

**Interrogating the competence of the African Court of Justice and Human Rights to review  
the African Union Assembly's decisions for compliance with human rights**

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**DECLARATION**

I **Nicholas Wasonga Orago** hereby declare that this is my original work, that it has not been submitted for assessment before any other academic forum and that where another person's work is used, it has been duly acknowledged.

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## LIST OF ABBREVIATIONS

ACJ	African Court of Justice
ACJHR	African Court of Justice and Human Rights
AComHPR	African Commission on Human and Peoples Rights
Act/the Act	The Constitutive Act of the African Union
ACtHPR	African Court on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AEC	African Economic Community
Assembly	The Assembly of Heads of State and Government of the African Union
AU	African Union
EC	European Community
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EU	European Union
Note	Foot Note
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice

ICTY	International Criminal Tribunal for Yugoslavia
ILA	International Law Association
ILC	International Law Commission
IOs	International Organisations
NGO	Non-Governmental Organisation
TEFU	Treaty on the Functioning of the European Union
TEU	Treaty on the European Union
UN	United Nations
UNSC	United Nations Security Council
UNGA	United Nations General Assembly
UNSG	United Nations Secretary General
RECs	Regional Economic Communities
Review	Judicial Review
WHO	World Health Organisation
WMO	World Meteorological Organisation



## TEN KEY WORDS

1. AU Assembly
2. African Court of Justice and Human Rights
3. Checks and balances
4. Compliance
5. Human rights norms and standards
6. International judicial review
7. Jurisprudence
8. Mandate
9. Rule of Law
10. *Ultra vires*

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## CHAPTER ONE

### INTRODUCTION

#### 1.1 Background to the study

Globalisation and the transfer of powers from state constitutional systems to international organisations (IOs) have led to several deficiencies, especially with regard to checks and balances in global governance.<sup>1</sup> The need to inculcate the rule of law and constitutionalism in global governance has therefore gained currency in the 21<sup>st</sup> century.<sup>2</sup> This has been exemplified by calls for the reform of the United Nations (UN) and the extensive reforms in regional IOs, such as the European Union (EU), with emphasis on institutional balance and the tempering of political power with institutional controls.<sup>3</sup>

The African continent has not been left behind in these developments. Africa has witnessed a proliferation of regional and sub-regional IOs with diverse mandates and competencies.<sup>4</sup> These bodies make decisions and adopt treaties with enormous implications for human rights and the fundamental freedoms of individuals.<sup>5</sup> Even though these IOs are well-intentioned, several questions arise about their checks and balances. First, how far are they bound to consider international human rights norms and standards in their work? Secondly, can their decisions be

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<sup>1</sup> S Griller 'Is this a Constitution? Remarks on a contested concept' in S Griller & J Ziller (eds) *The Lisbon Treaty: EU constitutionalism without a constitutional treaty* (2008) 31.

<sup>2</sup> See JE Alvarez 'International organizations: Then and now' (2006) 100 *American Journal of International Law* 339-341.

<sup>3</sup> J Raz 'The rule of law and its virtues' (1977) 93 *Law Quarterly Review* 198 – 202.

<sup>4</sup> Examples include, the African Union (AU) and its numerous organs provided for in article 5 of the Constitutive Act; regional economic communities (RECs), such as the Economic Community of West African States (ECOWAS), the Southern Africa Development Community (SADC), and the East African Community (EAC); and regional security and conflict prevention organisations, such as the Inter-Governmental Authority on Development (IGAD), among many others.

<sup>5</sup> Human rights implications include: non-representation of the interests of domestic constituencies; failure to respect civil and political rights under ICCPR, socio-economic rights under ICESCR & the other rights contained in the African Charter; lack of transparency, and insufficient participation by individuals and national interest groups, among others.

subjected to judicial review?<sup>6</sup> Lastly, which body in the African human rights system has the mandate to judicially review such decisions? These are some of the questions with which this thesis will attempt to grapple, albeit with a limited focus.

The Constitutive Act of the AU (the Act) is the grundnorm of the African regional and sub-regional IOs, establishing a constitutional framework for the AU and its organs and linking the AU system with the other regional and sub-regional organisations.<sup>7</sup> It aspires to create a system encompassing all the African regional IOs with the aim of consolidating African unity, and ultimately creating an economic and political union on the model of the EU.<sup>8</sup> The two organs of concern in this study are established by the Act and function within its constitutional framework. The Assembly of Heads of State and Government of the AU (the Assembly) is the supreme organ<sup>9</sup> with the functions of rule-making,<sup>10</sup> creation of standards, and guidance of the administrative organs of the AU in the implementation of AU's standards and strategic goals.<sup>11</sup> On the other hand, the African Court of Justice and Human Rights (ACJHR), established via a merger between the African Court of Justice and the African Court on Human and Peoples' Rights (ACtHPR),<sup>12</sup> is the main judicial organ of the AU,<sup>13</sup> and draws its mandate and competence from chapter three of its Statute.

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<sup>6</sup> Judicial review refers to the judicial consideration of a decision of an administrative authority by a judicial organ, usually a court. This is coupled with the notion that the reviewing institution can annul, set aside or declare illegal the contested decision. See, E de Wet and A Nolkaemper 'Review of Security Council decisions by national courts' (2002) 45 *German Yearbook of International Law* 184.

<sup>7</sup> The study is based on the doctrine of the rule of law and considers the Act as a constitution creating and empowering the functions of the AU and its organs. Any decision of any of the organs which is contrary to the letter and the principles of the Act are *ultra vires* and are subject to review by the ACJHR.

<sup>8</sup> N Steinberg *Background paper on the African Union* (2001) 2.

<sup>9</sup> The Act, article 5.

<sup>10</sup> The Act, articles 8 & 9; The decisions of the Assembly include: regulations, directives, recommendations, declarations, resolutions and opinions, among others (Rule 33 of the Rules of Procedure of the AU Assembly).

<sup>11</sup> JV Bernstorff 'Procedures for decision-making and the role of law in international organisations' (2008) 9 *German Law Journal* 1943.

<sup>12</sup> Protocol on the Statute of the African Court of Justice and Human Rights, chapter 1.

## 1.2 Statement of the problem

Certain decisions of the Assembly have been controversial, raising a number of key human rights concerns.<sup>14</sup> One such decision is Decision Doc. Assembly/AU/13(XIII) of 3 July 2009 by the Assembly urging African states not to co-operate with the International Criminal Court (ICC) concerning the human rights situation in Darfur, Sudan,<sup>15</sup> and the subsequent indictment by the ICC of the Sudanese President, Omar El Bashir, on five counts of crimes against humanity and a possible charge of genocide.<sup>16</sup> Since its independence in 1956, Sudan has experienced several armed conflicts culminating in the Darfur conflict that has been characterised by widespread and systematic serious violation of human rights, resulting in reported 200, 000 deaths and the displacement of 2.5 million people.<sup>17</sup> The violations have been documented to have reached the level of war crimes, crimes against humanity and possibly genocide.<sup>18</sup> The situation in Darfur has been dire, to the point of the UN Security Council (UNSC) determining it as constituting threat to international peace and security and adopting Resolution 1593.<sup>19</sup>

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<sup>13</sup> The Statute of the African Court of Justice and Human Rights, article 2.

<sup>14</sup> See, for example, the decision Assembly/AU/Dec.127(VII) of 2 July 2006 mandating Senegal to try Hisséne Habré for the crimes committed in Chad despite the highest courts in that state stating categorically that Senegal lacked the jurisdiction to do so, and thus denying the victims of the atrocities committed by the deposed president access to justice in the Belgium courts.

<sup>15</sup> Decision on the Meeting of African States Parties to the Rome Statute of the ICC, Doc. Assembly/AU/13(XIII) para 10.

<sup>16</sup> ICC-02/05-01/09 of 4 March 2009.

<sup>17</sup> Socyberty, '*The Darfur conflict: What needs to be done*' available at <http://socyberty.com/issues/the-darfur-conflict-what-needs-to-be-done/> (accessed on 26/10/2010).

<sup>18</sup> See UN High Commissioner for Human Rights, Situation of Human Rights in the Darfur Region of the Sudan (7 May 2004) UN Doc E/CN.4/2005/3; Warrant of Arrest for Omar Hassan Ahmad Al Bashir (4 March 2009) No ICC-02/05-01/09; Human Rights Committee, Concluding Observations: Sudan, (26 July 2007) UN Doc CCPR/C/SDN/CO/3/CRP.1, para. 9

<sup>19</sup> M Ssenyonjo 'The ICC arrest warrant decision for president Al Bashir of Sudan' (2010) 59 *International and Comparative Law Quarterly* 206

This AU decision has, therefore, been specifically chosen because it runs contrary to the need to enhance the fight against impunity and ensure the prosecution and punishment of international crimes such as genocide and crimes against humanity; customary law crimes that have attained the status of *jus cogens* and engender the *erga omnes* obligations of states to investigate, prosecute and punish perpetrators.<sup>20</sup> This decision not only goes against the duty of AU member states that have ratified the Rome Statute to carry out their obligations under that Statute in good faith,<sup>21</sup> but also goes against the human rights norms and standards in the Act, the UN Charter,<sup>22</sup> and customary international law.

Such decisions of the Assembly have adverse impacts on the realisation of the human rights and fundamental freedoms of the African people, especially with regard to access to justice. This study will critically consider whether the ACJHR has the mandate to review such decisions in order to enhance the respect for, and the protection of human rights in Africa. In doing that, the study will briefly reflect on the obligation of the Assembly to consider international human rights norms and standards, both in the Act and in general international law, in the exercise of its mandate.

### 1.3 Research questions

In relation to the background and problem statement above, the study revolves around the following critical questions:

- a) Does the concept of judicial review exist in international law and what is the basis for its existence?

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<sup>20</sup> J Dugard *International law: A South African perspective* (2009) 160; MC Bassiouni 'International crimes: *Jus cogens* and obligation *erga omnes*' (1996) 59 *Law & Contemporary Problems*, 63 67.

<sup>21</sup> The doctrine of *pacta sunt servanda* as expounded in the Vienna Convention on the Law of Treaties (1969), article 26.

<sup>22</sup> Charter of the United Nations (1945), 1945, 59 Stat. 1031, TS 993, 3 Bevens 1193, article 103. It provides that in the case of a conflict of obligations of member states between the Charter and another international agreement, the obligations under the Charter prevail. The fact that the resolution to refer the Darfur situation to the ICC by the UN Security Council (UNSC) was made under Chapter VII of the UN Charter and was binding on all member states makes the Assembly decision contrary to the UN Charter and thus of no legal effect/invalid.

- b) Does the Assembly have an obligation to consider international human rights norms and standards in adopting decisions under the Act?
- c) Does the ACJHR have the mandate to review the decisions of the Assembly to ensure compliance with international human rights norms and standards?
- d) Which parties have the competence to seize the judicial review mandate of the ACJHR?
- e) What are the means through which the ACJHR can exercise its review mandate?
- f) What are the effects of a finding of *ultra vires* on the decisions of the Assembly?
- g) How effective can review be in the protection, promotion and fulfilment of human rights on the African Continent?

#### **1.4 Significance of the study**

The significance of this study rests in its attempt to consider the possibility of the Assembly's decisions, and by extension those of the other organs of the AU, being reviewed by the ACJHR to ensure compliance with international human rights norms and standards. The study intends to initiate intellectual debate among African human rights scholars and activists on the possible use of judicial review as a mechanism to enhance the overall protection and fulfilment of human rights and fundamental freedoms in Africa through the ACJHR.

#### **1.5 Research methodology**

The study is based on desktop research. The information used is obtained from primary sources, such as, treaties, protocols and decisions of the AU, and relevant secondary sources, particularly text books, journals, case law and internet resources. The study analyses and draws inspiration from the jurisprudence of the European Court of Justice (ECJ), especially as the AU system is based on the model of the EU and the ECJ has the competence to review the decisions of EU organs. Inspiration and lessons are further drawn from the jurisprudence of the ICJ with regard to its competence to review the decisions of UN organs. Conclusions drawn from the analysis of this information are applied towards answering the research questions.



## 1.6 Literature review

Despite the passionate debate and efforts by jurists to discern the human rights obligations of IOs and the resulting competence of judicial organs to review their decisions, the issue is far from settled. More unsettling and disconcerting is the dearth of literature on this subject in the African context. The debate has focused mainly on the powers of the ICJ to review decisions of UN organs, especially the UNSC, with a consensus being reached that even though the ICJ has no express powers of review provided for in the UN Charter or in its Statute, it has an incidental power of review through its advisory opinion competence and in contentious cases properly before it.<sup>23</sup>

Several judges of the ICJ have stated in their separate or dissenting opinions that the Court lacks an express power of review akin to that exercised by constitutional courts in municipal systems.<sup>24</sup> *Martenczuk* argues that even though the Court has no power of review in terms of specific means and procedure by which to scrutinize the decisions of the political organs of the UN, it can examine the validity of such decisions in a case properly brought before it.<sup>25</sup> He

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<sup>23</sup> E de Wet *The chapter VII powers of the United Nations Security Council* (2004); E de Wet *et al Review of the Security Council by member states* (2003); M Sameh *The role of the International Court of Justice as the principal judicial organ of the United Nations* (2003) 279; D Akande 'The International Court of Justice and the Security Council: Is there room for judicial control of the decisions of the political organs of the United Nations?' (1997) 46 *International and Comparative Law Quarterly* 309; B Martenczuk 'The Security Council, the International Court and judicial review: What lessons from Lockerbie?' (1999) 10 *European Journal of International Law* 517-547; GR Watson 'Constitutionalism, judicial review and the world court' (1993) 34 *Harvard International Law Journal* 21; K Roberts 'Second guessing the Security Council: The International Court of Justice and its powers of judicial review' (1995) 7 *Pace International Review* 281; T Frank 'The power of appreciation: who is the ultimate guardian of UN legality?' (1992) 86 *American Journal of International Law* 519, among others.

