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Reference Guide to Africa's International Courts

An Introduction

James Thuo Gathii and Harrison Otieno Mbori

Introduction

This reference guide introduces the eight active international courts in Africa.[1] Also included is a ninth inactive court, the Arab Maghreb Union's Judicial Organ. The discussion of the Arab Maghreb Union's Judicial Organ in this reference guide examines why there has been less judicialization in North Africa relative to other parts of Africa. All of Africa's active international courts came into existence in the last two and half decades.[2] At the end of the Cold War, only a single quasi-judicial adjudicative body, the African Commission on Human and Peoples' Rights (ACHRP or the Commission) was in existence. These international courts stem from two sources: sub-regional economic integration arrangements and the regional human rights system of the African Union (AU). The African Court on Human and Peoples' Rights (ACtHPR or African Court), formed in 2006, is the regional human rights court in Africa.[3] It complements the human rights

[1] In this Reference Guide, we have focused only on judicial institutions (except the African Commission on Human and Peoples' Rights) and operational institutions (except the AMU Judicial Organ). There are present in Africa other quasi-judicial institutions such as the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), High Commission of Appeal of the African Intellectual Property Organization (AIPO), and the Board of Appeal of the African Regional Industrial Property Organization (ARIPO), which this chapter does not cover. Additionally, the following are other non-operationalized international courts in Africa that the chapter does not address: the African Economic Community Court of Justice (AECCJ), the Arbitration Tribunal of the Economic Community of West African States, and the Economic Community of Central African States (ECCAS) Court of Justice.

[2] Karen Alter, The New Terrain of International Law: Courts, Politics, Rights 68 (2014) (affirming that when the Cold War ended in 1989, there were six permanent international courts plus the non-compulsory dispute settlement system of the General Agreement on Tariffs and Trade (GATT)).

[3] The yet to be constituted ACJHPR will replace the ACtHPR when its Protocol (the Malabo Protocol) receives its requisite number of ratifications to enter into force. The ACJHPR, if it comes to fruition, will introduce inter-state dispute resolution mandate similar to that of the International

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promotional mandate of the ACHRP formed in 1986. The ACHRP is a quasi-judicial body. The other international courts in Africa are as follows:

1. East Africa Court of Justice (EACJ) (established in 2001)
2. Economic Community for West African States (ECOWAS) Court of Justice (ECCJ) (established in 2001)
3. South Africa Development Community (SADC) Tribunal (established in 2005)
4. West African Economic and Monetary Union (WAEMU) Court of Justice (established in 1995)
5. Organization for the Harmonization of Business Law in Africa Common Court Justice and Arbitration (OHADA CCJA) (established in 1997)
6. Common Market for Eastern and South Africa (COMESA) Court of Justice (established in 1998)
7. Court of Justice of the Central African Economic and Monetary Community (CEMAC) (established in 2000)
8. Arab Maghreb Union (AMU) Judicial Organ.

This reference guide proceeds as follows. Part One provides an overview of the general characteristics of Africa's international courts. Part Two then proceeds to discuss each of these international courts individually. The guide starts with the human rights-oriented courts: the EACJ, ECCJ, and SADC Tribunal, as well as the African Court and Commission. It then proceeds to discuss the COMESA Court of Justice. It goes on to discuss the courts that focus more on economic disputes. These are the OHADA CCJA and the CEMAC Court of Justice and, to some extent, the WAEMU Court of Justice. The last court is the least active of them, the AMU Judicial Organ.

For each court, the guide discusses when and by whom it was established, its jurisdiction, its rules relating to access for litigants, and its composition and organization. The overall aim of this guide is to introduce these courts to the reader unfamiliar with them. In this sense, this guide is an important reference tool that provides the context for understanding these international courts. This guide therefore serves the important goal of making the analytical nature of the chapters in the rest of the book more accessible to readers unfamiliar with these courts. The guide ends with a table summarizing the subject matter jurisdiction of each court, the year it was created, the year it made its first ruling, the number of Member States subject to its jurisdiction, and how many binding rulings it has made.

Court of Justice (ICJ) and the international crimes mandate akin to that of the International Criminal Court (ICC).

Part One: The General Characteristics of Africa's International Courts

All these international courts share the following three distinctive features. First, with the exception of the AMU Judicial Organ, they all allow, or at some point in the past, entertained cases from individuals and non-governmental organizations (NGOs), in addition to suits by states against states. Second, with the exception of the African Court for cases instituted by individuals or NGOs they have compulsory jurisdiction, meaning that the cases filed can continue even without the defendant's state consent.[4] The fact that they allow individuals to file cases is a large part of the reason why some of them have become very active. Third, although all these courts without exception allow states to file cases against each other, with the exception of a case between Ethiopia and Eritrea in the COMESA Court of Justice, there have been no cases between states filed in these courts.

Courts Specializing in International Human Rights

One of the distinctive characteristics of Africa's international courts is that although three of them were established as sub-regional economic/trade courts, they have primarily decided human rights cases. These are the EACJ, the SADC Tribunal, and the ECCJ. Yet, only the ECCJ has an explicit jurisdictional mandate to decide human rights cases. By contrast, the EACJ and the SADC Tribunal, until it was suspended in 2010, have pursued a broad interpretive strategy to justify assuming jurisdiction over human rights. Thus, a major feature of these courts is the manner in which they have re-purposed their original mandate over trade disputes to become bold adjudicators of human rights cases and disputes of a political nature. The repurposing of their mandates is evidence that these courts are enmeshed within regional movements that are aimed at advancing human rights at the national level and that are increasing spreading at the regional and sub-regional level.

There is a vast difference between the jurisprudence of these sub-regional courts, on the one hand, and the jurisprudence produced by the regional body established to receive complaints under the African Charter on Human and Peoples' Rights (the Banjul Charter), the ACHRP, on the other. Although the Commission argues that its decisions are binding on states, it has taken an extremely deferential remedial approach towards states when complaints are brought. It has

[4] *See* Karen Alter, The New Terrain of International Law: Courts, Politics, Rights 42–44 (2014).

often sought amicable resolutions and failed to quantify and award damages notwithstanding receiving cases involving serious and massive violations of human rights.[5]

Decision-making over human rights cases has been politically consequential especially where these decisions have been consistent with the strongly held preferences of states found to be in violation. The SADC Tribunal's jurisdiction to receive individual complaints was formally removed in 2014 after it decided against the Zimbabwean government's land reform program constituted discrimination based on race and that it was conducted without due process. In East Africa, the jurisdictional structure and rules of the EACJ were changed after it decided a politically sensitive case from Kenya. In West Africa, Gambia unsuccessfully attempted to persuade ECOWAS states to review the jurisdiction of the ECCJ by denying it the right to receive individual petitions after the court decided it had violated the rights of journalists. Karen Alter, James Gathii, and Laurence Helfer discuss these backlashes more fully in Chapter 7 in this book.

By contrast, to the broad interpretive strategy of the courts in East, West, and Southern Africa, the COMESA Court of Justice has undertaken a more restrictive interpretive strategy. Further, the COMESA Court of Justice has largely remained an industrial tribunal. Its case-law has primarily arisen from employees of the regional integration organization within which the Court is nestled. It is notable, however, that the WAEMU and CEMAC Courts of Justice have a sizeable share of employment disputes on their docket.

The COMESA Court of Justice, unlike the EACJ, the SADC Tribunal and the ECOWAS Court of Justice, has not decided human rights cases. A large part of the explanation for the COMESA Court's unique trajectory in redeploying to become an industrial as opposed to a trade integration court has to do with the lack of civil society interlocutors to bring cases to the Court, to defend the Court, and to lobby for court reform. This together with its restrictive interpretive mandate and its location, first in Lusaka, Zambia and currently in Khartoum, Sudan, strongly suggests why the Court has been unable to build a broader jurisdictional reach and constituencies to bring cases and to defend it as the other sub-regional courts have been able to do. In addition, even though it shares similarities in its individual access and jurisdictional rules to other sub-regional courts, it is also limited by an exhaustion of domestic remedies rule, which together with its restrictive interpretive strategy has effectively left it to become an industrial tribunal.[6]

[5] Rachel Murray, The African Commission on Human and Peoples' Rights and International Law 176–78 (2000); Rachel Murray & Elizabeth Mottershaw, *Mechanisms for the Implementation of Decisions of the African Commission on Human and Peoples' Rights*, 36 Human Rts. Q. 349–72 (2014).

[6] For more, *see* James T. Gathii, *The COMESA Court of Justice*, *in* The Legitimacy of International Trade Courts and Tribunals 314 (Robert Howse, Helene Ruiz Fabri, & Geir Ulfstein eds., 2018).

Sub-Regional Courts Specializing in Sub-Regional Economic Law

Another set of Africa's international courts have focused relatively more on economic than other issues such as human rights. These set of courts have therefore begun to challenge, and in some respects, are breaking down the previously closed-off national legal regimes and their presumed hierarchical superiority over sub-regional, regional, and international legal rules. The best example of supra-national economic regulation in Africa, the supra-national corporate, commercial, and business laws of the OHADA region. The OHADA Court of Justice is the highest judicial body charged with the enforcement and monitoring of compliance with OHADA law. The Member States of the OHADA region have accepted the authority of the OHADA Court of Justice.

Another court that has done that is the WAEMU Court of Justice. In 2002, this Court declared the supremacy of WAEMU competition law over national law of Member States. This has meant that Senegal as a WAEMU Member State has had to give up its ability to enforce competition law at the national level to the WAEMU Commission. The fact that Senegal unsuccessfully contested what it saw as a "power-grab" by WAEMU, and eventually relented after losing the case in the WAEMU Court of Justice, demonstrates the efficacy of this Court with regard to a supra-national economic issue. It is notable though, as noted earlier, the WAEMU Court of Justice has decided more employment related disputes arising between WAEMU institutions and its employees.

Another example of a court that deal with economic comes from the CEMAC region. Here, the Member States have surrendered to CEMAC sub-regional law jurisdiction over banking regulation. A powerful sub-regional banking institution, Banque des États de l'Afrique Centrale (BEAC), has emerged. BEAC has asserted and successfully defended its competence to govern sub-regional banking law through the CEMAC Court of Justice.

Although African sub-regional courts have generally not been invited to decide more trade cases, the experience in the WAEMU, CEMAC, and OHADA sub-regional regimes demonstrates the emerging transnational regulation of economic activities. In addition, both the EACJ and the COMESA Court of Justice have decided their first purely trade cases.[7] These cases may herald a new phase of litigation on trade issues to add to the already large number of human rights cases for those courts.

[7] For the EACJ case, *see* James Gathii, *The East African Court of Justice: Human Rights and Business Actors Compared,* in International Court Authority (Karen Alter, Laurence Helfer, & Mikael Madsen eds., 2018). For the COMESA case, *see* James Gathii, *The Court of Justice*, *in* The Legitimacy of International Trade Courts and Tribunals 314–48 (R. Howse, H. Ruiz-Fabri, G. Ulfstein, & M. Zang eds., 2018).

Why is there No Judicialization in North Africa?

The AMU Judicial Organ is the least active of Africa's international courts. Why has judicialization been so difficult in North Africa? We offer four plausible explanations. First, North African countries in the immediate period of decolonization placed more emphasis on developing national cohesion than developing a pan-Arab sub-regional identity.[8] Each of these countries faced irredentist movements within them that made building national cohesion an imperative. In addition, threats posed to Arab regimes with the rise of Islamic movements including the Muslim Brotherhood and Al Qaeda has required these regimes to bolster their internal order from domestic and international threats in a manner that partly explains the lip service paid to the pan-Arab project.[9] Second, the development of a sub-regional institutional framework within the AMU was hindered by territorial conflicts among these states as well as deep divisions between them.[10] Most significantly is the dispute between Algeria and Morocco over Western Sahara over which a war between 1975 and 1991 culminated in closing the border between the two in 1994. That dispute spilled over into the International Court of Justice (ICJ) and in the AU and to date remains unresolved. In addition, disputes between Libya and Mauritania weakened the possibilities of regional integration in the AMU.[11] Third, the Maghreb area countries have individually negotiated trade and other agreements with the European Union (EU) which remains their most important trading partner. So much so that Morocco had attempted in 1987 to join the EU and had their bid rejected. In the words of William Zartman, "[r]egional unity has made little headway in northern Africa. National rivalries and the Algerian war have kept pan-Maghrebism from solidifying; national consciousness and national ideologies have kept Nilotic unity, or even foreign policy cooperation with Egypt, from crystallizing in northeast Africa."[12]

Finally, some scholars have argued that judicialization is not highly favored as a dispute settlement mechanism among states that share an Islamic background. According to Emilia Justyna Powell countries to the north of Africa, which are largely Islamic, prefer mediation and negotiation as opposed to the kind of dispute settlement through international courts.[13] This view dovetails well with Makane

[8] Cesare P.R. Romano, *Mirage in the Desert: Regional Judicialization in the Arab World*, *in* Experiments in International Adjudication: Historical Accounts 186 (Ignacio de la Rasilla & Jorge E. Vinuales eds., 2019) (noting that "pan-Arabism has been used by Arab Maghreb countries to buttress their legitimacy and sovereignty, externally vis-à-vis non-Arab states and internally vis-à-vis each other … but at the same time [feared that] proactive Arab unity would threaten their sovereignty"). *Id*. at 186.

