persons- must be given the right to bring application of review of acts of the Union when the act substantially affects their interest

vi. The role of NGO's accredited to the Union need to be increased and be given power to contest acts of the Union where an amendment is to be made.

vii. Till the amendment is in effect, the General Assembly of the Union, which is to authorize organs of the Union to reach the ACJHR, should formulate objective criteria and adopt a lenient policy towards its authorization scheme

viii. Again till the protocol is amended, the ACJHR need to define the phrase interest of justice in a manner that will enable organs of the Union to intervene in cases displaying interpretation of the CA

ix. Above all, the personality to be appointed on the position of the judgeship must act proactively, but with care not to reluctantly encroach sovereignty of states.

NOTES AND COMMENTS

PROSPECTIVE OVERRULING AND RETROACTIVE APPLICATION IN THE FEDERAL COURTS

OLIVER WENDELL HOLMES, JR., author of *The Common Law*, was speaking as Mr. Justice Holmes of the United States Supreme Court when in 1910 he wrote, "I know of no authority in this court to say that in general state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years."[1] There is a certain grandeur in the sweep of Holmes' phrasing, but the statement remains a fair description of one of the central principles in our received learning on the common law.

THE ROOTS OF RETROACTIVITY

However distant may be the origin of the principle that judicial decisions are of their nature retrospective,[2] its more recent influence must be traced to Blackstone, whose *Commentaries* provided the classic formulation and made clear its intellectual justification.[3] Blackstone's argument may be stated simply. The duty of a court, he said, is not to "pronounce a new law, but to maintain and expound the old one."[4] Consequently, in deciding a case, a judge is bound to *find* the law as it existed when the controversy arose and to *declare* it as being the controlling principle in the case.[5]

From the declaratory nature of a judicial decision, Blackstone derived the necessity that the decision have retrospective effect. If the decision interpreted a law, then it did no more than declare what the law had always been. If

---

1. Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (dissenting opinion).

2. In an important book first published in 1713, ten years before Blackstone was born, Sir Matthew Hale had written:

> The decisions of courts of justice . . . do not make a law properly so called for that only the king and parliament can do; yet they have a great weight and authority in expounding, declaring, and publishing what the law of this kingdom is . . . . And though such decisions are less than a law, yet they are a greater evidence thereof, than the opinion of any private persons, *as such*, whatsoever.

HALE, HISTORY OF THE COMMON LAW 141 (5th ed. 1794). The passage is discussed in GRAY, THE NATURE AND SOURCES OF THE LAW 218-19 (2d ed. 1921).

3. See GRAY, *op. cit. supra* note 2, at 218-24. *Cf.* Carter Oil Co. v. Weil, 209 Ark. 653, 658-59, 192 S.W.2d 215, 218 (1946).

4. 1 BLACKSTONE, COMMENTARIES 69 (1769).

5. As Gray explained the system:

> The Law, indeed, is identical with the rules laid down by the judges, but those rules are laid down by the judges because they are law, they are not the Law be-

subsequently it became necessary to overrule this first interpretation, it was equally clear to Blackstone that the overruling decision also did no more than declare the law—albeit in a more enlightened manner. In the diction which Blackstone was fond of using, the first decision had been merely an "evidence" of the law—and as it subsequently developed, an erroneous evidence.[6] Once it was postulated that courts must limit themselves to finding and declaring the law, the necessity of retroactive application of overruling decisions easily followed.[7] In a famous passage, Blackstone said:

> These judicial decisions are the principal and the most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law . . . . Yet this rule admits of exceptions where the former determination is most evidently contrary to reason . . . . But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not* law; that is, that it is not the established custom of the realm, as had been erroneously determined.[8]

> cause they are laid down by the judges; or . . . the judges are the discoverers, not the creators, of the Law.

GRAY, *op. cit. supra* note 2, at 93.

6. As Dean Shulman expressed it:

> The doctrinal reasons are that courts do not "pass" laws, but merely "apply" them to specific cases; that the overruled decision was a mistake as to the law and consequently never was the law; that the overruling decisions is not a new law but the application of what is, and therefore had been, the true law.

Shulman, *Retroactive Legislation*, 13 ENCYC. SOC. SCI. 355, 356 (1934).

See, *e.g.*, Legg's Estate v. Commissioner, 114 F.2d 760 (4th Cir. 1940) ("Decisions are mere evidences of the law, not the law itself; and an overruling decision is not a change of law but a mere correction of an erroneous interpretation." *Id.* at 764).

The same language has been used in cases involving a change in administrative regulations issued under a statute. See, *e.g.*, Howard Pore, Inc. v. Nims, 322 Mich. 49, 73, 33 N.W.2d 657, 667 (1948). For a discussion of "retroactive interpretative rules," see 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 5.09 (1958).

7. A statement of the "inexorable logic" underlying this theory is given by Professor Davis:

> If an interpretative rule is merely an interpretation of a statute, and if the meaning of the statute has been there from the time of its original enactment, then no problem of a retroactive interpretative rule can arise, for either the interpretative rule expresses the true meaning of the statute or it does not; if it does, then that is what the statute has always meant and the rule has not changed the law retroactively; if it does not, then it does not matter whether the rule can be made retroactive, for the rule is invalid in that it is inconsistent with the statute.

DAVIS, *op. cit. supra* note 6, at § 5.09. See Note, 32 MICH. L. REV. 1009 (1934). See also 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 748 (rev. ed. 1937) ("However the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court.").

8. 1 BLACKSTONE, COMMENTARIES 68-71 (1769), quoted in GRAY, *op. cit. supra* note 2, at 219-20.

If the law had always been what the most recent judicial decision declared it to be, the possibility existed that a man's actions could be judged by a standard not yet judicially discovered at the time the actions took place. It was therefore urged that retroactive application of a judicial decision, when attempted in the United States, was limited by Article I, section 10 of the Constitution, which provides that "No State . . . shall pass any *ex post facto* law, or law impairing the obligation of contracts."[9] But this view was consistently rejected. The provision, "according to the natural import of its terms, is a restraint upon legislative power and concerns the making of laws, not their construction by the courts." So summarized the United States Supreme Court in *Ross v. Oregon*,[10] rejecting the contention that a state judicial decision which put an unexpected construction on a newly-enacted statute violated the *ex post facto* clause. In *Frank v. Mangum*,[11] the Court rejected the allied contention that the *ex post facto* clause is violated by a judicial decision which overrules or is inconsistent with a prior decision.[12] And the same rationale was applied to the prohibition against the impairment of contract obligations: the act of impairment must be a legislative act. Thus, in *Tidal Oil Co. v. Flanagan*[13] the Court found no impairment in "the mere fact that the state court reversed a former decision to the prejudice of one party."[14]

It should not be assumed, however, that retroactive application of a judicial decision will always be constitutionally permissible. In *Brinkerhoff-Faris Trust & Savings Co. v. Hill*[15] the taxpayer-company brought suit in a state court of Missouri to enjoin collection of a state tax on the ground that discriminatory assessment of the tax violated the due process clause of the fourteenth amendment. The state courts had repeatedly held, beginning with the *Laclede* case,[16] that under the relevant state statute a suit in equity was the only remedy open to a taxpayer wishing to contest the validity of an assessment; the possibility of a prior appeal to the State Tax Commission had been termed "preposterous" and "unthinkable" by the courts.[17] Consequently, "no one doubted the authority of the *Laclede* case until it was expressly overruled in the case at bar,"[18] in which the Missouri Supreme Court discovered that the

9. The federal government is prohibited from passing an ex post facto law by Art. I, § 9 of the Constitution.

10. 227 U.S. 150, 161 (1913). See also Calder v. Bull, 3 U.S. (3 Dall.) 385 (1798); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810). *Cf.* Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936).

11. 237 U.S. 309 (1915).

12. *Cf.* Central Land Co. v. Laidley, 159 U.S. 103 (1895); Tidal Oil Co. v. Flanagan, 263 U.S. 444, 450 (1924); Fleming v. Fleming, 264 U.S. 29 (1924).

13. 263 U.S. 444 (1924).

14. *Id.* at 450. See also Fleming v. Fleming, 264 U.S. 29 (1924).

15. 281 U.S. 673 (1930).

16. Laclede Land & Improvement Co. v. State Tax Comm'n, 295 Mo. 298 (1922).

17. See 281 U.S. at 676.

18. *Id.* at 677.

appropriate remedy was in fact an appeal to the State Tax Commission. It further held that because the period of limitations for appeal to the Commission had run, and because the company was guilty of laches in not prosecuting such an appeal, its bill for equitable relief had to be dismissed.

Speaking through Justice Brandeis, the Supreme Court held that the retroactive application of the overruling decision, when taken in combination with the period of limitations, had the effect of denying the company "due process of law—using that term in its primary sense of an opportunity to be heard and to defend its substantive right"[19] to be taxed on a nondiscriminatory basis. An appeal to the State Tax Commission before *Laclede* was reversed would have been "entirely futile," the Court said, and an appeal to the Commission after *Laclede* was reversed was barred by the period of limitations. Thus, although the state court's decision to give retroactive effect to the holding in the overruling case—involving no more than "a retroactive change in the law of remedies"[20]—was not in itself unconstitutional, it became so when, in combination with the period of limitations, its effect was to preclude the company from ever being heard on its claim.

Constitutional problems might also be presented, as Mr. Justice Black pointed out in his opinion in *James v. United States*,[21] by retroactive application of an overruling decision which reinterprets a criminal statute and, in effect, announces "the creation of a judicial crime."[22] Application of the overruling decision to acts done during the intervening period might violate the defendant's right to fair notice and render the statute unconstitutionally vague during that intervening period.[23]

But the fact that courts upheld retroactive application of judicial decisions against attack on constitutional grounds did not end the matter. It only signalled a shift of the attack to policy grounds. At least three results of the practice of making judicial decisions retroactive—even if the practice be constitutionally permissible—were said to be deleterious to the creative growth of an equitable legal system. First, retroactive overruling worked unfair surprise on persons who had justifiably relied upon judicial decisions, thereby "frustrat[ing] the reasonable expectations of well-intentioned men."[24] Second, the knowledge that the frustration of such expectations was a necessary consequence of overruling a prior decision served to inhibit the judicial overruling of precedents which were outworn and outmoded, thereby perpetuating the life of obsolescent legal rules.[25] And third, adherence to the rule of retro-

19. *Id.* at 678.

20. *Id.* at 681.

21. 366 U.S. 213, 222 (1961).

22. *Id.* at 224.

23. See note 124 *infra.*

24. Cardozo, *Address Before N.Y. State Bar Association*, 55 REP. N.Y. STATE BAR ASS'N 263, 294 (Jan. 22, 1932).

25. See, *e.g.*, Fox v. Snow, 6 N.J. 12, 76 A.2d 877 (1950) (and particularly dissent by Vanderbilt, C.J., *id.* at 14, 21-28, 76 A.2d at 878, 882-85); Crowley v. Lewis, 239 N.Y. 264,

active overruling obscured in "the murky shadow of Blackstonian jurisprudence" the important teachings of the Legal Realists that judges as much as legislators exercise an "ineluctable lawcreating function,"[26] thereby discouraging open and honest analysis of what courts do in fact.[27]

Having stated their objections to the practice of retroactive overruling, the critics of the Blackstonian view proposed prospective overruling as the remedy.[28] Briefly stated, prospective overruling is the judicial technique by which a court—eager to overrule an outmoded precedent but reluctant to disappoint the expectations of the parties—applies that precedent in deciding the particular case before it but simultaneously announces that it shall consider the precedent as overruled in all future cases.[29] Justice Cardozo, the major advocate of prospective overruling,[30] gave the following as a "fair paraphrase"[31] of the doctrine:

266-67 (1925); Lombardo v. Adams, 12 Misc. 2d 589, 593-95, 172 N.Y.S.2d 271, 274-76 (Sup. Ct. 1958). *Cf.* Helvering v. Griffiths, 318 U.S. 371, 402 (1943); Bailey v. Richardson, 182 F.2d 46, 56-58 (D.C. Cir. 1950), *aff'd by an equally divided court*, 341 U.S. 918 (1951).

26. Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 2, 6 (1960). See Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961); CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

27. See, *e.g.*, FRANK, COURTS ON TRIAL (1949); FRANK, LAW AND THE MODERN MIND (1930); LLEWELLYN, THE BRAMBLE BUSH (1930).

28. The earliest proposals include Canfield, *Speech to South Carolina Bar Association*, REP. S.C. BAR ASS'N 17-19, 20-21 (1917); Carpenter, *Court Decisions and the Common Law*, 17 COLUM. L. REV. 593, 606 (1917); Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision*, 18 COLUM. L. REV. 230, 250-51 (1918); WIGMORE, PROBLEMS OF LAW 79-82 (1920). The first major attack came from Chief Justice von Moschzisker of the Supreme Court of Pennsylvania. Von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 426-27 (1924). See also Note, 47 HARV. L. REV. 1403, 1412 (1934).

29. See Kocourek, *Retrospective Decisions and Stare Decisis and a Proposal*, 17 A.B. A.J. 180, 182 (1931); Kocourek & Koven, *Renovation of the Common Law Through Stare Decisis*, 29 ILL. L. REV. 971, 995-96 (1935); Covington, *The American Doctrine of Stare Decisis*, 24 TEXAS L. REV. 190, 203 (1946); Moore & Oglebay, *The Supreme Court, Stare Decisis and Law of the Case*, 21 TEXAS L. REV. 514 (1943); Comment, 25 VA. L. REV. 210 (1938); Note, 60 HARV. L. REV. 437 (1947). *Cf.* Snyder, *Retrospective Operation of Overruling Decisions*, 35 ILL. L. REV. 121 (1940).

30. See CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 142-67 (1921); Cardozo, *Address Before N.Y. State Bar Association*, 55 REP. N.Y. STATE BAR ASS'N 263, 294-96 (Jan. 22, 1932); Great No. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932) (Cardozo, J.). *Cf.* LEVY, CARDOZO AND FRONTIERS OF LEGAL THINKING 109-11 (1938).

It has been suggested that Cardozo's "recurrent interest" in developing methods to avoid retroactive application of newly-announced rules stemmed from the injustice he felt when Columbia Law School increased the length of its prescribed course to three years after he had entered at a time when the required course was only two years. Cardozo did not finish the three-year course and never received his degree. See Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 10 n.31 (1960).

31. Cardozo, *Address*, *supra* note 30, at 296.

> The rule that we are asked to apply is out of tune with the life about us. It has been made discordant by the forces that generate a living law. We apply it to this case because the [judicial] repeal might work hardship to those who have trusted to its existence. We give notice, however, that any one trusting to it hereafter will do so at his peril.[32]

Hence, the crucial operative effect of the doctrine is that it allows a court to have its cake and eat it too—to overrule an outmoded precedent without having to disappoint the justified expectations of anyone.[33]

NON-BLACKSTONIAN RETROACTIVITY

Although prospective overruling might alleviate certain defects of Blackstonian retroactivity, it would not provide a complete remedy. For it has long been held that if there is a change in either the statutory or decisional law before final judgment is entered, the appellate court must "dispose of [the] case according to the law as it exists at the time of final judgment, and not as it existed at the time of the appeal."[34] This rule is usually regarded as being founded upon the conceptual inability of a court to enforce that which is no longer the law, even though it may have been the law at the time of trial, or at the time of the prior appellate proceedings. Thus, treaties, statutes, constitutional amendments, and judicial decisions will often have decisive implications for events already concluded at the time of their effective date.

The authoritative American statement of the rule was made by Chief Justice Marshall in *United States v. Schooner Peggy*:[35]

> It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation . . . . In such a case, the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside.[36]

That *Schooner Peggy* need not have been applied so broadly, however, seems clear from its facts. The schooner Peggy was a French trading vessel that

---

32. *Ibid.*

33. For a statement that prospective overruling "has made great headway, and assumed substantial importance" in recent decades, see HART & SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 620 (Tent. ed. 1958). For the less enthusiastic view that prospective overruling has failed "to emerge as a standard appellate device," see Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960). For a policy argument against prospective overruling, see note 192 *infra*.

34. Montague v. Maryland, 54 Md. 481, 483 (1880).

35. 5 U.S. (1 Cranch) 102 (1801).

36. *Id.* at 108-10.

had been run ashore and captured by the United States ship Trumbull, acting under orders of the President to seize any armed French vessel found on the high seas. An order of condemnation was entered on September 23, 1800. A week later, while the case was pending before the Supreme Court, the United States signed a convention with France providing in part that "property captured, and not yet definitively condemned . . . shall be mutually restored."[37] The Court held that it was bound to follow the treaty and order the judgment of condemnation set aside, even though it was not erroneous when delivered by the lower court. It reached this decision by reading "definitively" to mean "having no further possibility of appeal or judicial review."[38]

Two considerations, decisive in the literal sense, stand out. First, the treaty that intervened before final judgment was by its terms framed to be retroactive and to reach all prior lower court condemnations not yet decided on appeal. The rule of *Schooner Peggy*—that a change in governing law before entry of final judgment must be applied by an appellate court—would seem, therefore, to be based upon the precise command of retroactive application made by the treaty that the Court was construing. It would not seem to be based upon any general principles of jurisprudence applicable whether the intervening change in law provided for retroactivity or not. Second, *Schooner Peggy*, as Chief Justice Marshall carefully pointed out, was not a "mere private [case] between individuals"; rather, it involved "great national concerns" and had important foreign policy implications.[39] To find retroactivity necessary in such comparatively delicate circumstances might not inevitably require finding it necessary in circumstances less charged with national and international significance. These two considerations have not been thought in subsequent cases to qualify Marshall's broad language, however; as a result, newly-announced law has been applied retroactively in a variety of circumstances quite unlike those present in *Schooner Peggy*.

Schooner Peggy was concerned with a change made in the positive law by treaty. But changes in the positive law can also be made by statute. For example, in *Carpenter v. Wabash Railway Co.*,[40] the plaintiff was denied the right to intervene in an equity receivership proceeding involving the railroad; the denial was affirmed by the Court of Appeals. Three weeks after the petition for certiorari had been filed in the United States Supreme Court, but before it had been acted upon, Congress amended the relevant statute to authorize intervention by those in petitioner's position. After granting certiorari, the Supreme Court assumed without deciding "that the determination of the court below was correct upon the record before it and in the light of the law as it then stood." But, it added, "it is our duty to consider the amended

37. *Id.* at 107.

38. *Id.* at 108.

39. *Id.* at 110.