<sup>24</sup> See *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 Reports (1971) 45 and 143- 144 (Separate opinion of Judge Onyeama)(hereafter 'the Namibia Opinion'); Dissenting judgments of President Schwebel and Judge ad hoc Jennings in *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom and Libyan Arab Jamahiriya v United States of America)* Preliminary Objections Judgment of 27 February 1998 (1998) ICJ Reports 115 (together hereafter '*Lockerbie case (Preliminary Objections)*') 7-13 and 10 of their separate judgments, respectively.

<sup>25</sup> Martenczuk (n 23 above) 526.

asserts that an incidental review function is implicit in the ICJ's exercise of its judicial functions and that this can be used to obtain authoritative and impartial interpretations of the law.<sup>26</sup> *de Wet* focuses on the extent to which the UNSC is subject to law, and the limitations of its chapter VII powers. She discusses review as one of the ways in which the powers of the UNSC can be limited both by using the procedure of advisory opinions and of contentious proceedings.<sup>27</sup> *Sammeh* merges the arguments of Martenczuk and de Wet, and takes a critical look at the function of the ICJ as a constitutional court. He examines extensively the existence of review competencies in the jurisprudence of the ICJ, the scope of those competencies, and the means of seizure of the competencies.<sup>28</sup>

The ECJ, on the other hand, has express powers of review of decisions of EU organs.<sup>29</sup> *Schermers and Waelbroeck*<sup>30</sup> extensively discuss the mandate of the ECJ to review the actions of EU organs. They discuss the acts susceptible to review, the grounds for illegality, available legal remedies, and the effects of review.<sup>31</sup> *Turk* elaborates on the reviewable acts of EU organs by the ECJ both under its proper and implied review mandate.<sup>32</sup>

There is yet to be a study specifically dedicated to the discussion of the possibility of the ACJHR reviewing the decisions of the Assembly for compliance with human rights norms and standards. This thesis proposes to venture into these uncharted waters.

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<sup>26</sup> Martenczuk (n 23 above) 528.

<sup>27</sup> de Wet (n 23 above) part I.

<sup>28</sup> Sameh (n 23 above) 279-340.

<sup>29</sup> *Consolidated Version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, articles 263-267 (hereafter 'TFEU') available at: <http://www.unhcr.org/refworld/docid/4b17a07e2.html> (accessed 10 September 2010).

<sup>30</sup> HG Schermers & DF Waelbroeck *Judicial protection in the European Union* (2001), chapter 3.

<sup>31</sup> Schermers & Waelbroeck (n 30 above) 313-345.

<sup>32</sup> AH Turk *Judicial review in EU law* (2009), chapters 1-3.

## 1.7 Limitations

A major limitation of this study is the dearth of literature and information relating to the jurisprudence of the ACJHR as it has not built such jurisprudence, the Court Protocol having not come into force.<sup>33</sup> The ACtHPR, which is intended to be a Chamber of the ACJHR, has also not built any substantive jurisprudence having only heard one case since its inception.<sup>34</sup> This is compounded by the lack of review jurisprudence at the AComHPR. Reliance will therefore be placed on literature surrounding the mandate of the ECJ and the ICJ from where the author will draw inspiration to elaborate the arguments proffered.

## 1.8 Overview of chapters

This research paper is divided into five chapters, each chapter covering specific but related arguments. Chapter one provides the context in which the study is set. It introduces the basis, background, justification, limitation and structure of the study. Chapter two lays the conceptual framework and provides an overview of judicial review in international law. Chapter three undertakes a brief study of the powers and the human rights obligations of the Assembly. It analyses the Assembly's Bashir decision in relation to the human rights standards discussed. Chapter four critically analyses the review mandate of the ACJHR, the parties competent to seize that mandate, the reviewable decisions, and the effects of ACJHR's judgment that the Assembly's decision is *ultra vires*. Chapter five provides a conclusion and recommendations and considers the potential for review in the enhancement of the respect for, protection, promotion and fulfilment of human rights in Africa.

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<sup>33</sup> As at 6 August 2010, the Protocol had been signed by 22 states, but has so far received only three ratifications, Burkina Faso, Libya and Mali. The Protocol requires 15 ratifications to come into force. See <http://www.africa-union.org/root/au/Documents/Treaties/list/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR>. (accessed on 23/10/2010).

<sup>34</sup> *Yogogombaye v Senegal* Application No. 001/2008, Judgment of 15 December 2009.

## CHAPTER TWO

### JUDICIAL REVIEW IN INTERNATIONAL LAW: A CONCEPTUAL FRAMEWORK

#### 2.1 Introduction

The doctrines of constitutionalism and the rule of law have permeated the discourse in the law of IOs in the recent past and they form the basis of the discussion in this study.<sup>1</sup> The doctrine of constitutionalism encompasses the obligation of organs of IOs to conduct their mandates in accordance with the powers granted to them under their constitutive instruments.<sup>2</sup> The doctrine is based on the reformation of the practice of IOs to conform to the substantive and procedural regularities contained in their constitutive documents and in general international law.<sup>3</sup> This doctrine is closely aligned to the doctrine of the rule of law<sup>4</sup> which aims to ensure an effective balance of power, where the exercise of political power is tempered by judicial controls.<sup>5</sup> The importance of the doctrine of the rule of law in the control of arbitrary use of power was aptly captured by Plato who stated that 'where law is subjected to some other authority....the collapse of the state is not far off, but if the law is the master of the government...then the situation is full of promise...'.<sup>6</sup> This statement is especially significant to IOs as it emphasizes the need for judicial controls and remedies in instances of arbitrary exercise of powers.

The upshot of the merger of the two doctrines in the law of IOs entails the requirement that decisions of IOs are based on their properly expressed or implied mandates as per their

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<sup>1</sup> See International Law Association (ILA), Berlin Conference Report 2004 'Accountability of International Organisations,' reprinted in (2004) 1 *International Organizations Law Review* 236-237.

<sup>2</sup> JV Bernstorff 'Procedures for decision-making and the role of law in international organisations' (2008) 9 *German Law Journal* 1961.

<sup>3</sup> As above.

<sup>4</sup> The rule of law is defined as 'a principle of governance in which all persons, institutions and states are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights norms and standards' – Former UNSG Kofi Annan in Report S/2004/6/6 of 23 August 2004 para 6.

<sup>5</sup> J Raz 'The rule of law and its virtues' (1977) 93 *Law Quarterly Review* 198-202.

<sup>6</sup> Quoted in JM Farral *UN sanctions and the rule of law* (2007) 31.

constitutive documents and general international law; failure to do so renders a decision *ultra vires* and thus illegal. How then are the *ultra vires* decisions of IOs corrected? The mechanism most suited to address such *ultra vires* decisions of IOs is review. This chapter looks at review in the municipal and international law spheres and identifies their similarities.

## 2.2 Judicial review in municipal law

The concept of judicial review is well-known in municipal legal jurisdictions the world over.<sup>7</sup> It burst into judicial consciousness after the celebrated decision of the United States' Supreme Court in the *Marbury v Madison* case, where the Supreme Court held that constitutions form the fundamental and paramount law of nations, and that any decision of any body of government repugnant to a constitution is void.<sup>8</sup> However, it should be noted that the precise nature, content and scope of review varies from one municipal order to another depending on the review powers vested in the courts. A study of review in each of the municipal orders is beyond the scope of this study and the author will only consider essential elements common across the different legal systems.

Review in municipal law contemplates the review of legislative, executive and judicial actions to determine whether or not they are consistent with the provisions of the constitution, statutes or other sources of law, or whether they are void and incapable of producing any legal effect.<sup>9</sup> There are two spheres of review at the municipal level: administrative and constitutional. Administrative review involves the scrutiny of acts or decisions of the three branches of government in relation to ordinary legislation and legal principles.<sup>10</sup> Constitutional review, on the other hand, looks at the action or decision in issue in light of higher fundamental laws, such as a

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<sup>7</sup> At least 160 states across the world recognize JR, see E de Wet *The chapter VII powers of the United Nations Security Council* (2004) 117.

<sup>8</sup> *Marbury v Madison* (1803) 1 Cranch 137, 2 L.Ed. 60, available at [http://www.law.cornell.edu/supct/html/historics/USSC\\_CR\\_0005\\_0137\\_ZO.html](http://www.law.cornell.edu/supct/html/historics/USSC_CR_0005_0137_ZO.html) (accessed on 20/09/2010).

<sup>9</sup> KH Kaikobad *The ICJ and judicial review: A study of the Court's powers with respect to judgments of the ILO and UN Administrative Tribunal* (2000) 12-13.

<sup>10</sup> Kaikobad (n 9 above) 17.

constitution,<sup>11</sup> violation of fundamental rights and liberties, and inconsistencies with state treaty and international law obligations.<sup>12</sup> Such review is either formal, dealing with issues of procedure, requisite majorities and other technical formalities, or substantive, requiring the court to look at the substantive legality of the relevant act or statute and determine whether it is consistent with the requisite standards.<sup>13</sup> Failure to conform to such fundamental laws leads to the review of such act or legislation by either striking it down, among other remedies, thus nullifying its adverse effects.<sup>14</sup>

### 2.3 The concept of judicial review in international law

Review in the law of IOs is 'the process through which a court determines whether an IO has acted substantively within its powers and procedurally in the correct manner'.<sup>15</sup> It can be traced to the practice of review in the municipal level. Review has extensively permeated the municipal legal arena to the point that it can be authoritatively said to have achieved the status of a general principle of law recognised by civilised nations.<sup>16</sup> However, the existence and scope of review in the international legal arena, especially with regard to the review of the decisions of IOs for legality, have generated many controversies.<sup>17</sup> Even though many jurists agree that

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<sup>11</sup> An infamous example is the review by the South African Appellate Court of the attempts by the Apartheid National Party to disenfranchise the non-white voters in the Cape Province in *Harris v Minister of the Interior* 1952 (2) SA 428(A) and *Minister of the Interior v Harris* (1952) 4 SA 769.

<sup>12</sup> Kaikobad (n 9 above) 14.

<sup>13</sup> An example is the review by the South African Constitutional Court of the 1996 Constitution to ensure that it conformed to the 34 Constitutional Principles contained in the Interim Constitution in *Ex Pate Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the republic of South Africa (First Certification judgment)* 1996 (4) SA 744 (CC) and *Certification of the Amended Text of the Constitution of the Republic of South Africa 1996 (Second Certification Judgment)* 1997 (2) SA 97 (CC).

<sup>14</sup> JM Pickeril *Constitutional deliberation in congress: The impact of judicial review in a separated system* (2004)40.

<sup>15</sup> E Lauterpacht 'Judicial review of the acts of international organisations' in LB de Chazourness & P Sands (eds) *International law, International Court of Justice and the nuclear weapons* (1999) 92.

<sup>16</sup> ICJ Statute, article 38(1)(c). For an extensive discussion on this and a similar conclusion, see de Wet (n 7 above) chapter three.

<sup>17</sup> See, for example, G Aringo-Ruiz 'The "federal analogy" and the UN Charter interpretation: A crucial issue' (1997) 8 *European Journal of International Law* 20-22; de Wet (n 7 above) (2004) 72-75.

there is need for a system of checks and balances in the functions and operations of IOs to ensure compliance with international law, the mechanism to achieve this desire remains elusive.<sup>18</sup> Therefore, to better appreciate the ability of review to fulfil this tall order, a preview of the systems where it has been used is imperative. The power of a judicial body to undertake review can either be express, provided for in its statute or the constitutive treaty, as exemplified by the EU system, or incidental, the tribunal exercising the power in a case properly before it, as exemplified by the UN system.