[9] *Id*. at 182.

[10] *Id*. at 184.

[11] Cesare P.R. Romano, *Trial and Error in International Judicialization, in* The Oxford Handbook of International Adjudication 117 (Cesare PR Romano, Karen J. Alter, & Yuval Shany eds., 2014).

[12] William Zartman, Government and Politics in Northern Africa 184 (1964).

[13] Emilia Justyna Powell, Islamic Law and International Law: Peaceful Resolution of Disputes (2019).

Mbengue's view that inter-state dispute settlement in Africa indicates a preference for solitary diplomacy.[14] However, Powell and Mbengue's views are contradicted by the fact that Islamic states in North Africa have litigated in inter-state disputes before the ICJ.[15] In our view, the combination of all these factors compounded by the relatively weak to the non-existence of the AMU as a sub-regional body makes cooperation around any set of issues including dispute settlement through an international court next to impossible. Some scholars have, however, argued that it is the weakness in the rule of law in the Maghreb region, which is a precondition for international adjudication, that partly explains why this Court was "nipped in the bud."[16]

Part Two: Individual Reference Guide to Africa's International Courts

The African Court on Human and Peoples' Rights (ACtHPR)

Establishment

The Member States of the now defunct Organization of African Unity (OAU) adopted the Banjul Charter on 27 June 1981 in Nairobi, Kenya.[17] The Banjul Charter entered into force on 21 October 1986. In an effort to achieve the objectives set out in the Banjul Charter, Member States adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights on 9 June 1998 which entered into force on January 25, 2004 (the Protocol). Previously, the African human rights system only had a quasi-judicial[18] and promotional[19] institution in the form of the Commission.[20] Article 1 of the Protocol establishes the ACtHPR. The Court, which is also discussed in Chapter 6 of this book, is set up to complement the protective mandate of the ACHPR.[21] The Court started functioning officially in 2006 when its first set of eleven judges were

[14] Makane Mbengue, *African Perspectives on Inter-State Litigation, in* International Law Disputes: Weighing The Options 182 (Natalie Klein ed., Cambridge Univ. Press 2014).

[15] *See also* Cesare P.R. Romano, *Mirage in the Desert: Regional Judicialization in the Arab World*, *in* Experiments in International Adjudication: Historical Accounts 182 (Ignacio de la Rasilla & Jorge E. Vinuales eds., 2019) (arguing that existing international adjudicative courts have been the "fora of choice for many Arab disputes").

[16] Cesare P.R. Romano, *Trial and Error in International Judicialization, in* The Oxford Handbook of International Adjudication 118 (Cesare PR Romano, Karen J. Alter & Yuval Shany eds., 2014).

[17] The Charter is referred to as the Banjul Charter to celebrate Sir Dawda Jawara, a former head of the State of Gambia who played a pioneering role towards its adoption.

[18] Frans Viljoen, *Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights*, 67 Int'l & Comp. L. Q. 64 (2018).

[19] African Charter on Human and Peoples' Rights (hereinafter "Banjul Charter"), art. 30.

[20] Victor Dankwa, *The Promotional Role of the African Commission on Human and Peoples' Rights, in* The African Charter on Human and Peoples' Rights: The System of Practice 1986–2000, at 335 (Malcolm Evans & Rachel Murray eds., 2002).

[21] The Protocol, art. 2.

elected. Unlike the ACHPR which could arguably only deliver non-binding views or recommendations on communications or petitions, the ACtHPR issues judgments that are legally binding on the state parties to the Protocol.[22]

Jurisdiction

The Court has broad jurisdiction over both contentious cases[23] and advisory opinions. Jurisdiction over contentious cases presented by individuals and NGOs is subject to the state sued in the Court having accepted the jurisdiction of the Court by signing a declaration to that effect as required under Article 34(6) of the Protocol. The Court has jurisdiction over all cases and disputes submitted to it on the interpretation and application of the Charter, Protocol, and other human rights instruments ratified by Member States.[24] The Court may also give an advisory opinion on any legal matter relating to the Banjul Charter or any other relevant human rights instrument. The Court is limited from giving an advisory opinion on a matter being examined before the Commission.[25] In exercising its function, the Court applies the provisions of the Charter as well as any other human rights instruments ratified by the states concerned.[26] A minimum number of seven judges is required for quorum.[27] A party to a case is to be represented by a legal representative of their choice.[28] The Court delivers judgment ninety days after the completion of deliberations.[29] The judgment is read in open court and is considered final. A judgment of the Court represents the unanimous or majority decision with judges being entitled to deliver dissenting opinions.[30]

Access to the Court

The access to the African court is bifurcated into direct access and indirect. Direct access to the Court is granted to the following entities: the Commission; a state party which has lodged a complaint to the Commission; a state party against which the complaint is lodged at the Commission; a state party whose citizen is a victim of human rights violation; and African Intergovernmental Organizations.[31] Additionally, the Court may entitle NGOs with observer status before the Commission, and individuals to institute cases directly before it but only subject to Article 34(6) of the Protocol.[32] This provision then requires that at the time

[22] Joseph M. Isanga, *The Constitutive Act of the African Union, African Courts and the Protection of Human Rights: New Dispensation?*, 11 Santa Clara J. Int'l L. 269, 284 (2013).
[23] Karen Alter, The New Terrain of International Law (2014).
[24] The Protocol, art. 3.
[25] *Id*. art. 4.
[26] *Id*. art. 7.
[27] *Id*. art. 23.
[28] *Id*. art. 10(2).
[29] *Id*. art. 28(1).
[30] *Id*. art. 28.
[31] *Id*. arts. 5(1)(a)–(e).
[32] *Id*. art. 5(3).

of ratification or any time after ratification, the state ratifying the Protocol can make a declaration accepting the competence of the Court to receive cases under Article 5(3) of the Protocol from NGOs and individuals. The Court shall not receive any petition under Article 5(3) involving a state party which has not made such declaration (the Article 34(6) declaration).[33] There are therefore four cumulative criteria for access in cases involving NGOs and individuals: first, the state involved must have ratified the Banjul Charter; second, the state must have ratified the Court's Protocol; third, (in cases of NGOs) it must have observer status before the Commission; and finally, the state must have made a declaration under Article 34(6).

The indirect access to the Court is set out in Rules 118 and 119 of the Commission's Rules of Procedure. What this means is that the indirect access route is *only* possible through the Commission. Leading African human rights scholar Frans Viljoen has argued that indirect access should also be possible through referral by the African Committee on the Rights and Welfare of the Child if the access provisions of the Protocol are interpreted with a purposive and non-textualist approach.[34] Viljoen offered this as a critique of the Advisory Opinion rendered by the Court barring the possibility of a referral by the African Committee on the Rights and Welfare of the Child.[35] The possibility of such indirect access through the Commission would have carved a path to file cases in the Court by NGOs and individuals in the absence of the requirements on ratification of the Protocol and the Article 34(6) optional declaration that are perquisites to filing cases in the Court.

Under the current rules of the Court, indirect access route has four sub-routes. First, the Commission can refer its non-compliance merits findings to the Court.[36] Second, the Commission can refer its non-compliance interim measures to the Court.[37] Third, the Commission can refer serious or massive human rights violations at any stage of the examination of a communication when it deems it necessary.[38] Finally, pursuant to Article 6 of the African Court Protocol, the Court can request the Commission to give its opinion on admissibility of a communication pending before the Court or the Court can transfer a communication to the Commission.[39]

[33] *Id*. art. 34(6); Michelot Yogogombaye v. Senegal, Appl. No. 1/2008, ACtHPR, Judgment (Dec. 15, 2009).

[34] Viljoen, *supra* note 18, at 85.

[35] Advisory Opinion 2/2013, The African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court and Human and Peoples' Rights (Dec. 5, 2014).

[36] Rule 118(1) of the Rules of Procedure of the African Commission on Human and Peoples' Rights.

[37] Rule 118(2) of the Rules of Procedure of the African Commission on Human and Peoples' Rights; The Protocol, art. 6(3).

[38] Rule 118(3), Rules of Procedure of the African Commission on Human and Peoples' Rights.

[39] Rule 119(1), Rules of Procedure of the African Commission on Human and Peoples' Rights.

Composition and Organization

The Court is composed of eleven judges.[40] To be elected as a judge, one must be a jurist of high moral character, and of recognized practical, judicial, or academic competence.[41] One must also possess experience in the field of human and peoples' rights. Judges are nominated by state parties, who can nominate up to three candidates, two of whom must be nationals of the state. The Secretary-General then prepares a list of nominees to be transmitted to the state parties thirty days prior to the next session of the Assembly. The judges are elected by secret ballot by the Assembly. In doing so, the Assembly should ensure that there is representation of the main regions of Africa as well as gender representation.[42] Judges are appointed for a period of six years and may be re-elected only once.[43] The Court elects a president and vice president for a period of two years and they also may be re-elected once.[44] The President is employed on a full-time basis to perform judicial functions, thus resides at the seat of the Court (currently in Arusha).[45] A judge cannot be suspended or removed from office unless found to be no longer fulfilling the conditions required to be a judge.[46] A judge who is elected to replace another judge whose term has not expired will serve until the end of his predecessor's term.[47]

The Economic Community for West African States (ECOWAS) Court of Justice

Establishment

The heads of state and government of the West African states formed ECOWAS when they signed the Treaty of the Economic Community of West African States in Lagos Nigeria on May 28, 1975 (Treaty of Lagos). Article 4 of the Treaty established institutions to achieve the aims set out in the Treaty. Among the institutions created was the Tribunal for the community.[48] In 1991, the Member States revised the Treaty and through Articles 6 and 15 of the Revised Treaty of the Economic Community of West African States (ECOWAS Treaty), established the Community Court of Justice. In pursuance with Article 6(2) of the ECOWAS Treaty, the Member States adopted the Protocol on the Community Court of Justice.[49]

[40] The Protocol, art. 11.
[41] *Id*.
[42] *Id*. art. 14(2) & (3).
[43] *Id*. art. 15.
[44] *Id*. art. 21(1).
[45] *Id*. art. 21(2).
[46] The Protocol, art. 19(1).
[47] *Id*. art. 15(3).
[48] Article 1(d) of the Treaty of the Economic Community of West African States.
[49] Protocol A/P.I/7/91 on the Community Court of Justice.