40. 309 U.S. 23 (1940).

statute and to decide the question in harmony with its provisions,"[41] quoting *Schooner Peggy*'s language. The judgment denying petitioner the right to intervene was vacated and the district court was directed "to allow petitioner's claim in accordance with the statutory provision,"[42] although the effect of the decision was admittedly to grant the petitioner a statutory right under a statute which did not exist at the time he originally asserted it.[43]

In *Vance v. Rankin*,[44] to cite another example, the plaintiffs succeeded in obtaining a writ of mandamus to compel town officials to take action made mandatory by statute. The appellate court affirmed. While the appeal was pending before the Supreme Court of Illinois, the state legislature amended the statute to make the action in question discretionary rather than mandatory. Since there now was no statute in force requiring the town officials to act, the state supreme court reversed the judgment and dissolved the writ of mandamus, thus denying the plaintiff a statutory right that existed at the time he asserted it.

Changes in the positive law before final judgment may also be made by constitutional amendment. A clear-cut illustration of the effect of such a change upon pending litigation is provided by *United States v. Chambers*,[45] a criminal prosecution[46] under the National Prohibition Act. The two defendants, Chambers and Gibson, were indicted on June 5, 1933. Chambers pleaded guilty, and judgment was postponed until the December term. On December 5, 1933, the twenty-first amendment, which repealed the eighteenth amendment, became effective. The cases of Chambers and Gibson, who had not yet pleaded, were called on December 6, 1933. The Supreme Court affirmed dismissal of the indictments on the ground that when "a statute is repealed or rendered inoperative, no further proceedings can be had to enforce it in pending prosecutions . . . ."[47] Accordingly, any prosecutions begun before

41. *Id.* at 26-27.

42. *Id.* at 30.

43. *Contra,* Concordia Ins. Co. v. School Dist., 282 U.S. 545 (1931).

44. 194 Ill. 625, 62 N.E. 807 (1902).

45. 291 U.S. 217 (1934).

46. Because this was a criminal prosecution, it builds not only upon the cases which followed *Schooner Peggy* but also upon the principle, established at common law, that repeal of a penal statute prohibits prosecution of acts committed before the repeal if those acts had not yet been prosecuted to final judgment. The repeal is regarded as an indication that the state no longer wants such acts punished, regardless of when they took place, and no longer views them as criminal. Annot., 89 A.L.R. 1514 (1934). The retroactivity which results from application of this principle may reflect the strict interpretation by which criminal statutes are traditionally construed. In situations in which the federal "saving" statute, 1 U.S.C. § 109 (1958), is applicable, however, prosecutions begun before repeal could be continued. The statute provides that repeal of a federal statute shall not release prior penalties or liabilities incurred prior to repeal, "unless the repealing act shall so expressly provide." The Court found the statute inapplicable in *Chambers*. See 291 U.S. 217, 224 (1934).

47. 291 U.S. at 223.

repeal may not be continued after repeal, even though the acts listed in the indictment were criminal when done.[48]

Changes in the controlling law before final judgment is entered may also be made by judicial decisions which reverse, qualify, limit, or reinterpret prior judicial decisions. For example, in *Vandenbark v. Owens-Illinois Glass Co.*,[49] plaintiff instituted a diversity action in federal court alleging that she had contracted silicosis through the negligence of the defendant, her employer. The trial court dismissed the complaint on the ground that the law of Ohio, the governing state, did not permit recovery for such a disease. The Court of Appeals affirmed. After the trial court had dismissed the complaint, the Ohio Supreme Court reversed its former decisions and expressly ruled that silicosis was a compensable illness under Ohio common law. The United States Supreme Court granted certiorari and reversed; it ruled that the doctrine of *Erie v. Tompkins* must be read to incorporate, in effect, the doctrine of *Schooner Peggy*. A federal court sitting in a diversity case must therefore apply the most recent state court decision, even if it came after the operative events or the entry of judgment by a lower court. "Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered."[50]

The *Vandenbark* Court's commentary upon *Schooner Peggy* is interesting because of its awareness of the factual context of the original decision. The Court noted that *Schooner Peggy* involved a treaty, not a judicial decision, and that it involved high national interests, rather than private parties. After acknowledging the existence of these limiting factors, however, the Court adopted a broad interpretation, observing quite correctly that "the principle quoted has found wide acceptance in a variety of situations."[51]

---

48. *But cf.* Swank v. Tyndall, 226 Ind. 204, 78 N.E.2d 535 (1948) (civil); Rix v. Asadoorian, 171 A.2d 925 (N.H. 1961) (civil), holding that an amendment to the state constitution restricting trial by jury in civil cases to actions involving $500 or more is not applicable to an action in progress which involved less than $500. The court said:

> At the time the defendant requested trial by jury . . . the amendment had not taken effect and the defendant was entitled to trial by jury as it formerly existed . . . .

171 A.2d at 927.

49. 311 U.S. 538 (1941).

50. *Id.* at 543. See also Johnson v. Cadillac Motor Co., 261 Fed. 878 (2d Cir. 1919), commented on in CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 158-60 (1921).

51. 311 U.S. 538, 542 (1941). The result in *Vandenbark* was extended one stage further procedurally when the Court of Appeals for the Sixth Circuit followed on rehearing a state supreme court decision reversing the state rule which the circuit court had previously applied to the case. Doggrell v. Southern Box Co., 208 F.2d 310 (6th Cir. 1953).

Once a final judgment has been entered, the pressures toward an end to litigation which are embodied in the principle of res judicata diminish the possibility that a subsequent change in the law will be applied retroactively. But a party still has available the right to seek a petition for a writ of habeas corpus and, in the federal courts, the right to make a motion under Federal Rule of Civil Procedure 60(b) for relief from a final judgment. See 7 MOORE, FEDERAL PRACTICE ¶ 60 (2d ed. 1955). For the relevance of an aspect of posture —failure to appeal—to the availability of habeas corpus, *compare* Sunal v. Large, 332 U.S.

THE RETREAT FROM RETROACTIVITY

The compelling influence of Blackstone upon the early American judiciary resulted in repeated recitation of the declaratory nature of law. Courts consistently announced that judicial decisions, particularly overruling decisions, must be retroactive; the requirement of retroactivity was seen as a necessary consequence of the theory, jealously adhered to, that a court's power was limited to declaring pre-existent law and did not extend to the making of new law. But it gradually became clear that the declaratory theory was too rarefied to permit just application in many cases. Logomachy, to paraphrase Dean Shulman, too often triumphed over wisdom and substance.[52] It thus became necessary for courts to develop judicial methods which more closely approached the achievement of substantial justice by respecting *bona fide* expectations.

The Legislative Divorce Cases

One example of an area in which nineteenth century courts were moved to apply their decisions prospectively was that involving direct or collateral attack upon the validity of legislative divorces. Fifty years ago the granting of divorces by the passage of a special legislative act was still considered appropriate in some states; it had enjoyed wide acceptance earlier.[53] If the power of a legislature to grant divorces was terminated by legislation or a constitutional amendment, all previously-granted legislative divorces were presumably valid. But when the power was terminated by a judicial decision that the power had not existed in the legislature *ab initio,* the validity of existing legislative divorces was called into uncomfortable question. To make such a ruling retroactive would be to upset the basis of fundamental social arrangements and to change the status of innocent men, women, and children. Although the cases make for quaint reading today, their importance to the parties was more than historical.

A typical case was *Bingham v. Miller,*[54] decided by the Supreme Court of Ohio in 1848. The plaintiff brought an action in assumpsit. The defendant introduced evidence that she had been lawfully married and contended, therefore, that under the rule disabling married women from entering contracts, her husband was the only proper defendant. The plaintiff countered by introducing evidence of a legislative divorce granted to her husband. If the divorce were valid, the wife would be the appropriate defendant. The wife,

174 (1947), *with* Estep v. United States, 327 U.S. 114 (1946). See also Polites v. United States, 364 U.S. 426 (1960); Chicot Cty. Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940).

52. See Shulman, *Retroactive Legislation,* 13 ENCYC. SOC. SCI. 356-57 (1934).

53. See, *e.g.,* Maynard v. Hill, 125 U.S. 190, 206-09 (1888); Noel v. Ewing, 9 Ind. 37, 53 (1857) (citing statistics); Starr v. Pease, 8 Conn. 540 (1831); Baldwin, *Legislative Divorces and the Fourteenth Amendment,* 27 HARV. L. REV. 699 (1914).

54. See 17 Ohio 445 (1848). See, *e.g.,* MADDEN, PERSONS AND DOMESTIC RELATIONS 256-61 (1931); JACOBS & GOEBEL, DOMESTIC RELATIONS 380 (3d ed. 1952). *Compare* Richeson v. Simmons, 47 Mo. 20 (1870), *with* Winkles v. Powell, 173 Ala. 46, 55 So. 536 (1911).

therefore, contended that the legislative divorce was void as beyond the power of the legislature to grant and that in legal contemplation she remained a married woman. The court refused to charge the jury that the divorce was invalid, and the defendant assigned the refusal as error. The state supreme court held that although the legislature had "assumed and exercised this power [to grant divorces] for a period of more than forty years,"[55] it had done so by encroaching upon a judicial power in violation of the state constitution; the legislature had never had the power to grant divorces.

Strictly, it should follow that the defendant's divorce was invalid, that her husband was the only appropriate defendant, and that the plaintiff's action must be dismissed. The court refused to bend to such strictness, however. It said:

> To deny this long exercised power, and declare all the consequences resulting from it void, is pregnant with fearful consequences. If it affected only the rights of property, we should not hesitate; but second marriages have been contracted, and children born, and it would bastardize all of these, although born under the sanction of apparent wedlock, authorized by an act of the Legislature before they were born, and in consequence of which the relation was formed which gave them birth. On account of these children, and for them only, we hesitate. And in view of this, we are constrained to content ourselves with simply declaring that the exercise of the power of granting divorces, on the part of the Legislature, is unwarranted and unconstitutional . . . .
>
> We trust we have said enough to vindicate the constitution, and feel confident that no department of State has any disposition to violate it, and that the evil will cease.[56]

The court therefore affirmed the trial court's refusal to charge that the divorce was invalid. The effect of the decision was that while no more legislative divorces could be granted, those already granted would be respected, even though the legislature had lacked power to grant them. The opinion demonstrates that the dogmas and shibboleths of necessary retroactivity will not always be followed when to do so would deny justice without any compensating gain beyond the preservation of a fiction.

The Municipal Bond Cases

An example of the growth of a similar technique is provided by the series of municipal bond cases which came before the United States Supreme Court in the second half of the nineteenth century. The facts in *Gelpcke v. Dubuque*,[57] the first and most important of the cases, represent a pattern found in all the others. The Supreme Court of Iowa repeatedly had held that the legislature had the power to authorize municipalities to issue bonds to aid in the construction of railroads. After the city of Dubuque had issued bonds under

55. 17 Ohio at 448.

56. *Id.* at 448-49.

57. 68 U.S. (1 Wall.) 175 (1863). See Thayer, *The Case of Gelpcke v. Dubuque*, 4 HARV. L. REV. 311 (1891); Read, *The Rule in Gelpcke v. Dubuque*, 9 AM. L. REV. 381, 397 (1875).

an authorizing statute, the state supreme court reversed itself and held that the legislature lacked the power to authorize such bond issues. When the city refused to make a payment due upon bonds that he held, Gelpcke brought suit in a federal court in Iowa. It was clear that if he had brought his action in a state court, Gelpcke would have lost; the state court would have applied the most recent decision in the area and ruled that because the legislature lacked the power to authorize bond issues of the type in question, the authorizing statute had never been the law, and the bonds were therefore never valid obligations of the city. Indeed, Gelpcke had every reason to expect the same result in the federal court. For even under the doctrine of *Swift v. Tyson*,[58] a federal court sitting in a diversity case would usually follow a state court's interpretation of a state constitutional provision or statute; construction of such local law was not considered to be a part of that general common law which a federal court could "make" (or was it "find"?) for itself.[59] Even in *Gelpcke* the Supreme Court was "not unmindful of the importance of uniformity in the decisions of this court, and those of the highest local courts, giving constructions to the laws and constitutions of their own States. It is the settled rule of this court in such cases, to follow the decisions of State courts."[60]

But while remaining "not unmindful" of the general rule that it follow the state court construction and hold invalid the bonds upon which Gelpcke was suing, the Supreme Court declined to follow the general rule. Instead, it held that bonds, valid under judicial decisions outstanding when they were issued, remained valid and enforceable after those judicial decisions were overruled. "However we may regard the late [overruling] case in Iowa as affecting the future," the Court said, "it can have no effect upon the past."[61] The law which governed the life and validity of the bonds was thus the law at the time they were issued, not the law as subsequently declared. The underlying thrust was to say that the overruling opinion of the Supreme Court of Iowa would be considered as having prospective effect only in the federal courts; the overruled decision would continue to be regarded as the governing law by federal courts until the date of overruling.

Mr. Justice Miller, dissenting, saw the implications of this clearly. He conceded that the "moral force" of the majority's position was "unquestionably very great,"[62] but found that it could not "be sustained either on principle or authority."[63] His opinion points to principle and authority with Blackstonian vigor:

---

58. 41 U.S. (16 Pet.) 1 (1842).

59. See Burns Mortgage Co. v. Fried, 292 U.S. 487 (1934); HART & SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 630-31 (Tent. ed. 1958).

60. 68 U.S. (1 Wall.) at 206.

61. *Ibid.*

62. *Id.* at 210.

63. *Ibid.* See FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 213-21 (1939).

> The Supreme Court of Iowa is not the first or the only court which has changed its rulings on questions as important as the one now presented. I understand the doctrine to be in such cases, not that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, and never had been, the law, and is overruled for that very reason. The decision of this court contravenes this principle, and holds that the decision of the court makes the law, and in fact, that the same statute or constitution means one thing in 1853, and another thing in 1859. For it is impliedly conceded, that if these bonds had been issued since the more recent decision of the Iowa court, this court would not hold them valid.[64]

"The decision of the court makes the law"—there was the heart of *Gelpcke* as far as Justice Miller's dissent was concerned. The municipal bond cases, of which *Gelpcke* was the first, effectively recognized that state courts may sometimes and for some purposes be regarded as making law prospectively, much as legislatures do, rather than merely as declaring it retroactively, and that such regard would particularly be forthcoming when significant reliance had been placed upon the overruled decisions.[65] As Justice Holmes later said of *Gelpcke*, "the principle is that a change of judicial decision after a contract has been made on the faith of an earlier one the other way is a change of the law."[66] And again, "the class of cases to which I refer have not stood on the ground that this court agreed with the first decision, but on the ground that the state decision makes the law for the State, and therefore should be given only a prospective operation when contracts had been entered into under the law as earlier declared."[67]

Subsequent cases continued to stress the reliance which parties had placed on the only legal guides available at the time they entered a contract or other transaction.[68] Some tried to rationalize the departure from Blackstone and the

64. 68 U.S. (1 Wall.) at 211.

65. The following language is typical:

> Parties have a right to contract, and they do contract in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule.

Olcott v. The Supervisors, 83 U.S. (16 Wall.) 678, 690 (1872).

66. Kuhn v. Fairmont Coal Co., 215 U.S. 349, 371 (1910) (dissenting opinion). Justice Holmes further criticized *Gelpcke* in Muhlker v. New York & N.R.R., 197 U.S. 544, 573 (1905).

67. 215 U.S. at 371.

68. See, *e.g.*, Anderson v. Santa Anna, 116 U.S. 356 (1886); Green Cty. v. Conness, 109 U.S. 104 (1883); New Buffalo v. Iron Co., 105 U.S. 73 (1881); Taylor v. Ypsilanti, 105 U.S. 60 (1881); Moores v. National Bank, 104 U.S. 625 (1881); Railroad Co. v. McClure, 77 U.S. (10 Wall.) 511 (1871); The City v. Lamson, 76 U.S. (9 Wall.) 477 (1869); Havemeyer v. Iowa Cty., 70 U.S. (3 Wall.) 294 (1865). See also Hill v. Atlantic & N.C. R.R., 143 N.C. 539, 55 S.E. 854 (1906); Haskeff v. Maxey, 134 Ind. 182, 33 N.E. 358 (1893). *Contra*, Norton v. Shelby Cty., 118 U.S. 425 (1886). More recent cases include Sutter Basin Corp. v. Brown, 40 Cal. 2d 235, 253 P.2d 649 (1953) and Reppel v. Board of Liquidation, 11 F. Supp. 799 (E.D. La. 1935). *Cf.* Catlett, *The Development of the*

declaratory theory along different theoretical lines. Thus, in *Douglass v. County of Pike*,[69] a municipal bond case similar on its facts to *Gelpcke*, the Supreme Court said:

> The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment.[70]

Criminal and Other Cases

The cases just discussed illustrate departures from the declaratory theory of the judicial function in order to protect the social values represented by personal status or commercial arrangements created in reliance upon judicial decisions subsequently held erroneous. It was almost inevitable that the same result would occur when even more important values were at stake. An illustrative case is *State v. Jones*.[71] The defendant had been prosecuted several years before under a criminal statute providing penalties for conducting a lottery. The court held that the activity in which he was engaged was not a lottery within the meaning of the statute; accordingly, he was found not guilty.[72] The defendant continued to engage in the same activity—sanctioned by the court's opinion—and was eventually prosecuted a second time under the same statutory provision. The trial court dismissed on the authority of the earlier decision. On appeal, the state supreme court changed its former interpretation of the statute, held that the statute was intended to prohibit activity of the kind engaged in by the defendant, and overruled the decision in the first prosecution.[73] But the court declined to apply the overruling decision to the defendant. "The plainest principles of justice," it said, demand that the former decision be overruled prospectively; accordingly, "in denying retrospective operation to our overruling decision, we are governed by the overruled decision in settling the defendant's rights."[74]

Doctrine of Stare Decisis and the Extent to Which it Should Be Applied, 21 WASH. L. REV. 158, 167 (1948).

69. 101 U.S. 677 (1879).

70. *Id.* at 687.

71. 44 N.M. 623, 107 P.2d 324 (1940).

72. Roswell v. Jones, 41 N.M. 258, 67 P.2d 286 (1937).

73. 44 N.M. at 630, 107 P.2d at 329.