### 2.3.1 Incidental powers of review under the UN system

The UN Charter and the ICJ's Statute do not give the ICJ an express mandate to review the decisions of other UN organs, efforts to have express powers of review having been abandoned in San Francisco.<sup>19</sup> The lack of an express mandate for the ICJ to review has also been commented upon by several ICJ judges in cases and advisory opinions.<sup>20</sup> Does it therefore mean that the UNSC and the other organs have unlimited powers and the ICJ cannot in any situation review their decisions? Many ICJ judges and several jurists are in consensus that the ICJ possesses incidental powers of review and is capable of employing those powers to ensure that decisions of UN organs are not *ultra vires* their powers as provided by the UN Charter.<sup>21</sup> This view was endorsed by the International Criminal Tribunal for Yugoslavia (ICTY)<sup>22</sup> when it declared that even though the discretion of the UNSC under Chapter VII is wide, it does not mean that incidental review jurisdiction disappears, particularly in cases where there is a manifest contradiction with the principles and purposes of the UN Charter.<sup>23</sup> The Appeals

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<sup>18</sup> Akande (section 1.6 above note 23) 310-11; Lauterpacht (n 15 above) 94.

<sup>19</sup> For a discussion of Belgium's Dumbarton Oaks Proposals, see GR Watson 'Constitutionalism, judicial review and the world court' (1993) 34 *Harvard International Law Journal* 8-14; MJ Herdegen 'The "constitutionalisation" of the UN security system' (1994) 27 *Vanderbilt Journal of Transnational Law* 147; De Wet (n 7 above) 75.

<sup>20</sup> See section 1.6 above, note 24.

<sup>21</sup> For an extensive list of jurists writing on this topic, refer to section 1.6 above, note 20. See also, HWA Thirlway 'The law and the procedure of the ICJ 1960-1989, Part Eight' (1996) *British Yearbook of International Law* 68 note 243.

<sup>22</sup> Created by the UNSC through SC Res. S/RES/808 (1993) and SC Res. S/RES/827.

<sup>23</sup> *Prosecutor v Dusko Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, 2 October 1995, Case No. IT-94-1-AR72, reprinted in (1996) 35 *International Legal Material* 32 (*Tadic Case*).

Chamber further acknowledged that the UNSC as an organ of an IO is subject to constitutional limitations imposed by the UN Charter as the constitutional framework of the UN.<sup>24</sup>

How then does the ICJ exercise its incidental powers of review? Review can be undertaken either through its advisory opinion mandate<sup>25</sup> or through its contentious mandate,<sup>26</sup> each of which is explained below in turn. The advisory opinion mandate has been used extensively by the ICJ to review the legality of the actions of UN organs in relation to their mandates under the UN Charter.<sup>27</sup> This use of the advisory opinion has led jurists to observe that the ICJ has moved from being a participant in the process of peaceful settlement of inter-state disputes to a constitutional court advising the organs of the UN on matters concerning them, and thus now acts as a UN Court.<sup>28</sup>

However, the advisory opinion mandate has its limitations. Even though they have authoritative character, advisory opinions are not binding on the organs which requested them and also do not render the issue *res judicata*, limiting its effectiveness as a mechanism for review.<sup>29</sup> A debilitating limitation on the use of the advisory opinion as a mechanism for review is the discretion given to the organs, in requesting, and the ICJ in agreeing to give, an opinion on the particular issue. It makes it unlikely for an organ to request an opinion if the exercise of its mandate is clearly *ultra vires*, and the ICJ may also avoid giving an opinion if the matter is highly

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<sup>24</sup> *Tadic* case (n 23 above) paras 20-21.

<sup>25</sup> UN Charter, article 96 & ICJ Statute, article 65 allows the UNSC, the UNGA and other organs and specialized agencies to request advisory opinions on any legal matter.

<sup>26</sup> Statute of the ICJ, chapters II & III; Rules of Procedure of the ICJ, Rule 87.

<sup>27</sup> Examples include: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion (1971) ICJ Reports 16, at 45-54; *Certain Expenses of the United Nations*, Advisory Opinion (1962) ICJ Reports 151 at 168; *Competence of the General Assembly for Admission of a State to the UN*, Advisory Opinion (1950) ICJ Reports 4. For a more extensive discussion of the cases, see Watson (n 19 above) 14-22.

<sup>28</sup> KJ Keith *The extent of the advisory jurisdiction of the International Court of Justice* (1971) 239; T Sugihara 'The advisory function of the International Court of Justice' (1974) 18 *Japanese Annual of International Law* 23 45-47.

<sup>29</sup> *Kaikobad* (n 9 above) 56-57.



controversial and politically sensitive.<sup>30</sup> Despite the limitation, it remains a flexible mechanism that can be used to resolve wide-ranging disputes, be they concrete or abstract.

The contentious jurisdiction of the ICJ has, on the other hand, played a less prominent role in the review of the decisions of the UN organs. Its use may have crystallized in the *Lockerbie*<sup>31</sup> and *Genocide*<sup>32</sup> cases, where challenges were made against binding UNSC Resolutions 748(1992) and 883(1993), and Resolution 713(1991), respectively. The contentions were, however, settled diplomatically, leaving many writers rueing the missed opportunity for the ICJ to expressly demarcate and assert its review mandate.<sup>33</sup>

The contentious jurisdiction has its own limitation with regard to the review of decisions of UN organs as only states can be parties to a dispute in the ICJ and IOs are only allowed to transmit relevant information on the request of, or authorisation by, the Court.<sup>34</sup> Further, even though the ICJ judgments are binding,<sup>35</sup> this is only with regard to the parties to the dispute and only in relation to that particular dispute. It is, therefore, impossible to apply that judgment to an IO even if it participated in the proceedings as per article 34(2) of the Statute of the Court.

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<sup>30</sup> See M Pomerance *The advisory function of the international court in the League and UN eras* (1973) chapter 5; G Fitzmaurice 'The law and procedure of the ICJ, 1951-54: Questions of jurisdiction, competence and procedure' (1958) 38 *British Yearbook of International Law* 21-22.

<sup>31</sup> *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom and Libyan Arab Jamahiriya v United States of America) Provisional Measures*, (1992) 3 ICJ Report 114 at 155-156 (hereafter '*Lockerbie case (provisional measures)*').

<sup>32</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crimes of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))*, *Provisional Measures*, Order of 8 April 1993,(1993) ICJ Report (*Genocide Case*).

<sup>33</sup> For an extensive discussion on the two cases and their relevance to the ICJ's use of its contentious jurisdiction, see: de Wet (n 7 above) chapter 2; Martenczuk (section 1.6 above, note 23) 517- 525; Watson (n 19 above) 22-28; Akande (n 18 above) 311-312 note 8; Herdegen (n 19 above) 143-145.

<sup>34</sup> Statute of the ICJ, article 34.

<sup>35</sup> Statute of the ICJ, article 60.

### 2.3.2 Express powers of review under the EU system

The review powers of the ECJ can be traced to the French Council of State (*Conseil d'Etat*) and is based on the French procedure of *recours pour excès de pouvoir*, which loosely translated means 'ultra vires appeal against the abuse of power'.<sup>36</sup> This was enhanced by the adoption and application of principles of international law, and formed the review jurisdiction of the ECJ as contained in the Treaty of Rome.<sup>37</sup>

The EU system is the most striking example of an express treaty-based power of review, and the Treaty on the Functioning of the EU (TFEU)<sup>38</sup> empowers the ECJ to 'review the legality of the acts adopted jointly by the European Parliament and the Council, acts of the Council, the Commission and of the European Central Bank (ECB) other than recommendations and opinions, and the acts of the European Parliament intended to produce legal effects *vis-à-vis* third parties'.<sup>39</sup> It further provides the grounds upon which such acts can be reviewed: lack of competence, infringement of essential procedural requirements, infringement of the Treaty or any rule of law relating to its application, or misuse of powers.<sup>40</sup> It gives authorization to the member states, the Council or the Commission to seize the review competence of the ECJ.<sup>41</sup> The Treaty also provides a limited opportunity for natural and legal persons to seize the review jurisdiction of the ECJ if a decision is directed at or concerns them.<sup>42</sup> Article 264 of TFEU gives the ECJ the authority to declare *ultra vires* decisions void, and the relevant organ is required to comply.<sup>43</sup>

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<sup>36</sup> M Lagrange 'The role of the Court of Justice of the European Communities as seen through its case law' (1961) 26 *Law and Contemporary Problems* 403.

<sup>37</sup> JM Josselin & A Marciano, 'How the Court made a federation of the EU' (2006) 68, available at <http://www.springerlink.com/content/f3vw032557232164/fulltext.pdf> (accessed on 19/09/2010).

<sup>38</sup> TFEU (see section 1.6 above, note 29).

<sup>39</sup> TFEU, article 263.

<sup>40</sup> TFEU, article 263, para 2.

<sup>41</sup> As above.

<sup>42</sup> TFEU, article 263 para 4.

<sup>43</sup> TFEU, article 266.

Article 265 TFEU empowers the ECJ, in an action instituted by member states or other EU organs, to review the failure or omission of EU organs to act in infringement of the EU Treaties. Article 267 further confers the ECJ jurisdiction to interpret the EU Treaties, and to validate and interpret acts of EU organs established by the Council where such issues have been raised in the court of a member state.<sup>44</sup> The review powers of the ECJ are discussed more substantively in Chapter four of this study in comparison with review in the ACJHR.

#### **2.4 Similarities between review in the international and municipal spheres**

Several similarities can be drawn from the practice of review in the municipal and international spheres. First, even though some international tribunals may undertake review in the administrative sphere, as discussed above in relation to municipal review, the majority of the international tribunals embrace constitutional review and use this to scrutinize the decisions of IOs *vis-à-vis* their constitutive instruments. Secondly, as in the municipal sphere, review in the international sphere scrutinizes the validity of decisions of the different organs of an IO which may be administrative, legislative or judicial.<sup>45</sup> Thirdly, in its exercise of this power, an international tribunal will look at the constitutive instrument of the IO in question, relevant treaties and conventions, customary international law, and general principles of law.<sup>46</sup> This is similar to the practice of domestic tribunals that have recourse to the constitution of a state, its legislation, and general legal principles when determining the validity of decisions. Fourthly, review at the international level borrows from the centralized review systems in the municipal sphere, as it acknowledges the possibility of review being conducted either in a live dispute through the contentious jurisdiction or as abstract constitutional review through the advisory opinion jurisdiction. Lastly, as in the municipal sphere, international tribunals can also review decisions of IOs for formal or substantive validity.<sup>47</sup>

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<sup>44</sup> AS Sweet 'The European Court of Justice and the judicialisation of EU governance' (2010) *Living Reviews in EU Governance* 10.

<sup>45</sup> Kaikobad (n 9 above) 27.

<sup>46</sup> Akande (n 18 above) 315-25.

<sup>47</sup> Lauterpatcht (n 15 above) 92.

## **2.5 Conclusion**

The need for the entrenchment of the doctrines of constitutionalism and the rule of law in the operations of IOs cannot be overemphasized, taking into account the important roles and the wide powers that IOs have assumed in international relations. The mechanism most suited to achieve institutional balance, and to provide proper checks and balances in the use of institutional power is judicial review conducted by impartial judicial authorities. Even though the doctrine of review was first established in municipal jurisdictions, it has achieved significance in international law and is exercised by international judicial tribunals through express and incidental jurisdiction to ensure the legality of decisions of IOs. This conceptual framework of review in international law, therefore, lays the basis for the discussion of review in the subsequent chapters.

## CHAPTER THREE

### THE LEGAL OBLIGATION OF THE ASSEMBLY TO CONSIDER HUMAN RIGHTS NORMS AND STANDARDS IN EXECUTING ITS MANDATE

#### 3.1 Introduction

Developments in international relations have seen states transfer power to IOs with supra-national decision-making authority, with adverse consequences for the traditional accountability structures and mechanisms inherent in the state systems.<sup>1</sup> In Africa, this has led to the formation of the AU with the Assembly as its supreme organ.<sup>2</sup> The Assembly has enormous powers, misuse of which, may have adverse consequences for the protection of human rights.<sup>3</sup> This has led to several questions with regard to its mandate, especially in the field of human rights. First, what are the sources of its powers, and are those powers unlimited? Secondly, does it have human rights obligations, and is it legally bound to consider those obligations when making decisions under its mandate? Thirdly, are its decisions subject to judicial review? These are some of the questions this chapter will strive to answer and put into perspective.

#### 3.2 Sources of the powers of the Assembly

In discussing the limitations of the powers of the Assembly, it is important to first understand the sources of those powers and how they can be used *intra vires*. The powers granted to the Assembly are found explicitly in the Act<sup>4</sup> and the Rules of Procedure.<sup>5</sup> These express powers are important for the achievement of the purposes and objects of the AU. They allow the Assembly to undertake express functions, such as, standard-setting or rule-making,<sup>6</sup> the

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<sup>1</sup> W Kalin & J Kunzli *The law of international human rights protection* (2009) 86.

<sup>2</sup> For extensive discussions on the formation of the AU, see K Kindiki, 'The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal' (2003) 3 *African Human Rights Law Journal* 97.

<sup>3</sup> See section 1.1 above note 5.

<sup>4</sup> AU Act, articles 9, 23 & 30

<sup>5</sup> Rules of Procedure of the Assembly, Rule 4.