Jurisdiction

The Court has jurisdiction to hear and determine disputes referred to it on the interpretation and application of the provisions of the Treaty.[50] Disputes regarding the Treaty or its application can only to be settled by the Court.[51] The Court may also give advisory opinions on questions arising from the Treaty.[52] A request for an advisory opinion is to be made by a Member State, the ECOWAS Authority (the highest ECOWAS decision-making body), the Council, the Executive Secretary, and institutions of the community.[53] The Court has personal jurisdiction over disputes between Member States; and disputes between one or more Member States and institutions of the community.[54] In 2004, in *Olajide Afolabi v Nigeria*, the ECOWAS Court declined to adjudicate over a human rights claim arguing that the Protocol did not confer jurisdiction over human rights.[55] In 2005, Member States adopted the Supplementary Protocol A/SP.1/01/05 which expressly provides that ECOWAS Court has the power to hear cases relating to the violation of human rights.[56] This was done in pursuance of the fundamental principles of ECOWAS in which Member States undertake to recognize, promote, and protect human and peoples' rights in accordance with the Banjul Charter.[57]

A Member State may institute proceedings against another Member State or institution of the community on behalf of its nationals.[58] Efforts to have the dispute resolved amicably must have first been attempted and failed.[59] This is not the case for human rights disputes. Private litigants (natural and legal persons) from ECOWAS Member States may approach the Court without exhausting local remedies.[60] In *Hadijatou Mani Koraou v Republic of Niger* the Court held that an application of a human rights violation before the Court must not be anonymous or pending before another international court.[61] A party to a dispute is to be represented by one or two agents nominated by that party. These agents may request assistance of one or more Advocates or Counsels who are recognized to practice law by the laws and regulations of Member States.[62] Proceedings of the Court are in

[50] Article 9(2) of the Protocol on the Community Court of Justice (hereinafter "Protocol on the CCJ").
[51] Protocol on the CCJ, art. 22(1).
[52] Protocol on the CCJ, art. 10(1).
[53] *Id*.
[54] Protocol on the CCJ, art. 9(2).
[55] Lucyline Nkatha Murungi & Jacqui Gallinetti, *The Role of Sub-Regional Courts in the African Human Rights System,* 7 SUR—Int'l J. Human Rts. 119, 133 (2010).
[56] Supplementary Protocol A/SP1/01/05 on the Community Court of Justice.
[57] Solomon Ebobrah, *Human Rights Developments in African Sub-regional Economic Communities during 2010*, 11 Afr. Human Rts. L. J. 216, 228 (2011).
[58] Protocol on the CCJ, art. 9(3).
[59] *Id*.
[60] Karen Alter, James Gathii, & Laurence Helfer, *Backlash against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 Eur. J. Int'l L. 292, 296 (2016).
[61] Hadijatou Mani Koraou v. Republic of Niger, ECW/CCJ/JUD/06/08 (Oct. 27, 2008).
[62] Protocol on the CCJ, art. 12.

two parts: written and oral.[63] The President and two other judges are required for a sitting of the Court to be valid.[64] More judges may sit but the number of judges sitting must be an uneven number.[65]

The Court determines disputes in accordance with the Treaty and the Rules of Procedure of the Court.[66] It may also apply the body of laws contained in Article 38 of the Statute of the International Court of Justice.[67] The Banjul Charter has also been used by the Court as a rights catalogue.[68] Decisions are read in open court with reasons for the decision being stated.[69] The decisions are final.[70] That means that they can only be reviewed where there is discovery of a fact that would have a decisive factor on the decision that was unknown to the Court or the party.[71] Under the Treaty, such ignorance should not be due to negligence.[72] An application for revision must be made within five years.[73]

Composition and Organization

The seat of the Court is determined by the Authority which is the highest ECOWAS decision-making body. However, the Court may decide to sit in the territory of another Member State where the facts of the case demand.[74] Currently, the Court sits in Abuja, Nigeria. The official languages of the Court are English and French.[75] The Court is composed of seven independent judges selected and appointed by the Authority from nationals of Member States of the community.[76] The appointees must possess the qualifications of appointment to the highest judicial office in their countries.[77] The seven judges of the Court elect a president and vice president from among themselves. The President and Vice President serve for a term of three years.[78] Judges are appointed from a list of persons nominated by Member States.[79] Nominees must be between forty and sixty years of age.[80] A judge of the Court is not eligible for re-appointment after they attain sixty-five years of age.[81] Judges of the Court are appointed for a period of five years which is only renewable

[63] *Id*. art. 13.
[64] *Id*. art. 14.
[65] *Id*. art. 13.
[66] *Id*. art. 19(1).
[67] *Id*. art. 19(1).
[68] Murungi & Gallinetti, *supra* note 55, at 119, 130.
[69] Protocol on the CCJ, art. 19(2).
[70] *Id*.
[71] *Id*. art. 25.
[72] *Id*. art. 25.
[73] *Id*. art. 25(4).
[74] *Id*. art. 26.
[75] *Id*. art. 31.
[76] *Id*. art. 3(2).
[77] *Id*. art. 3(1).
[78] *Id*. art. 3(2).
[79] *Id*. art. 3(4).
[80] *Id*. art. 3(7).
[81] *Id*. art. 3(7).

once.[82] A judge whose term has expired shall remain in office until his successor has been appointed.[83] The Protocol requires a judge whose term has expired to continue hearing the cases which he had begun.[84] A judge may resign at any time by writing a letter of resignation.[85] Where a judge is unable to perform his functions, has a physical or mental disability, or is involved in gross misconduct, the Court draws a report which is transmitted to the Authority which may relieve the judge in question of his post.[86] Article 4(11) of the Protocol prohibits judges from exercising any political or administrative functions, or engaging in other professional occupations.

East Africa Court of Justice (EACJ)

Establishment of the Court

The establishment and history of the establishment of the EACJ can be traced to the Treaty for the Establishment of the East African Community (EAC Treaty) signed on November 30, 1999 by the heads of state and governments of East African States. That Treaty entered into force on July 7, 2000. It was subsequently amended on December 14, 2006 and again on August 20, 2007. Article 9(1)(e) of the EAC Treaty establishes the EACJ. The Court is mandated to ensure the adherence to law in the interpretation, application, and compliance of the EAC Treaty.[87] The EACJ became operational on November 30, 2001.

Jurisdiction

The EACJ has a contentious and advisory jurisdiction.[88] In both instances, its primary role is that of the interpretation and application of East African Community (EAC) treaties.[89] In its original structure, the Court had one chamber.[90] However, amendments to the Treaty for the Establishment of the EAC (EAC Establishment Treaty) that came into effect in March 2007 created an Appellate Division, making the Court a two-chamber court.[91] The First Division is comprised of ten

[82] *Id*. art. 4(1).
[83] *Id*. art. 4(3).
[84] *Id*. art. 4(3).
[85] *Id*. art. 7.
[86] *Id*. art. 4(7).
[87] Article 23 of the Treaty for the Establishment of the East African Community, 2144 U.N.T.S. 255 (Nov. 30, 1999) (hereinafter "EAC Treaty").
[88] EAC Treaty, art. 27–36.
[89] EAC Treaty, art. 27(1).
[90] *User Guide*, EACJ 11 (2013), https://www.eacj.org//wp-content/uploads/2013/11/EACJ-Court-Users-Guide-September-2013.pdf.
[91] EAC Treaty, art. 24. The EAC Treaty provides that the Court "shall consist of a First Division and an Appellate Division." *Id*. art. 23(2). These amendments were made following a decision of the EACJ that was strongly objected to by the government of Kenya. For more on the circumstances leading to the amendments, *see* Chapter 7 in this book.

judges,[92] two from each of the five EAC Member States.[93] The Appellate Division is comprised of five judges,[94] one from each of the five Member States.[95] The current location of the Court is Arusha, Tanzania. This location is deemed to be temporary; a permanent seat for the Court has not yet been determined by the Summit,[96] the highest organ in the EAC.[97] The Summit also appoints judges to the Court.[98] Other than the President of the Court, who also heads the Appellate Division, and the Principal Judge of the First Instance Division,[99] the judges do not reside in Arusha.[100] They come to Arusha when there is a prescheduled convening of Court business.[101] Judges hold office for a seven-year period[102] and must retire at seventy years of age.[103] As further evidence of the novelty of this Court, the salaries, conditions of service, and other terms of EACJ judges are yet to be determined.[104]

As noted earlier, the EACJ has jurisdiction "over the interpretation and application" of the EAC Establishment Treaty.[105] The Treaty that established the EACJ also provides that it "shall have such other original, appellate, human rights and other jurisdiction *as will be determined* by the Council at a suitable subsequent date."[106]

[92] EAC Treaty, art. 24(2) (providing that the First Instance Division shall not be comprised of more than ten judges).

[93] *Id*. art. 24(1)(a) (providing that no more than two judges can be appointed from the same EAC Partner State).

[94] *Id*. art. 24(2) (providing that the Appellate Division shall not be comprised of more than five judges).

[95] *Id*. art. 24(1)(b).

[96] *Id*. art. 47 (providing that the "[s]eat of the Court shall be determined by the Summit").

[97] *Id*. art. 10 (stating that the Summit comprises the heads of government of the five East African Partner States).

[98] *Id*. art. 24.

[99] Under the EAC Treaty, the President "shall direct the work of the Court, represent it, regulate the disposition of matters before the Court, and preside over its sessions." *Id*. art. 24(10). Under art. 24(8), the "Principal Judge shall direct the work of the First Instance Division, represent it, regulate the disposition of the matters brought before the Court and preside over its sessions." *Id*. art. 24(8). The EAC Treaty provides that '[t]he President and Vice-President … shall not be nationals of the same Partner State.' *Id*. art. 24(6).

[100] *EACJ Judge President, Principal Judge Now Full-Time in Arusha*, EACJ (July 2, 2012), https://www.eacj.org/?p=397.

[101] Since 2013, both divisions of the Court have held longer quarterly sessions every year as the number of cases has increased. For example, the First Division continued to meet between February 4 and 28. *See EACJ 5th Quarter Sessions Resume Today*, EACJ (Jan. 27, 2014), http://eacj.org/?p=1756.

[102] EAC Treaty, *supra* note 87, at art. 25(1).

[103] *Id*. art. 25(2). As a matter of practice, judicial appointments are staggered to prevent all the judges' terms coming to an end at the same time. In the first appointment round, judges are appointed for seven years. In the second appointment round, judges are appointed for five years. The cycle is then repeated with each subsequent appointment round. Interview with Justice Butasi, Principal Judge of the EACJ First Division, in Arusha, Tanzania (June 25, 2014).

[104] *See* EACJ, Strategic Plan: 2010–2015, at v (Apr. 2010), http://eacj.org/wp-content/uploads/2013/09/EACJ_StrategicPlan_2010-2015.pdf. The EAC Treaty provides that the Summit, which consists of the heads of government of EAC states, shall determine the salary, terms, and conditions upon recommendation of the EAC Council of Ministers. EAC Treaty, *supra* note 87, at art. 25(5).

[105] EAC Treaty, *supra* note 87, at art. 27(1). In addition, the EAC Treaty provides that the role of the Court shall be to "ensure the adherence to law in the interpretation and application of and compliance with this Treaty." *Id*. art. 23(1).

[106] *Id*. art. 27(2) (emphasis added).

At the 15th Ordinary Summit of the EAC's heads of state, a decision was made to defer giving the EACJ jurisdiction over human rights and to instead consult with the AU on the matter.[107] The Summit, however, extended the Court's jurisdiction over trade and investment cases as well as cases arising under the EAC's Monetary Union treaty.[108] The Court also has jurisdiction over disputes between the EAC and its employees;[109] arbitral disputes arising from commercial contracts between private parties; and agreements to which the EAC, any of its institutions, or EAC Member States are parties if an arbitration clause in such a contract or agreement confers such jurisdiction.[110]

For the parties with direct access, the jurisdiction of the Court, subject to the limitation of Article 27(1) of the EAC Treaty that provides that the Court shall be granted jurisdiction over human rights at a future date,[111] is compulsory once the relevant state has ratified the EAC Treaty. However, under its *Katabazi* doctrine, the Court has assumed jurisdiction over human rights cases based on the argument that in doing so, the Court is simply exercising its jurisdiction to interpret and apply treaty provisions.[112]

Access to the Court

The access to the EACJ can only be made through direct access as stipulated in Articles 28, 29, and 30 of the EAC Treaty. This means that unlike the ACtHPR, the EACJ does not have any means of indirect access. Any person residing in the EAC can bring cases to the EACJ.[113] Such suit can only be filed against one of the EAC Member States or an institution of the EAC for a declaration that its conduct is inconsistent with the EAC Treaty.[114] Employees of the EAC may sue regarding

[107] *See* EAC IRC Repository, Communiqué the 15th Ordinary Summit of the EAC Heads of State, para. 16 (Nov. 30, 2013), http://repository.eac.int/bitstream/handle/11671/546/Annex%20VI-COMMUNIQUE%20OF%20THE%2015TH%20ORDINARY%20SUMMIT%20OF%20HEADS%20OF%20STATE.pdf?sequence=1&isAllowed=y (extending the jurisdiction of the EACJ to include commercial, investment, and monetary matters, but deciding to work with the AU (rather than the EACJ) on matters relating to human rights and crimes against humanity).

[108] EAC IRC Repository, Communiqué of the 16th Ordinary Summit of the East African Community Heads of State, para. 9 (Feb. 20, 2015), http://repository.eac.int/bitstream/handle/11671/547/COMMUNIQUE%2016TH%20ORDINARY%20EAC%20HEADS%20OF%20STATE%20SUMMIT%2018TH%20FEB%202015-1.pdf?sequence=1&isAllowed=y. *See also* EAC, EACJ Gets New Judges and Deputy Principal Judge (Jan. 27, 2015), http://eacj.org/?p=1754 (noting that "[t]he summit approved the Council recommendation to extend the jurisdiction of the [EACJ] to cover trade and investment as well as matters associated with the East African Monetary Union. On Human Rights matters as well as crimes against humanity, the Summit directed the Council of Ministers to work with the African Union on this matter.")

[109] EAC Treaty, *supra* note 87, at art. 31.

[110] *Id*. art. 32.

[111] *Id*. art. 27(1).