74. *Id.* at 631, 107 P.2d at 329. *But see* the opinion of Zinn, J., concurring in the overruling but declining to agree with the limitation to prospective application:

> To approve their action is to sanction a usurpation by the judiciary of a legislative function. We would not permit the Legislature to encroach upon the domain assigned exclusively to us by the Constitution of our State. By what right, other than by a judicial sense of superiority, do we presume to say this shall hereafter be

The momentum toward prospective overruling may have been unusually great in the *Jones* case because of the involvement of the defendant in both the overruled and the overruling cases: if anyone had a right to rely upon the first decision it was Jones himself. But the same result has followed in the more usual criminal cases in which different defendants were involved in the two decisions.[75] To allow "punishment of an act declared by the highest court of a state to be innocent, because the same court had seen fit to reverse its interpretation of a statute," said one court, "would be the very refinement of cruelty."[76]

Prospective overruling has also been made use of in cases involving the creation of a new liability where prior cases had specifically held that no liability existed.[77] A common example is provided by decisions abolishing charitable immunity of hospitals in certain tort actions; the abolition is made prospective because it resulted in the enforcement of a duty of care which could not have been enforced at the time the operative facts occurred.[78] Another example is provided by a case in which the reinterpretation of a state taxation statute to make taxable that which had previously been held to be nontaxable was given prospective effect only.[79]

THE MEANING OF SUNBURST

The technique of prospective overruling was thus not novel when in 1932 the United States Supreme Court was first asked to pass upon its constitutionality in *Great No. Ry. v. Sunburst Oil & Ref. Co.*[80] A Montana statute gave the State Railroad Commission authority to fix rates of carriage for intrastate shipments, and to change the rates upon a showing that they were unreasonable. The statute had been interpreted by the Montana Supreme Court in *Doney v. Northern Pac. Ry.*[81] to authorize a right of reparation in both carriers and shippers for excesses or deficiencies in payments whenever

---

> the law which heretofore was not the law. To announce a rule of substantive law for the future is solely the function of the Legislature. If what the majority says is the law, then it has been the law ever since the Legislature passed the lottery law.

Id. at 635-36. 107 P.2d at 338.

75. See, *e.g.*, State v. Bell, 136 N.C. 674, 49 S.E. 163 (1904); State v. Simanton, 100 Mont. 292, 49 P.2d 981 (1935). *Cf.* People v. Maughs, 149 Cal. 253, 86 Pac. 187 (1906); Price v. Johnston, 334 U.S. 266, 292 (1948).

76. State v. Longino, 109 Miss. 125, 133, 67 So. 902, 903 (1915).

77. *Cf.* Langdell v. Dodge, 100 N.H. 118, 122 A.2d 529 (1956); Wilson v. Doehler-Jarvis, 358 Mich. 510, 100 N.W.2d 226 (1960). See also Sunray Oil Co. v. Commissioner, 147 F.2d 962 (10th Cir. 1945), *cert. denied*, 325 U.S. 861 (1945).

78. See, *e.g.*, Parker v. Port Huron Hosp., 361 Mich. 1, 26-29, 105 N.W.2d 1, 13-15 (1960). See also Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

79. Arizona Tax Comm'n v. Ensign, 75 Ariz. 376, 257 P.2d 392 (1953).

80. 287 U.S. 358 (1932). See Annot., 85 A.L.R. 262 (1933) (collecting cases of prospective overruling prior to *Sunburst*).

81. 60 Mont. 209, 199 Pac. 432 (1921).

the rate schedules were annulled or modified because unreasonable. After a determination that the relevant rates were excessive and unreasonable, Sunburst sued Great Northern to recover excess payments. The Supreme Court of Montana held that the *Doney* case had been erroneously decided and that the statute empowering the Commission or a court to invalidate rate schedules did not create a right of reparation in anyone with respect to charges paid under the schedule before it was invalidated. The *Doney* rule was therefore disavowed. However, because it constituted "the governing principle for shippers and carriers who, during the period of its reign, had acted on the faith of it,"[82] the court elected to adhere to the *Doney* principle in the case before it and to allow Sunburst to recover the overpayments it had made to Great Northern. At the same time the court announced that the rule of the *Doney* case was disapproved and would not be followed in the future.

The United States Supreme Court granted certiorari to consider Great Northern's claim that it was denied due process by the Montana Supreme Court's disposition of the case. Great Northern's contention was said to be this: "Adherence to precedent as establishing a governing rule for the past in respect of the meaning of a statute is . . . a denial of due process when coupled with the declaration of an intention to refuse to adhere to it in adjudicating any controversies growing out of the transactions of the future."[83]

The Court held unanimously that it was not; "the federal constitution," it said, "has no voice upon the subject."[84] The opinion—fittingly enough because of his long-held hopes that courts would develop techniques for accommodating stare decisis to judicial creativity—was written by Justice Cardozo.[85] The opinion stressed that the case presented primarily an issue of what judgments a *state* court might permissibly make "in defining the limits of adherence to precedent."[86] It found either of two alternative approaches within the range of permissible choice. On the one hand, a state may say what the Montana court said in the proceedings below, "that decisions of its highest court, though later overruled, are law none the less for intermediate transactions."[87] As to these transactions, "we may say of the earlier decision that it has not been overruled at all. It has been translated into a judgment of affirmance and recognized as law anew."[88] That, in effect, was the manner in which *Gelpcke v. Dubuque* and its progeny had treated state court decisions.[89] On the other hand, a state "may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and

82. 287 U.S. at 361.
83. *Id.* at 363-64.
84. *Id.* at 364.
85. See note 30 *supra.*
86. 287 U.S. at 364.
87. *Ibid.*
88. *Id.* at 365.
89. See text at notes 57-70 *supra.*

the reconsidered declaration as law from the beginning."[90] That, in effect, was what the Court had found constitutional in *Tidal Oil Co. v. Flanagan*.[91] Because the due process clause does not inhibit a state from making either choice, the Court said, the "choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature."[92] Montana's choice being a permissible one, the judgment was affirmed.[93]

The usual analysis of *Sunburst* regards the decision as establishing the power both of state and federal courts to issue a prospective "prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule."[94] But as the present analysis suggests, the Court's central concern was rather with the power of a *state* court to treat a precedent in a manner that would honor *bona fide* reliance and reasonable expectations. And that problem, surely, was not a difficult one once the Court had upheld in *Tidal Oil Co. v. Flanagan* [95] the retroactive application of new decisions, thereby making "invalid what was valid in the doing,"[96] in disregard of reliance upon precedent and reasonable expectations as to its durability.

The Import of James v. United States

After the decision in *Sunburst*, the possibility of prospective overruling was not again to engage the attention of the Supreme Court until the recent decision of *James v. United States*.[97] The defendant was indicted for "wilfully and knowingly" failing to pay income tax on funds that he had embezzled. His defense was based upon the holding in *Commissioner v. Wilcox*,[98] decided fifteen years earlier, that embezzled funds do not give rise to taxable income. After James was convicted in the trial court and the conviction was affirmed on appeal, the Supreme Court granted certiorari.

A majority of six members of the Court voted to overrule *Wilcox* and hold that embezzled funds constitute taxable income.[99] A differently constituted majority of six voted to reverse the conviction—three on the ground that since James' actions took place during the period in which *Wilcox* was not yet overruled, the statutory requirement of "willful" evasion could not be proved;[100] and three others on the ground that *Wilcox* had been properly decided on the

90. 287 U.S. at 365.
91. 263 U.S. 444 (1924). For a discussion of this case, see text at notes 13-14 *supra*.
92. 287 U.S. at 365.
93. *Id.* at 367.
94. *Id.* at 366.
95. 263 U.S. 444 (1924).
96. 287 U.S. at 364.
97. 366 U.S. 213 (1961).
98. 327 U.S. 404 (1946).
99. The six members were Chief Justice Warren and Justices Frankfurter, Clark, Harlan, Brennan, and Stewart.
100. The three were Chief Justice Warren and Justices Brennan and Stewart.

merits and should be a bar to prosecution in *James*.[101] One Justice voted to affirm the conviction,[102] and the remaining two voted to remand the case to the district court for a new trial.[103]

The opinion of Chief Justice Warren, which announced the judgment of the Court that *Wilcox* be overruled and the conviction of James be reversed, makes no explicit mention of prospective overruling, but centers on the necessity for proof of the "evil motive and want of justification in view of all the circumstances"[104] which willfulness legally implies. It reversed the conviction because of the belief "that the element of willfulness could not be proven in a criminal prosecution for failing to include embezzled funds in gross income in the year of misappropriation so long as the statute contained the gloss placed upon it by *Wilcox* at the time the alleged crime was committed."[105] Read in the broadest sense, the opinion would seem to suggest that *James* should have prospective effect only, and that *Wilcox* should govern all taxpayer conduct until the date of decision in *James*.[106] Read more narrowly, the opinion would seem to suggest that *James* must be prospective at least with respect to criminal prosecutions, since the requisite willfulness could not be present prior to the date of decision in *James*, but that retroactive civil actions requiring no proof of willfulness might perhaps permissibly be based upon the holding in *James*. On either reading, however, the Chief Justice's approach results in the prospective announcement of a new rule of criminal liability. It may be fair to suggest that had the possibility of this partial prospective overruling not been available, the necessity of making the new ruling retroactive with respect to criminal prosecutions might have led the Chief Justice to follow prior cases in affirming or further distinguishing the holding in *Wilcox*.[107]

The concurring opinion of Mr. Justice Black announces his conviction that "*Wilcox* was sound when written and is sound now."[108] In addition to a discussion on the merits of overruling *Wilcox*, the opinion marshals an argument against "the prospective way in which this is done."[109] The gravamen of the argument is that the availability of prospective overruling is an invitation to courts to overreach the limits of judicial power and undertake to do what only a legislature may constitutionally do.

101. The three were Justices Black, Douglas, and Whittaker.

102. He was Mr. Justice Clark.

103. The two were Justices Harlan and Frankfurter.

104. 366 U.S. at 221.

105. *Id.* at 221-22.

106. *But cf. The Supreme Court, 1960 Term*, 75 HARV. L. REV. 193, 196 (1961), arguing that a "definitive answer to this question apparently must await a subsequent decision of the Court." No hint of an answer is provided by Rev. Rul. 61-185, 1961 INT. REV. BULL. No. 42. See also Beck v. United States, — F.2d — (9th Cir. 1962).

107. See, *e.g.*, Rutkin v. United States, 343 U.S. 130 (1952); J.J. Dix, Inc. v. Commissioner, 223 F.2d 436 (2d Cir.), *cert. denied*, 350 U.S. 894 (1955); Marienfeld v. United States, 214 F.2d 632 (8th Cir. 1954); United States v. Bruswitz, 219 F.2d 59 (2d Cir.), *cert. denied*, 349 U.S. 913 (1955); United States v. Wyss, 239 F.2d 658 (7th Cir. 1957).

108. 366 U.S. at 223.

109. *Ibid.*

The argument of Mr. Justice Black begins with a recitation of the fact that *Wilcox* authoritatively held that the relevant statutory language in the Internal Revenue Code did not impose a tax upon embezzled income. It continues:

> The Wilcox case was decided fifteen years ago. Congress has met every year since then. All of us know that the House and Senate Committees responsible for our tax laws keep a close watch on judicial rulings interpreting the Internal Revenue Code. Each committee has one or more experts at its constant disposal. It cannot possibly be denied that these committees and these experts are, and have been, fully familiar with the *Wilcox* holding. When Congress is dissatisfied with a tax decision of this Court, it can and frequently does act very quickly to overturn it.[110]

Moreover, he adds, the Internal Revenue Code was "completely overhauled and recodified" in 1954, after the *Wilcox* decision, and it left that decision intact."[111] Finally, repeated attempts to subject embezzled funds to income taxation have been defeated; this is not, therefore, a case in which Congress failed to change the law "because it did not know what was going on in the courts or because it was not asked to do so . . . ."[112] When the Court changed by judicial decision a statutory interpretation which Congress knew of for fifteen years and left standing for fifteen years, it "passed beyond the interpretation of the tax statute and proceeded substantially to amend it."[113] The thrust of this argument would appear to be that the first judicial interpretation of a statute gives a possibly ambiguous phrase a settled meaning and that any change in that meaning should be made by the legislature, particularly where the legislature can be said to have acquiesced in the substance of the judicial interpretation. For a court to change that meaning in such circumstances, in other words, is for it to amend a statute which Congress has declined to amend.[114] And such amendment, the opinion contends, may be particularly pernicious when it involves, in effect, the "creation" of a new crime. The opinion adds:

> [F]or a court to interpret a criminal statute in such a way as to make punishment for past conduct under it so unfair and unjust that the interpretation should be given only prospective application seems to us to be the creation of a judicial crime that Congress might not want to create.[115]

---

110. *Id.* at 230-31.

111. *Id.* at 231.

112. *Id.* at 231-32. See the comments of Justice Stone in connection with the Sherman Act:

> The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 488 (1940).

113. 366 U.S. at 224.

114. *Compare* Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953), *with* Girouard v. United States, 328 U.S. 61, 69-70 (1946). *Cf.* United States v. Girouard, 149 F.2d 760, 765 (1st Cir. 1945) (Woodbury, J., dissenting).

115. 366 U.S. at 224-25.

Mr. Justice Black then reaches the heart of the matter: the availability of the technique of prospective overruling, by offering a court the means of avoiding the often unpleasant consequences of retroactivity, encourages it when interpreting a statute to make law, not in the acceptable and inevitable judicial sense in which courts make law but in the unacceptable legislative sense in which legislatures make law.[116] The unavailability of prospective overruling is thus viewed as a safeguard against inappropriate, because unauthorized, judicial action.[117] In Mr. Justice Black's statement of it:

> [O]ne of the great inherent restraints upon this Court's departure from the field of interpretation to enter that of lawmaking has been the fact that its judgments could not be limited to prospective application. This Court and in fact all departments of the Government have always heretofore realized that prospective lawmaking is the function of Congress rather than of the courts. We continue to think that this function should be exercised only by Congress under our constitutional system.[118]

Mr. Justice Harlan, conceding that *Wilcox* was wrongly decided, addresses his attention to fashioning an appropriate method of overruling it.[119] He starts with the assumption that "our decisions in the tax and any other field for that matter *relate back* to the actual transactions with which they are concerned, and that that is only the normal concomitant of the fact that we do not sit as an administrative agency making rulings for the future, but rather adjudicate actual controversies as to rights and liabilities under the laws of the United States."[120] Even conceding that *Wilcox* is wrong, therefore, an "outright reversal"[121] of the conviction could not be reconciled with the view that the interpretation of an unchanged statute must "relate back" to the time of enactment. But Mr. Justice Harlan suggests that James should be able to secure a reversal if he had in fact relied upon the holding in *Wilcox* and therefore lacked the willfulness required for conviction.[122] This would be a question of fact to be decided at a new trial in the district court; it should not be decided on appeal either in favor of the defendant, as the opinion of Chief Justice Warren decided it, or against the defendant, as the opinion of Mr. Justice Clark decided it. If *bona fide* reliance upon *Wilcox* could not be demonstrated, then the principle of relation back would govern and would

116. *Cf.* Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226-27 (1908) (Holmes, J.).

117. Values of stare decisis are, of course, also relevant here. See generally Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949); Radin, *The Trail of the Calf*, 32 CORNELL L.Q. 137 (1946); Pound, *What of Stare Decisis?*, 10 FORDHAM L. REV. 1 (1941); Lobingier, *Precedent in Past and Present Legal Systems*, 44 MICH. L. REV. 955 (1946); Ellenbogen, *The Doctrine of Stare Decisis and the Extent to Which It Should be Applied*, 20 TEMPLE L.Q. 503 (1947).

118. 366 U.S. at 225.

119. *Id.* at 241.

120. *Id.* at 244-45.

121. *Ibid.*

122. *Id.* at 245.

make the ruling in *James* applicable.[123] This allowance of reliance as a defense would also seem to meet constitutional objections centering upon the lack of adequate notice.[124]

The opinions of Mr. Justice Black and Mr. Justice Harlan in the *James* case were apparently the first in the Supreme Court to suggest that prospective overruling raised problems of constitutional significance. Yet neither opinion undertook an analysis of the significance of these problems. Mr. Justice Black alone cited *Sunburst*, and for the imprecise proposition that "[w]e realize that there is a doctrine with wide support to the effect that under some circumstances courts should make their decisions as to what the law is apply only prospectively."[125]

Some Earlier Assumptions

The assumption that the holding of *Sunburst* applies to the federal courts and sanctions their authority to speak prospectively had been made prior to *James* by at least two Justices of the United States Supreme Court. In *Mosser v. Darrow*,[126] the Court held that a reorganization trustee who expressly permitted key employees to profit from trading in securities of the trust was personally liable for profits realized by these employees. Although conceding that "there is no hint or proof that he [the trustee] has been corrupt or that he has any interest, present or future, in the profits he has permitted these employees to make,"[127] the Court held that good faith was not a defense and found that the "most effective sanction for good administration is personal liability for the

123. A second possible defense—that "at the time he failed to make his return [James] was not under any misapprehension as to the law, but indeed that at the time and under the decisions of this Court his view of the law was entirely correct"—Mr. Justice Harlan suggests only to reject:

> Petitioner's obligation here derived not from the decisions of this or any other court, but from the Act of Congress imposing the tax. It is hard to see what further point is being made, once it is conceded that petitioner, if he was misled by the decisions of this Court, is entitled to plead in defense that misconception. Only in the most metaphorical sense has the law changed: the decisions of this Court have changed, and the decisions of a court interpreting the acts of a legislature have never been subject to the same limitations which are imposed on legislatures themselves . . . forbidding them to make any *ex post facto* law . . . .

366 U.S. at 247.

124. See text at notes 21-23 *supra*. The opinion of Mr. Justice Black in *James* says:

> [A] criminal statute that is so ambiguous in scope that an interpretation of it brings about totally unexpected results, thereby subjecting people to penalties and punishments for conduct which they could not know was criminal under existing law, raises serious questions of unconstitutional vagueness.

366 U.S. at 224. See also Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960); Bickel, Foreword: *The Passive Virtues*, 75 Harv. L. Rev. 40, 62-64 (1961); United States v. Cardiff, 344 U.S. 174 (1952).

125. 366 U.S. at 224.

126. 341 U.S. 267 (1951).