<sup>6</sup> Article 9(1)(a); for a more general analysis, see JE Alvarez 'International organizations: Then and now' (2006) 100 *American Journal of International Law* 333-335.

determination of particular courses of conduct of the AU,<sup>7</sup> and the distribution of resources to the other organs of the AU.<sup>8</sup>

The Assembly also has wide implied powers necessary for it to achieve the AU's purposes and objects.<sup>9</sup> Even though these implied powers are not listed by the Act, they are inherent in the practice of IOs. The availability of implied powers to organs of IOs was acknowledged by the ICJ in the *Namibia Opinion*<sup>10</sup> in reference to article 24(2) of the UN Charter. The ICJ asserted that the reference to specific powers under article 24(2) 'does not exclude the existence of general powers to discharge the responsibilities for the maintenance of international peace and security'.<sup>11</sup> The ICJ had earlier in the *Reparations for Injuries Opinion*<sup>12</sup> stressed, in relation to the power of the UN to commence an international action, that powers not specifically granted in the constitutive treaty could be implied from the IO's legal personality and developed in practice.<sup>13</sup> Explicit treaty recognition of the implied powers of organs of IOs is exemplified by article 235 of the Treaty Establishing the European Community (EC Treaty).<sup>14</sup> Implied powers thus provide IOs with the flexibility they require to respond to ever-changing situations and circumstances.

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<sup>7</sup> The Assembly decides on, and approves, the activities of the other organs, such as, sanctions (articles 9(1)(b), 23 & 30), intervention in member states (articles 4(h) & 9(1)(g), and approval of reports of other organs (article 9(1)(b) &(e)), among others.

<sup>8</sup> Control of finances, article 9(1)(f).

<sup>9</sup> N Blokker, 'Beyond "Dili": On the powers and practice of international organisations' in G Kreijen (ed) *State sovereignty and international governance* (2002) 302; HG Schermers & N Blocker *International institutional law* (1995) 158-163.

<sup>10</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion (1971) ICJ Reports 16 (hereafter '*the Namibia Opinion*').

<sup>11</sup> *The Namibia Opinion* (n 10 above) 52.

<sup>12</sup> *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion (1949) ICJ Reports 174, (hereafter '*Reparations for Injuries Opinion*').

<sup>13</sup> *Reparations for Injuries Opinion* (n 12 above) 179-182.

<sup>14</sup> Blocker (n 9 above) 302.

The Assembly thus has both express and implied powers necessary for it to carry out its mandate and functions. These powers are, however, not infinite and should adequately be checked by the ACJHR through its review mandate to ensure that they are used legitimately, are within the scope of the Act, and are geared towards the achievement of the purposes and objectives of the AU.

### **3.3 Limitations of the powers of the Assembly**

Limitations of the institutional and operational powers of the Assembly can be derived from two sources: first, the institutional and procedural limitations contained in the Act; and secondly, the substantive limitations from rules and principles of international law and the general practice of IOs.<sup>15</sup> A thorough exposition of these limitations is beyond the scope of this study, and this section only undertakes a cursory glance at the relevant standards of limitation.

#### **3.3.1 Institutional and procedural limitations in the Act**

As an organ drawing its mandate from the Act, the Assembly is bound to abide by the provisions of the Act. This was confirmed, with regard to the UNSC, by the ICTY in the *Tadic* case,<sup>16</sup> that the UNSC is subjected to the constitutional limitations present in the Charter, and that despite its broad powers, it cannot go beyond the jurisdiction of the UN at large and must also respect the specific limitations derived from the internal division of powers within the UN.<sup>17</sup> This constitutional limitation had been expressed earlier by the ICJ in its Advisory Opinion on *Condition of Admission of States to Membership in the UN* where it stated that 'the political character of an organ cannot release it from observance of treaty provisions established by the Charter when they constitute limitations on its powers and criteria for its judgments'.<sup>18</sup>

The Assembly is, therefore, under a duty to abide by the constitutional and institutional limitations laid down in the Act, and any decisions *ultra vires* its mandate should be subjected to

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<sup>15</sup> D 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) 165 ; ILA, New Delhi Conference Report, *Third report consolidated, revised and enlarged versions of recommended rules and practices (RRPs)* (2002) 2.

<sup>16</sup> *Tadic* case (section 2.3.1 above, note 23) 32

<sup>17</sup> *Tadic* case (n 16 above) para 28.

<sup>18</sup> *Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion*, (1948) ICJ Reports 64.

review.<sup>19</sup> This is a solemn duty owed to the member states collectively and individually and by extension to all the peoples of Africa collectively.<sup>20</sup>

### 3.3.1.1 Human rights limitations

The promotion and protection of human rights is one of the pillars on which the AU is built and all the decisions of its organs must be aimed at fulfilling this important goal. The human rights limitations on the powers of the Assembly are encompassed in the purposes and principles of the AU as captured in the Preamble, the objectives<sup>21</sup> and the principles.<sup>22</sup> The Preamble encapsulates the determination of the AU to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and ensure good governance and the rule of law.<sup>23</sup>

Constitutionalism, promotion of the rule of law, and respect for human rights permeate the Act and form a major mandate of the AU as is reflected in more than 6 of its 14 objectives and in more than 8 of its 16 guiding principles. Some of the specific objectives include:<sup>24</sup> encouragement of international co-operation taking due account of the UN Charter and the Universal Declaration of Human Rights; promotion of democratic principles and institutions, popular participation and good governance; promotion and protection of human and peoples' rights in accordance with the African Charter on Human and Peoples Rights and other relevant human rights instruments, among others. The guiding principles which reflect human rights standards include:<sup>25</sup> participation of the African people in the activities of the AU; right of intervention by the AU in grave circumstances, such as, war crimes, genocide and crimes

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<sup>19</sup> ILA New Delhi Report (n 15 above) 5

<sup>20</sup> As above.

<sup>21</sup> AU Act, article 3.

<sup>22</sup> AU Act, article 4.

<sup>23</sup> AU Act, Preamble para 9. See also VO Nmehielle 'The African Union and African renaissance: A new era for human rights protection in Africa?' (2003) 7 *Singapore Journal of International and Comparative Law* 433.

<sup>24</sup> AU Act, articles 3(e)-(k) respectively.

<sup>25</sup> AU Act, articles 4(c)-(p) respectively.



against humanity, as well as in situations that seriously threaten legitimate order; respect for democratic principles, the rule of law, human rights and good governance, among others.

Unlike the UN Charter which specifically provides that the UNSC must act in accordance with the purposes and principles of the UN,<sup>26</sup> the Act does not expressly limit the Assembly in that regard. However, this is a limitation that has been recognised as a general rule that binds all IOs and their organs.<sup>27</sup> The human rights imperatives contained in the purposes and principles of the Act are affirmed in binding treaties that the Assembly is bound to consider in making its decisions. Article 3(e) of the Act specifically calls on the Assembly to take due account of the UN Charter and the Universal Declaration. Article 3(h) further enjoins it to take into account the African Charter and other relevant human rights instruments when making decisions. These relevant human rights instruments include regional<sup>28</sup> and international instruments.<sup>29</sup> The practice of using the standards contained in international human rights treaties as review standards for the activities of organs of IOs has been exemplified by the ECJ in its review of the legality of the decisions of EU organs. Article 6 of the Maastricht Treaty,<sup>30</sup> like article 3(h) of the Act, sets the human rights review standards as guaranteed by the European Convention on Human Rights (ECHR).<sup>31</sup> It is, therefore, imperative for the Assembly to consider the adverse human rights impacts of its decisions and to evaluate the necessity and proportionality of its

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<sup>26</sup> UN Charter, article 24(2).

<sup>27</sup> Schweigman (n 15 above) 167.

<sup>28</sup> These include: The African Charter on the Rights and Welfare of the Child (ACRWC); The Protocol to the African Charter on the Rights of Women in Africa, among others.

<sup>29</sup> For an extensive discussion, see F Viljoen 'Communications under the African Charter: Procedure and admissibility', in Evans & Murray (eds) *The African Charter on human and peoples' rights: The system in practice* (2008) 131-132.

<sup>30</sup> Treaty on the European Union (TEU) as amended by the Lisbon Treaty, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF> (accessed on 13/09/2010)

<sup>31</sup> D Cortright & E de Wet '*Human rights standards for targeted sanctions*' Sanctions and Security Research Program, Project of the Fourth Freedom Forum and the Kroc Institute for International Peace Studies. January 2010, available at [www.sanctionsandsecurity.org](http://www.sanctionsandsecurity.org) (accessed on 12/09/2010).

decisions in relation to the human rights norms and standards contained in the relevant treaties.<sup>32</sup>

### 3.3.1.2 Procedural limitations

Procedures are important in the transformation of arbitrary political power into the legitimate exercise of public functions in the interests of member states.<sup>33</sup> Procedure enhances the formalisation and rationalisation of the exercise of public power and leads to the legitimacy and enforceability of the resultant decisions.<sup>34</sup> Breaches of procedures thus render decisions illegitimate, unenforceable and reviewable by judicial tribunals. Procedural requirements entail the principles of legality, proportionality and impartiality, right of access to information and the right to a fair hearing, an obligation to give reasons for decisions and to provide for appeals.<sup>35</sup> The Act<sup>36</sup> and the Rules of Procedure<sup>37</sup> of the Assembly provide for the manner in which decisions are to be made by the Assembly, and any decision made contrary to the procedures are *ultra vires*.

### 3.3.2 Substantive limitations derived from rules and principles of international law and general practices of international organizations.

As an organ of the AU, an IO with legal personality, the Assembly is subject to international law and is thus legally obligated to carry out its mandate and to exercise its powers in accordance with international law.<sup>38</sup> The question of legal personality of IOs was settled by the ICJ in the *Reparations for Injuries Opinion* where the Court affirmed, in relation to the UN, that an

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<sup>32</sup> Schweigman (n 15 above) 171.

<sup>33</sup> JV Bernstorff 'Procedures for decision-making and the role of law in international organisations' (2008) 9 *German Law Journal* 1950.

<sup>34</sup> Bernstorff (n 33 above) 1951.

<sup>35</sup> Bernstorff (n 33 above) 1952.

<sup>36</sup> AU Act, article 7.

<sup>37</sup> Rules of Procedure of the Assembly, Rule 6 and sections III, IV & V of Chapter I.

<sup>38</sup> ILA New Delhi Report (n 15 above) 9; see *Interpretation of the Agreement of 25 March 1950 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, (1980) ICJ Reports 73 90.

international legal personality was “indispensable” if the UN was to achieve its purposes and principles under the Charter, and that its functions and rights could only be understood on the premise of a large measure of international personality.<sup>39</sup> The Court further affirmed that IOs were subjects of international law capable of possessing rights and duties.<sup>40</sup>

The International Law Commission (ILC) in stressing the obligation of IOs to be governed by international law asserts that ‘states cannot escape the governance of customary international law and the general principles of international law by creating an IO that will not be bound by the legal limits imposed upon its member states; that would entail an unacceptable infringement on the rights of third parties’.<sup>41</sup> The ILC Draft Rules on Accountability by IOs stresses this point by stating that membership of an IO does not entail a reduction in state responsibility for their international law obligations.<sup>42</sup> The entrenchment of this fundamental concept is expounded by Brownlie who argues that states cannot through delegation avoid their responsibilities under international law, thereby emphasizing the need for accountability and effectiveness in the decisions of IOs.<sup>43</sup> Some of the limitations based on substantive international law are discussed hereunder.

### 3.3.2.1 Customary international law

Principles of customary international law form a major human rights limitation on the decision-making powers of the Assembly and must be taken into account if a decision is to escape scrutiny through judicial review.<sup>44</sup> The very essence of accountability of IOs for their *ultra vires*

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<sup>39</sup> *Reparations for Injuries Opinion* (n 12 above) 179.

<sup>40</sup> As above; See also P Malanczuk *Akehurst's modern introduction to international law* 7 rev ed (1997) 93-94.

<sup>41</sup> ILC Commentary on the Draft Convention on the law of treaties between states and international Organisations and between international Organisations, (1982) 2 *Year Book of the International Law Commission* 56; For similar arguments, see Dissenting Opinion of Judge Bedjaoui in *Lockerbie case (provisional measures)* (section 2.3.1 above note 31) 155-156.

<sup>42</sup> ILC New Delhi Report (n 15 above) 13.

<sup>43</sup> I Brownlie, ‘State Responsibility: the problem of delegation’ in K Ginther *et al* (eds) *Völkerrecht zwischen normative Anspruch und politischer Realität* (1994) 300-301.

<sup>44</sup> E de Wet ‘The role of the European Court in the development of a hierarchy of norms within international law: Evidence of constitutionalism?’ (2009) 5 *European Constitutional Law Review* 289.

acts has attained the status of customary international law.<sup>45</sup> Even though this is a generally accepted fact, the problem lies in determining which particular norms have attained the status of customary international law, and to what extent they actually set limits on the concrete activities of IOs. These questions, though important, are beyond the scope of this study.