[112] Katabazi and 21 others v. Secretary General of the East African Community and Another, Ref. No. 1 of 2007, EACJ 3 (Nov. 1, 2007).

[113] EAC Treaty, supra note 87, art. 30(1).

[114] *Id*. art. 30 (providing that in such a case the Court could be asked to determine "the legality of any Act, regulation, directive, decision or action of Partner State or an institution of the EAC on grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions

the terms and conditions of their service to the EAC.[115] The Court's arbitral jurisdiction can be invoked pursuant to an agreement or contract between commercial actors, the EAC, or EAC Member States.[116] A matter may be referred to the Court first by a Partner State.[117] Second, by the Secretary General (SG) of the Community possesses a power of ensuring the enforcement of the Court's decision. The SG can do so by submitting a reference to the Court in cases where the SG considers that a Partner State has failed to fulfil an obligation under the Treaty or has infringed a provision of the Treaty.[118] Before reference to the Court, the SG is required to submit a report with observations and findings of the infringement or violation to the Partner State.[119] The Appellate Division of the EACJ has affirmed the holding in the *Katabazi* case that there is nothing in the EAC Treaty preventing the SG from conducting an investigation into treaty violations on his or her own initiative.[120] Further, the Appellate Division has held that failure to submit a report under Article 29(1) may constitute a contravention of the Treaty.[121]

If the Partner State does not submit any responses to a report by the SG under Article 29(1) within four months, its observations are unsatisfactory, the SG is required to submit the matter to the Council.[122] The Council then decides whether the SG can refer the matter to the Court or the matter is resolved by the Council.[123] In addition, the Council is empowered to direct the SG to refer the matter to the Court if it fails to resolve the matter.[124] In all the proceedings before the Court, every party to a dispute must be represented by an advocate entitled to appear in the Court of any of the Partner States.[125]

Finally, the third entities that have direct access to the Court are legal and natural persons who are resident in a Partner State.[126] These entities include resident companies, NGOs, and individuals in the six Partner States in the EAC. They are granted access to the Court to make any reference to the Court to determine the legality of an Act, regulation, directive, decision, or action of a Partner State, or an institution of the Community on the grounds that such Act, regulation, directive,

of this Treaty"). A carve-out in art. 30(3) provides that the Court shall have no jurisdiction "where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner state." *Id*. art. 30(3).

[115] *Id*. art. 31.
[116] *Id*. art. 32.
[117] *Id*. art. 28.
[118] *Id*, art. 29(1).
[119] *Id*.
[120] Democratic Party v. The Secretary General of the East African Community and Others, Appeal No. 1 of 2014, paras. 76 and 77 (July 28, 2015).
[121] *Id*. at para. 79(v).
[122] EAC Treaty, *supra* note 87, art. 29(2).
[123] *Id*.
[124] *Id*. art. 29(3).
[125] *Id*. art. 37(1).
[126] *Id*. art. 30 .

decision, or action is unlawful or in an infringement of the provisions of the Treaty.[127] This access provision makes it possible for a non-citizens of the EAC Partner State to make a reference to the Court since the requirement for access is for residency and not citizenship. This widens the doors of access to many more entities than would have access to the Court were the provision to be only for citizens in the Partner States.

Composition and Organization

As noted earlier, the EACJ has two divisions: a First Instance Division and an Appellate Division. The Court is composed of a maximum of fifteen judges. Ten of the fifteen judges sit at the First Instance Division while five sit at the Appellate Division.[128] Judges are appointed by the Summit from a list of persons nominated by the Partner States,[129] and serve for a term of seven years.[130] The Summit also appoints, from the Appellate Division, two judges to serve as the President and Vice President of the Court.[131] A principal judge and a deputy principal judge are also appointed from the First Instance Division to direct the work of the division. Before the 2006/7 amendments, the EACJ consisted of no more than six judges, with no more than two from each of the original three Partner States. This structure was based on the fact that the EAC then had five members who would appoint two First Instance Judges (for a maximum of ten) and one Appellate Division Judge (up to a maximum of five as provided by the EAC Treaty). When South Sudan joined the EAC in 2016, the membership rose to six but the EAC Treaty was not amended to accommodate the appointment of more judges in equal numbers from the expanded membership of the EAC. The Court has now implemented a rotational system of appointments to accommodate the expanded membership.

A judge may resign at any time by giving a three months' written notice to the Chairman of the Summit.[132] Misconduct, bankruptcy, conviction of a criminal offence, or the inability to perform functions may result in the removal of a judge from office.[133] Removal from office is only done by the Summit. A judge may be suspended pending determination from a tribunal concerning the removal from office.[134] In such a case, a temporary judge is appointed for the duration of the suspension.[135]

Disputes in which the Community is a party are not excluded from national jurisdiction solely on this basis.[136] The official language of the Court is English. The

[127] *Id*. art. 30.
[128] *Id*. art. 24(2).
[129] *Id*. art. 24(1).
[130] *Id*. art. 25.
[131] *Id*. art. 24(2).
[132] EAC Treaty, *supra* note 87, art. 24(5).
[133] *Id*. art. 26(1).
[134] *Id*. art. 26(2).
[135] *Id*. art. 26(2A).
[136] *Id*. art. 33.

seat of the Court is determined by the Summit.[137] Decisions of the Court are delivered in open court.[138] Only one judgment is delivered, which is the majority decision. A judge, however, has the option of delivering a dissenting opinion.[139] An application of review is only permitted where there is discovery of a fact that would have had a decisive influence on the judgment that was unknown to the Court and the parties before the decision was made.[140] Article 35A of the Treaty provides for the right of appeal which may only be done on points of law, grounds of lack of jurisdiction, or procedural irregularity.

South Africa Development Community (SADC) Tribunal

Establishment of the Tribunal

On August 17, 1992, in Windhoek, Namibia, the heads of state or government of the Southern African states signed the Declaration and Treaty establishing the SADC.[141] Through Article 9(1)(g) of the Treaty a Tribunal was established. To give effect to the goals set out in the Treaty, Article 22 made provision for Member States to conclude a series of Protocols. On August 7, 2000 at the SADC Summit in Windhoek, the Member States adopted the Protocol on the Tribunal of the Southern African Development Community.[142] The Protocol makes provisions on the functioning of the Tribunal including organization, jurisdiction, and procedure of the Tribunal. The Tribunal also functions in accordance with the Rules of Procedure of the Southern African Development Community Tribunal. The first Protocol of the Tribunal and the Rules of Procedure (Tribunal Protocol) was adopted by the SADC Summit on August 7, 2000 and was subsequently amended on October 3, 2002. As we note later, the SADC Tribunal established in 2000 was disbanded and a 2014 Protocol was introduced to re-establish it, this time without individual access to the Tribunal, but it has yet to come into force.[143]

Jurisdiction

The Tribunal as constituted by the 2000 Protocol had jurisdiction over all cases relating to the interpretation and application of the Treaty; interpretation, application, and validity of the Protocols, all subsidiary instruments adopted with the framework of the Community and acts of the institution of the Community. It

[137] *Id*. art. 47.
[138] *Id*. art. 35(2).
[139] *Id*.
[140] *Id*. art. 35(3).
[141] Declaration and Treaty establishing the Southern African Development Community (hereinafter "Declaration and Treaty").
[142] Preamble, Agreement Amending the Protocol on the Tribunal, Southern African Development Community 2000.
[143] For the full account of how this happened, *see* Chapter 7 in this book.

also had jurisdiction over all matters specifically provided in any agreements that Member States may conclude among themselves or within the Community and which confer jurisdiction on the Tribunal.[144] The Tribunal also had jurisdiction over disputes between Member States, and between natural or legal persons and Member States.[145] The claims by natural persons could only be accepted after the exhaustion of domestic remedies, and the Protocol also explicitly confers compulsory jurisdiction on the Tribunal.[146] The Protocol empowered the Tribunal to give preliminary rulings in proceedings of any kind and between any parties before the courts or tribunals of the states. However, it did not have original jurisdiction.[147] The Tribunal also had exclusive jurisdiction on disputes between the Member States and the Community[148] over disputes between natural or legal persons and the Community,[149] and over disputes between the Community and staff.[150] Finally, the Tribunal had advisory jurisdiction which could have been requested by the Summit or by the Council in terms of Article 16(4) of the SADC Treaty.[151]

The Tribunal had no express mention of jurisdiction over human rights.[152] Inclusion of a specific human rights mandate for the SADC Tribunal was debated and rejected.[153] While there is no express human rights mandate before the removal of its jurisdiction to receive cases from individuals in the 2014 Protocol the Tribunal decided several human rights cases. One of the most well-known cases is *Mike Campbell (PVT) Ltd and 78 others v The Republic of Zimbabwe* (the *Campbell* case). In that case Zimbabwe challenged the jurisdiction of the Court arguing that the Tribunal had no jurisdiction over human rights issues. In response, the Tribunal held that the fact that the SADC Treaty included references to human rights, democracy, and rule of law as principles of SADC sufficed to grant it jurisdiction over these matters.[154]

The jurisdiction of the Tribunal extended to Member States, the Community, and, prior to 2014, natural or legal persons who could bring cases before the Tribunal.[155] A dispute could have been referred to the Tribunal either by the Member States, or by the competent institution or organ of the Community and, prior to 2014, by natural or legal persons. Representation of states and institutions of the Community was possible through an appointed agent.[156]

[144] Protocol on the Tribunal in the Southern African Development Community 2000, art. 14 (hereinafter "Protocol on the Tribunal 2000").
[145] *Id*. art. 15(1).
[146] *Id*. arts. 15(2) & (3).
[147] *Id*. art. 16.
[148] *Id*. art. 17.
[149] *Id*. art. 18.
[150] *Id*. art. 19.
[151] *Id*. art. 20.
[152] Murungi & Gallinetti, *supra* note 55, at 123.
[153] *Id*. at 132.
[154] *Id*. at 133.
[155] Declaration and Treaty, *supra* note 141, arts. 17, 18.
[156] Protocol on the Tribunal 2000, *supra* note 144, at art. 27.

Decisions of the Tribunal were to be considered final and binding.[157] The decision were required to be in writing and delivered in open court stating reasons for decision. Decision were required to be taken by majority.[158] An application for a review of a decision could have been made where there is discovery of a fact which might have had decisive influence on the decision of the Tribunal.[159] Enforcement of a judgment was governed by the civil procedure rules in the territory of the state in which the judgment was to be enforced.[160] A party concerned was entitled to refer non-compliance of a decision by a state to the Tribunal.[161] Where the Tribunal found that there has been non-compliance, it reports its finding to the Summit for appropriate action.[162]

As alluded to earlier, the SADC Tribunal has been suspended since 2010 after it made a ruling against Zimbabwe in the *Campbell* case and is discussed more extensively in Chapter 7 of this book.[163] Zimbabwe failed to comply with the decision of the Tribunal. The Tribunal referred the non-compliance of Zimbabwe to the Summit in accordance with Article 32(4) of the Protocol on the Tribunal of the SADC.[164] Zimbabwe submitted a legal opinion challenging the legality of the SADC Tribunal on the grounds that the Protocol never entered into force.[165] In April 2010, Zimbabwe's non-compliance was discussed by SADC Ministers of Justice and Attorneys Generals. They then submitted their advice to the Summit.[166] At the same time, the Tribunal made another ruling of non-compliance. In August 2010, the Summit decided not to reappoint judges to the Tribunal.[167] The judges of the Tribunal at the time were to hear and determine the pending cases before them but did not take any new cases.[168] In 2014, a new protocol on the Tribunal was adopted but it has not entered into force. The new Protocol establishes a new judicial organ with limited jurisdiction.[169] Under the new Protocol, the Tribunal does not hear and determine complaints from private litigants.[170]

[157] Declaration and Treaty, *supra* note 141, at art. 16.
[158] Protocol on the Tribunal 2000, *supra* note 144, at art. 24.
[159] *Id*. art. 26.
[160] *Id*. art. 32(1).
[161] *Id*. art. 32(4).
[162] *Id*. art. 32(5).
[163] Henok Asmelash, *Southern African Development Community (SADC) Tribunal*, *in* Max Planck Encyclopedia of International Procedural Law (June 1, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2991562.
[164] Solomon Ebobrah, *Human Rights Developments in African Sub-regional Economic Communities during 2010*, 11 Afr. Human Rts. L. J. 216, 247 (2011).
[165] *Id*.
[166] *Id*.
[167] *Id*. at 228.
[168] *Id*.
[169] Gino Naldi & Konstantinos Magliveras, *The New SADC Tribunal: Or the Emasculation of an International Tribunal*, 63 Netherlands Int'l L. R. 133–59 (2016).
[170] Karen Alter, James Gathii, & Laurence Helfer, *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 Eur. J. Int'l L. 292, 294 (2016).