127. *Id.* at 275.

consequences of forbidden acts . . . ."[128] Mr. Justice Black dissented.[129] Because the "rule of trustee liability [now announced by the Court] did not exist before today," he found "grossly unfair" its retroactive application to a trustee who could not have known that his conduct was subject to such a rule.[130]

> Despite its novelty, there is much to be said in favor of such a rule for cases arising in the future. It seems to me, however, that there is no reason why the rule should be retroactively applied to this respondent, when to do so is grossly unfair. Admittedly, the most that can be said against respondent is that he made an honest mistake which before today would not have subjected him to the heavy financial penalty. Under these circumstances, if the new rule is to be announced by the Court, I think it should be given prospective application only. See *Great Northern R. Co. v. Sunburst Oil Co.* . . . .[131]

Another statement, also relying upon *Sunburst*, was made by Mr. Justice Frankfurter in his concurring opinion in *Griffin v. Illinois*.[132] The case involved a challenge to the constitutionality of an Illinois statute which governed the procedure by which the state provided appellate review of criminal convictions. In order to obtain appellate review a defendant was required to furnish the appellate court with a bill of exceptions or with a report of the proceedings at the trial certified by the trial judge. Often such documents could be prepared only if the defendant had access to a stenographic transcript of the trial proceedings. Although the state furnished a free transcript to any person appealing from a sentence of death, indigent defendants who wished to appeal from less severe sentences were required to pay for the transcript themselves or to forego the opportunity to appeal. Griffin was denied an appeal from a conviction for armed robbery because of financial inability to buy a transcript. The Supreme Court reversed. It held that once a state provides for appellate review and makes that review "an integral part" of its "trial system for finally adjudicating the guilt or innocence of a defendant,"[133] it may not condition access to that review upon the financial ability or status of the defendant. The Court ruled that the state was required either to furnish a transcript to every indigent defendant who wished to appeal or to make other arrangements for affording adequate and effective appellate review to indigent defendants, assuming in each instance that the state desires to continue providing some form of judicial review. The cause was remanded for further action not inconsistent with the opinion.

Mr. Justice Frankfurter, concurring in the disposition of the case, wrote a separate opinion. He agreed that the procedure under the Illinois rule amounted

128. *Id.* at 274.
129. *Id.* at 275.
130. *Id.* at 275-76.
131. *Id.* at 276. *But see* Mr. Justice Black's later view that "prospective lawmaking is the function of Congress rather than of the courts." James v. United States, 366 U.S. 213, 225 (1961). See text at notes 108-18 *supra*.
132. 351 U.S. 12, 20 (1956).
133. *Id.* at 18.

to "squalid discrimination"[134] and that if a state "has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity."[135] Having announced his agreement with the substantive judgment of the Court, Mr. Justice Frankfurter then embarked upon a discussion of the nature of the law which had been newly declared. While agreeing that Griffin should be given the opportunity to appeal, he urged that the Court should have specifically limited its ruling to prospective application because "candor compels acknowledgment that the decision rendered today is a new ruling" and, for "sound reasons, law generally speaks prospectively."[136] The operative significance of such an application would be to deny writs of habeas corpus to presently-incarcerated prisoners who were precluded from obtaining judicial review of their convictions because of their inability to purchase a transcript. The application of the new rule prospectively only, Mr. Justice Frankfurter concluded, "is consonant with the spirit of our law and justified by those considerations of reason which should dominate the law . . . ,"[137] citing the *Sunburst* case.

It should be noted that the action urged by Mr. Justice Frankfurter in *Griffin* differed significantly—even more significantly than *Mosser v. Darrow* did—from the action taken by the state court in *Sunburst*. His opinion in *Griffin* would not postpone application of the new rule to the next case, as the state court had in *Sunburst*, but instead would apply the new rule in the case before him. Since Mr. Justice Frankfurter was not engaging in "future prophecies alone," his opinion cannot be cited in support of the usual interpretation of *Sunburst*.

The litigation in the *Sunburst* case brought to the Supreme Court the limited question of whether the use of prospective overruling by a state supreme court denied a party due process under the fourteenth amendment. The decision was that it did not. The case did not in any way raise on its facts the complex question of whether the use of prospective overruling by a federal court—bound as a state court is not by the strict requirements of Article III —was constitutionally permissible.[138] This constitutional question is of a different order from the question raised by the facts in *Sunburst*. At least it is far from clear that the same result should follow in the one case as in the

134. *Id.* at 24.
135. *Ibid.*
136. *Id.* at 25-26.
137. *Id.* at 26.
138. Professor Davis finds judicial power to overrule prospectively "inherent" and "intrinsic" in all courts. 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 5.09, at 352 and n.18 (1958).

Professor Moore says:

> As far as state courts are concerned the United States Constitution neither precludes nor compels the prospective-effect approach. And, while a federal constitutional court cannot render an advisory opinion, the same view should prevail in the federal courts for the following reasons. The overruling decision is rendered in an actual controversy between adverse parties. The fact that a former decision is overruled,

other.[139] The question merits an independent analysis that the cases have neglected to give it.

ARTICLE III AND PROSPECTIVE OVERRULING

Article III of the Constitution extends the judicial power of the federal courts "to all Cases" and "to Controversies." That the exercise of this power must be limited to the resolution of actual and concrete cases and controversies—and may not be brought to bear upon abstract and hypothetical questions, however great their interest—has been a ruling constitutional principle at least since *Marbury v. Madison*.[140]

As Professor Bickel has written of this limit upon federal courts:

> It follows that courts may make no pronouncements in the large and in the abstract, by way of opinions advising other departments upon request; that they may give no opinions, even in a concrete case, which are advisory because they are not finally decisive, the power of ultimate disposition of the case having been reserved elsewhere; and that they may not decide non-cases, which are not adversary situations and in which nothing of immediate consequence to the parties turns on the results.[141]

In short, the power of a federal court under Article III to make authoritative determinations and declarations of law derives solely from its power to decide cases. And a court's holding in the decision of a case is entitled to binding effect as a pronouncement of law only to the extent that the rules of law held to govern were necessary to the resolution of the conflict presented. But whether a federal court has paid appropriate respect to the injunctions of Article III should not rest finally upon a literal inquiry into whether a particular statement in a judicial opinion is necessary to the decision of the case, or whether the decision on the facts could nonetheless stand without it. Larger considerations are at play here, considerations which relate to the service which Article III renders to a system based upon the separation of governmental powers.

> but without retroactive effect, indicates a careful and thoughtful evaluation of the correct legal doctrines involved. The prospective application of the overruling decision is merely a product of the case or controversy presented.

1 MOORE, FEDERAL PRACTICE 4082-84 (2d ed. 1959).

139. *But see* Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960).

> The *Sunburst* case came up from the state courts but I see no reason to suppose that a different result would be reached in a federal, constitutionally established court .... And since federal courts have frequently asserted judicial power to overrule, why should not they prospectively overrule; the greater includes the lesser.

Id. at 15 n.48.

140. 5 U.S. (1 Cranch) 137 (1803). Although *Marbury v. Madison* may be read as a limitation only upon judicial review of the actions of other branches of government, its rationale has been broadened to become a general jurisdictional limitation on the actions of federal courts in all cases.

141. Bickel, Foreword: *The Passive Virtues*, 75 HARV. L. REV. 40, 42 (1961).

As *Marbury v. Madison* made clear, preservation of the concept of separation of powers embodied in the Constitution requires that the Supreme Court in certain circumstances review the actions of the legislative and executive branches of the government. If judicial review is a constitutional necessity, however, invocation of this ultimate power by men who in the literal sense are irresponsible remains tolerable only so long as that power governs no more than necessity strictly dictates. And adherence to the limitations and prohibitions of Article III represents one means of insuring that binding judicial decisions are not made until the branches of government which are directly accountable to the people have had an opportunity to pass upon the issues involved. For as Thayer a half-century ago reminded us:

> [T]he tendency of a common and easy resort to this great function [of judicial review], now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.[142]

Article III can thus be said to embody a rationale which seeks—for reasons which search the essence of the separation of powers—to make it difficult for courts to pass judgment upon decisions of other branches of government by establishing strict limits to the exercise of judicial power.[143] To the degree that the preservation of these policies is deemed important, Article III should be given a construction which limits the power of federal courts to disturb or to deny the validity of statutes or actions of other branches of government.

When it is subjected to this kind of interpretation, Article III appears as a symbolic vehicle for carrying the freight of judicial abstention—even, as it were, a "benevolent fiction." The final authority of a court rests upon public respect for its decisions. That public respect, which ultimately enables federal courts to pass judgment upon the acts of its partners in government is based, however, upon an image which represents courts as declaring legal principles with an authority and certainty that cannot be expected from legislatures when they make law on an experimental, trial-and-error basis. The public image which sustains the unique powers of a federal court is thus not strikingly different from the image which possessed Blackstone; both images bespeak an uneasiness about a court making law. The doctrines of judicial abstention which are mirrored in Article III may thus be viewed as a means for preserving public respect for the judiciary by deterring courts from making pronouncements of law except in those cases where the constitutional duty cannot be avoided.[144]

Thus, although the realist jurisprudence may have laid to rest the fiction that judges merely find the law which legislatures make, the crucial need in

142. THAYER, JOHN MARSHALL 106-07 (1901).

143. See, *e.g.*, Poe v. Ullman, 367 U.S. 497 (1961); Muskrat v. United States, 219 U.S. 346 (1911).

144. See generally Bickel, Foreword: *The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

a democracy to limit the exercise of judicial review provides the rationale for a view of the case and controversy requirements of Article III that would seem to conflict as much as the Blackstonian view had with the rationale underlying prospective overruling. For prospective overruling is designed to make it easier—not more difficult—for a court to strike down the action of a legislature or to reverse its own prior decision of which the legislature had been aware. Indeed, a central argument usually advanced for the use of prospective overruling is that it will encourage courts to change the law in situations where the consequences of retroactivity would otherwise discourage such a change.[145] To the degree that a purpose of Article III is to discourage courts from making changes in the law when legislatures are as capable of making the changes, prospective overruling should be regarded as within its prohibitory intent. And although Article III is usually regarded as imposing limitations only upon judicial review of the actions of coordinate branches of the federal government, its rationale would seem to counsel similar limitations upon federal judicial review of the actions of state governments.[146]

The relevance of these propositions about Article III and prospective overruling can be illustrated by brief reference to the four opinions discussed above —those of Justice Cardozo in *Sunburst*, Mr. Justice Black in *Mosser*, Mr. Justice Frankfurter in *Griffin*, and Chief Justice Warren in *James*.

In *Sunburst*, Justice Cardozo was passing upon the action of a state court in applying the holding of a prior case to the resolution of the factual conflict before it and simultaneously announcing that the case was overruled and would not be followed in the future. The precise decision in the case before the state court was, therefore, that the rule of the prior case must be followed. Under the analysis suggested here, the application of that rule to the facts in dispute would mark the limit of the constitutional power of a federal court under Article III. The announcement that the rule of the prior case would henceforth be considered overruled—"a prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule,"[147] as Justice Cardozo put it—would be beyond the authority of a federal court because it would not represent a pronouncement of law derived from the case or controversy before it.

The opinion of Mr. Justice Black in *Mosser* would be susceptible to the same analysis: a federal court would be held to lack the constitutional power

145. See articles cited at notes 28-29 *supra*.

146. The view that state governments should be allowed to function as laboratories for social experimentation—free from federal judicial intervention except in "shocking" cases of the denial of substantive rights—was, of course, central to the thinking of Justices Brandeis and Holmes. See, *e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). This view underlies the line of cases, beginning with Nebbia v. New York, 291 U.S. 502 (1934), which marked the decline of substantive due process with respect to rights without a claim to a preferred position in the constitutional hierarchy. See, *e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Palko v. Connecticut, 302 U.S. 319 (1937); Note, 70 YALE L.J. 322 (1960).

147. 287 U.S. at 366.

to announce a new rule of fiduciary duty at the same time that it applied a different and discarded rule to the resolution of the case and controversy before it. These two opinions thus represent attempts at prospective overruling in a manner which when done by federal courts must be held to raise serious Article III problems.

The opinions of Mr. Justice Frankfurter in *Griffin* and of Chief Justice Warren in *James*, however, are different in a significant way; each would apply the newly-announced rule to the facts before the Court, while adding some general statements about how subsequent cases will or should be treated. The resolution of the actual case and controversy in *Griffin*, under Mr. Justice Frankfurter's approach, would involve the application of the new rule to its facts; Griffin would be provided with a free stenographic transcript of the trial proceedings in his case if he could not afford to pay for it himself. Similarly, Chief Justice Warren would apparently apply the new rule that embezzled income is taxable to the defendant James, although finding that another element necessary for conviction, willfulness, was lacking still. Both opinions apply the new rule to the facts before the Court. The announcement of the new rule in such circumstances means that it becomes intimately bound up with the decision of a case and controversy. In a literal sense, it is *decisive* of that case and controversy.

In summary, then, a state court, after fashioning a new rule, may apply it: (1) to conduct occurring subsequent to the announcement only; (2) to conduct occurring subsequent to the announcement and also to the present litigants; or (3) to conduct occurring subsequent to the announcement, to the present litigants, and also to conduct which occurred prior to the announcement. For a federal court, however, the choice is more limited: Article III forecloses selection of the first alternative; but it "has no voice" as to selection between the other two.[148] Before making this selection, a federal court must determine whether the decision as to retroactivity should be made in the case in which the new rule is announced or should be deferred to a subsequent case in which a party seeks application of the new rule to prior conduct. Once this decision is made, it becomes necessary to identify criteria relevant to choice.

When to Decide Retroactivity

"The most important thing we do," said Justice Brandeis, "is not doing."[149] His statement was a shorthand method of expressing one of the abiding themes of his judicial thought: that the Supreme Court should avoid precipi-

148. Of course the choice for a federal court may be more limited even with respect to these two alternatives if the change in law has not been made by the court itself, but instead has been made by a change in a treaty, constitution, or statute, or by decision of another court. That is the teaching of such cases as *Schooner Peggy*, *Chambers*, and *Vandenbark*. See text at notes 34-51 *supra*.

149. Conversation with Felix Frankfurter, manuscript on file at Harvard Law School Library; quoted in Bickel, The Unpublished Opinions of Mr. Justice Brandeis 1, 17 (1957).

tate decision of constitutional issues, and that it should decide such issues only when it is unable otherwise to dispose of a case properly before it.[150] This is more than merely a formal statement of the jurisdictional fact that a federal court acts beyond its Article III powers when it decides something other than an actual "case" or "controversy." It is also a statement which justifies that jurisdictional fact by at least two important results which flow from a strict regard for it.

First, judicial insistence upon deciding only "cases" and "controversies" in the constitutional sense and avoiding decision in hypothetical noncases is a method of insuring that courts have before them the most complete and developed record possible before they render a decision.[151] Similarly, insistence upon truly adverse parties, aware crucially that the issue has been joined in a way that now permits of resolution nowhere in the system but in the courts and that resolution is a pressing present need, offers an assurance that courts will be provided with more complete and adequate factual records. And the more developed the record which the court has before it, the greater the likelihood that a wise and fair decision will result.[152]

Second, judicial insistence upon resolving conflicts only when they cannot be resolved appropriately by any other authority in the system is a method of insuring that in a democracy full recourse will be had to the political branches of government before judicial intervention is available.[153] If it is true, as de Tocqueville said, that in the United States all political questions eventually become judicial questions,[154] it may also be true that many political questions, when attempt is first made to bring them to courts, are still considerably distant from being judicial questions. When this difference is made apparent to "the expert feel of lawyers,"[155] a court encourages legislative and executive responsibility by refusing to provide the parties a resolution of their conflict so long as other, more representative bodies remain available for petition.

These considerations and the statement of Justice Brandeis which prompted them, relate not only to the decision of whether a court should declare the

150. See BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 2-3 (1957). *Cf.* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring); Willing v. Chicago Auditorium Ass'n, 277 U.S. 274 (1928) (Brandeis, J.); International News Serv. v. Associated Press, 248 U.S. 215, 248 (1918) (Brandeis, J., dissenting).

151. *Cf.* Adler v. Board of Educ., 342 U.S. 485, 503 (1952) (Frankfurter, J., dissenting); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).

152. See Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924).

153. In Professor Frankfurter's words:

> Perhaps the most costly price of advisory opinions is the weakening of legislative and popular responsibility. It is not merely the right of the legislature to legislate; it is its duty . . . . It must be remembered that advisory opinions are not merely advisory opinions. They are ghosts that slay.

Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1007-08 (1924).

154. See 1 DE TOCQUEVILLE, DEMOCRACY IN AMERICA 306 (4th ed. 1841).

155. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring).

existence of a case or controversy which it may appropriately entertain; they also relate to the discretionary decision of whether a court, having announced a new rule, should join to that announcement a statement on whether or not the new rule will be retroactively applied. Thus, the decision of whether to make an announcement with respect to retroactivity becomes, in these circumstances, almost precisely a decision as to whether the issue of retroactivity has been presented to the court *as*—and not merely in association with—an actual case or controversy. In wide measure the same reasons—recited above—which at once justify and limit the court in hearing a question in the first place also justify and limit it in hearing the companion question of retroactivity.[156]

The question of the retroactivity of a specific judicial decision should be decided on the same conditions as all other questions decided by federal courts: only when presented in a factual posture which can appropriately be termed a case or controversy in the constitutional sense. In deciding wisely when to rule upon retroactivity, a court can encourage the subsequent framing of the issue in more precise factual terms and can abide the resolution of it until other "departments," in Judge Hand's probing archaism,[157] have had an opportunity to meet it, perhaps in a manner to make judicial review unnecessary.[158] A court's use of deliberate silence about the retroactive effect of

156. In many cases there will be no necessity for a court to indicate whether or not its decision is retroactive because any retroactive rights that might be granted would be incapable of enforcement. For example, § 6(a) of the Subversive Activities Control Act of 1950, 64 Stat. 993, 50 U.S.C. § 780 (1958), denies to members of Communist organizations the right to apply for, to use, or to renew a United States passport. It is not unlikely that if a court test is had, the statute will be declared unconstitutional. *Cf. The Supreme Court, 1960 Term*, 75 HARV. L. REV. 80, 111 (1961). If the Court were to announce that its decision were retroactive, such a declaration would not seem capable of having any operative consequences. Assuming a plaintiff who, prior to the decision, had been denied a passport under the invalid provision and who could prove the damages resulting from the denial, there does not appear to be any federal statute authorizing suit. To declare such a decision retroactive would therefore be to declare a right which has no remedy.