Customs that have attained the status of peremptory norms of *jus cogens* or obligations *erga omnes* are, however, more ascertainable and have a stronger limiting effect on the activities of IOs.<sup>46</sup> *Jus cogens* has fundamental and overriding characteristics, and entails an obligation of a special nature which requires that decisions of the Assembly cannot be unfettered where they conflict with peremptory norms of international law.<sup>47</sup> The importance of *jus cogens* in limiting the actions of IOs, with regard to the UNSC, was captured by Judge *ad hoc* Lauterpatcht in the *Genocide Case* when he posited that 'It cannot be said that the UNSC can act free of all legal controls...the prohibition of genocide has long been regarded as one of the few undoubted examples of *jus cogens* and it is unacceptable for a UNSC resolution to contemplate or require participation in the same'.<sup>48</sup> The Assembly is, therefore, obliged to respect peremptory norms of international law in its decisions.<sup>49</sup>

### 3.3.2.2 General principles of international institutional law

The general principles constitute an important limitation on the powers of the Assembly especially due to the controversy and unsettled debate as to whether or not IOs are bound by treaties they have not expressly ratified. Several principles, some of which are contained in the Act, provide important standards and benchmarks against which the decisions of the Assembly can be reviewed. Some of the general principles are noted hereunder in turn.

First, is the principle of attributed competence which is based on the fact that IOs are not the original subjects of power, and depend on powers attributed to them from the member states

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<sup>45</sup> ILA Berlin Report 2004 (section 2.1 above, note 1) 254.

<sup>46</sup> See ILC Report of the 58th Session, UN Doc. A/61/10 (2006) 421.

<sup>47</sup> Vienna Convention on the Law of Treaties, article 53.

<sup>48</sup> *Genocide Case* (section 2.3.1 above, note 32) para 39.

<sup>49</sup> S Lamb 'Legal limits to UN Security Council powers, in Goodwin-Gilland & Talmon (eds) *The reality of international law: Essays in honour of Ian Brownlie* (1999) 372.

through their constitutive instruments.<sup>50</sup> It limits the decisions of IOs to those they are expressly or impliedly empowered to make with the aim of fulfilling their purposes and the principles.<sup>51</sup> The Assembly depends on the Act for attribution of its powers and functions, and is thus limited in its powers as they must be justified by reference to the Act.<sup>52</sup>

Secondly, the principle of good governance, which entails the management of public affairs in a transparent, accountable, participatory, responsive and equitable manner showing due regard for democratic principles, also limits the decision-making powers of the Assembly. It requires adherence to the rule of law, institutional checks and balances, and effective oversight agencies.<sup>53</sup> Promotion of good governance is not only a fundamental goal of the AU but also one of its central guiding principles.<sup>54</sup>

The third principle, good faith, is the cornerstone of all the decisions of IOs and contains the standards of honesty, fairness and reasonableness.<sup>55</sup> The limitation is based on the Vienna Convention on the Law of Treaties.<sup>56</sup> This has been supplemented by the doctrine of inter-temporal law<sup>57</sup> which requires that rights must be maintained contemporaneously with the changes brought about by the development of international law.<sup>58</sup> This limits the Assembly to make decisions in good faith and to interpret their powers, as provided in the Act, in light of developments in international law.

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<sup>50</sup> AV Bogdandy 'General principles of international public authority: Sketching a research field' (2008) 9 *German Law Journal* 1934.

<sup>51</sup> *Reparations for Injuries Opinion* (n 12 above) 185.

<sup>52</sup> Lauterpacht (section 2.3.1 above, note 15) 93.

<sup>53</sup> C Sentiso 'International Cooperation for Democracy and Good Governance: Moving Toward a Second Generation?' (2001) 13 *European Journal of Development Research* 154.

<sup>54</sup> AU Act, articles 3(g) & 4(m).

<sup>55</sup> ILA New Delhi Report (n 15 above) 5.

<sup>56</sup> Vienna Convention (n 47 above) preamble para 3, & articles 26 & 31.

<sup>57</sup> JG Merrills *The development of international law by the European Court of Human Rights* (1988) 74.

<sup>58</sup> C Beyani 'The legal premises for the international protection of human rights' in Goodwin-Gilland & Talmon (eds) *The reality of international law: Essays in honour of Ian Brownlie* (1999) 30.

The last principle, precaution, requires the Assembly, in its decision-making, to take steps to ensure that no unnecessary harm is occasioned both to the member states and third parties, especially the civilian populations, or to take steps to minimize those risks.<sup>59</sup> It enhances accountability and reduces the adverse effects of decision of IOs.<sup>60</sup> It binds the Assembly to take all factors into account and to critically balance the necessity and proportionality of its decisions before such decisions are made.

### 3.4 The legality of the Assembly's decisions in the Bashir case

This section briefly examine the legality of the Assembly's decision in issue in this study, as delineated in section 1.2 above, in light of the limitations discussed in section 3.3 above. To determine whether the Assembly had the power to make the Bashir decision,<sup>61</sup> recourse is to be had to the Act. According to the ICJ in the *1969 Nuclear Weapons (WHO) Advisory Opinion*,<sup>62</sup> 'in order to delineate the field of activity or the area of competence of an IO, one must refer to the relevant rules of the organisation and, in the first place, to its constitution'.<sup>63</sup> The Act and Rules of Procedure entrust the Assembly with extensive decision-making powers to enable it to guide the AU in the achievement of its purpose and objectives as shown in section 3.2 above. However, the exercise of such powers is limited by human rights norms and standards and general principles of international law.

In the decision not to co-operate with the ICC in the arrest of President Bashir, the reasons presented were that the prosecution would have adverse consequences on the peace process in Darfur and that the action was taken without due regard to sustainable peace in Sudan.<sup>64</sup>

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<sup>59</sup> ILA New Delhi Report (n 15 above) 11.

<sup>60</sup> ILA, Berlin Report 2004 (n 45 above) 270.

<sup>61</sup> For an extensive discussion on the Darfur situation leading to the indictment of the Sudanese President, see Ssenyonjo (Section 1.2 above, note 19) 205-225.

<sup>62</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion (1996) ICJ Report 66 (hereafter '*WHO Nuclear Weapons Opinion*').

<sup>63</sup> *WHO Nuclear Weapons Opinion* (n 62 above) 74.

<sup>64</sup> SO Ouma 'The politics of international criminal justice: The ICC's arrest warrant for Bashir and the AU's neo-colonial conspirator thesis' in CB Murungu et al (eds) *Prosecuting international crimes in Africa* (2010) 127 (forthcoming – on file with author).

These arguments are contrary to entrenched theory that positive and lasting peace can only be achieved through the realisation of justice and respect for human rights and fundamental freedoms.<sup>65</sup> The fight against impunity, and for the vindication of human rights violations, especially to the level of atrocities witnessed in Darfur, should not be viewed as impediments to the achievement of positive peace in Darfur; rather, they form essential avenues for the achievement of lasting peace and tranquillity not only in Darfur, but the entire State of Sudan.

The Assembly decision, therefore, denies the survivors and victims of human rights atrocities in Darfur justice, reparations and the vindication of rights, and is against the express human rights obligations of the Assembly as discussed in section 3.3.1 above.<sup>66</sup> The ECJ addressed the issue of denial of justice and the right to judicial protection under article 6(2) of the EU Treaty in the *Segi* case,<sup>67</sup> which concerned the implementation of measures adopted by the EU through its Common Positions in relation to UNSC Resolution 1373.<sup>68</sup> In the exercise of its review functions, the ECJ held that EU law provided for an avenue of judicial protection and emphasized the applicants' right to a remedy and access to courts of law.<sup>69</sup> Further, in the *Kadi* case, similarly dealing with anti-terrorism resolutions of the UNSC, the ECJ stressed the importance of access to justice and the right to a fair trial.<sup>70</sup> The failure of the Assembly to consider the human rights implications of its decision on the victims in Darfur negates the legality of its decision and invites review of the decision by the ACJHR.

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<sup>65</sup> NA Welsh 'Remembering the role of justice in resolution: Insights from procedural and social justice' (2004) 54 *Journal of Legal Education* 49-50.

<sup>66</sup> The right to a remedy which entails both the procedural right of access and the substantive remedy is a general principle of law that has been recognised as a norm of customary international law, see ILA Berlin Report 2004 (n 45 above) 266.

<sup>67</sup> *Segi, Araitz Zubimendi Izaga, Aritza Galarraga v Council of the European Union*, Case C-355/04 (2007) ECR I-01657.

<sup>68</sup> E de Wet 'Holding international institutions accountable: The complementary role of non-judicial oversight mechanisms and judicial review' (2008) 9 *German Law Journal* 2003 note 70.

<sup>69</sup> *Segi* (n 67 above) paras 51-54

<sup>70</sup> *Yassin Abdulla Kadi & Al Barakat International Foundation v Council & Commission*, Cases 402/05 & C-415/05, 3 September 2008, paras 316-326.

The Bashir decision specifically contravenes the solemn undertakings and obligation of the AU member states, which are also member states of the UN and signatories to the UN Charter, with regard to article 103 of the Charter.<sup>71</sup> In relation to the obligations under article 103, the ICJ in the *Lockerbie case* emphasized that member states are obliged to respect and accept resolutions made under the Charter, and that these prevail over obligations under any other treaty.<sup>72</sup> The Act-based competencies of the Assembly cannot, therefore, be used to triumph over Charter obligations as contained in UNSC Resolution 1593 referring the Darfur situation to the ICC.

The UNSC is charged with the mandate of the maintenance of international peace and security,<sup>73</sup> and this mandate was enhanced by the adoption of Resolution 1314 of 2000 which, in paragraph 9, specifically prohibits the deliberate targeting of civilian populations and other protected persons, and the committing of systematic, flagrant and widespread violations of international law, acknowledging this to constitute a threat to international peace and security. The UNSC has the sole and primary responsibility for the determination of situations threatening international peace and security. In its adoption of Resolution 1593 above, it had considered the balance between the need for international justice and the imperatives for peace in Darfur, and came to a conclusion that the need for international justice overrode the concerns for peace in Darfur. Should the AU Assembly, without any specific mandate on international peace and security, be allowed to contradict the above UNSC determination of the need for justice in Darfur, and ask AU member states to blatantly violate a binding UNSC Resolution in utter disregard of article 103 of the UN Charter? I think not. It would be a travesty of law, and a betrayal of the universal need for justice should the AU Assembly's decision be raised successfully against the protection of human rights and the fight against impunity in Africa. The AU should not be considered a shield against the reach of international criminal law, and as a protection for those who trample underfoot the most elementary rights of humanity.<sup>74</sup>

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<sup>71</sup> For analysis of this obligation, see section 1.2 above note 22.

<sup>72</sup> *Lockerbie case* (n 41 above) para 42.

<sup>73</sup> UN Charter, article 24.

<sup>74</sup> *Tadic case* (n 16 above) para 58.



The decision also contravenes customary international law standards which specifically identify crimes against humanity and genocide, crimes with which Bashir is charged, as *jus cogens* crimes, and calls on member states to ensure the investigation, prosecution and punishment of those crimes.<sup>75</sup> In this regard, the Assembly's decision can be equated to UNSC Resolution 713 which imposed an arms embargo upon Bosnia, thereby unwittingly aiding the commission of genocide in Bosnia.<sup>76</sup> Judge *ad hoc* Lauterpatcht emphasized that this was against a well-established *jus cogens* rule.<sup>77</sup> In making this decision, the Assembly is calling on its member states to become supporters and collaborators in the commission of war crimes, crimes against humanity, and the possible genocide in Darfur, crimes having the status of *jus cogens*.<sup>78</sup> As has been emphasized above, states cannot form IOs so as to abdicate their responsibilities under international law, and thus the AU bears the collective duty of all its member states to ensure that international customary law crimes are investigated, prosecuted and punished.<sup>79</sup> In adopting the resolution and instructing its members not to co-operate with the ICC in these endeavours, the Assembly was thus in breach of international customary law, and such use of its decision-making powers should be reviewed.

The Assembly also breached fundamental general principles of law as discussed in section 3.3.2.2 above. Even though it couched its decision under the precautionary principle with the aim of achieving peace in Darfur, it failed to consider the principles of good faith, necessity, proportionality, objectivity, impartiality, due diligence, good governance, and the rule of law.<sup>80</sup> To

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<sup>75</sup> The Rome Statute of the International Criminal Court July 17, 1998, 2187 U.N.T.S. 90, part II. It only contains crimes that have achieved the status of customary international law.

<sup>76</sup> Akande (section 1.6 above note 23) 322.

<sup>77</sup> *Genocide case* (n 48 above) 441 para 102.

<sup>78</sup> MC Bassiouni 'International crimes: *Jus cogens* and obligation *erga omnes*' (1996) 59 *Law & Contemporary Problems*, 63 67.

<sup>79</sup> For a more in-depth analysis, see ILA Berlin Report (n 45 above) 243-245.