Composition and Organization

Under the Agreement Amending the Protocol on the Tribunal, Southern African Development Community 2000, the Tribunal consisted of a minimum of ten members, appointed from nationals of Member States. The appointees were required to possess qualifications required for appointment to the highest judicial position in their states or are jurists of recognized competence.[171] Each Member State was entitled to nominate one candidate. From the list of nominated candidates, the Council recommended ten nominees to the Summit for appointment as Members of the Tribunal.[172] Members of the Tribunal were appointed for a term of five years, renewable only once for a period of five years.[173] Of the ten members to the Tribunal, there were five regular members and five additional members. Regular members were designated to sit regularly on the Tribunal. The additional members could be invited to sit on the Tribunal by the President when a regular member was temporarily absent or unable to perform his or her function.[174]

The President of the Tribunal was elected by the Tribunal for a term of three years.[175] The 2000 Protocol was silent on whether this term was renewable. Where the President was temporarily absent or unable to perform their functions, other Members could elect an acting president.[176] Members of the Tribunal could resign at any time by a letter to the Council through the Executive Secretary.[177] Dismissal of Members could only be done in accordance with the Rules.

Constitution of the Tribunal required three members whereas a full bench is constituted of five members.[178] However, no two or more members shall be nationals of the same state.[179] Members were not appointed on a full-time basis as the Tribunal only sat when it is required to consider a case submitted to it.[180] The Council could decide, following the recommendation of the President, that the workload of the Tribunal requires members to serve on a full-time basis. In such cases, the members elected or subsequently appointed to serve on full-time basis could not hold any other office or employment.[181] A member was required to continue to hear and complete cases partly heard by that member regardless of expiration of his term of office.[182] A registrar, appointed by the Tribunal, was charged with the responsibility for the day-to-day administration of the Tribunal.[183] The

[171] Protocol on the Tribunal 2000, *supra* note 144, at art. 3(1).
[172] *Id*. art. 4. The Council is an institution consisting of one Minister from each Member State.
[173] *Id*. art. 6.
[174] *Id*. art. 3(2).
[175] *Id*. art. 7(1).
[176] *Id*. art. 7(2).
[177] *Id*. arts. 8(1) & (2).
[178] *Id*. art. 3(3).
[179] *Id*. art. 3(3).
[180] *Id*. art. 6(2).
[181] *Id*. art. 6(3).
[182] *Id*. art. 8(4).
[183] *Id*. art. 12.

Tribunal had a seat at a place designated by the Council.[184] This did not, however, limit it from sitting anywhere within the Community for a particular case, if this is considered desirable.[185] The working languages of the Tribunal were English, Portuguese, and French.[186]

The 2014 SADC Tribunal Protocol removed individual access for individuals when the Tribunal is eventually reconstituted.[187] The 2014 Protocol also provides that the law to be applied by the Tribunal is now limited to the SADC Treaty and applicable to SADC Protocols.[188] This is a significant reduction from the "old" Tribunal which could interpret the SADC Treaty, the SADC Protocols, all subsidiary instruments adopted by the Summit, the Committee of Ministers (CoM), or by any other institution or organ of the Community pursuant to the SADC Treaty.[189] Another significant change is that under the 2014 Protocol the President of the Tribunal will be elected by the Summit[190] and not by the other judges as was previously.[191]

African Commission on Human and Peoples' Rights (ACHPR)

Establishment

The Organization of African Unity (OAU), the forerunner to the AU, adopted the Banjul Charter in 1981 which entered into force in 1986. The Banjul Charter establishes an African commission to promote, protect, and interpret the rights in the Charter.[192] The Commission shares this role with the ACtHPR. The OAU inaugurated the Commission in 1987. The Banjul Charter mandates the Commissioners to act in their personal capacity and to be impartial.[193] This requirement of impartiality and independence explains why the Commission's headquarters is located in Banjul, the Gambia, away from the OAU headquarters in Addis Ababa.[194] The Commission is a human rights "monitoring body" or a "supervisory institution."[195]

[184] *Id*. art. 13.
[185] *Id*.
[186] *Id*. art. 22.
[187] Protocol on the Tribunal in the Southern African Development Community 2014, art. 33 (hereinafter "Protocol on the Tribunal 2014").
[188] *Id*. art. 35.
[189] Protocol on the Tribunal 2000, *supra* note 144, art. 21.
[190] Protocol on the Tribunal 2014, *supra* note 187, art. 5(1).
[191] Protocol on the Tribunal 2000, *supra* note 144, art. 7.
[192] OAU, *African Charter on Human and Peoples' Rights (Banjul Charter)* 21 Int'l Leg. Materials 58, arts. 30, 45 (1982).
[193] *Id*. art. 31.
[194] M. L. Balanda, *African Charter on Human and Peoples' Rights, in* New Perspectives and Conceptions of International Law: An Afro-European Dialogue 134 (K. Ginther & W. Benedek eds., 1984).
[195] Gino J. Naldi, *The African Union and the Regional Human Rights System, in* The African Charter on Human and Peoples' Rights: The System Practice 1986–2006, at 35 (Malcolm Evans & Rachel Murray eds., 2008).

It is important to note that the Commission is not a court or tribunal with compulsory jurisdiction. The Commission can be compared with such bodies as the United Nations Human Rights Committee, and is thus best described as a "quasi-judicial" organ with jurisdiction to receive inter-state communications and "other" communications.[196]

Jurisdiction

The Commission's mandate is to promote human and peoples' rights through documentation, research, and formulation of rules and principles. It also charged with ensuring the protection of human and peoples' rights, interpretation of the provisions of the Charter, and any other tasks entrusted to it.[197] The Commission has three missions:

1. The promotion of human and peoples' rights;
2. The protection of human and peoples' rights; and
3. The interpretation of the Banjul Charter.[198]

In exercising its protective mandate, the Commission receives two types of communications: communications from states[199] and other communications other than those of state parties.[200] The Rules of Procedures of the Commission allows natural (individuals) or legal persons to present communications to the Commission under Article 55 of the Banjul Charter.[201] The Commission has allowed applicants other than the harmed victims, especially NGOs, to present communications on behalf of human rights violation victims through the system of *actio popularis*.[202] Through these communications, petitioners inform the Commission that they believe another state has violated the provisions of the Charter.[203] States have seldom initiated petitions.[204] The provision for other communications other than those of

[196] *Id*.
[197] Banjul Charter, *supra* note 19, art. 45.
[198] *Id*.
[199] *Id*. arts. 47, 54.
[200] *Id*. arts. 55–59.
[201] African Commission on Human and Peoples' Rights Rules of Procedure, rule 93 (hereinafter "ACHPR Rules").
[202] Article 19 v. Eritrea, Communication 275/2003, AHRLR 73, African Commission on Human and Peoples' Rights [ACHPR] (May 2007); Malawi African Association and Others v. Mauritania, No. 54/91, AHRLR 149, ACHPR (May 11, 2000); Constitutional Rights Project (in respect of Lekwot and Others) v. Nigeria, No. 87/93, AHRLR 183, ACHPR (Mar. 22, 1995).
[203] Banjul Charter, *supra* note 19, art. 47.
[204] Rachel Murray, The African Commission on Human and Peoples' Rights and International Law 65 (2000) (according to Murray, "a complaint was received from Sudan alleging human rights violations by Ethiopian troops in Sudanese territory during the alleged Ethiopian invasion of the Kurmuk and Gissan regions in Sudan on 12th January 1997. The Commission referred the matter to the OAU Secretariat and advised Sudan to do likewise because Ethiopia is not a party to the Charter and thus not subject to the Commission's jurisdiction," *Id*. In March 1999 an African radio station, Gabon's African Number One, noted that the Democratic Republic of Congo had submitted a complaint against Rwanda, Uganda, and Burundi, although there is no official record of this from the

states has made it possible for individuals and NGOs to have direct access to the Commission (ICJ Press Communiqué 99/34, 23 June 1999; at the 25th Session (see 25th Session Transcripts, 12).

Seizure and Admissibility of Individual Communications

Any natural or legal person can submit a communication to the Commission through the Chairperson of the Commission pursuant to Article 55 of the Banjul Charter.[205] The Commission has never decided not to be seized of a matter submitted through this procedure. The main aim of admissibility is to serve a screening or filtering mechanism between national and international institutions.[206] The question of admissibility is normally determined separately from the substantive questions. The principle of exhaustion of local remedies applies when referring a matter to the Commission.[207] Article 56 of the Banjul Charter set out the grounds for admissibility. They are as follows: all communications should identify their author; the communication must be compatible with the AU Constitutive Act and the Banjul Charter; communications must not be written in disparaging language; communication must not be based solely on media information; and all communications must be sent after exhaustion of domestic remedies. The Commission prepares a report of facts and findings after it has gathered all information deemed necessary in relation to a particular communication.[208] The report is sent to the states concerned and communicated to the Assembly. The report transmitted to the Assembly may contain recommendations the Commission deems useful.[209] The Commission submits a report to the Assembly at each ordinary session of the Assembly of heads of state and heads of government.[210]

Composition and Organization

The Commission consists of eleven members (Commissioners), who must be nationals from different African states.[211] The AU Assembly of heads of state and government elects the eleven Commissioners for a renewable period of six years. They

Commission. A case has subsequently been submitted to the ICJ by the same state although it is not clear whether the facts are the same: Democratic Republic of Congo v. Burundi, Uganda and Rwanda, ICJ Press Communiqué 99/34 (June 23, 1999). In addition, at the 25th Session (*see* 25th Session Transcripts, 12), Ethiopia made a statement alleging violations by Eritrea. The Commission mentioned Article 47 of the Charter and stated that it would be willing to consider a case. It is not known if any has been submitted.).

[205] ACHPR Rules, *supra* note 201, rule 93.

[206] *See* Frans Viljoen, *Communications under the African Charter: Procedure and Admissibility, in* The African Charter on Human and Peoples' Rights: The System Practice 1986-2006, at 88 (Malcolm Evans & Rachel Murray eds., 2008).

[207] Banjul Charter, *supra* note 19, art. 50.

[208] *Id*. art. 52.

[209] *Id*. art. 53.

[210] *Id*. art. 54.

[211] *Id*. art. 32.

are eligible for re-election.[212] The members should be persons of high morality, integrity, impartiality, and competence in matters of human and peoples' rights.[213] The members of the Commission also serve in their personal capacity. State parties to the Charter nominate persons to serve as members of the Commission.[214] The members elect from themselves a chairperson and a deputy who serve for a period of two years and are eligible for re-election.[215] Seven members are required for a sitting to have quorum.[216]

Common Market for Eastern and South Africa (COMESA) Court of Justice

Establishment

The states party to the Preferential Trade Area for Eastern and Southern African States signed the Treaty For the Establishment of the Common Market for Eastern and Southern Africa (COMESA Treaty) on November 5, 1993 in Kampala, Uganda. The Treaty was ratified on December 8, 1994. The Common Market replaced the Preferential Trade Area which had existed since the Agreement for the Establishment of the Preferential Trade Area (PTA) was signed on December 21, 1981. Article 7(1)(c) of the COMESA Treaty established the Court of Justice as one of the organs of the Common Market.[217] The COMESA Court of Justice is mandated to ensure adherence to law in the interpretation and application of the COMESA Treaty.[218] The Court is also governed by its Rules of Procedure.[219]

Jurisdiction

According to Article 23(1) of the Treaty, the Court has jurisdiction to adjudicate all matters referred to it pursuant to the Treaty. Matters are first heard and determined by the First Instance Division. A matter may be appealed to the Appellate Division on the following grounds if they relate to: (i) a point of law; (ii) lack of jurisdiction; and (iii) procedural integrity.[220] The Court also has jurisdiction over claims by employees of the Common Market related to their terms and conditions of employment.[221] It may also determine claims against the Common Market by third parties

[212] *Id*. arts. 32, 34.
[213] *Id*. art. 31.
[214] *Id*. art. 36.
[215] *Id*. art. 42.
[216] *Id*. art. 42(3).
[217] Treaty Establishing the Common Market for Eastern and Southern Africa, art. 7(1)(c) (hereinafter "COMESA Treaty").
[218] *Id*. art. 19(1).
[219] Rules of the Court of Justice of the Common Market for Eastern and Southern Africa 2016.
[220] COMESA Treaty, *supra* note 217, art. 23(3).
[221] *Id*. art. 27(1).

over acts performed by its employees in the exercise of their duties.[222] The Court has jurisdiction to hear matters arising out of a contract which confers jurisdiction to the Court through an arbitration clause. It also has jurisdiction over disputes arising out a special agreement between Member States regarding the Treaty.[223] Disputes to which the Common Market is a party are not excluded from national jurisdiction solely on this basis.[224] Article 32 of the COMESA Treaty makes provision for the Court to give advisory opinions on questions of law arising from the Treaty. An advisory opinion may be requested by the Authority (COMESA's highest decision-making body), the Council, or by Member States.[225] The Court has jurisdiction to issue interim orders in any case in which it considers it necessary.[226] The first case received by the COMESA Court was between Ethiopia and Eritrea concerning dispute over goods in transit.[227] The proceedings in this case were suspended so that the parties could settle it out of Court.[228] This dispute that was not decided by the Court, is the only recorded dispute between two states in an African international court.