Similarly, the Hill-Burton Act of 1944, 60 Stat. 1041 (1946), 42 U.S.C. § 291 (1958), which provides federal funds to assist the states in the construction of public and other nonprofit hospitals in accordance with federally-approved plans, specifically declares that a state plan providing for hospital facilities which are racially "separate but equal" shall not on that ground be denied approval. 42 U.S.C. § 291e(f) (1958). Because "separate but equal" facilities have been held unconstitutional in so many other areas of United States life, it is likely that, when judicially tested, they may be held unconstitutional in hospitals supported by federal and state funds. See N.Y. Times, Feb. 13, 1962, p. 1, col. 4, reporting the bringing of suits to test the statute's constitutionality. But even if such a holding were declared to be retroactive, it is nearly inconceivable that the federal government would be successful in a suit against a state for recovery of federal funds already spent by the state under the invalid statutory authorization: the equities of reliance are weighted much too unevenly to allow that result. In both of these cases, the question of whether the court's declaration of unconstitutionality could or would be retroactive or not is, therefore, in consequential terms, of no real meaning at all.

157. See generally HAND, THE BILL OF RIGHTS (1958); see also *Learned Hand*, 71 YALE L.J. 108 (1961).

158. See, *e.g.*, the opinion to the President of Attorney General Homer Cummings as

a judicial decision should be regarded as another technique of declining jurisdiction in the cause of institutional competence; in short—a passive virtue.[159]

The Durham Case

A case which is particularly instructive on several aspects of this problem is *Durham v. United States*,[160] in which the Court of Appeals for the District of Columbia supplemented the existing rule with a new rule for the determination of insanity in criminal cases. "[I]n adopting a new test," the court said, "we invoke our inherent power to make the change prospectively."[161] Perhaps this qualification of the reach in time of the *Durham* rule was necessary tactically in order to secure approval from a sufficient number of members of the court for such a significant change in the law. But however necessary it was tactically, the qualification remains questionable for several reasons.

First, after the court had decided that the new rule should be applied to the facts in *Durham* upon remand, any further announcement of how the rule would be applied to other fact situations not before the court was unnecessary to the decision and was therefore premature.[162]

Second, if the rule was denied retroactive effect only because of fears that the courts would be burdened administratively by an overwhelming number of petitions for writs of habeas corpus from persons convicted after being found sane under the M'Naghten rule, these fears were based upon no more than a guess. Assuming *arguendo* that an excessive burden upon the administration of the courts is a valid reason for prospective decision-making, the reality of such a burden could best have been determined by waiting to see how many petitions were filed in how concentrated a period of time. If the number filed were awesome, then the same result of denying retroactivity could have been announced in a subsequent case. If the number filed were manageable, then the announcement denying retroactivity was unnecessary on

---

to whether West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), *overruling* Adkins v. Children's Hosp., 261 U.S. 525 (1923), would have retroactive effect. 39 OPS. ATT'Y GEN. 22 (1937), reprinted in FREUND, SUTHERLAND, HOWE & BROWN, CONSTITUTIONAL LAW 111-12 (2d ed. 1961).

159. See Bickel, Foreword: *The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

160. 214 F.2d 862 (D.C. Cir. 1954).

161. *Id.* at 874 (citing cases).

162. It may be argued that because the Court of Appeals in *Durham* reversed the defendant's conviction and ordered a new trial on the ground that the prevailing M'Naghten rule for determining insanity had been misapplied by the trial court, any additional statement about what rule to apply in the future was prospective overruling of the kind prohibited to federal courts by Article III. However, even if this is a permissible reading of the case, the federal courts of the District of Columbia are regarded as state courts, not bound by the case and controversy requirements of Article III, when they hear cases not based upon federal statutes of national applicability. See Keller v. Potomac Elec. Power Co., 261 U.S. 428 (1923). The problems raised by the textual discussion of *Durham* remain relevant to all federal courts.

these grounds and may have deprived deserving petitioners of the benefit of the new rule.[163]

Third, if the Court of Appeals had been silent in *Durham* upon the retroactive effect of the new rule, the issue of retroactivity would first have been raised in the trial courts of the District of Columbia,[164] where it could have been fully briefed and argued, as it apparently was not in *Durham*. Adversary litigation directed solely to the question of retroactivity would probably have developed for the court both the necessities and the injustices of prospective application of the new rule. The court would then have had more detailed evidence upon which to base its decision on retroactivity.

Fourth, by choosing to make the announcement of prospectivity in the *Durham* case, the court in effect deprived itself of the opportunity to have before it specific cases which might place a severe strain on the sense of injustice created by denying retroactive application. At least it is possible that in many cases retroactive application would seem not only desirable, all factors considered, but even equitably mandatory. Effectuation of this possibility—that the *Durham* rule might be applied most equitably on a case-by-case basis—the court foreclosed by its premature announcement.[165]

In summary, *Durham* seems a case in which the uses of silence would have been appropriate and, indeed, fruitful. The result of silence could have been a decision upon retroactive application made in the context of actual cases and upon actual facts. Perhaps under the tension of such objectified claims to retroactivity, the position eventually reached would have been wiser because less sweeping and because more related to the facts of given cases.

---

163. Moreover, retroactive application of the new rule could not be uniform because the procedural posture of many of the cases which would subsequently come before the court would compel retroactivity. For example, those cases in which the crime was committed before the crime in *Durham* but which came to trial after the decision in *Durham* would be governed—in effect retroactively—by *Durham*. This means that chance alone would control the inevitable retroactive application. See text at notes 34-51 *supra*.

164. However, this referral of the decision as to retroactivity to the lower courts for initial judgment will be useful for higher courts only if the lower court judges attempt to deal realistically with the issues involved. It will be rendered of insignificant value if the lower court judges reach their decision as to retroactivity by a lexicographical analysis of the diction and verb tenses of the overruling opinion in a search for its intent. That this happens may be seen from two recent cases applying Mapp v. Ohio, 367 U.S. 643 (1961). See People v. Figuero, 30 U.S.L. WEEK 1050, 2158 (N.Y. Cty. Court, Kings Cty., Sept. 30, 1961), and Hall v. Warden, 30 U.S.L. WEEK 2360 (D. Md. 1962). See also People v. Ryan, 152 Cal. 364, 92 Pac. 853 (1907); Johnson v. Stoveken, 52 N.J. Super. 460, 145 A.2d 801 (1958); State v. Long, 177 A.2d 609 (Essex Cty. Ct., N.J., Jan. 24, 1962), relying upon "the rationale of the decision of the United States Court of Appeals in Warring v. Colpoys," discussed in text at notes 174-85 *infra*.

165. For instance, it is not inconceivable that habeas corpus would be denied to those who conceded the issue of insanity at trial, but granted to those who contested it. Other criteria for treating different petitioners in different manners, depending upon the totality of the circumstances in each individual case, are not difficult to imagine. The point is that courts are more likely to think in terms of these criteria when actual cases demand consideration of them than when they are making abstract determinations as to retroactivity *vel non*. That is one of the lessons of the remand in *Griffin*. See text at notes 166-67 *infra*.

The Griffin Case

A second case which is instructive for these purposes, although for different reasons, is *Griffin v. Illinois*.[166] In that case the Supreme Court held that if a state conditioned judicial review in criminal cases upon the furnishing to an appellate court of a stenographic transcript of the trial, it must furnish such transcripts at state expense to defendants who cannot afford them. The case was remanded to the state court for application of the new principle. In thus disposing of the case, the Court abstained from deciding the questions not presented by the facts in *Griffin* of whether the new rule should be applied retroactively to persons presently imprisoned. Its judgment in abstaining was proved wise by subsequent events.

Upon remand, the Supreme Court of Illinois amended its court rule and announced that transcripts would be furnished at state expense to all indigent prisoners, regardless of whether they were sentenced prior to the Supreme Court's decision in *Griffin* and regardless of whether they had pursued post-conviction remedies in which they might have raised the issue ultimately presented and decided in *Griffin*.[167] The state decision was made with a sophisticated awareness of the variety of circumstances on the basis of which a claim of retroactivity could be made, an awareness which might well have been absent from a sweeping pronouncement by the United States Supreme Court on the issue of retroactivity. The effect of the state court's decision was to make unnecessary, at least with respect to Illinois, a determination by a federal court of whether *Griffin* should be applied retroactively. In this particular case, that determination was made unnecessary because the state court decided upon remand that it would apply the free-transcript rule retroactively. If the state rule had not been changed in this manner, presumably lower federal courts would have had to determine in the first instance whether *Griffin* should be applied retroactively; and these lower court determinations eventually would have reached the United States Supreme Court. However, in making its decision upon retroactivity at that point, the Supreme Court would have been able to consider the reasoning in the lower court's opinion or perhaps in conflicting opinions in cases coming from different lower courts. Such an opportunity may increase the likelihood that as many arguments and grounds of reasoning as possible will be before the Court when it makes its decision, and this likelihood may increase the quality of the decisions which result.[167a]

166. 351 U.S. 12 (1956).

167. People v. Griffin, 9 Ill. 2d 164, 137 N.E.2d 485 (1956) (Schaeffer, J.). *But see* People v. Berman, 19 Ill. 2d 579, 169 N.E.2d 108 (1960).

167a. It should be noted, however, that at least one serious question is raised by the suggestion that the United States Supreme Court postpone the decision as to the retroactivity of a new rule until it has before it a group of conflicting, well-considered opinions by lower federal courts. In a case like *Mapp v. Ohio*, conflicting lower court opinions might mean that some prisoners would have been granted habeas corpus and been released, while others would have been denied habeas corpus and been retained in prison, by the time the question of retroactivity came before the United States Supreme Court. If the Court's

The Eskridge Case

When the issue of retroactivity is properly a part of the case and controversy before the court, it should of course be decided. And, as important, it should be decided in a reasoned opinion which explains the factors that compelled the result. An example of a case in which the United States Supreme Court avoided this duty is *Eskridge v. Washington State Board*,[168] the case which first presented the Court with the question of whether to apply *Griffin* retroactively.[169] Eskridge was convicted of murder in 1935 and was prevented at that time from seeking appellate review because of his inability to pay for the stenographic transcript required by statute. In 1956, after the decision in *Griffin*, he sought release upon a writ of habeas corpus; the writ was denied by the state courts of Washington. On certiorari, the Supreme Court reversed, holding in a per curiam opinion that Eskridge had been denied the constitutional right declared in *Griffin*. Despite the fact that two justices dissented, "believing that on this record the *Griffin* case, decided in 1956, should not be applied to this conviction occurring in 1935,"[170] the majority did not explain their logic of retroactivity. When the question of retroactivity is the central question in a case, a court should accompany its decision with reasons. As Professor Freund has said of *Eskridge*:

> The answer involves considerations, not only of principle but also of practical administration, that seem to call at least for some further delineation; but the problem was disposed of summarily on the authority of the earlier decision [in *Griffin*].[171]

Assertion without reasons is unnecessary when reasons are available, as they are here, and unwise in any circumstance; it leads too easily to the suspicion that the law of the case is based upon power alone, and not upon reasoned analysis and judgment.[172]

These cases[173] are instructive, then, in helping to answer the question of when, in the case-by-case process of announcing and initially applying a new

---

decision was to deny retroactive effect to the new rule, the question would remain of the status of persons already released from jail by lower court writs of habeas corpus.

168. 357 U.S. 214 (1958).

169. See also Burns v. Ohio, 360 U.S. 252 (1959), applying the rule in *Griffin* to a conviction had in 1953; Comment, 55 MICH. L. REV. 413 (1957).

170. 357 U.S. 214, 216 (1958).

171. FREUND, THE SUPREME COURT OF THE UNITED STATES 185-86 (1961).

172. See Brown, Foreword: *Process of Law*, 72 HARV. L. REV. 77 (1958); Hart, Foreword: *The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 22 (1959).

173. A further example of the failure of the Supreme Court to address itself to relevant questions of retroactivity is provided by Reck v. Pate, 367 U.S. 433 (1961). Emil Reck was convicted of murder in 1936 and sentenced to a term of 199 years. After earlier proceedings were unsuccessful, People v. Reck, 392 Ill. 311, 64 N.E.2d 526 (1945); Reck v. People, 7 Ill. 2d 261, 130 N.E.2d 200 (1955), *cert. denied*, 351 U.S. 942 (1956), Reck sought a writ of habeas corpus, alleging that a confession used against him at trial had been obtained illegally. The district court noted that "Reck was convicted of this crime in

rule, a court should reach the issue of retroactivity. In *Durham*, the question was presented prematurely and need not have been reached. In *Griffin*, the question similarly was presented prematurely and was appropriately avoided. In *Eskridge*, the question was appropriately before the court in a case and controversy requiring its resolution; it was therefore properly reached, but should have been decided more forthrightly than by the *sub silentio* technique employed.

Guides and Criteria For Retroactivity

Once a court has properly before it the specific issue of retroactivity, and once it has recognized the desirability of accompanying its decision with explicit reasons, it should rely upon reasons that functionally relate to the newly-announced rule and that reflect an awareness of the operative effects of its decision. An unusual example of the confusion which may result when a court fails to identify and apply meaningful criteria to a decision determining retroactivity *vel non* can be seen in the "extraordinary"[174] case of *Warring v. Colpoys*.[175] The case involved the interpretation of a federal contempt statute which punished misbehavior in the presence of a court "or *so near thereto* as to obstruct the administration of justice." In 1918 the Supreme Court had held in *Toledo Newspaper Co. v. United States*[176] that the statute was to be given a causal, rather than a geographic, interpretation; it was applicable, therefore, to acts done at great distances from the court so long as they had a "reasonable tendency" to obstruct justice. This interpretation prevailed until April 1941, when the Supreme Court in *Nye v. United States*[177] overruled

---

1936 and at *that* time the Due Process Clause was not violated by the circumstances surrounding the making of his confession. Today, the Due Process Clause is violated." United States *ex rel.* Reck v. Ragen, 172 F. Supp. 734, 745 (N.D. Ill. 1959). The court found, however, that although the confessions by subsequent standards were coerced, this consideration was overbalanced by its belief that Reck was guilty, that evidentiary problems would preclude retrial twenty-two years after the crime, and that if released Reck was likely to commit further crimes. It held that under these circumstances due process did not require retroactive application of the coerced confession doctrines. *Id.* at 747. In addition, it cited Mr. Justice Frankfurter's opinion in *Griffin* to support its conclusion that "the Due Process Clause must . . . speak prospectively in Habeas Corpus cases." *Ibid.* The Court of Appeals affirmed upon the wholly different ground that the confessions were voluntary. United States *ex rel.* Reck v. Ragen, 274 F.2d 250, 254 (7th Cir. 1960).

On certiorari, the Supreme Court reversed in an opinion which details the evidence relating to the giving of the confession and concludes that, by the standard set in the subsequent cases, the confession was coerced. 367 U.S. 433 (1961) (two justices dissenting). No mention was made of the question of retroactivity in the majority opinion. The decision would seem to apply retroactively to Reck's confession constitutional standards that had not been enunciated when he gave it. *Cf.* Donnelly, J. Goldstein & Schwartz, Criminal Law 289-97 (1962).

174. Hart & Sacks, The Legal Process: Basic Problems in the Making and Application of Law 631 (Tent. ed. 1958).

175. 122 F.2d 642 (D.C. Cir. 1941) (Vinson, J.); *cert. denied*, 314 U.S. 678 (1941).

176. 247 U.S. 402, 421 (1918).

177. 313 U.S. 33 (1941).

Toledo Newspaper and held that the words "so near thereto" must be given a solely geographical construction. In so holding, the Court set aside convictions under the statute which were based upon acts done in April 1939 at a distance of more than 100 miles from the federal courthouse. The petitioner Warring had been charged with contempt under the same federal statute for acts done at a great physical distance from the court. He was convicted on February 24, 1939—two years before *Nye* overruled the *Toledo Newspaper* doctrine and two months before the actions central to *Nye* even took place. After the decision in *Nye*, Warring sought release upon a writ of habeas corpus.

The question presented was whether upon habeas corpus *Nye* should be given retroactive application to events which occurred two years before it was announced. The district court for the District of Columbia denied the writ and Warring appealed. The Court of Appeals affirmed.

Speaking through Judge Vinson, the court considered the petition as presenting primarily the question of whether the new construction put on the contempt statute by the *Nye* decision in 1941 "took away the District Court's power to adjudge one guilty of contempt . . . ."[178] in 1939 "when in that year the Court had the power under [a different] construction."[179] What is important, the court found, was the "plane"[180] on which the change in the construction of the law stood. The Constitution stands on a higher plane than a statute, and a statute stands on a higher plane than a judicial decision. But judicial decisions interpreting an unchanged statute stand upon the same plane. To make *Nye* retroactive and thus deny the jurisdiction of the district court in 1939, the court said, would be "to place the Nye case on a higher plane than, for example, the Toledo decision"[181] and the cases which adhered to it. But *Toledo* and the subsequent cases "were on the same plane as the Nye case,"[182] since they all involved interpretation of the same unchanged statute. Inexorably, this was held to mean that retroactivity must be denied. The moving premise behind this inexorability seems to be that an overruling announcement can be retroactive only if it is on a higher plane than the decision which it is overruling; if it is merely on the same plane, it cannot lay claim to being the "basic, superior law"[183] which is a prerequisite of retroactive application.[184]

178. 122 F.2d at 645.
179. *Ibid.*
180. *Id.* at 645-47.
181. *Id.* at 646.
182. *Ibid.*
183. *Ibid.*
184. The tenor of the court's discussion is perhaps best demonstrated by its summary of the considerations which should "guide the lawmakers and the law-appliers in making their determinations in respect of whether a change in the law is to be effective only for the future or also for the past." The court says:

> All of the loose ends presented in this discussion on the effect of altering the law can be pretty well tied together when it is realized that law is not a pure science,

The same result would follow, under these broad rules, even if Warring had been convicted before *Nye*, having appropriately but unsuccessfully challenged *Toledo Newspaper*, and sought reversal in an appeal taken after *Nye*; the conviction would presumably have to be affirmed because the district court at the time of the conviction had the power to find Warring guilty.[185] The performance of the court in *Warring* is not typical, and need not become so, but it demonstrates the ease with which a decision on retroactivity can go grievously astray. It becomes necessary, then, to suggest factors which a court should consider in determining the issue of retroactivity.

The Purpose of the Newly Announced Rule

In deciding whether to give a new rule retroactive effect, a court to which the issue properly has been presented first should attempt to identify the purposes of the new rule, next should determine whether on balance those purposes will be served by general retroactive application of the new rule, and finally should decide whether these purposes will be promoted by retroactive application of the new rule in the particular case before it.