<sup>80</sup> The decision conflicts with credible reports, including a report commissioned by the AU itself, on Darfur indicating the massive violations of human rights, and the need for justice and accountability for the crimes. The reports on Darfur include: UN High Commissioner for Human Rights, Situation of Human Rights in the Darfur Region of the Sudan (7 May 2004) UN Doc E/CN.4/2005/3; and Report of the African Union High-Level Panel on Darfur (AUPD), October 2009, paras 41–127, among others.

many of the Heads of State and Government in the Assembly, the decision was not made in good faith but was replete with a preoccupation for self-preservation due to their own violation of human rights in their backyards. To them, it was not whether the non-prosecution of Bashir would enhance the peace process in Darfur, but rather a keen desire not to set a precedent that could be used against them when their turn came to face justice for human rights atrocities.<sup>81</sup> Such a blatant abuse of authority in disregard for international law cannot and should not be tolerated if Africa is to claim its rightful place among the community of nations in international relations. The need for the ACJHR to provide proper checks and balances at the AU decision-making level and to ensure responsible use of organisational power to achieve AU purposes and objectives cannot therefore be overemphasized.

Like the ECJ which has used the right to be heard and the right to a remedy to review the decisions of the organs of the EU,<sup>82</sup> the ACJHR can use the provisions of the African Charter<sup>83</sup> to review the legality of the Bashir decision. It can further rely on the standards set in the Universal Declaration<sup>84</sup> and the ICCPR,<sup>85</sup> among others.<sup>86</sup> Even though these human rights standards are not absolute and can be limited, such limitation can only be under specific conditions, must have a legitimate aim for the achievement of the principles and objectives of the AU, and must also conform to the principles of necessity and proportionality.<sup>87</sup> The ACJHR should, though paying deference to the Assembly's appreciation of the facts and the circumstances in Darfur, be able to determine that the Assembly either blatantly abused its

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<sup>81</sup> The main force behind the decision not to co-operate is Muhamar Gaddafi of Libya who not only has been in conflict with the UNSC in relation to the Lockerbie incident but has an appalling human rights record in Libya. The Support by Kenya is to protect its leaders who are being investigated and may be indicted due to the Post Election Violence in 2007. For a discussion on the precedential value of the Bashir indictment, see Ssenyonjo (n 70 above) 208-209.

<sup>82</sup> ECHR, articles 6(1) & 13; see Cortright & de Wet (n 31 above) 1.

<sup>83</sup> African Charter, article 7.

<sup>84</sup> Universal Declaration, articles 8 & 10

<sup>85</sup> ICCPR, articles 2(3) & 14(1).

<sup>86</sup> The Statute of the ACJHR, article 31.

<sup>87</sup> Cortright & de Wet (n 31 above) 7.

power or made a manifest error in the assessment of the situation, as its reasons for the decision were not well-founded.

### 3.5 Conclusion

Even though the Assembly has wide express and implied powers in order to enable it to achieve its mandate under the Act, these are not unqualified and the use of those powers demand accountability and transparency. The human rights limitations on these powers are found within the Act itself and general international law, and the Assembly is under an obligation to consider these standards in the use of its decision-making powers, and to ensure that its decisions conform to these standards. Blatant disregard for fundamental human rights standards, as was evident in the Bashir decision discussed in section 3.4 above, vitiates the legality of the Assembly's decisions. To foster accountability in the Assembly's exercise of decision-making powers, the ACJHR should be mandated to undertake review of *ultra vires* decisions of the Assembly. The ACJHR's review obligations was ably summarised, albeit with reference to the UN, by Judge *ad hoc* Lauterpatch that '... the Court, as the principal judicial organ of the UN is entitled, indeed bound, to ensure the rule of law within the UN system and, in cases properly brought before it, to insist on adherence by all UN organs to the rules governing their operation'.<sup>88</sup>

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<sup>88</sup> *Genocide Case* (n 48 above) 439 para 99.

## CHAPTER FOUR

### THE COMPETENCE OF THE ACJHR TO REVIEW THE DECISIONS OF THE ASSEMBLY

#### 4.1 Introduction

The resurgence of constitutionalism and the rule of law in Africa is an important phenomenon taking into account the authoritarianism and dictatorship that has bedevilled the post-colonial African continent.<sup>1</sup> For the gains made in the jurisdictions that have enthusiastically reasserted the rule of law and constitutionalism<sup>2</sup> to be spread all over Africa, there is a need to anchor this new development at the very apex of African regional integration, the AU. The need for an institutional balance and proper checks and balances in the conduct of the mandate of the different organs within the AU cannot therefore be overemphasized. However, for such a balance to be achieved and for checks and balances to be effective, there is a need for constitutionalism and adherence to the rule of law and respect for human rights. These can be best achieved with a judicial organ properly equipped and mandated to conclusively interpret the provisions of the Act and to review the actions of the organs to ensure compliance with the Act. The judicial organ with such mandate in the AU system is the ACJHR. This section looks at the mandate of the ACJHR to review the Assembly's decisions in order to ensure compliance with human rights standards discussed in section 3.3 above.

#### 4.2 The judicial review mandate of the ACJHR

Does the ACJHR have the mandate to review the decisions of the Assembly for legality? Where does the ACJHR get such powers and how is it mandated to exercise those powers? In responding to these questions, it is asserted that the ACJHR has an express mandate to determine the validity of the Assembly's decisions and in doing so can exercise its review competencies and annul such decisions if they are made *ultra vires* the Assembly's powers as provided in the Act or international law. The ACJHR can exercise these review competencies either through its contentious or advisory opinions mandates as discussed hereunder.

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<sup>1</sup> See generally, HK Prempeh 'Murbary in Africa: Judicial review and the challenge of constitutionalism in contemporary Africa' (2006) 80 *Tulane Law Review* 1239 – 1324.

<sup>2</sup> Prempeh (n 1 above) 1241-1243.

#### 4.2.1 Basis for the review competence of the ACJHR in contentious cases

While the Act is silent on the review mandate of the ACJHR, the same can be traced to the mother treaty from which the Act was drafted, the African Economic Community (AEC) Treaty.<sup>3</sup> The AEC Treaty envisaged the Court's competence to adjudicate on actions brought by member states or the Assembly if Treaty provisions are violated or if an organ, authority or a member state is believed to have exceeded or abused its power.<sup>4</sup> The Court's decisions were intended to be binding on all parties.<sup>5</sup>

The review mandate of the ACJHR under its contentious jurisdiction is provided for in article 28 of the Statute of the Court. Article 28 gives the Court jurisdiction over all cases and legal disputes submitted to it, which include:<sup>6</sup> the interpretation and application of the Act; the interpretation, application or validity of other AU treaties and all subsidiary legal instruments adopted within the framework of the AU; interpretation and application of the African Charter, ACRWC, Africa women's protocol or any other legal instrument relating to human rights ratified by the state parties concerned; any question of international law; and all acts, decisions, regulations and directives of the AU organs.

Even though this review provision is not sufficiently and clearly developed as that provided in EU, specifically articles 263-267 of the TFEU, it shows that the ACJHR has the mandate to interpret and to ensure the validity of the Assembly's decisions. In interpreting and determining the validity of the Assembly's decisions, the ACJHR must look at their legality and determine that they were made *intra vires* the Act, and are not contrary to international law, customary international law and general principles of law, as provided by article 31 of the Court's Statute. In doing this, the Court will be reviewing the legality of the Assembly's decisions, and if those decisions are *ultra vires* the powers of the Assembly and are consequently illegal, they can then be annulled by the Court.

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<sup>3</sup> AP Corrine & D Rukare 'Current developments: The new African Union and its Constitutive Act' (2002) 96 *American Journal of International Law* 373.

<sup>4</sup> The Treaty Establishing the African Economic Community, 3 June 1991, (1991) 30 *International Legal Materials* 1241, article 18 (3)(a) (hereafter 'AEC Treaty').

<sup>5</sup> AEC Treaty, article 19.

<sup>6</sup> Statute of the ACJHR, articles 28 (a)-(e).

The importance of review in enhancing the validity of institutional decisions was emphasized in the ECJ case of *Les Verts v European Parliament*.<sup>7</sup> It emphasised that the EC is based on the rule of law and institutions could not avoid a review of the validity of measures adopted by them, to ensure that they were compatible with the EC Treaty.<sup>8</sup> It asserted that the Treaty 'established a complete system of legal remedies and procedures designed to permit the ECJ to review the legality of the measures adopted by the institutions'.<sup>9</sup> Judge Castro in his separate opinion in the *Namibia* case also noted with regard to the ICJ that 'the court as a legal organ cannot cooperate with a resolution which is clearly void, contrary to the rules of the Charter or to the general principles of law'.<sup>10</sup> It is thus argued that in exercising its mandate to interpret and ensure the validity of decisions of AU organs, the ACJHR has the competencies to review those decisions to ensure that they are *intra vires* the powers of the organs; if not, it should annul them.

This review competency in contentious cases is further entrenched by the express authority of the ACJHR as the primary organ charged with the interpretation and application of the Act and other legal instruments.<sup>11</sup> The importance of this interpretative role is clearly seen in contradistinction to the decentralized approach of the UN system where UN organs are individually empowered to interpret Charter provisions specific to their functions, one of the main arguments against the review competencies of the ICJ.<sup>12</sup> The fact that the ACJHR is the main judicial body of the AU coupled with the fact that it has the express mandate to interpret the Act thus clothes it with sufficient judicial powers to be able to review Assembly decisions for compliance with the provisions of the Act as part of its judicial function.

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<sup>7</sup> Case 294/83, (1986) ECR 1339.

<sup>8</sup> As above, para 23.

<sup>9</sup> As above.

<sup>10</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion (1971) ICJ Reports 16, 180.

<sup>11</sup> Statute of the ACJHR, Preamble para 3 and article 28.

<sup>12</sup> Martenczuk (section 1.6 above, note 23) 526.

#### 4.2.1.1 Parties with the competence to seize the review mandate of the ACJHR

Traditional international law has held states to be the primary constituencies of IOs, and thus the only competent parties capable of constituting an action challenging the legality of the decisions of IOs. However, this view has been overtaken by the contemporary view which acknowledges that decisions of IOs transcend national boundaries and affect other entities that may not be states.<sup>13</sup> The contemporary view, therefore, acknowledges that individuals and NGOs possess the necessary competence to seize the jurisdiction of international tribunals.<sup>14</sup>

This contemporary approach has been adopted in the Statute of the ACJHR which provides for a broad spectrum of parties that can expressly or impliedly seize the review jurisdiction of the ACJHR.<sup>15</sup> The parties with the authorization to present cases relating to issues provided for in article 28 thus include:<sup>16</sup> state parties to the protocol; the Assembly; the Parliament; and other organs of the AU authorized by the Assembly. This is an important provision with regard to review as it provides that organs of the AU can be parties to a case before the Court, an improvement on the situation in the UN where UN organs cannot be parties to a case in the ICJ. If the Assembly can bring a contentious case to the Court, then it follows that it can also be sued in the Court.<sup>17</sup> However, uncertainties abound as to the possibility of the other organs of the AU instituting cases in the Court for review of the *ultra vires* decisions of the Assembly, due to the principle of complementarity which requires that organs of IOs resolve their differences internally through non-contentious means.<sup>18</sup> This is compounded by the failure in most treaty monitoring bodies of the inter-state complaint mechanism,<sup>19</sup> raising concerns whether member

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<sup>13</sup> de Wet (section 3.4 above, note 68) 1990.

<sup>14</sup> ILA Berlin Report 2004 (section 2.1 above, note 1) 225 226.

<sup>15</sup> M du Plessis & L Stone 'A court not found?' (2007) 7 *African Human Rights Law Journal* 540.

<sup>16</sup> Statute of the ACJHR, articles 29 (1)(a)&(b).

<sup>17</sup> This is similar to the EU system where EU organs have the status of both applicants and defendants in judicial proceedings before the ECJ, see A Turk *Judicial review in EU law* (2009) 4.

<sup>18</sup> F Seyersted *Common law of international organizations* (2008) 322 note 239.

<sup>19</sup> RK Smith *Textbook on international human rights* (2007) 140.

states would be able to seize the contentious jurisdiction of the Court with the aim of reviewing the Assembly's *ultra vires* decisions.<sup>20</sup>

The above concerns raise the question whether any other parties can seize the article 28 review competence of the ACJHR. An answer to these concerns can be found in article 30 which contains an important and interesting variation regarding the parties capable of presenting cases to the ACJHR.<sup>21</sup> It provides a wide range of parties who can seize the jurisdiction of the Court in instances of human rights violations in accordance with African Charter, ACRWC, the Women's Protocol, or any other legal instrument relevant to human rights ratified by the state parties concerned. The parties envisioned in article 30 include: the AComHPR; the African Committee of Experts on the Rights and Welfare of the Child; African IOs accredited to the AU or its organs; African national human rights institutions (NHRIs); and individuals or relevant NGOs accredited to the AU or its organs subject to the provision of article 8(3).<sup>22</sup> Article 8(3) raises the important question of whether the Assembly needs to ratify the Court Protocol and make the requisite declaration in order to enable individuals and accredited NGOs to institute review cases against it, or whether it is bound by the Protocol by reason of being an AU organ. In the EU, EU organs are bound by and are obligated to comply with all the Community Treaties without any requirement for their ratification.<sup>23</sup> Martenczuk, in his discussion of the obligations of the UNSC under the UN Charter, asserts that organs of IOs are bound by the legal instruments adopted under their auspices.<sup>24</sup> Taking the above discussion into account, it is argued that the Assembly is bound by the Court Protocol by reason of it being an organ of the AU and so does

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<sup>20</sup> Due to the desire to maintain diplomatic ties and to enhance friendly relations between states, most member states are unlikely to institute a suit against the Assembly unless the Assembly's decision is against its critical interests, as was exemplified by Libya's situation in the *Lockerbie* case and Bosnia's in the *Genocide* case.