A matter may be referred to the Court by a Member States,[229] the Secretary-General,[230] as well as by natural and legal persons resident in the country of a Member State.[231] A party to a matter before the Court must be represented by Counsel.[232] The treaty allows for a Member State, the Secretary-General, or a resident of a Member State, who is not party to a case, to intervene in the case by providing evidence to support or oppose arguments of a party.[233]

The seat of the Court determined by the Authority[234]was in March 2003 located in Khartoum, Sudan.[235] The official languages of the Court is English, French, and Portuguese.[236] The Treaty requires that judgments of the Court to be delivered in public.[237] A judgment may be delivered privately between the parties in special circumstances where the Court determines it is undesirable to deliver the judgment in public.[238] The decision of the Court is considered final and conclusive. Decisions

[222] *Id*. art. 27(2).
[223] *Id*. art. 28.
[224] *Id*. art. 29.
[225] *Id*. art. 32.
[226] *Id*. art. 35.
[227] Desire Kayihura, *Parallel Jurisdiction of Courts and Tribunals: The COMESA Court of Justice Perspective*, 36 COMMONWEALTH L. BULL. 588 (2010).
[228] *Id*.
[229] COMESA Treaty, *supra* note 217, art. 24.
[230] *Id*. art. 25.
[231] *Id*. art. 26.
[232] *Id*. art. 33.
[233] *Id*. art. 36.
[234] *Id*. art. 44.
[235] James Gathii, *The Under-Appreciated Jurisprudence of African Regional Trade Judiciaries,* 12 OR. REV. INT'L L. 245, 247 (2010).
[236] COMESA Treaty, *supra* note 217, art. 43.
[237] *Id*. art. 31(1).
[238] *Id*.

of the Court are not open to appeal.[239] A party may apply for a review of a judgment where there is discovery of a fact that could have had a decisive influence on the judgment that was unknown at the time of making the application.[240] The execution of judgments imposing a pecuniary obligation on a person are governed by the civil procedure rules of the Member State in which its execution is to take place.[241]

Composition and Organization

The Court of Justice is divided into two divisions: (i) the First Instance Division and; (ii) the Appellate Division.[242] The First Instance Division is composed of seven judges whereas the Appellate Division is composed of five judges.[243] One of the judges of the Appellate Division shall be designated as the President of the Court. A judge from the First Instance Division shall be designated as the Principle Judge. A person appointed as a judge must fulfil the conditions required for holding high judicial office in their country or must be a jurist of recognized competence.[244] No two or more judges may be nationals of the same Member State.[245]

Judges hold office for a period of five years and may be re-appointed for another term of five years.[246] The judges of the Court were first appointed by the Authority on June 30, 1998.[247] Where the term of a judge comes to an end before delivering a decision or opinion with respect to a matter the judge was hearing, the judge shall continue to sit as a judge only for the purpose of completing that particular matter.[248] The President may resign his office by giving one year's written notice to the Chairman of the Authority. This resignation is not effective until a successor is appointed.[249] Removal from judicial office is only permissible for misbehavior or the inability to perform the functions of the office.[250] If a judge is appointed to replace the President or other judge before expiry of their term, the appointed judge shall serve in office for the remainder of the term of the replaced President or judge.[251] A temporary judge may be appointed where one of the judges is absent or unable to perform his function for a period that could cause significant delay in the work of the Court.[252]

[239] *Id*.
[240] *Id*.
[241] *Id*. art. 40.
[242] *Id*. art. 19(2).
[243] *Id*. art. 20(1).
[244] *Id*. art. 20.
[245] *Id*. art. 20(2).
[246] *Id*. art. 21(1).
[247] Gathii, *supra* note 235.
[248] COMESA Treaty, *supra* note 217, art. 21(3).
[249] *Id*. art. 21(4).
[250] *Id*. art. 22(1).
[251] *Id*. art. 22(2).
[252] *Id*. art. 22(3).

West African Economic and Monetary Union (WAEMU) Court of Justice

The WAEMU was created through the Treaty on the West African Economic and Monetary Union (WAEMU Treaty).[253] The Treaty was signed on the January 10, 1994 in Dakar, Senegal.[254] The Treaty was signed by Benin, Burkina Faso, Ivory Coast (Cote d'Ivoire), Mali, Niger, Senegal, and Togo. Guinea-Bissau joined the Union on May 2, 1997, bringing the number of states in the Union to eight.[255] The Union was created with the aim of promoting economic integration between its members.[256]

WAEMU Member States all share a common currency, the CFA Franc.[257] The CFA Franc will be replaced by the Eco in 2020. The Eco is a new currency which will remain pegged to the euro like the CFA Franc. However, France will no longer have a representative on WAEMU's currency board and WAEMU Member States will not be required to keep 50 percent of their foreign reserves in the French Treasury.

Establishment

In an effort to achieve its functions, WAEMU established various bodies, among them the WAEMU Court of Justice.[258] Article 39 of the Treaty establishes the WAEMU Court of Justice. The Court of Justice is mandated to ensure the observance of the law of the Union by Member States in interpretation and implementation.[259] The Court was officially set up on January 27, 1995.[260] The Court has rendered thirty-seven decisions since its inception until 2018.[261] More than three-quarters of these cases have been cases between the Union and its staff, and advisory opinions.[262] As a result the Court has acted more as administrative tribunal as opposed to supporting the integration process through ensuring observance of the law.[263]

[253] *Treaty on the West African Economic and Monetary Union*, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2426/download.

[254] Illy Ousseni, *The WAEMU Court of Justice, in* The Legitimacy of International Trade Courts and Tribunals 349 (R. Howse, H. Ruiz-Fabri, G. Ulfstein, & M. Zang eds., 2018).

[255] *Id*.

[256] Ousseni, *supra* note 254.

[257] *Voluntary Peer Review of Competition Policy: West African Economic and Monetary Union, Benin and Senegal*, United Nations Conference on Trade and Development, UNCTAD/DITC/CLP/2007, 1, 2 (2007).

[258] *Id*. at 1, 3.

[259] Ousseni, *supra* note 254, at 350.

[260] *Id*.

[261] *Id*.

[262] *Id*. at 351.

[263] *Id*.

Jurisdiction

The jurisdiction of the Court falls into two categories: contentious jurisdiction and advisory jurisdiction. Under its contentious jurisdiction there are seven types of proceedings possible.[264] These are actions for infringements; actions for annulment of the Union Acts; actions relating to competition matters; disputes between the Union and its staff; actions relating to non-contractual liability and compensation; and reference for preliminary ruling and arbitration.[265] The arbitration jurisdiction of the Court is neither automatic nor compulsory. Instead, parties involved must agree on arbitration through a submission agreement notified to the Court.[266]

An advisory opinion may be sought on the Union texts; on international agreements and their compliance with the WAEMU Treaty; and opinion on any difficulty regarding the application or interpretation of union law.[267] The right to seek an advisory opinion from the Court is limited to the Commission, the Council of Ministers, the Authority of heads of state and government, Member States, Union bodies, and institutions.[268] The decisions of the Court are final and binding but an application for revision may be made.[269]

Composition and Organization

The Court is composed of eight judges, one from each Member State.[270] The judges are appointed by the WAEMU Authority (the highest decision-making body in WAEMU), from nationals of Member States who possess the qualifications required for appointment to the highest judicial officers in their states.[271] The judges are appointed for a period of six years which can be renewed.[272] Once appointed, a judge cannot be dismissed or his/her salary or pension suspended unless s/he is no longer able to fulfil the conditions and obligations required to be a judge.[273] A registrar is appointed by the Court to govern the administrative matters of the Court. The register is appointed for a renewable six-year term.[274] A case may be brought before the Court by Union bodies, institutions and agencies, Member States, national courts, and natural and legal persons.[275]

[264] *Id*. at 354.
[265] *Id*. at 354–58.
[266] *Id*. at 358.
[267] *Id*. at 359.
[268] *Id*. at 349.
[269] *Id*. at 361.
[270] *Id*. at 353.
[271] *Id*.
[272] *Id*.
[273] *Id*. art. 12; Additional Act No.10/96 Regarding the Status of the Court of Justice of WAEMU.
[274] Ousseni, *supra* note 254, at 353.
[275] *Id*. at 360.

Organization for the Harmonization of Business Law in Africa Common Court Justice and Arbitration (OHADA CCJA)

Establishment

Sixteen mainly francophone West African states signed the Treaty on the Harmonization in Africa of Business Law (OHADA Treaty) on October 17, 1993 in Port Louis, Mauritius.[276] The acronym OHADA translates to its French title, *Organisation pour l'Harmonisation en Afrique du Droit des Affaires*. The organization currently has seventeen members after the Democratic Republic of Congo became a member in 2012.[277] This means that OHADA currently has seventeen members mainly within the CFA Franc zone[278] and are thus largely civil law-based francophone countries.[279] The OHADA Treaty is, however, open to membership by any state of the African Union (AU).[280] OHADA connects countries in both the WAEMU, which mainly covers the West African CFA Franc zone and the Central African Economic and Monetary Community (CEMAC) covering the Central African CFA Franc zone. The first sixteen members revised the OHADA Treaty in Quebec, Canada on October 17, 2008. One of the amendments increased the official languages of OHADA from one, French, to four, French, English, Spanish, and Portuguese.[281] The OHADA Treaty establishes the OHADA.[282] The OHADA's objective is to harmonize business law in state parties by developing and adopting simple, modern, and common rules, adapted to their economies, setting up appropriate judicial procedures, and encouraging recourse to arbitration for the settlement of contractual disputes.[283]

OHADA also aims to promote African unity as well as the gradual economic integration for countries in the CFA Franc zone in order to improve company business, ensuring legal security of economic activities, promoting development and investment, and the promotion of arbitration and mutual efforts to improve professional justices and judicial officers.[284] To achieve these aims, the OHADA

[276] *Preamble, Treaty on the Harmonization of Business Law in Africa*, OHADA (Official Bulletin) (Nov. 24, 2016), http://www.ohada.com/content/newsletters/3247/jo-ohada-se-nov2016-official-translation.pdf (the sixteen members were Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo (Brazzaville), Ivory Coast, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad, and Togo) (hereinafter "Treaty on the Harmonization in Africa of Business Law, Official Translation").

[277] OHADA, *OHADA History: Table of Ratifications*, https://www.ohada.org/index.php/fr/ohada-en-bref/presentation-ohada-historique (last visited on Feb 12, 2020) (Fr).

[278] These countries use the CFA Franc as their currency and are former French colonies within a colonially established monetary cooperation policy created in the late 1930s.

[279] All members are francophone except Cameroon (bilingual English-French and English common law applies), Equatorial Guinea (Spanish), and Guinea-Bissau (Portuguese).

[280] Treaty on the Harmonization in Africa of Business Law, Official Translation, *supra* note 276, art. 53.

[281] *Id*. art. 42.

[282] *Id*. art. 3.

[283] *Id*. art. 1.

[284] *Id*. at Preamble.