Many courts, for example, will be urged to apply retroactively the rule of *Mapp v. Ohio* that illegally seized evidence may not constitutionally be admitted in a state criminal proceeding. A reading of Mr. Justice Clark's majority opinion would probably suggest to a lower court that the central purpose of the *Mapp* rule is to deter police conduct which violates "the right to privacy embodied in the Fourth Amendment" and to insure that "the [constitutional] right to be secure against rude invasions of privacy by state officers" no longer remains "an empty promise."[186] The rule was not devised to require the exclusion of illegally seized evidence because of its inherent unreliability; or put another way, the *Mapp* case manifests no constitutional doubt that those convicted on the basis of illegally seized evidence had committed the acts with which they were charged. Therefore a court deciding the issue of retroactivity of the *Mapp* rule should ask: Would the release from prison of every person whose conviction was based upon illegally seized evidence have any effect in deterring unconstitutional searches? Assuming a finding of some deterrent effect, would it be substantial enough to outweigh the undesirability of reversing the convictions of many assumedly guilty prisoners? Since the

---

> that law loses its vital meaning if it is not correlated to the organic society in which it lives, that law is a present and prospective force, that law needs some stability of administration, that the law is all the law there is, that law is more for the parties than for the courts, that people will rely upon and adjust their behavior in accordance with all the law be it legislative or judicial or both.

Id. at 646.

185. See HART & SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 635 (Tent. ed. 1958). For comment on *Warring v. Colpoys*, see Note, 28 VA. L. REV. 656 (1942); Note, 26 MINN. L. REV. 658 (1942); Note, 27 IOWA L. REV. 315 (1942); Note, 16 U. CINC. L. REV. 71 (1942).

186. 367 U.S. 643, 660 (1961).

function of the rule is to deter future illegal searches by making such efforts fruitless, a court could reasonably find that application of the rule to persons convicted on the basis of past illegal searches would at best have slight deterrent effect upon future misconduct, and that whatever deterrent effect would result from retroactive application would be insufficient to warrant across-the-board release of prisoners.[187]

Cases posing the question of whether the *Mapp* rule should be made retroactive may yield the same answer—a denial of retroactivity—both to the question of across-the-board retroactive application and to the question of differentiated retroactive application on a case-by-case basis. But the two questions may require different answers when the retroactivity of a rule with a function other than deterrence is under consideration. For example, although the rule against the admission into evidence of coerced confessions [188] is usually said to be based upon a desire to deter improper police practices and brutality,[189] it also draws strength from the belief that a coerced confession will often be untruthful.[190] Thus, although one purpose of the coerced confession rule—to deter future coercion—might not be furthered either by general or selective retroactive application, another purpose of the rule—to assure that no person is punished on the basis of such inherently unreliable evidence—might well be served by either general or selective retroactive application. Because the empirical assumptions underlying this second aspect of the rule may be said to raise doubts about whether the man in prison is really the man who committed the crime, a court could reasonably find that the rule demands reexamination of at least those convictions based in substantial part upon coerced confessions.

Problems of retroactive application are not limited to the announcement of new criminal rules, however; they are also presented by the announcement of new civil rules. In the famous case of *MacPherson v. Buick Motor Co.*, for example, the court announced for the first time that an automobile manufacturer's duty to inspect for negligence—which previously extended solely

187. It might be argued, however, that the release of all prior-incarcerated prisoners would have some "shock" value in demonstrating to the police that the courts intend to stand behind the new exclusionary rule.

188. See, *e.g.*, Brown v. Mississippi, 297 U.S. 278 (1936); Chambers v. Florida, 309 U.S. 227 (1940); Watts v. Indiana, 338 U.S. 49 (1949).

189. See, *e.g.*, Malinski v. New York, 324 U.S. 401 (1945); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Payne v. Arkansas, 356 U.S. 560 (1958). *Cf.* Leyra v. Denno, 347 U.S. 556 (1954).

190. Professor Wigmore regarded the possibility that a confession might be untrustworthy as the only valid reason for its exclusion. 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940). See Note, 70 YALE L.J. 298 (1960).

Students of human behavior have cast considerable doubt upon the reliability of "voluntary" confessions as well. See, *e.g.*, FREUD, PSYCHOANALYSIS AND THE ASCERTAINMENT OF TRUTH IN COURTS OF LAW 23, COLLECTED WORKS, Vol. II (1956); REIK, THE COMPULSION TO CONFESS 259-62, 265-66 (1959); ALEXANDER & STAUB, THE CRIMINAL, THE JUDGE AND THE PUBLIC 94-95, 139-49 (1956).

to the dealer—would now extend all the way to the ultimate third-party purchaser. This rule may be said to embody several purposes. One purpose of the rule may have been to increase the likelihood of a plaintiff's recovery by allowing suit against the manufacturer as well as against the dealer. A second purpose of the rule may have been to place the loss resulting from the plaintiff's accident upon the person who is in the best position to distribute the cost of the accident broadly throughout the community. Still a third purpose of the rule may have been to place an affirmative and enforceable duty to inspect upon the automobile manufacturer—who is presumably in a better position to inspect than either the dealer or the purchaser—in order to decrease the frequency of accidents resulting from faulty parts.

The first purpose—increasing the likelihood of a plaintiff's recovery—would certainly be served by retroactive application, for such application would assure that more plaintiffs could sue the defendant with the deeper pocket. The second purpose—spreading the incidence of loss—would probably also be served by retroactivity, for the costs of negligent losses often can be distributed as well by charging higher prices in the future to absorb past unexpected expenses as by prospectively pricing a product so as to absorb future anticipated expenses. The third purpose—discouraging noninspection by the manufacturer—might not be furthered by retroactive application, however, because, as with *Mapp*, the new rule cannot have the desired deterrent effect upon manufacturers' conduct already completed.

A court faced with a rule with a variety of purposes, some of which will be served by retroactive application and some of which will not, may find it difficult, therefore, to decide whether on balance the dominant function of the rule will be furthered by such application.[191] All that can reasonably be asked is that a court diligently search out and identify every reasonable purpose underlying the rule and wisely employ its judicial expertise in arriving at a balanced and articulated decision.

The Element of Surprise

Even if a court determines that the purposes underlying a new rule will on balance be served by retroactive application, it must still decide whether fur-

191. This determination of the function of a new rule will continue to be an extremely difficult one. For instance, following the adoption of the twenty-first amendment, which repealed the eighteenth amendment, federal courts were asked to release upon habeas corpus prisoners serving sentences for violating the National Prohibition Act. If the purpose of the repeal was to concede that the nation had made an erroneous designation of what should be illegal, there is some justification for ordering retroactive application to persons convicted as a result of that admitted error. However, if the purpose was to change the methods of dealing with a problem which itself had changed in quality, scope, and seriousness, there is justification for limiting the repeal to prospective application only. In fact, petitions for habeas corpus were uniformly denied. See, *e.g.*, Ellerbee v. Aderhold, 5 F. Supp. 1022 (N.D. Ga. 1934), and text at notes 45-48 *supra*.

Quaere: can the purpose of a rule based upon equal protection, as, *e.g.*, the rule of Griffin v. Illinois, 351 U.S. 12 (1956), ever be served by retroactive application?

ther considerations would counsel against retroactive application. One such consideration is the degree and quality of the surprise which would result from the change in the rule of law. This consideration—often phrased in terms of fairness to the litigants—asks the question: Will a decision to make the new rule retroactive defeat reasonable expectations and justified reliances that were based on the assumption of the continued existence of the old rule? Several aspects to this problem must be dealt with.[192]

First, the element of surprise will not realistically be an operative factor in a great many cases because the parties will have acted without any knowledge at all of what the governing law was; whatever law is finally held to govern their conduct, whether it be the old rule or the new rule, will be a new rule to them.[193] This is something of what Cardozo meant when he wrote, "The

192. Because this Comment is concerned primarily with the actions of federal courts, for whom prospective overruling should be regarded as prohibited by Article III of the Constitution, it will not deal with the question of the effect which prospective overruling has upon a litigant's incentive to urge the adoption of a new rule when he knows that the benefit of the new rule, if he is successful, will be denied to him. The problem, of course, remains an important one for state courts. See Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959) (". . . to refuse to apply the new rule here would deprive appellant of any benefit from his effort and expense in challenging the old rule which we now declare erroneous. Thus there would be no incentive to appeal the upholding of precedent since appellate could not in any event benefit from a reversal invalidating it." *Id.* at 28, 163 N.E.2d at 97). *Cf.* Terracciona v. Magee, 53 N.J. Super. 557, 148 A.2d 68 (1959).

The situation with respect to unfairness may be different, however, when so-called institutional litigants are involved. The interest of an institutional litigant such as an insurance company in having a rule of law changed is not limited to the specific case in which it seeks the change; rather, it extends to a whole class of cases which will arise in the future and in which it can make use of the change in law. See, *e.g.*, Mutual Life Ins. Co. v. Bryant, 296 Ky. 815, 177 S.W.2d 588 (1943), *overruling* National Life & Acc. Ins. Co. v. O'Brien's Executrix, 155 Ky. 498, 159 S.W. 1134 (1913). Similarly when a state supreme court prospectively overrules at the instance of the State a prior interpretation of a criminal statute, the State has been deprived of only a single conviction; it will be able to have the benefit of the new decision in all subsequent cases. See, *e.g.*, State v. Jones, 44 N.M. 623, 107 P.2d 324 (1940), *overruling* City of Roswell v. Jones, 41 N.M. 258, 67 P.2d 286 (1937), and text at notes 71-76 *supra*. An organization like the National Association for the Advancement of Colored People which engages in frequent litigation in order to establish principles to be applied to a large number of similar cases in the future may also be considered to be an institutional litigant.

Because the use of prospective overruling will not deprive an institutional litigant of the substantial benefit of the new rule which it won, its use is not likely to dry up incentive to challenge established law or to discourage attempts to seek changes in the law. But in cases involving only private litigants, state courts should consider whether the example of prospective overruling will discourage others from bringing new and creative ideas and arguments to appellate courts for fear that they will be arguing the cause not for themselves but for another. See von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 426-27 (1924); HART & SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 623-25 (Tent. ed. 1958).

193. The respect due reliance under such circumstances was a particular concern of Jerome Frank. See his opinions in Commissioner v. Hall's Estate, 153 F.2d 172, 174 (2d

picture of the bewildered litigant lured into a course of action by the false light of a decision, only to meet ruin when the light is extinguished and the decision is overruled, is for the most part a figment of excited brains."[194] And it is something of what Gray meant when he said, "Practically, in its application to actual affairs, for most of the laity, the law, except for a few crude notions of the equity involved in some of its general principles, is all ex post facto."[195] Thus, in many cases, the parties, because of their not uncommon ignorance of the legal principle that controls their actions, will not be able to make a *bona fide* claim of surprise. In these cases a sense of unfairness to the parties from retroactivity would have to stem from other considerations.

Second, the quality of the surprise which is created by a judicial decision will in part be a reflection of how consistent and settled was the law from which the new decision is departing. Sometimes the prior rule will have been embodied in a single landmark opinion which the jurisdiction has consistently adhered to and reaffirmed. To overrule such a precedent when the parties had based their conduct upon it would result in surprise. More often, however, the precedents are not in such monolithic condition. There may be two or three overlapping and partially inconsistent lines of cases in an area, each attempting to distinguish and limit to their facts the other lines. An authoritative, codifying decision primarily clarifies an uncertain area of the law—even if it specifically overrules cases in one or all of the inconsistent lines—more than it states a new rule reversing abruptly a single old rule.[196] In such circumstances, the existence of inconsistent and conflicting precedent may not provide the basis for reasonable reliance on any single precedent; a party here can do no more than act upon the best available guesses of how a court, if litigation ensues, will approach the conflict in the relevent precedent. Because the conditions for reasonable reliance are not present, the possibility of a *bona fide* claim of surprise is unlikely.

Cir. 1946) (dissenting opinion); Helvering v. Proctor, 140 F.2d 87, 89 (2d Cir. 1944) (dissenting opinion); Aero Spark Plug Co. v. B.G. Corp., 130 F.2d 290, 292, 295-98 (2d Cir. 1942) (concurring opinion); *In re* Marine Harbor Properties, Inc., 125 F.2d 296, 299 (2d Cir. 1942) (dissenting opinion). See also GRAY, THE NATURE AND SOURCES OF LAW 100 (2d ed. 1921).

194. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 122 (1921). Elsewhere Cardozo said:

> My impression is that the instances of honest reliance and genuine disappointment are rarer than they are commonly supposed to be by those who exalt the virtues of stability and certainty.

Address Before the N.Y. State Bar Association, 55 REP. N.Y. STATE BAR ASS'N 263, 295 (Jan. 22, 1932).

195. GRAY, THE NATURE AND SOURCES OF LAW 100 (2d ed. 1921).

196. Retroactive clarification of uncertain law ordinarily involves no unfairness. It is retroactive change of settled law, not retroactive settling of unsettled law, which may produce unjust results. This is why interpretative rules issued after the enactment of a new statute may normally speak as of the time of the statutory enactment. Retroactively applying an original interpretation of an unclear statute is not unfair. 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 5.09, at 350 (1958).

Third, it will not do for a litigant to claim surprise in cases in which the overruled decision has long been eroded by cases which have all but explicitly overruled it. Decades of cases limiting the original decision to its facts, distinguishing it from almost indistinguishable situations, declining to overrule it in apologetic tones that seem to admit that consistency would compel such an overruling—decades of cases so treating the older decision would seem to make it a weak reed upon which to rely. Parties might nevertheless claim that although they recognized that the precedent was eroded, still it was not overruled, and they had no way of knowing when the temper of the court would finally be hospitable to administering the *coup de grace* of explicit overruling. But this is the same kind of claim suggested when the parties were faced with selecting between several partially inconsistent lines of precedent. It rests not so much upon unfairness resulting from surprise as it does upon unfairness resulting from the necessity of choice in an area in which there is less certainty than one, compelled to act, would wish.

Fourth, even when the meaning of the relevant precedent in an area is fairly clear and has not been questioned or challenged by later cases, reliance upon it need not always be regarded as giving rise to a claim of surprise when the day of overruling arrives. If the precedent was made in a lower court and has never been passed upon by the highest court of a jurisdiction, reliance upon it is generally held to be similar to reliance upon an uninterpreted statute —the party relying does so at his peril.[197] "In his case," as Cardozo put it, "the chance of miscalculation is felt to be a fair risk of the game of life, not different in degree from the risk of any other misconception of right or duty."[198] The rule may find justification in the degree of freedom which it maintains in an appellate court when it first is asked to pass upon the question; the court is not bound by any lower court decision, no matter how old be that decision. So, too, courts may not honor reliance upon a decision—even if made by the highest court of the jurisdiction—which was rendered many years prior to dramatic changes in the field of activity to which it is relevant.[199] If the area of activity has undergone spectacular growth or contraction, parties should not be surprised if a court makes a decision recognizing these changes, rather than relying upon a case decided before any of the changes occurred. Any good lawyer, asked about the reasonableness of reliance upon the aging precedent, would have counselled that reversal was at least a good possibility.[200]

197. *Compare* State *ex rel.* Williams v. Whitman, 116 Fla. 196, 156 So. 705 (1934), *with* United States v. Calamaro, 137 F. Supp. 816 (E.D. Pa. 1956) *and* State v. Striggles, 202 Iowa 1318, 210 N.W. 137 (1926). See *In re* Luster, 12 Ill. 2d 25, 145 N.E.2d 75 (1957).

198. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 148 (1921). See Evans v. Supreme Council, 223 N.Y. 497, 503, 120 N.E. 93, 97 (1918).

199. *Compare* Federal Baseball Club v. National League, 259 U.S. 200 (1922) *and* Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953), *with* United States v. International Boxing Club, 348 U.S. 236 (1955) *and* United States v. Shubert, 348 U.S. 222 (1955).

200. See generally Traynor, *Unjustifiable Reliance*, 42 MINN. L. REV. 11 (1957).

It has also been suggested that the conceptual division of the law into primary and remedial rights and duties may provide a further basis for identifying unfair surprise to the parties.[201] Under this analysis, primary law is defined as the principles which announce basic policies and duties to which an individual must conform; remedial law is defined as the principles which provide sanctions and methods of enforcement for failure to conform to the duties prescribed by the primary law. Although admitting the difficulty of adequately distinguishing between primary and remedial law for many purposes, advocates of this approach nonetheless find it useful in great measure. Its general thrust is that decisions which result in changes in the primary law are likely to create or destroy pre-existing duties, while decisions which result in changes in the remedial law are likely to change merely a method of enforcement, leaving the pre-existing duty in force. From this is drawn the conclusion that greater surprise is likely to result from a change in the existence or nonexistence of a duty than from a change in the method of enforcing a duty which already exists.

The *MacPherson*[202] case illustrates at once the utility and the limitations of the primary-remedial distinction as a method of identifying actual surprise. The case is usually read to announce that an automobile manufacturer has a duty to inspect for negligence which extends all the way to the ultimate purchaser of the product. Read in this way, the case imposes a duty upon the manufacturer which was not present before it was decided; he is held liable to a person when it had never been held previously that he had any duty to that person. This would appear to be a change in the primary law. Such a change would be said to raise legitimate claims against retroactivity. But the case is susceptible of another reading. Even before the decision in *MacPherson* an automobile manufacturer had a duty to dealers to inspect his cars for negligence, and dealers could enforce this duty against the manufacturer. What the court did in *MacPherson* was to extend that duty to third-party purchasers as well. Read in this way, the case did not create any new duty upon the manufacturer; it merely widened the range of persons to whom that duty was owed. This would appear to be a change in the remedial law, and such a change would be said to raise as significant a claim against retroactive application as would a change in the primary law.

A more satisfactory approach to the problem of ascertaining the degree of actual surprise created by a change in legal doctrine might acknowledge the usefulness of the primary-remedial distinction as a starting point but would proceed to inquire further into the real impact of the change upon those to whom the new rule would be applied retroactively. Thus, even if *MacPherson*

201. See generally HART & SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Tent. ed. 1958). See FHA v. The Darlington, Inc., in which Mr. Justice Frankfurter says:

> While, to be sure, differentiation between "remedy" and "right" takes us into treacherous territory, the difference is not meaningless.