<sup>21</sup> ICJ Statute, article 35(1) provides that only states can be parties to contentious cases before the ICJ, and article 263 TFEU provides a broader array of parties who can seek review in the ECJ being the member states, the European Parliament, the Council, the Commission, and to a limited extent natural and legal persons. For a discussion, see Turk (n 17 above) 2.

<sup>22</sup> It provides for a declaration by member states accepting the competence of the Court to receive cases instituted by individuals or NGOs in terms of article 30(f).

<sup>23</sup> JH Weiler *The constitution of Europe: Do the new clothes have an Emperor?* (1999) 26.

<sup>24</sup> Martenczuk (n 12 above) 534.



not need to make the declaration envisioned in article 8(3). Individuals and accredited NGOs thus have standing to seize the Court's review jurisdiction under article 28.

A broad, teleological and functional interpretation of the Court's Statute allows for an interpretation that permits all the above-mentioned parties to seize the review mandate of the Court.<sup>25</sup> One of the principle objectives of the AU is the enhancement of the respect for, and protection of, human rights and fundamental freedoms, as discussed in section 3.3.1.1 above. In order for the AU to achieve those objectives, it is imperative that the Assembly respects and protects human rights in all its decisions. Failure of the Assembly in that regard, if it violates any of the human rights principles and standards captured in the instruments mentioned in article 30, therefore mandates the bodies mentioned above to undertake action in the Court to invalidate the *ultra vires* decision of the Assembly.<sup>26</sup>

#### **4.2.2 Basis for the review competence of the ACJHR in advisory opinions**

The ACJHR can also exercise its review competence on legal questions via advisory opinions requested by AU organs, such as, the Assembly; the Parliament; the Executive Council; the Peace and Security Council; the Economic, Social and Cultural Council (ECOSOCC); the financial institutions; and any other organ of the AU that may be authorized by the Assembly.<sup>27</sup> This is similar to the power of review exercised by the ICJ using its advisory opinion mandate per article 96(1) of the UN Charter.<sup>28</sup> In the UN, the UNGA has also accorded power to request advisory opinions, per article 96(2) of the Charter, to specialised agencies of the UN, and this has been used successfully to obtain authoritative interpretations from the ICJ and also to

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<sup>25</sup> Interpretation by recourse to the objects and purpose of an organisation is the most dynamic form of interpretation as it takes into account the living character IOs. See HG Schermers & NM Blocker *International institutional law* (1995) 1349.

<sup>26</sup> This broad, teleological and functional approach to interpretation has been adopted by both the ICJ and the ECJ in the implementation of their respective interpretative and review mandates. For a further discussion, see HG Schermers & D Waelbroeck *Judicial protection in the European Communities* 5 ed (1992) 18-26.

<sup>27</sup> Statute of the ACJHR, article 53(1).

<sup>28</sup> Examples include: *Certain expenses of the UN* (1962) ICJ Reports 151; *Namibia Opinion* (n 10 above) 128-129; and the *Mazilu* case (1989) ICJ Reports 175.

review the validity of actions or decisions of UN organs and specialised agencies.<sup>29</sup> However, the Court's Statute omits important parties charged with the protection of human rights from the advisory opinion jurisdiction of the ACJHR, such as, the AComHPR, the African Committee of Experts on ACRWC, NHRIs and NGOs.<sup>30</sup>

### 4.3 Reviewable decisions

This section looks at two elements that are important for a decision to be reviewable by the ACJHR: first, their binding nature; and secondly, they must raise legal questions and should not merely be political questions. The section then applies these elements to the Assembly's Bashir decision.

Must the decisions be binding in order for them to be liable for review? This is not a settled question and many jurists have argued that the decisions in question must be binding if they are to be liable for judicial review by international tribunals.<sup>31</sup> However, several other jurists have suggested that the decisions need not be binding per se, as long as they produce a de facto impact on the rights and interests of member states or third parties.<sup>32</sup> A definition of 'reviewable decisions' in the EU was developed in the *ERTA* case where the ECJ held that an action for annulment is available 'against all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effect'.<sup>33</sup> This was further developed in the *IBM* case where the ECJ held that such legal effect occurs, when the measure is binding on, and is

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<sup>29</sup> Examples include: *Opinion on the competence of the ILO Administrative Tribunal* (1956) ICJ Reports 77; *Opinion on article 28 of the IMCO constitution* (1960) ICJ Reports 150; *Opinion on the interpretation of resolution 276 of the UNSC* (1971) ICJ Reports 12; *Opinion on the interpretation of the agreement of 25 March 1951 between the WHO and Egypt* (1980) 73; and WHO request for opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (1996) ICJ Report 66, among many others.

<sup>30</sup> D Juma 'Lost (or found) in transition? The anatomy of the African Court of Justice and Human Rights' (2009) 13 *Max Plank Yearbook of United Nation Law* 302.

<sup>31</sup> Schermers & Waelbroeck (n 26 above) 313; Martenczuk (n 12 above) 524; D D'Angelo 'The "check" on international peace and security maintenance: The ICJ and judicial review of Security Council resolution' (2000) 23 *Suffolk Transnational Law Review* 593, among others.

<sup>32</sup> Turk (n 17 above) 12-13; de Wet (n 13 above) 1988; ND White *The law of international organisations* (2005) 168-170.

<sup>33</sup> *Commission v Council*, Case 22/70 (1971) ECR 263 para 42.

capable of affecting the interests of, the applicants by bringing about a distinctive change in their legal position.<sup>34</sup> Turk argues that the two ECJ decisions emphasize the substance of a decision and not just its form.<sup>35</sup>

According to Amerasinghe, reviewable decisions of a particular IO will depend on its constitutive act.<sup>36</sup> He discusses the first category of reviewable decisions as per articles 25 of the UN Charter and 9(a) of the Constitution of the World Meteorological Organisation (WMO) which place duties on member states of those organisations to carry out the decisions of the UN and the WMO Congress, respectively.<sup>37</sup> He further discusses the second category of reviewable decisions as per article 9(b) of the WMO Constitution and article 22 of the World Health Organisation's (WHO) Constitution which, even though requiring members to comply with them, provide an opt-out clause for member states who reject, or are unable to comply, with the decisions, provided that they give reasons to the Secretary-General and the Director-General, respectively.<sup>38</sup> He concludes that the two sets of decisions are intended to have binding effect creating obligations and rights.<sup>39</sup>

The Assembly's decisions fall into the above two categories. Rule 33 of the Assembly's Rules of Procedure divide the Assembly's decisions into regulations and directives as the first category<sup>40</sup> and declarations, recommendations, resolutions and opinions as the second category.<sup>41</sup> The first category decisions are expressly provided to have binding effect on member states, AU organs, and RECs, and their non-implementation attracts sanctions in terms

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<sup>34</sup> *IBM v Commission*, Case 60/81 (1981) ECR 2639 para 9.

<sup>35</sup> Turk (n 17 above) 12.

<sup>36</sup> CF Amerasinghe *Principles of the institutional law of international organisations* (2005) 160.

<sup>37</sup> Amerasinghe (n 36 above) 162.

<sup>38</sup> As above.

<sup>39</sup> Amerasinghe (n 36 above) 163.

<sup>40</sup> Rules of Procedure of the Assembly, Rule 33(a)&(b).

<sup>41</sup> Rules of Procedure of the Assembly, Rule 33(c).

of article 23 of the Act.<sup>42</sup> On the other hand, the second category decisions are not binding and are intended to guide and harmonise the viewpoints of member states.<sup>43</sup> However, Rule 37(1) does not make the above distinction and provides that sanctions under article 23(2) of the Act shall be imposed on member states who fail, without good and reasonable cause, to comply with the decisions and policies of the AU. A reading of Rules 33 and 36 indicates an obligation of member states to comply with all the decisions of the Assembly.<sup>44</sup> It can, therefore, be inferred that all the Assembly's decisions are binding even though the second category decisions, as discussed above, have an-opt out clause in terms of which a member state who has a good and reasonable cause need not comply. This inference leads to the conclusion, similar to Amerasinghe's conclusion above, that all the Assembly's decisions are *prima facie* binding, are reviewable, and can thus be reviewed by the ACJHR in the exercise of its review mandate.<sup>45</sup>

In the exercise of its review mandate, the ACJHR must defer to the appreciation of the situation and the facts by the Assembly and should not substitute its own appreciation for that of the Assembly.<sup>46</sup> However, this does not mean that the ACJHR should refuse to review a decision of the Assembly just because political questions are raised. As long as cogent legal questions arise in a particular case, the Court should be able to exercise its review mandate to ensure that the Assembly's decisions are valid and are made within the ambit of the Act.<sup>47</sup> The ICJ's jurisprudence on the political question was laid down in the *WHO Regional Office* case where it was stated that if a case falls within the normal judicial process of the ICJ, the motives which

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<sup>42</sup> Rules of Procedure of the Assembly, Rules 33(2) & 34(2).

<sup>43</sup> Rules of Procedure of the Assembly, Rule 33(c).

<sup>44</sup> Support for such an interpretation is found in the ICJ's opinion in the *Namibia* case where it held that UNSC resolution 276(1970) was binding on states in terms of article 25 even though it was made under Chapter VI of the UN Charter. See ICJ's reasoning in the *Namibia* case, paras 111-116 extensively quoted in Amerasinghe (n 36 above) 169-171.

<sup>45</sup> A broad interpretation of reviewable acts has also been adopted by the ECJ which has refused to interpret its review mandate as only extending to legally binding acts laid down in article 288 TFEU, see Turk (n 17 above) 12.

<sup>46</sup> DW Bowett 'The Court's role in relation to international organisations' in V Lowe & M Fitzmaurice (eds) *Fifty years of the International Court of Justice: Essays in honour of Sir Robert Jennings* (1996) 191.

<sup>47</sup> Bowett (n 46 above) 182-183.

inspired the submission of the case are irrelevant.<sup>48</sup> The ICJ further stated that in situations where political considerations are prominent, it is particularly necessary for the opinion of an international tribunal to be obtained in order to settle the legal principles pertaining to the debate.<sup>49</sup>

The above interpretation of the political question was further confirmed by the ICJ in its opinion on the *Legality of the Use of Nuclear Weapons* when it stated that 'the fact that a question has political aspects does not deprive it of its character as a legal question ... whatever its political aspect, the court cannot refuse to admit the legal character of a question which invites it to discharge an essential judicial task'.<sup>50</sup> In her analysis of this issue, Bowett asserts that an international tribunal faced with a political question should not exercise its competence where its analysis of the background leads to a conclusion that the legal question posed is of minimal relevance to the real dispute, and where the findings of the court are likely to be ignored by states or organs with contrary opinions.<sup>51</sup>

#### 4.3.1 Competence to review the Bashir decision

Is the Assembly's Bashir decision reviewable, and is the ACJHR prohibited from reviewing it because of the political question? According to the above discussion, the Bashir decision, as a resolution of the Assembly, falls in the second category and is *prima facie* binding on member states. Even though some member states of the AU have said they are bound to comply with the ICC's arrest warrant,<sup>52</sup> the actual practices of other member states tell a different story.<sup>53</sup> A

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<sup>48</sup> Advisory Opinion of 20 December 1980 (1980) ICJ Reports 73, 87.

<sup>49</sup> As above.

<sup>50</sup> *Legality of the Use of Nuclear Weapons*, Advisory Opinion (1996) ICJ Reports 234 para 13.

<sup>51</sup> Bowett (n 46 above) 186.

<sup>52</sup> The African countries include Uganda, Botswana, Ghana and South Africa. See A Jamaa, 'Motherland Africa is not ready to arrest president Al-Bashir' 2 September 2010, available at <http://english.alshahid.net/archives/12252> (accessed on 10/10/2010).

<sup>53</sup> Since the issuance of his arrest warrant, the Sudanese president has visited Kenya and Chad, full members of the Rome Statute and also visited Ethiopia, Eritrea, Egypt and Libya. See T Deen, 'President and Criminal Court in Cat-and-Mouse Game' available at <http://allafrica.com/stories/201008280183.html> (accessed on 10/10/2010).

clear indication of an obligation to respect the Assembly's decision was shown by Kenya which not only invited President Bashir to an official function in that country, but also went as far as to rely on the Assembly's decision as a basis for not complying with its binding international obligations under the ICC Statute.<sup>54</sup> The Assembly's decision on Bashir is thus arguably reviewable.