Treaty establishes four organs: the Conference of Heads of State and Government, the Council of Ministers, the Common Court of Justice and Arbitration (OHADA CCJA), and the Permanent Secretariat.[285] The Treaty also declares the headquarters or official seat of OHADA to be Yaoundé, Cameroon, and that this location is transferable by the decision of the Conference of Heads of State.[286] The OHADA harmonizes business laws among its state parties through the enactment and adoption of Uniform Acts.[287] The OHADA currently has nine Uniform Acts that override national legislation in areas including general commercial law, law of commercial companies and of economic interest grouping, law of sureties, law of cooperative societies, and arbitration and mediation.[288] The OHADA CCJA is thus established as an organ of this *de-novo* and innovative supranational regionally binding law-making system.[289]

Jurisdiction

The OHADA CCJA has jurisdiction over verifying OHADA draft Uniform Acts (UAs) and issuing opinions to other OHADA organs.[290] Before getting to the OHADA CCJA, the Permanent Secretariat (PS) forwards the draft UAs to the governments of state parties, who submit their written observations to the PS within ninety days.[291] The PS may double the ninety-day timeline depending on the circumstances and the nature of the draft UA.[292] It is after this timeline that the draft UAs are submitted to the OHADA CCJA for verification. The OHADA CCJA exercises its power of verification by issuing an opinion. After receiving the opinion of the CCJA, the PS prepares the final text of the draft UA and proposes its inclusion in the agenda of the next Council of Ministers meeting.[293] The OHADA CCJA, also has the jurisdiction to interpret and uniformly apply the OHADA Treaty, its promulgated regulations, and the UAs.[294]

In addition, the OHADA CCJA has advisory jurisdiction over consultations or questions presented by any state party or the Council of Ministers on any questions within the scope of the OHADA Treaty, regulations, UAs, or other decisions.[295] The national courts of state parties may also request advisory opinions from the

[285] *Id*. art.3.
[286] *Id*. art.3.
[287] *Id*. art.4.
[288] OHADA, *OHADA Uniform Acts*, https://www.ohada.org/index.php/fr/ohada-en-bref/presentation-ohada-historique (last visited Feb. 12, 2020) (Fr.).
[289] *See* Regis Y. Simo, *Regional Integration in Africa through Harmonization of Laws*, *in* Regional Integration and Policy Challenges in Africa 118 (Adam B. Elharaika, Allan C.K Mukungu, & Wanjiku Nyoike eds., 2015).
[290] Treaty on the Harmonization in Africa of Business Law, Official Translation, *supra* note 276, art. 7.
[291] *Id*.
[292] *Id*.
[293] *Id*.
[294] *Id*. art.14.
[295] *Id*.

OHADA CCJA.[296] Finally, the OHADA CCJA has appellate jurisdiction to receive appeals from the national appellate courts of state parties on all matters over the application of the UAs, regulations, except those decisions administering criminal sanctions. The OHADA CCJA can also exercise its appellate jurisdiction on decisions from national courts, which are not appealable to their national court of appeal.[297] In exercising its appellate mandate, the Treaty empowers the OHADA CCJA to quash decisions of national courts and to hear this cases afresh on their merits.[298]

The OHADA CCJA thus has three types of jurisdiction: interpretive and dispute settlement jurisdiction in contentious cases; advisory jurisdiction, and appellate jurisdiction from national courts. The Court has compulsory jurisdiction and acts as the apex judicial entity on OHADA law. The subject matter jurisdiction of the OHADA CCJA is limited to purely economic disputes that spring directly from OHADA UAs, regulations, and decisions. These UAs, regulations, and decisions are limited to business and commercial codes.

Appellate Jurisdiction

The OHADA CCJA exercises its appellate jurisdiction when appeals are referred either directly by the parties to a dispute or by the highest appellate national court of a state party.[299] This means that two private actors can have a dispute adjudicated in the Court without a state party involved. The access to the OHADA CCJA is thus broad enough to allow private individuals and companies to present their disputes before it. The OHADA Treaty also allows preliminary rulings from the OHADA CCJA when referrals are done by the state party's national courts. This is a good example of the preliminary ruling mechanism present in some supranational courts. The lodging of an appeal before the OHADA CCJA has the effect of staying any proceedings pending before the highest appellate national court.[300] This rule, however, does not affect the enforcement of the decision under appeal.[301] The national court may only relist such a case once the OHADA CCJA declares that it lacks jurisdiction.[302] The OHADA CCJA has jurisdiction to declare it manifestly lacks jurisdiction on its own motion or in *limine litis* (before a review on the merits) by any party to the proceedings.[303] The Court has a thirty-day limit to make a ruling after receipt of the observations of lack of jurisdiction or on expiry of time limit for the presentation of the said observations.[304] Additionally, the OHADA Treaty

[296] *Id.*
[297] *Id.*
[298] *Id.*
[299] *Id.* art. 15.
[300] *Id.* art. 16.
[301] *Id.*
[302] *Id.*
[303] *Id.*
[304] *Id.* art. 17.

empowers the OHADA CCJA to receive appeals from any party challenging the rulings on jurisdiction of a national appellate court as long as such appeal is lodged within two months of the notification of the national court's decision.[305]

In cases where the OHADA CCJA overrules the jurisdictional finding of the national court, the finding is deemed final and the national court decision is nullified.[306] Thus unlike other African international courts, the OHADA CCJA hears appeals in cases where both parties are private natural or artificial persons.

Finality of decisions

The OHADA Treaty declares that the judgments of the OHADA CCJA are final and enforceable. These decisions are enforceable in the state parties in the same manner as decisions of national courts.[307] This makes the OHADA CCJA and the OHADA system a supranational system that allows its apex judicial entity to make final determinations on OHADA law. The OHADA Treaty strengthens this by providing that any decisions delivered by a national court that are contrary to a judgment of the OHADA CCJA in respect to the same matter shall not be enforceable in the territory of a state party.[308] The hearings of the OHADA CCJA are required to be in public and the presence of all the parties.[309] The assistance of counsel in these cases is also a mandatory requirement.[310]

Arbitration

The OHADA CCJA has supervisory jurisdiction over arbitrations administered by the OHADA CCJA Arbitration rules.[311] It is important to note that this supervisory jurisdiction covers the two main types of arbitrations under OHADA: a OHADA CCJA administered arbitration and a Uniform Act arbitration. Under a OHADA CCJA administered arbitration, the CCJA operates as the administering body and is subject to OHADA CCJA Arbitration rules.[312] In such cases, the CCJA has a dual role, where it functions both as an arbitral institution and as a supervising court.[313] Its role as an arbitral institution entails stipulation of the applicable procedural rules and playing an administrative role.[314] As a supervisory court, it has authority to hear and deal with applications to annul an award rendered under a CCJA arbitration.[315] In a Uniform Act arbitration, the court can assume arbitral jurisdiction where any of the parties is domiciled or has their usual place of residence in the

[305] *Id*. art. 18.
[306] *Id*. art.18.
[307] *Id*. art. 20.
[308] *Id*. art. 20.
[309] *Id*. art. 19.
[310] *Id*. art. 19.
[311] *Id*. art. 21.
[312] Arbitration Rules of the Common Court of Justice and Arbitration (1999), arts. 1, 2.
[313] *Id*.
[314] *Id*.
[315] *Id*. arts. 29–34.

territory of a State Party, or where the contact is performed or will be performed wholly or partly in the territory of one or more State Parties.[316] Additionally, it is important to note that the arbitration mandate of OHADA CCJA administered arbitrations includes inter-state arbitration and investor-state disputes.[317]

The OHADA CCJA's arbitral jurisdiction can be invoked pursuant to an arbitration clause in a contract or by agreement. As explained above, for both types of arbitrations, it is not the OHADA CCJA itself that hears the arbitration but rather the court appoints or confirms arbitrators who then keep the Court informed of the progress of the proceedings and submit the draft award to the Court for approval in conformity with Article 24 of the Treaty.[318] The Court acts as an appointing authority where the parties fail to agree on a slate of arbitrators within a period of thirty days, or where the parties fail to agree on a sole arbitrator.[319] The Treaty mandates also empowers the Court to approve the arbitrators the parties choose.[320] The Court selects arbitrators from a list of arbitrators updated annually and also finally decides any challenge of appointment of arbitrator made by a party to a dispute.[321] The treaty also empowers the Court to verify the form of arbitral awards before the arbitral panel issues them as final awards.[322]

Mediation

The OHADA Council of Ministers adopted the Uniform Act on mediation in November 2017. The OHADA CCJA supervisory role over mediation is not part of the revised OHADA Treaty but is established under the OHADA Uniform Act on Mediation (UAM). The UMA defines mediation as including any process where the parties to dispute request a third person to assist them in their attempt to reach an amicable settlement of their dispute, adversarial relationship or disagreement arising out of a legal or contractual relationship or related to such relationship, involving natural persons or legal entities, including public bodies or states.[323] This means that the OHADA CCJA can supervise mediations involving individuals, companies, or states. The OHADA UAM allows mediations to be implemented by the parties (conventional mediation), at the request or invitation of a state court (judicial mediation), an arbitral tribunal, or a competent public entity.[324] Mediations under the UAM can also be *ad hoc* or institutional.[325] This

[316] Treaty on the Harmonization in Africa of Business Law, art. 21 (Official Translation).
[317] OHADA Uniform Act on Arbitration (2017), arts. 2, 3. *See* GETMA International v. Republic of Guinea (I), Case No. 001/2011/ARB, paras. 1–2, Award, Common Court of Justice and Arbitration of OHADA [CCJA] (Apr. 29, 2014).
[318] *Id*. art. 21.
[319] *Id*. art. 22.
[320] *Id*. art. 22.
[321] *Id*. art. 22.
[322] *Id*. art. 24.
[323] OHADA Uniform Act on Mediation 2017, art. 1(a).
[324] *Id*. art. 1(b).
[325] *Id*.

means that the OHADA CCJA does not have to act the only institution that administers mediation since most of these will be conducted at the domestic state level. The UAM has rules on the conduct of mediations, status of mediator, guiding principles of mediation, correspondence between the mediator and the parties, confidentiality of mediations, admissibility of evidence in mediations, termination of mediation procedure, mediation costs, recourse to arbitral or judicial procedure, and implementation settlement agreements.[326] The OHADA CCJA will thus only interact with mediation cases as an administrative institution or when cases form state courts or arbitral tribunals involving mediation are referred to it.

Composition and Organization

The OHADA CCJA is composed of nine judges. The Council of Ministers may, depending on the needs of the service and the financial means, also fix a higher number of judges than the nine required above.[327] The judges are elected for a seven-year non-renewable term.[328] These judges must be selected from among nationals of the state parties and the Court shall not consist of more than one judge from the same state party.[329] This rule ensures that no single state party dominates the appointees and thus creating any legitimacy deficits. The judges must be selected from a list of individuals who fulfil any of the following three conditions. First, they must be judicial officers with at least fifteen years of professional experience, having held high judicial or legal office. They must be lawyers who are members of the bar of one of the state parties with at least fifteen years of professional experience. They must be lecturers of law with at least fifteen years of professional experience.[330] The Treaty, however, limits the numbers of practicing lawyers and academics to only two members of the Court.[331] This means that the other five members or more of the Court must always be judges or former judges with at least fifteen years' experience. The terms of one seventh of the members of the Court are renewed each year.[332]

The Court meets in plenary session. However, since 2005, the Court has been formed into two sections in order to better manage the cases brought before it.[333] Each section has three judges each and is presided by the two vice-presidents.[334] Documents are first published in French and should there be divergence between different translations, the French version prevails.[335] While OHADA

[326] *Id*. arts. 2–16.
[327] *Id*. art. 31.
[328] *Id*.
[329] *Id*.
[330] *Id*.
[331] *Id*.
[332] *Id*.
[333] Salvatore Mancuso, *OHADA Report*, 20 Eur. Rev. Priv. L. 179 (2012).
[334] *Id*.
[335] *Id*.

is headquartered in Yaounde, Cameroon, the OHADA Court of Justice and Arbitration sits in Abidjan, Ivory Coast.[336]

Court of Justice of the Central African Economic and Monetary Community (CEMAC)

The Central African Economic and Monetary Community commonly known by its French acronym CEMAC (*Communauté Économique et Monétaire de l'Afrique Centrale*) was established by the signing of the Treaty establishing the Economic and Monetary Community of Central African States in N'Djamena, Chad on March 16, 1994.[337] CEMAC replaced the Customs Union, *Union Douanière des Etats de l'Afrique Centrale,* that previously existed between the members post-independence.[338] The CEMAC Treaty became operational in 1999 after its ratification and was later revised in Yaounde, Cameroon on June 25, 2008.[339] The Member States of CEMAC are Cameroon, Central African Republic, Congo, Gabon, Equatorial Guinea, and Chad.[340]

Establishment

The Court of Justice was agreed in the *Traité Constitutif* of CEMAC, in Article 2. The Court has two chambers: one for judicial matters, the other for budgets and accounts.[341] The Judicial Chamber assures compliance with CEMAC treaties and conventions with regard to their interpretation and application.[342] The Accounts Chamber assures the management of CEMAC's accounts.[343] The Court of Justice was established on June 25, 1999 and became operational on December 14, 2000. As of 2006, the Court had issued twenty-two decisions and five advisory opinions.

[336] OHADA, *Organization for Harmonization in Africa Business Law*, https://www.ohada.org/index.php/fr/notre-organisation/presentation-ohada-organisation (last visited on Jan. 19, 2020) (Fr.).