358 U.S. 84, 93 (1958) (dissenting opinion).

202. 217 N.Y. 382, 111 N.E. 1050 (1916).

is read merely as effecting a remedial change, by widening the range of persons to whom the pre-existing duty was owed, the court should inquire into the real content of the pre-existing duty. For example: Was the "duty" ever enforced against the manufacturer in suits brought by dealers? Was the manufacturer aware of and insured against suits brought for violation of the duty? Only by asking questions of this kind can a judge go beyond the formalistic distinction between primary and remedial law as a method of ascertaining actual surprise.

The distinction between primary and remedial duties and rights is not wholly unrelated conceptually to the more familiar distinction between substantive and procedural duties and rights.[203] This distinction has had some viability in the related problem of when to give newly-enacted statutes retroactive application. The general rule has been framed along lines similar to those framed by the primary-remedial doctrine: if the statute is substantive, it must have prospective application only, but if it is procedural, it may have retroactive application as well. The substantive-procedural distinction raises the familiar difficulties of classification, and can work results which give rules of procedure an importance for decision which most often might be thought to be associated with substantive rules only. Statutes relating to personal disability to sue, for example, may be said to do no more than regulate the procedure for enforcing substantive rights, but when applied retroactively they may prevent a litigant from ever enforcing the right.[204] Again, newly-enacted statutes requiring the deposit of security in stockholders' derivative suits may do no more than regulate the procedure for enforcing substantive rights, but when applied to a suit in progress may result—though only procedural—in its termination.[205] A court, wishing to employ the procedural-substantive distinction as an aid to ascertaining actual surprise must realize, therefore, the limitations of the construct and must be prepared further to inquire into its relevance for the purposes at hand.

It might be argued that the availability of a declaratory judgment to determine the rights and status of individuals should be a factor in a court's consideration of whether surprise counsels that it give its decision prospective effect only. This argument would contend that since the parties could have sought a declaratory judgment and thus avoided the surprise that often accompanies a retroactive decision, it is not unfair to subject them to that surprise when they have failed to take advantage of this anticipatory procedure. This argument seems unrealistic when applied to cases in which the law seemed to be clear to the profession and the overruling decision was almost totally unexpected; if the holding of the overruled decision was clear and had not been eroded by subsequent decisions, a party would seem justified in relying upon it without first seeking the superfluous assurance of a declaratory

203. See Note, 71 YALE L.J. 344, 349 (1961).

204. See, *e.g.*, Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936). *Cf.* Coster v. Coster, 289 N.Y. 438, 46 N.E.2d 509 (1943); Kircher v. Kircher, 288 Mich. 669, 286 N.W. 120 (1939).

205. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

judgment. To impose upon the parties the burden of the surprise resulting from a completely unexpected overruling decision, solely upon the ground that they had it within their power to avoid that surprise by seeking a declaratory judgment of the obvious, would not seem reasonable. Moreover, the argument that the availability of a declaratory judgment justifies denying relief from overruling decisions which create surprise is unrealistic for most tort cases, since the parties will not have previously considered that the acts they contemplate doing are arguably tortious, and impractical for many contract cases, since the parties under commercial pressures will not be able to abide the time required for a court to hear the case and grant a declaratory judgment. However, the argument may have some validity as to institutional litigants [206] which can reasonably expect to be involved in periodic lawsuits on given questions, such as hospitals uncertain as to the status of the charitable immunity doctrine in their jurisdiction or insurance companies uncertain as to the validity of a proposed addition to its standard policy. It may also have validity as to questions of the interpretation, construction, and constitutionality of statutes which have never been passed upon judicially.

The Administration of the Courts

In determining whether to give a retroactive reach to an overruling decision, a court may be urged to consider the effect such retroactivity will have upon the administration of the courts. It is often argued that retroactive effect should be denied to a new rule of criminal due process if a result of retroactivity will be to burden the courts with petitions for habeas corpus from incarcerated prisoners, perhaps "in numbers unknown to us."[207] According to this argument, retroactivity should be granted if at all only when there is some indication—such as statistical data of the number of imprisoned persons who could potentially take advantage of the new rule—that the volume of cases likely to result is within the ability of courts to handle with reasonable administrative efficiency and expenditure of time. In many cases such an indication may be impossible to procure; for example, no one knows the number of persons presently serving state prison sentences as the result of convictions had prior to *Mapp v. Ohio* [208] and based upon illegally-seized evidence. But whether the indication is reliably statistical or is only a sage guess, this view reflects the value judgment that granting the benefits of the new rule to those convicted under the rejected rule may not be worth the necessary administrative burden of processing the resultant load of habeas corpus petitions. Court dockets may be crowded and groaning in many parts of the nation,[209] but if other considerations counsel a court to make a new due process rule retroactive, it is difficult to see why prisoners have less of a right to be on

206. See note 192 *supra.*

207. Griffin v. Illinois, 351 U.S. 12, 25 (1956) (Frankfurter, J., concurring).

208. 367 U.S. 643 (1961). See Friendly, *Reactions of a Lawyer-Newly Become Judge,* 71 YALE L.J. 218, 236 n.105 (1961).

209. See generally ZEISEL, KALVEN, & BUCHHOLZ, DELAY IN THE COURT (1959).

these dockets than the divorce and tort claimants who largely account for the present delay in the courts. The sense of injustice which compels retroactive application of the new rule in favor of convicted prisoners ought not be defeated merely by a fear of overworking the judiciary or temporarily postponing hearings on civil cases.

The considerations of retroactivity which are based upon the administration of the courts have a second aspect. This aspect embraces the argument that many judicial decisions, if given retroactive force, could be applied fairly only upon an uneven basis, thus diminishing respect for the judicial system. Applied to the *Mapp* case, for example, this argument would find unfairness in the fact that those prisoners who could win release, assuming *Mapp* were given retroactive application, would be those fortunate enough to be able to prove that illegally-seized evidence was used against them at trial, and that such proof may today, years after trial, depend upon such fortuitous factors as whether a transcript was kept at the trial, whether the police officers who made the seizure are dead or otherwise unavailable for questioning, whether there were witnesses to the illegal seizure, whether these witnesses are available for questioning today and can remember what took place then, whether the prisoner can afford a lawyer to help him assemble what evidence remains available today on the illegality of the search. To make release dependent upon such factors, according to the logic of this argument, would be to draw arbitrary distinctions between persons similarly situated. But the same fortuitous circumstances that would come to bear upon habeas corpus proceedings also come to bear daily at trial; many persons otherwise similarly situated often receive different treatment from the law because of the fortuitous circumstance of their superior or inferior access to evidence, to competent counsel, to money, and to witnesses. While such unfairness need not be regarded as desirable, it ought to be recognized as sometimes inevitable and as inhering in every stage of the judicial process. Such disrespect for courts as results from unfairness caused by fortuitous factors is already with us in large measure; it would seem difficult to say that it will be increased significantly by the allowance of certain habeas corpus hearings in which further fortuitous unfairness may occur.

Conclusion

The use of prospective overruling by a federal court should be deemed prohibited by the case and controversy requirement of Article III of the Constitution. When a federal court overrules a prior decision and announces a new rule of law by applying it to the litigants in the case or controversy before it, it should withhold any statement as to the retroactive effect of the new rule. The question of whether the new rule should be applied retroactively should not be decided until it is presented to a court as an actual case and controversy. The decision as to retroactivity should then be made, but only after a consideration of criteria relevant to the purpose of the new rule and to the equitable and effective operation of the legal system.

BIBLIOGRAPHY

BOOKS AND ARTICLES

Akande D., The Competence of International Organizations and the Advisory Jurisdiction of the Court of Justice, 9 *EJIL* 437

Akande D., The International Court of Justice and The Security Council: Is There Room for Judicial Control of Decisions of The Political Organs of The United Nations? *46 Int'l & Comp. L.Q.* 309 1997

Albors-Llorens A., The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat? 62 *Cambridge Law Journal* 72(2003)

Alvarez J. E., Are corporations subjects of International law ? 9 *Santa Clara J. Int'l L.* 1(2011)

Alvarez J. E., *International Organization as Law- Makers* (Oxford; Oxford University Press) (2006)

Amerasinghe C. F., *Principle of the Institutional Law of International Organizations* (2nd ed.) (Cambridge; Cambridge University Press) (2005)

Arnull A., Private Applicants and the Action for annulment since *Codorniu*, *Common Market Law Review* 48 (2001)

Bantekas and Nash, *International Criminal Law (2nd ed.)* (London; Routledge-Cavendish) (2002)

Bebr G., Direct and Indirect Judicial Control of Community Acts in Practice: The Relation between Articles 173 and 177 of the EEC Treaty, 82 *Mich. L. Rev.* 1229 (1983-1984)

Bedajoui M., *The New World Order and the Security Council – Testing the Legality of its Acts* (Drodrecht; Maritnus Nijhoff Publ.) (1994)

Bekker G., The African Court on Human and Peoples' Rights: Safeguarding the Interest of Member States, 51 *Journal of African Law* 151, 2007

Bernhardt R., Domestic Jurisdiction of States and International Human Rights organs, *7 HRLJ* 205 1986

Bilder R. B., International Dispute Settlement and the Role of International Adjudication, 1 *Emory J. Int'l Disp Resol.* 131 (1986-87)

Blokker M. N., Exploring the Evolution of Purpose Methods and Legitimacy: Accountability of Intergovernmental Organizations, 94 *Am. Soc'y Int'l L.* Proc. 204 2000

Blokker M. N., International Organizations and Their Members: International Organizations Belong to All Members and to None-Variations on a Theme, 1 *Int'l Og. L. Rev.* 139 2004

Blokker M. N. and Schremer H.G., *International Institutional Law: Unity within Diversity* (3rd ed.,) (The Hague; Maritnus Nijhoff publ.) (1995)

Bowett D., "The Impact of Security Council Decision on Dispute Settlement Procedures," 5 *EJIL* 94(1994)

Bowett D. W., *The Law of International Institutions*, (4th ed.)(London; Stevens & sons) (1982)

Brolmann C., *The Institutional Veil of Public International Law International Organizations and The Law of Treaties* (Oregon; Hart Publishing) (2007)

Brown C., the Inherent Power of International Courts and tribunals, 76 *BYIL* 195 (2005), pp. 195-244

Brownlie I., *Principles of Public International Law* (6th ed.)(Oxford; Oxford University Press) (2003)

Buyoya P., Toward a Stronger African Union, 12 *Brown J. World Affairs* 165 2005-06

Chesterman S., Does Asian Exist? The Association of South East Asian Nations as an International Legal Person, 12 *SYIL* 133 2008

Cigam, Protecting the Interest of Civil Society in Community Decision-Making-The Limits of Art 230 EC, 52 *ICLQ* 995

Coleman A., International Court of Justice and Highly Political Matters, *Melb. J. Int'l Law* 29, 2003

Corthaut T., and Vanneste F., Waves Beteween Strasbourg and Luxembourg: the Right of Access to a Court to Counter the Validity of Legislative or Administrative Measures, 26 *YEL* 475 2006

Dekker I. F. and Wessel R. A., Governance by International Organizations: Rethinking the Normative Force of International Decisions, in (Dekker I. F., and Werner W. G., eds.) *Governance and International Legal Theory* (Drodrecht; Maritnus Nijhoff Publ.) (2004)

Ellis M.E., The New International Economic Order and General Assembly Resolution: The Debate over the Legal Effects of the General Assembly Resolutions Revised: Comment, 15 *Cal. W. Int'l L. J.* 647 1985

Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford; Hart Publ.) (2004)

Fagbayibo B., The (Ir)relevance of the Office of the Chair of the African Union Commission: Analysing the Prospects for Change, 56 *Journal of African Law* 1 2011

Fairhust J., *Law of the European Union* (8th ed.) (UK; Pearson Education Ltd.) (2010)

Fassbender B., The UN Charter as Constitution of the International Community, 36 *Colum. J Transnational L* 529 (1998)

Ford C., Adjudicating *Jus Cogens*, 13 *Wis. Int'l L.J* 145 (1994-95)

Gautier P., The Reparations for Injuries Case Revisited: The Personality of European Union in *Max Planck Year Book of United Nations Law* (2000)

Gill T.D., Legal and some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter, 26 *NYIL* 33 (1995)

Gomula J.,The International Court of Justice and Adminstrative Tribuals of International Organizations, 13 *Mich. J Int'l L.* 83 (1991-1992)

Gruchala-Wesierski T., A Framework for Understanding "Soft Law," 30 *McGill L.J.* 37 1984-85

Goursott X., The EC System of Legal Remedies and Effective Judicial Protection: Does the System Really Needs Reform?, Legal Issues of Economic Integration 221(2003)

Gross L., Domestic Jurisdiction, Enforcement Measures and the Congo, 1965 *AustYIL* 137 1965, pp. 137-158

Gunn A. M., Council and Court: Prospects in Lockebie for an International Rule of Law, 52 *U. Toronto Fac. L. Rev* 206 (1993-94)

Hansen R. F., The International Legal Personality of Multinational Enterprises: Treaty Custom and the Governance Gap, 10 *Global Jurists* 1 (2010)

Hartley T., *The Foundation of European Community Law* (7th ed.)(Oxford; Oxford University Press)(2010)

Hexner E.H., Interpretation by Public International Organizations of their Basic Instruments, 53 *AJIL* 341 (1959)

Hossain K., Legality of the Security Council Action: Does the International Court of Justice Move to take up the Challenge of judicial Review? 5 *Rev. Int'l L. & Pol.* 133(2009)

Hummer W. and Schweitzer M., Comment of Art 52, in B. Simma et al (eds.,) *The Charter of the United Nations: A Commentary* (2nd ed., I) (Oxford; Oxford University Press) (2002)

Joyner, Christopher, The United Nations And Democracy, 5 *Global Governance* 333 (1999)

Juma D., Lost (or) Found in transition? The Anatomy of the New African Court of Justice and Human Rights, 13 *Max Planck UNYB* 267 2009

Kelsen H., *The Law the United Nations: A Critical Analysis of its Fundamental Problems* (Stevens & Sons) (1951)

Kindiki K., The Proposed Integration of the African Court of Justice and the African Court of Human and People's Rights: Legal Difficulties and Merits, 15 *Afr. J. Int'l & Comp. L.* 138 2007

Klabbers J., Constitutionalism Lite, 1 *International Organization Law Review* 31

Klabbers J., *An Introduction to International Institutional Law* (Cambridge; Cambridge University Press) (2002)

Klabbers J., Institutional Ambivalence by Design: Soft Organization in International law, 70 *Nordic JIL* 403

Kolodkin R. A., 'Ad hoc' International Tribunal for the Prosecution of Series Violations of International Humanitarian Law in the Former Yugoslavia (1995) 5 *Crm. L. F*

Kwashima Y., Some Aspects of Illegal Acts of International Organization, 16 *Osaka University Law Review* 13 (1968)

Laches M., Legal Framework of an International Community, 6 *Emory Intl. L. Rev.* 329 (1992)

Lauterpacht H., The Function of Law in the International Community (Oxford; Clarendon Press)

Lenarts K. and Corthaut T., Judicial Review as a Contribution to the Development of European Constitutionalism, 22 *YEL*1 2002

Linderfalk U., *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* ( ) (2007)

McCauley E.F., Member State Implementation of European Economic Community legislation and Judgments, 11 *B. C. Int'l & Comp. L R.* 161 1988

Magliveras K.D. & Naldi G.J., The African Court of Justice, 66 *ZaoRV* 187 2006

Maluwa T., From the Organization of Africa Unity to the Africa Union: Rethinking the Framework for Inter-state Cooperation in Africa in the era of Globalization, 9 *U. Botswana L.J* 49 2009

Maluwa T., International Law-Making in the Organization of African Unity: An Overview, 12 *Afr. J. Int'l and Comp. L.* 201 2000

Manuel J. and Martin C., *Ubi ius, Ibi Remedium*?- Locus Standi of Private Applicants under Art.230(4) EC at a European Constitutional Crossroad , 11 *Maasticht J. Eur. and Comp. L* 233 (2004)

Martenczuk, B., The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie? 10 *EJIL* 617 1999

Mathijsen, P.S.R. F., *A Guide to European Union Law* (10th ed.) (Sweet & Maxwell) (2010)

McWhinney E., *Judicial Settlement of International Disputes: Jurisdiction, Justiciability and Judicial Law-Making on the Contemporary International Court* (Drodrecht; Maritnus Nijuhoff Publ.) (1999)

Mohammed A., Toward an Effective African Union: Participation, Institutions and Leadership in *the African Union and Strategies for Development in Africa* (Adejumob: & Olukoshi: eds., 2009)

Morrisson F., The Future of International Adjudication, 75 *Minn. L. Rev.* 827 (1990-91)

Murithi T., and Ndinga A.,, Introduction- Building an Africa Union for the 21st Century, in (Akokapri J. & Ndinga A., & Murithi T., eds.,) *The African Union and Its Institutions* (Jacana Media)(2001)

Mutlaq Al – Qahatani, The Shangai Cooperation Organization and the Law of International Organizations, 5 *Chinese Journal of International Law* 129 (2006)

Mwangi S. W., 'From the OAU to AU: The Experience, Promise and Expectation, in (Adejumobi S. & Olukoshi A., eds.) *The Africa Union and New Strategies for Development in Africa* (CODESRIA & DPMF)(2009)

Naldi G.J., and Magliveras K.D., The African Economic Community: Emancipation for African States or Yet Another Glorious Failure? 24 *N.C.J. Int'l & Comm. Reg.* 601 1998-99

Naldi G. J., and Magliveras K. D., The Proposed African Court of Human and Peoples' Rights: Evaluation and Comparisons, 8 *Afr. J. Int'l & Comp. L* 949 (1996)

Nicholson M., et al, The Scope of Review of Merger Decision under Community Law, 1*Eur. Competition J.* 123 (2005)

Nolte, Article 2(7) in Simma, B., *et al.* (eds.), *The Charter of the United Nations: A Commentary* (2nd ed., I) (Oxford; Oxford University Press) (2002)

Oppenheim L., *International Law: A Treatise,* I (4th ed.) (Longmans; Green & Co.) (1928)

Oppong R. F., The African Union, The African Economic Community and Africa's Regional Economic Communities: Untangling A Complex Web, 18 *Afr. J. Int'l and Comp. L.* 92 2010

Orakhelashvil A., The Position of the Individual in International Law, 31 *Cal W. Intl. L. J* 241 (2000-2001)

Osieke E., The Legal Validity of Ultra Vires Decisions of International Organizations, 77 *AJIL* 239 (1983)

Pan E. J., Authoritative Interpretation of Agreements: Developing More Responsible International Administrative Regimes, 38 *Harv. Int'l .L.J.* 503 (1997)