Is the Bashir decision a political decision, and does it raise political questions requiring the Court to decline to exercise its review mandate in accordance with the test expounded by Bowett above? It is true that many questions have been raised as to the bias that the ICC has shown in the prosecution of cases from Africa<sup>55</sup> and some have even said that it is being used as a neo-colonial tool to fix Africa.<sup>56</sup> However, this does not distract from the important legal issues being raised. In reaching its decision, the Assembly failed to take into account important international legal norms and standards, customary international law, and general principles of international law, as it is obligated to do by the Act.<sup>57</sup> The legal concerns about the Bashir decision are cogent as the decision breaches fundamental human rights, and promote the perpetuation of war crimes, crimes against humanity, and genocide, core international crimes that have attained the status of *jus cogens*, and which engender the *erga omnes* obligations of states. An *ultra vires* finding by the Court on the Bashir decision will also most likely be respected by the majority of African states, and eventually by the AU and its organs, due to the possible diplomatic and international pressures that will be brought to bear on the member states. The decision is thus primarily placed to lay the review foundation and jurisprudence of the ACJHR.

#### **4.4 Nature and effect of the Court's decision in the exercise of its review competence**

To ensure the functionality and effectiveness of the AU system, the starting point for the ACJHR in the exercise of its review mandate should be a presumption of validity and legality of the

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<sup>54</sup>Kenyan Daily Nation Newspaper, 'EU Parliament plans censure on Kenya over Bashir' 11 September 2010, available at <http://allafrica.com/stories/201009130119.html> (accessed on 10/10/2010).

<sup>55</sup> International Centre for Transitional Justice, 'Protecting the mission and mandate of the ICC' (2009) 2 available at [http://www.ictj.org/static/Africa/Briefing\\_AU\\_ICCReview.pdf](http://www.ictj.org/static/Africa/Briefing_AU_ICCReview.pdf) (accessed on 10/10/2010).

<sup>56</sup> Ouma (section 3.4 above, note 64) 132-133.

<sup>57</sup> As discussed in section 3.4 above.

Assembly's decisions.<sup>58</sup> This is crucial in enhancing the legitimacy of the AU system as it shifts the burden of proof to the party who asserts that the Assembly has acted in bad faith or *ultra vires* its powers as defined by the Act.<sup>59</sup> This approach has been affirmed by the ICJ in several cases in which it was called to determine the validity of the actions of UN organs.<sup>60</sup>

The ACJHR's Statute, unlike article 264 of the TFEU, is silent on the specific remedy available to the Court when exercising its review mandate. However, this does not mean that the Court is prohibited from declaring the Assembly's decisions to be invalid. The ECJ in the *Les Verts* case emphasized that, by virtue of its review mandate, it is endowed with a complete system of legal remedies and procedures designed to permit it to undertake its functions.<sup>61</sup> It can thus be implied that by giving the ACJHR the function to interpret and ensure the validity of AU organs' decisions, the Court was intended to have the requisite array of remedies, including annulment and invalidation, to enable it to effectively conduct its review mandate. Professor Gregory Tunkin asserted that '... a constituent instrument of an IO must be interpreted in the light of its aims and on the assumption that member states intended to make the IO as effective as the provisions of the instrument permits'.<sup>62</sup> The Court Statute can thus be given a broad and teleological interpretation to provide the Court with the requisite remedies to enable it to undertake its review functions.

Akande, discussing the review mandate of the ICJ, argues that lack of an express power to undertake review is not determinative; what is more important is a lack of an express prohibition from engaging in review.<sup>63</sup> He further emphasizes that a judge is required to apply the law, and that where s/he is faced with two conflicting principles of law which cannot be applied consistently, he is bound to apply the principle with a higher status unless prevented from doing

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<sup>58</sup> Bowett (n 46 above) 190.

<sup>59</sup> M Sameh *The role of the ICJ as the principle judicial organ of the UN* (2003) 235.

<sup>60</sup> See: *Certain Expenses* case, (n 28 above) 168; *Namibia* Opinion (n 10 above) 22; *Lockerbie* case (1992) 3 ICJ Report 114, para 42.

<sup>61</sup> *Les Verts* (n 7 above) para 23.

<sup>62</sup> Quoted in RJ Dupuy *Handbook on international organisations* (1998) 479-480

<sup>63</sup> Akande (section 1.6 above, note 23) 326.

so by some other law.<sup>64</sup> It is thus asserted that since no provision of law either in the Act or in the Court Statute specifically prohibits the ACJHR from declaring the Assembly's decisions *ultra vires*, it can legally do so in the exercise of its judicial powers to ensure that those decisions are valid and are in conformity with the Act and international law. The resultant effect of such a declaration is that those decisions lose their presumption of validity or legality and member states are not bound to enforce, or comply with, them.<sup>65</sup>

The decisions of the ACJHR in the exercise of its review mandate are final and binding on the parties to the conflict and require the parties to comply with them and to ensure their execution.<sup>66</sup> The Statute further provides that decisions on the interpretation and application of the Act are binding on member states and organs of the AU notwithstanding article 46(1) and so have a precedential value.<sup>67</sup> A finding by the Court that the Assembly's decision is *ultra vires* therefore binds all the other organs of the AU and the member states and, by extension, calls on them not to enforce or comply with the impugned decision.

#### 4.5 Conclusion

This chapter affirms that the rule of law applies in the AU system and that the ACJHR as the supreme judicial organ of the AU is empowered to interpret the Act and other legal instruments of the AU, and to ensure the validity of the decisions of AU organs. In the exercise of the above functions, the Court has the competencies to exercise judicial review to ensure that the Assembly's decisions are *bona fides* and *intra vires* the Act and international law; failing which, the Court can declare them invalid. A declaration of the invalidity of the Assembly's decision has universal application on all member states and not only the parties to the case in terms of article 50(3) of the Court Statute, enhancing constitutionalism and the rule of law throughout the continent. The chapter also affirms the wide range of parties capable of seizing the review competence of the ACJHR, an important development in protection of, and respect for, human rights and fundamental freedoms in Africa.

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<sup>64</sup> As above.

<sup>65</sup> Kaikobad (section 2.2 above, note 9) 46.

<sup>66</sup> Statute of the ACJHR, article 46.

<sup>67</sup> Statute of the ACJHR, article 50(3).



## CHAPTER FIVE

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 Synopsis of findings

This study has made a case for the review of the Assembly's decisions by the ACJHR to ensure that they are compliant with the Act, customary international law, and general principles of international law. Central to this study were the doctrines of constitutionalism and the rule of law and an assertion that the Act forms a constitutive framework within which all the AU's organs are to exercise their mandate; failing which, their decisions are *ultra vires* and thus invalid. The study established that even though the Assembly has wide express and implied powers, those powers are not without limitation and the Assembly is bound to exercise them taking into account human rights standards provided for, or envisioned, in the Act, customary international law, and general principles of law. It has also been established that the ACJHR has express review mandate entrenched in its Statute and it can exercise that mandate through contentious proceedings or through advisory opinions. Finally, the study establishes that unlike in the UN and EU systems, the Statute gives wide latitude as regards the parties that can seize the review mandate of the Court, a positive aspect in the enhancement of checks and balances, constitutionalism and the rule of law in regional governance in Africa.

#### 5.2 Conclusions

Questions abound as to the seriousness of the AU in implementing and enforcing the human rights, constitutionalism and rule of law objectives and principles discussed in section 3.3 above.<sup>1</sup> However, the best avenue for the realisation of these objectives in the AU system, especially when they have been violated by an organ of the AU, such as the Assembly, through *ultra vires* decisions, remains the ACJHR through its review mandate.

##### 5.2.1 Potential benefits of the review mandate of the ACJHR

The entrenchment of review in the AU system has several advantages for the functionality of the AU and the protection and realisation of human rights and fundamental freedoms in Africa. First, it has the potential to strengthen faith in the political organs of the AU, create and enhance legal

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<sup>1</sup> See Kindiki (section 3.2 above, note 2)101; E Baimu, 'The African Union: Hope for better protection of human rights in Africa?' (2002) 2 *African Human Rights Law Journal* 312.

certainty and legitimise political discretion, thereby generally enhancing the efficiency and credibility of the AU regionally and internationally.<sup>2</sup> Secondly, the ACJHR, through its review mandate, provides an important mechanism for the limitation of the illegitimate use of political power. This enhances the realisation, protection and enforcement of human rights and fundamental freedoms from the vicissitudes of political majorities.<sup>3</sup> Thirdly, the availability of review ensures that the Assembly's decisions are grounded in the principles of rationality, objectivity and proportionality to cushion them from *ultra vires* charges, thus considerably reducing the chances of arbitrariness and political self-aggrandisement.<sup>4</sup>

Fourthly, the ability of the ACJHR to interpret the Act and to undertake review of the decisions of AU organs ensures that there is uniformity in the interpretation of, and centrality with regard to adjudication on, the validity or otherwise of decisions of AU organs preventing conflicting decisions and the further disintegration of international law.<sup>5</sup> It also enhances consistency and coherence in the interpretation of the Act and the relevant human rights standards and principles, thereby reducing the risk of incompatible case law.<sup>6</sup> Such empowerment of the ACJHR also addresses the procedural obstacle of jurisdictional immunity of IOs before domestic courts.<sup>7</sup> Finally, the establishment of the Court and the entrenchment of its review mandate enhances the standard-setting role of the AU in the cultivation of constitutionalism; the rule of law; respect for human rights and fundamental freedoms; democratic principles of inclusion and participation; and the reduction of conflict and disintegration of societies in the continent.<sup>8</sup> The importance of a well-structured court system in the ordering of society, reduction of private

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<sup>2</sup> E de Wet, 'The chapter VII powers of the United Nations Security Council' (2004) 119.

<sup>3</sup> See Judge Chaskalson's judgment in the South African Constitutional Court case of *S v Makwanyane* 1995(3) SA 391 (CC), para 88.

<sup>4</sup> De Wet (n 2 above) 121

<sup>5</sup> On the dangers of divergent interpretations leading to detraction from the co-ordinating or unifying purpose of the Act, see HG Schermers & NM Blocker *International institutional law* (1995) 859-860.

<sup>6</sup> ILA Berlin Report 2004 (section 2.1 above, note 1) 286.

<sup>7</sup> ILA Berlin Report 2004 (n 6 above) 270; K Wellens *Remedies against international organisations* (2002) 114.

<sup>8</sup> SM Donnelly 'Reflecting on the rule of law, its reciprocal relations with rights, legitimacy and other concepts and institutions' (2004-2005) 32 *Syracuse Journal of International Law & Commerce* 253-254

violence, and increase in economic and political stability throughout a region can be seen in the example of the ECJ and its contribution to the ordering of European societies with the resultant improvement in economic and political progress.<sup>9</sup>

### 5.3 Recommendations

To transcend the pitfalls and the challenges that befell its predecessor, the OAU, it is imperative that the Assembly takes its human rights obligations as provided for in the Act seriously. This need to ensure compliance is ably captured in the saying that ‘an authority that negates its legal foundations negates itself’.<sup>10</sup>

If the AU is to grow and achieve its full potential, it has to follow the EU<sup>11</sup> example of an independent and impartial court exercising proper checks and balances on the exercise of the political power of the organisation.<sup>12</sup> The Assembly should, therefore, move with speed to ensure that the Protocol to the Statute of the ACJHR is ratified by member states and comes into force. It should also ensure that the resultant Court is sufficiently supported and empowered to enable it to carry out its mandate.<sup>13</sup> The Court should be empowered to work effectively, independently and impartially, especially when fulfilling its review mandate and providing checks and balances. This will enhance the legitimate use of express and implied powers to achieve the purposes and objectives of the AU.<sup>14</sup> The Assembly should specifically put in place implementation and enforcement mechanisms through which the decisions of the ACJHR, including review decisions, will not only be respected but also complied with. This is the only

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<sup>9</sup> Donnelly (n 8 above) 254; Sweet (section 2.3.2 above, note 44) 2.

<sup>10</sup> Martenczuk (section 1.6 above, note 23) 536.

<sup>11</sup> For similarities in the structure of the AU and EU, see D Olowu, ‘Regional integration, development and the AU agenda: Challenges, gaps and opportunities’ (2003) *Transnational Law and Contemporary Problems* 229-232.

<sup>12</sup> This should be in accordance with the principle of institutional balance as expounded by the ECJ in *Case C-70/88, Parliament v Council* (1990) ECR 2073.

<sup>13</sup> Taking into account para 11 of the preamble of the Act and para 5 of the preamble to the Protocol on the Statute of the ACJHR which requires that the AU to take necessary measures to strengthen institutions and provide them with sufficient power and resources to enable them discharge their respective mandates.

<sup>14</sup> See generally Josselin & Marciano (section 2.3.2 above, note 37) 60-73.

way the AU is going to fulfil the resolve and determination of member states 'to take up the multifaceted challenges that confront our continent and its peoples in the light of the economic, social and political changes taking place in the world'.<sup>15</sup>

**Word count: 18, 125**

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<sup>15</sup> AU Act, preamble para 6.

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