Papastavridis E., Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisi, 56 *Int'l & Comp. L. Q.* 83 2007

Passivirta E., The European Union: From an Aggregate of states to a Legal person? 2 *Hofstra L. & Pol'y Symp.* 371

Pierre –Marie Dupuy, The Constitutional Dimension of the Charter of the United Nations Revisited in 1*Max Planck UNYB* 1997

Petrescu O. M., Procedural Aspects Regarding for Preliminary Rulings, 8 *Romanian Journal of European Affairs* 33 (2008)

Petersman E., Dispute Settlement in International Economic Law-Lessons for Strengthening International Dispute Settlement in Non-economic Areas, 2 *J. Int'l Econ. Law* 89 (1999)

[pollux], Interpretation of the Charter, 23 *BYIL*54 (1946)

Rechner J., From the OAU to AU: A Normative shift with Implications for Peace Keeping and Conflict Management, or Just a Name Change?, *Vand. J.Tran snat'l L* 543 2006

Riechenberg K., Local Administration and the Binding Nature of Community Directives: A lesser Known Side of European Legal Integration, 22 *Fordham Int'l L. J.* 696 1998-9

Romano C., The Proliferation of International Judicial Bodies: The Pieces of the Puzzle, 31 *N.Y.U.J Int'l L. & pol.* 709 1998-1999

Rosenne S., *The World Court:* What It Is and How It Works (4th ed.) (Drodrecht; Maritnus Nijhoff Publ.) (1999)

Rubin A. P.,' An International Criminal Tribunal for the Former Yugoslavia?' (1994) 6 *Pace int'l L. Rev.* 7

Shaw M. N., *International law* (5th ed.) (Cambridge; Cambridge University Press) (2003)

Schachter O., The Quasi-Judicial Role of the Security Council and the General Assembly 58 *AJIL* 960 1964

Schreuner C., 'What is a Legal Dispute?' in (Isabelle B. *et al* eds.) *International Law between Universal and Fragmentation* (Drodrecht; Maritnus Nijhoff publ.)(2008)

Schrijver N. J., The Future of the Charter of the United Nations, 10 *Max Planck UNYB* 2006

Schwarze J, Judicial Review in EC Law- Some Reflections on the Origins and the Actual Legal Situation, 51 *ICLQ* 17(2002)

Schwebel S., The Reality of International Adjudication and Arbitration, 12 *Williamette J. Int'l L. and Dis. Res.* 359 (2004)

Schweigman D., *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* (The Hague; Kluwer law International) (2001)

Shany Y., No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary, 20 *EJIL* 73 2009

Slynn G., Judicial Review of Community Administrative Acts, 18 *B.L.J* 38 1986

Sohn L.B., The UN System as authoritative Interpreter of Its Law, in (Schacter O., and Joyner C., eds.) *United Nations Legal Order* (1995), pp. 169-244

Steiner J., Woods L. and Twigg- Flesner C., *EU Law* (9th ed.) (Oxford; Oxford University Press)(2006)

Udombana N.J., An African Human Rights Court and An African Union Court: A Needful Duality or A Needless Duplication?, 28 *Brook. J. Int'l L* 811, 2002-03

Udombana N., The Institutional Structure of the African Union: A legal Analysis, 33 *Cal. W. Int'l L.J.* 69 2002-03

Udombana N.J., Toward the African Court of Human and Peoples' Rights: Better Later Than Never, 3 *Yale Human Rights and Development L.J.* 45 2000

Van der Mei AP, The Advisory Jurisdiction of the African Court on Human and People's Rights, 5 *Afr. Hum. Rts. L. J.* 27 2005

Viljoen F., and Baimu E., Courts for Africa: Considering the Co-existence of the African Court on Human and Peoples' Right and the African Court of Justice, 22 *Neth. Q. Hum. Rts.* 241 2004

Watson G., Constitutionalism, Judicial Review and the World Court, 34 *Harv. Int'l L.J.* 1 (1993)

Wessel R., Revisiting the International Legal Status of the EU, 5 *European Foreign Affairs Review* 507 (2000)

Xavier L., Standing of Private Plaintiffs to Annul Generally Applicable European Community Measures: If the system is Broken, where should it be fixed? 30 *Fordham Int'l L.J* 1496 (2006-2007)

Yocheva K., Specific Acts of the Court Justice of the European Union Opinion of the Court of Justice 2011, *Acta U. Danubius Jur.* 75 2011

Zamora S., Authoritative Interpretation and Enforcement of International Economic Law, in Schachter and Joyner (eds.) *United Nations Legal Order* (Cambridge; Cambridge University Press) (1995)

OTHERS

Agne Limante, Actions for Annulment Before ECJ After the Lisbon Treaty: Has the Access to Justice Improved? Available at http://egpa-conference2011.org/documents/PSG10/Limante.pdf last accessed on June 19 2012

Charles Mutasa, Is the African Union ECOSOCC a New Dawn and a New Deal? , www.sarpn.orgza/documents/d0001191/p1321-ECOSOCC_AU_Mutasa_March2005.pdf.html

Christian Ahlborn, The Rules of International Organizations and the Law of International Responsibility, ACIL Research Paper no. 2011-03 (SHARES service), finalized 26 April 20111 (www.sharesproject.nl)

Christan Ganj, References for a Preliminary Ruling under Art 267 TFEU, Quick EU Law Series http://www.ganj.ro accessed on Dec 27 2011, Section Three

Danesh Sarooshi, Some Preliminary Remarks on the Conferral by States of Powers on International organizations, 4 New York University Jean Monnet Working Paper 1(2003) available at http://www.centers.law.nyu.edu/jeanmonnet/archive/papers/03/030401.pdf.html

Gerhard Hugo, The Pan African Parliament: Is the Glass Half full or Half Empty? ISS Paper 168 (2008) available at http://www.issafrica.org/uploads/paper168.pdf.html accessed January 20 2012

Girmachew Alemu, Introduction to the Norms and Institutions of the African Union, www.nyulawglobal.org/globalex/African_Union.html accessed on Feb 16 2012

Karsten Nowrot, New Approaches to the International Legal Personality of Multinational Corporations towards a Rebuttable Presumption of Normative Responsibilities, ESIL Research Forum on International Law: Contemporary Issues, Graduate Institute of International Studies(HEI), Geneva, Thursday 26- Saturday 28 May 2005, Workshop No 7

Opinion of Advocated General Jacobs *Union de pequenosAgricultores (UPA) v Council* [2002] E.C. R 1.

Reluca David, The European Union and Its Legal Personality 1993-2010 available on http://ssrn.com/abstract=1566492

Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union, Luxembourg, May 1995

"Statement of Department of State on US Withdrawal from Nicaraguan Proceedings, 18 January 1985, 79 AJIL 438

Strategic Plan 2006-2010 'One Africa, One Voice' (online) available at http://www.panafricanparliament.org (accessed on Feb 28 2012)

The Position of the UN Secretary General in UN Press Release SG/SM/6613, June 26 1998, Thirty-fifth annual Ditchley Foundation Lecture given today by Secretary-General Kofi Annan at Ditchley Park, United Kingdom

_____, The African Commission on Human and peoples' Rights, The Danish Centre for Human Rights (1998)

_____, Handbook on the working methods of the security council (2006), p.54 available at www.un.emb-japan.go.jp/p/handbook.pdf(last accessed on July 20 2012

Interview with Mr. Bright Mando, Legal Officer (Inter African Matters), Office of the Legal Counsel, AU Commission, in February 2012

Interview with Mr. Adewale E Lyanda, Legal Officer, Codification Office of the Legal Counsel, AU Commission, on June 2, 2012

INTERNATIONAL LEGAL MATERIALS

African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered in to force 21 October 1986

African Union Commission on International Law, adopted on Feb 04 2009, entered into force Feb 04 2009

Agreement Establishing the World Trade Organization available at www.wto.org/english/docs_e/legal_e.htm#wtoagreement

Charter of the Organization of Africa Unity, adopted on May 25,1963, entered in to force on 13 September 1963, 2 I.L.M 766 1963

Constitutive Act of the Africa Union, Adopted on July 11 2002, entered in to force on May 26 2001

Convention on the Ban of the Import into Africa and the Control of Trans-boundary Movement and Management of Hazardous Wastes within Africa, adopted Jan 01 1999 and entered into force May 22 2008

Convention on the Prevention and Combating of Terrorism, adopted July 01 1999, entered into force Dec 06 2002

Convention on the Western Indian Ocean Tune Organization, done at Mahe, Seychelles, 19 June 1991

Criteria for Granting Observer status and for A system of Accreditation within the African Union Ex.CL(VII) Annex IV

Decisions of the AU Assembly of Heads of state and government Doc. ASS/AU/ Dec 45 (III), Third Summit held in Addis Ababa, Ethiopia 6-8 July 2004

Decision on the Interim period ASS/AU Dec. 1(I), adopted at the First Ordinary Session of the Assembly of the African Union, 9-10 July 2002, Durban, South Africa, Paragraph XI

Declarations on the Framework for OAU Response to Unconstitutional Changes of Government, AHG/ Decl. 1 (XXXVIII) adopted at the 36th Ordinary Session of the OAU Assembly Heads of States and Government, Lome, Togo, July 2000;

Declarations on the Principles Governing Democratic Elections in Africa, AHG/Decl.1(XXXVIII), 38th Ordinary Session of OAU Assembly of Heads of States and Governments, 8 July 2002, Durban, South Africa;

Durban Declaration in Tribute to the Organization of African Unity on the occasion of the Launching of the African Union, Ass/AU/Decl. 2(I), adopted at the First Ordinary Session of Assembly of the Union 9-10 July 2002, Durban, South Africa

International Labor Organization (I LO), Constitution of the International Labor Organization, adopted 1 April 1949, available at http://www.unhcr.org/refworld/docid/3ddb5391a.html accessed 16 Nov 2011

International Agreement on Olive Oil and Table Olives, done at Geneva, 29 April 2005,

International Coffee Agreement, 1962 reprinted in 1 I.L.M.236, 1962

OAU Declarations on Democracy, Political, Economic and Corporate Governance, AHG/ 235(XXXVIII) Annex I, 38th Ordinary Session of the OAU Assembly Heads of State and Government, 8 July 2002, Durban, South Africa

Protocol on the Statute of The African Court of Justice And Human Rights, adopted 1 July 2008 Ass/AU/Dec. 196(XI)

Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament, adopted on 2 March 2001, entered into force (December 2003)

Protocol relating to the Establishment of the Peace and Security Council of the African Union, adopted 2 March 2001, entered into force 14 December 2003

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

Protocol of the Commission of Mediation, Conciliation and Arbitration, 3 I.L.M. 1116 (1964)

Protocol to the African Charter on Human and Peoples' Rights on the establishment African Court on Human and Peoples' Rights, adopted June 26 1998, entered into force 25 January 2004

Protocol No.2 on the Application of the Principles of Subsidiarity and Proportionality, Annex 2 to the TFEU, available at eur_lex.europa.eu/LexUriServ/LexUriServ.do?Uri=OJ:C:2008:115:001:01:en:HTML

Report of the PRC and Legal Experts on Various Legal Matters Ex-CL/195/VII adopted at 7th ordinary Session of the Executive Council of the AU 28 June-5 July, 2005, Sirte Libya

Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union, Luxembourg, May 1995

Revised Treaty of the Economic Community of West African States (ECOWAS), 24 July 1993 available at: http://www.unhcr.org/refworld/docid/492182d92.html accessed 15 Nov 2012

Rules of Procedure of the Assembly of the Union, First Ordinary Session, 9-10 July 2002, Durban, South Africa

Rules of Procedure of the Permanent Representatives Committee Ass/AU/2(I)-c, adopted at First Ordinary Session of Assembly of the African Union, Durban, South Africa 9-10 July 2002

Rules of Procedure of the ECJ available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt5_2008-09-25_17-33-27_904.pdf

Rules of Procedure of the Executive Council of the Union, First Ordinary Session, 9-10 July 2002, Durban, South Africa

SC Res 264, Resolution on the Situation in Namibia, adopted at 1465th Meeting, March 20, 1969

SC Res 269, Resolution adopted at the 1497th Meeting, 12 August 1969

SC Res 276, Resolution on the Situation in Namibia, adopted on the 1539h Meeting, 1970

SC Res 283, Resolution adopted at the 1550th Meeting, 29 July 1970

SC Res 284, Resolution adopted at the 1550th Meeting, 29 July 1970

Sirte Declaration, EAHG/Draft/ Decl. (iv) Rev.1 Fourth Extraordinary Session of the Assembly of Heads of State and Governments, 8-9 September 1999, Sirte, Libya

Statute of the Administrative Tribunal of the United Nations, adopted by the GA/Res. 351 A on 24 November 1949 and last amended by GA/Res. 52/166 on 15 Dec 1997

Statutes of the Commission of the African Union Ass /AU/2(I)-d, adopted at First Ordinary session of the Assembly of the African Union, 9-10 July 2002, Durban, South Africa

Statute of the Economic, Social and Cultural Council of the African Union ASS/AU/Dec. 48(III), adopted at Fifth session of the Assembly of the African Union,

Statute of the International Court of justice, UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998 available at http://www.unhcr.org/refworld/docid/3ae6b3a84.html accessed on 18 Nov 2012

The Treaty for establishment of the Economic Community of East African States, signed on 30 Nov 1999 and entered in to force7 July 2000

The Treaty of the Southern African Development Community, signed on 17 August 1992, entered in to force on September 1993 as Last amended in August 2001

Treaty establishing the Common Market for Eastern and Southern Africa reprinted in 33 I. L. M. 1067 1994

Treaty of the Court of Justice of the Cartegna Agreement, May 28 1979, English version reprinted in 18 I.L.M, 1203 1979

The African Union Non-Aggression and Common Defense Pact, adopted on July 1 2005 and entered into force on Dec 18 2009

The World Trade Organization Dispute Settlement Understanding available at www.wto.org/english/docs_e/legal_e/28-dsu.pdf

CASES

Appeal Relating to the Jurisdiction of the ICAO Council, Judgment of August 18 1972 (Pakistan v. India), Separate Opinion Dillard J., 1972 ICJ Rep,

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugo. (Serbia and Montenegro)), ICJ Rep. (1993)

Ballo v UNESCO, ILO Administrative Tribunal, Twenty-Eighth Ordinary Session, Judgment № 191(1972), (English Translation)

Broekmeulen v Huisarts Registraite Commissie ,Case 246/80, Judgment of 6 October 1981 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61980CJ0246:EN:PDF

Bulmer v Bollinger [1974] available at http://law-uk.info/2012/06/bulmer-v-bollinger-1974-2-all-er-1226/

Carew v IBRD, World Bank Administrative Tribunal, Decision No 142, May 19, 1995, available at http://lnweb90.worldbank.org/crn/wbt/wbtwebsite.nsf/%28resultsweb%29/5B8942B8F692D494852569ED00702077

Certain Expenses of the United Nations (Art 17, Paragraph 2 of the Charter), Advisory Opinion, ICJ Rep (1962)

Commission of the European Communities v. Council of the European Communities, Case No 22/70, Judgment of March 31,1971 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61970J0022:en:HTML

Federal Republic of Germany v European Parliament and Council of the European Union, C-76/98 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41049TJ0411:EN:HTML,

Foto Frost v Hauptzollant Lubeck –Ost, Case C- 314/85, Judgment of 22 October 1987 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61985CJ0314:EN:HTML

Golder v United Kingdom, Application No 4451/70, Judgment of 21 February 1975, EctHR (1975) available at http://www.robin.no/~dadwatch/echr/golder.html,

Handels –og Kontorfuktionaerernesr Forbund/ Danmark v Dansk Arbejdsgiverforenig acting on behalf of Danfoss ,Case C- 109/88, 1989 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61988CJ0109:EN:PDF.

Impressa Cosruzioni Comm Quirino Mazalia v Ferovia del Renon, Case 111/75(Preliminary Ruling), Judgment of 20 May 1976, Summary of Judgment available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61975CJ0111:EN:PDF

International Fruit Company v Produktschap Voor Groenten en Fruit, Joined cases 21-24/72, Judgment of 12 December 1972 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61972CJ0021:EN:PDF

Jègo-Quèrè et Cie SA v Commission, Case T-177/01, (2002) available at http://eiop.or.at/eiop/texte/2005-017.htm

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276(1970), Advisory Opinion, ICJ Rep. (1971)

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Rep, (1996)

Plaumann Co. v Commission of the European Economic Community - Case 25-62, Summary of Judgment 15 July 1963 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61962J0025:EN:HTML#I2

Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, (Preliminary Objections) Libya vs. US, ICJ Rep. (1998)

Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, (Provisional Measures Order of Apr.14), Libya vs. US, ICJ Rep. (1992)

Reparations for Injuries Suffered in the Services of the United Nations, Advisory Opinion, ICJ Rep, (1949)

R v International Stock Exchange of the UK and the Republic of Ireland, ex parte else (1993) available at http://www.justcite.com/Document/b2qZnYedoSaaa/r-v-international-stock-exchange-of-the-united-kingdom-and-the-ireland

Schneider v Commission, Case T-310/01 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002TJ0077:EN:HTML

Sogelma v. EAR, Case T- 411/06, Judgment of the Court of First Instance, 8 October 2008 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006TJ0411:EN:HTML

Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa, Advisory Opinion of June 7th 1955, ICJ Rep (1955)

SPA International Chemical Corporation v Amministrazione Delle Finanze Dello Stato, Case No 66/80, Judgment of May 13 1981 available at eur-lex.europa.eu/LexUriServ.do?Uri=CELEX:61980C5006:EN:PDF

SRL CILFIT and others v Ministry of Health and Lanficio di Gavardo SPA, Case 283 /81, Judgment of 6 Oct 1982 available at http://www.cvce.eu/obj/judgment_of_the_courtof_justice_cilfit_case283_81_october_1982-en-d3cb219e-2606_4ae9_b37c-2b2e4c42c60d.html

Prosecutor vs. Dusko Tadic, ICTY, Appeal Chamber, Decision on the Defence Motion for Interlocutary Appeal on Jurisdiction, 2 Oct. 1995 available at http://www.icty.org/x/cases/tadic/acdec/en/51002.htm accessed on Jun 2011

Yassin Abdullah Kadi v. Council of the European Commission and Commission of the European Communities, Case T-315/01, 21 September 2005 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009A0085:EN:HTML