[337] Victor Essien, *UPDATE: Regional Trade Agreements in Africa—A Historical and Bibliographic Account of ECOWAS and CEMAC,* NYU GlobaLex, https://www.nyulawglobal.org/globalex/CEMAC_ECOWAS1.html#CEMAC (last visited on Jan. 18, 2020).

[338] Angela Meyer, *Central African Economic and Monetary Union, in* The democratization of international organizations, First International Democracy Report 2011, at 3 (G. Finizio, L. Levi, & N. Vallinoto eds., 2011).

[339] Victor Essien, *UPDATE: Regional Trade Agreements in Africa—A Historical and Bibliographic Account of ECOWAS and CEMAC*, NYU GlobaLex, https://www.nyulawglobal.org/globalex/CEMAC_ECOWAS1.html#CEMAC (last visited on Jan. 18, 2020).

[340] CEMAC Member States, *Economic and Monetary Community of Central Africa*, http://www.cemac.int/etats_membres (accessed on Jan. 19, 2020) (Fr.).

[341] *Traité Constitutif CEMAC*, Droit Afrique, art. 2 http://www.Droit-Afrique.com (Fr.).

[342] *Id*. art. 5.

[343] *Id*.

Jurisdiction

According to the *Traité Revisé* of CEMAC, the Court of Justice has the power to issue sanctions against Member States who do not abide by the Treaty.[344] Prior to a Court of Justice ruling, the issue must first go to the Council of Ministers, and if they decide not to act, the Court of Justice may be called upon.[345] The Court of Justice, on referral by the Council of Ministers, also has the power to determine whether Commission members can continue in their positions after gross misconduct or incapacity.[346] Furthermore, the Court of Justice may suspend enforcement of CEMAC laws.[347]

The Convention Governing the Court of Justice provides that the role of the Court is two-fold—adjudicative and advisory.[348] In its adjudicative function, the Court of Justice makes the final judgments on the cases alleging violation of CEMAC treaties and subsequent conventions. It makes final judgments on litigation interpreting treaties, conventions, and other CEMAC rules, regulations, and enactments. It decides appeals and makes final judgments on disputes between the Banking Commission of Central Africa (COBAC) and credit institutions. It makes initial and final judgments regarding disputes arising between CEMAC and the agents of the Community institutions, except those governed by contracts under local law.[349]

In its advisory role, the Court of Justice advises Member States or CEMAC bodies on compliance with CEMAC legal standards, legal acts, or draft acts initiated by a Member State or CEMAC body under the relevant treaties.[350] The Judicial Chamber gives preliminary rulings on the interpretation of the CEMAC Treaty and subsequent texts when a national court or legal organization is called upon to hear during a dispute.[351] In addition, whenever a national court faces a CEMAC legal question, it is required that it must first notify the Judiciary Chamber for an advisory opinion before issuing a final decision. This advisory opinion is discretionary if the national court's ruling is subject to appeal.[352]

The Judicial Chamber has jurisdiction to issue final judgments in disputes relating to the compensation for damages caused by the bodies and Institutions of the Community or their agents in the exercise of their functions.[353] The Court of Justice also has jurisdiction over disputes arising between the Community and its

[344] *Traité Revisé*, CEMAC, art. 4, http://www.cemac.int/sites/default/files/ueditor/55/upload/file/20190718/1563448018616342.pdf (Fr.).
[345] *Id*. art. 35.
[346] *Id*. arts. 29, 30.
[347] *Id*. art. 45.
[348] *Convention Regissant la Court de Justice de la CEMAC*, art. 3, https://www.ceja.ch/images/CEJA/DOCS/Bibliotheque/Legislation/Africaine/Textes%20Regionaux/DE/DE2.pdf (Fr.).
[349] *Id*. art. 4.
[350] *Id*. art. 6.
[351] *Id*. art. 17.
[352] *Id*. art. 17.
[353] *Id*. art. 20.

agents.[354] Moreover, the Court has jurisdiction over disputes between Member States where there is a link with the Treaty and subsequent texts if these disputes are submitted to it.[355]

The Additional Acts regarding the Judicial Chamber and Account Chamber of the Court of Justice set the rules of the Court's operation, organization, responsibilities, and jurisdiction. The Court's session begins on October 1 and ends on September 30 each year with a hiatus from July 1 through September 30.[356] The judges are nominated by the Member States, with two judges nominated from each state. the conference of heads of states then appoints the judges for a non-renewable term of six years.[357] The judges may be removed from the Court under four circumstances including: the end of a term, death, dismissal, and where a judge decides to give up his/her position in which case s/he sits on the Court until a suitable replacement is appointed.[358] A judge may only be relieved of his duties in the case that the General Assembly, at the request of the *Premier Président* or the Executive Secretary of CEMAC, has determined that s/he no longer meets the requirements of a judge or is no longer able to satisfactorily perform his duties. The judge will have an opportunity to defend him/herself orally or in writing, and may request counsel.[359]

The members of the Court are required to refrain from any activity that is incompatible with their office, or which would compromise the independence, impartiality, and ability of the Court to perform its functions. If there is disagreement over whether a Court member's outside activities are inconsistent with preserving the Court's neutrality, the Court makes the final determination on the issue.[360]

The Court—including both the Accounts and Judicial Chambers—is comprised of thirteen judges led by a judge elected by his peers as *Premier Président*, as well as two other judges elected *Présidents de Chambre.*[361] The *Premier Président* represents the Court, coordinates the judicial and administrative functions of the Court, administers the services of the Court, manages the personnel, and approves the budget of the Court.[362] The Judicial Chamber is composed of six judges who elect, by a majority vote, the President of the Chamber.[363]

[354] *Id*. art. 21.
[355] *Id*. art. 22.
[356] Acte Additionnel Numero 06/00/CEMAC-041-CCE-CJ-02 Portant Statut de la Chambre Judiciaire de la Cour de Justice de la CEMAC (Dec. 14, 2000), arts. 7–8, https://www3.nd.edu/~ggoertz/rei/rei080/rei080.34tt1.pdf (Fr.).
[357] *Id*. art. 10.
[358] *Id*. arts. 21–21.
[359] *Id*. art. 22.
[360] *Id*. art. 17.
[361] *Id*. art. 26.
[362] *Id*. art. 28.
[363] *Id*. arts. 33–34.

The Judicial Chamber of the CEMAC Court of Justice

The jurisdiction of the Judicial Chamber is outlined in Articles 48 and 49 of the Additional Act. The Court has final appellate and initial jurisdiction in the following types of cases. First, differing opinions between states regarding language in the CEMAC Treaty and subsequent texts as long as the issue is presented to the Judicial Chamber for resolution. Second, cases arising between CEMAC and its agents. Third, judicial review of the legality of legal acts referred for its censure.[364] The Judicial Chamber also has final appellate jurisdiction over the following types of cases. First, interlocutory or direct appeals regarding the interpretation of judicial acts, treaties, conventions, and other subsequent texts of CEMAC. Second, cases related to determination of damages caused by the bodies and institutions of the Community or its agents in the exercise of their functions. Third, cases arising between COBAC and credit-granting establishments.[365] The Chamber also has jurisdiction as an arbitrator over disputes submitted to it by states, institutions, bodies, and organs of CEMAC, as well as any case submitted to it as a result of a contractual arbitration clause.[366]

The Accounts Chamber of the CEMAC Court of Justice

There is also an Additional Act which outlines the functioning of the Accounts Chamber. The Accounts Chamber is responsible for verifying the accounts of CEMAC and ensuring that CEMAC is financially well managed.[367] Like the Judicial Chamber, the Accounts Chamber is comprised of six judges who elect, by majority vote, the President of the Chamber.[368] The Accounts Chamber performs its functions through three means including: 1) judicial opinions; 2) through its general assembly; and 3) through its *Chambre du Conseil* or advisory chamber.[369] The general assembly includes all of the members and personnel of the Chamber and meets to deliberate on the functioning of the Chamber itself.[370] The *Chambre du Conseil* is comprised only of the Chamber judges and is responsible for the following: requests for opinion, procedural or case-law questions related to the Chamber's jurisdiction, drafting the budget report for CEMAC and its institutions, drafting the annual report, and drafting of specific reports related to the jurisdiction of the Chamber.[371]

The writing of an opinion recognizing the legitimacy of the audit reports is done following the examination of the reports. This examination is done in by the President of the Chamber, two to four judges, the court clerk, and an attorney

[364] *Id*. art. 48.
[365] *Id*. art. 48.
[366] *Id*. art. 49.
[367] *Id*. art. 47.
[368] *Id*. arts. 33–34.
[369] *Id*. art. 43.
[370] *Id*. art. 45.
[371] *Id*. art. 45.

where one is needed. The Chamber then makes a ruling based on a majority vote of the parties and the decision is signed by the President of the Chamber, the judges, and the court clerk.[372]

In the exercise of its judicial functions, the Chamber spot-checks the legality and regularity of revenue and expenses, takes precautionary measures when it finds serious failings capable of affecting the interests of CEMAC, judges the accounts, sanctions the management, pronounces the sentences in terms of fines, and rules on appeals.[373] The Accounts Chamber receives feedback from the National Courts of Accounts regarding the results of its audits, and may also provide these National Courts with additional support upon request from the Member State.[374] The Presidents of the National Courts of Accounts meet to evaluate the auditing system and results of completed audits. From this meeting, called by the *Premier Président* of the Court of Justice, a report is compiled with suggestions for the improvement of the auditing system and in order to harmonize the auditing systems of the Member States. This report also provides information as to the whether the accounts meet the established requirements and evaluates the weaknesses of the accounts discovered through the audits.[375]

Sanctions imposed by the Accounts Chamber

The Chamber may impose a fine on public accountants in the following cases: first, for delay in production of the accounts, if it does not present its accounts for examination on time. The fine is set at 100,000 francs CFA for the first month and 200,000 francs CFA from the second to sixth months. It is liquidated at the end of the sixth months. Second, For a delay in responding to the injunctions pronounced against it in the time allowed by decision of the Chamber or if it has produced no valid excuse for the delay. In the latter case, the fine is between 10,000 and 50,000 francs CFA.[376] Anyone who interferes in revenue or expenses operations or in the handling of funds and who is not by profession a Public Accountant or has not acted under the control or on behalf of a Public Accountant, is declared the *de facto* Accountant. The Public Account's management is subject to the judgment of the Chamber and is subject to the same obligations and responsibilities as other officials. They can be fined based on the size and duration of the delay or mishandling of funds. The amount of the fine can exceed the amounts unduly detained or handled.[377]

The Chamber sanctions any management inconsistencies committed by authorizing officers, officials, and other agents of the Community if they: (1) infringe the

[372] *Id*. art. 46.
[373] *Id*. art. 48.
[374] *Id*. arts. 49–50.
[375] *Id*. art. 51.
[376] *Id*. art. 52.
[377] *Id*. art. 54.

rules on the implementation of revenue and expenditure or interfere with the management of Community goods; (2) incur expenses without having the authority; (3) engage in over-spending irregular expenditures; (4) they have, in the exercise of their duties, knowingly failed to document that which they must knowingly document or have provided inaccurate or incomplete documentation; and (5) have provided to others or themselves or attempted to procure an unjustified advantage, financial, or in kind, resulting in damage to the Community.[378] The perpetrators referred to here may incur fines of between 100,000 and 1 million francs CFA. However, they will incur no penalty if they show a written order to commit the act previously given by their supervisor or by the person legally authorized to give such an order. In this case, the supervisor will then be held liable, in place of the original perpetrators.[379]

The Chamber may check the management of financial assistance granted by the Community to the states or to any community organization. It may also check the use of financial assistance paid to the Community by any third state or any national or international organization, as well as all donations.[380]

Arab Maghreb Union (AMU) Judicial Organ

On June 10, 1988, the heads of states of Algeria, Libya, Morocco, Mauritania, and Tunisia met in Zeralda, Algeria, where they decided to set up a commission responsible for defining the ways and means of realizing a union between the states.[381] On February 17, 1989 in Marrakech, Morocco, the Member States founded the union by signing the Treaty Establishing the Arab Maghreb Union.[382] Member States also adopted the Solemn Declaration on the establishment of the Arab Maghreb Union.[383] The AMU is an economic and political organization formed by five states; Algeria, Libya, Mauritania, Morocco, and Tunisia.[384] The aim of the union is to coordinate, harmonize, and rationalize policies and strategies among Member States to achieve sustainable development in all sectors of human activities.[385] Since the AMU was founded, it has adopted thirty-six Maghreb conventions on various sectors.[386]

Among the institutions established within the Union is the AMU Judicial Organ, established under Article 13 of the AMU Treaty.[387] The AMU Judicial Authority

[378] *Id*. art. 55.
[379] *Id*. art. 56.
[380] *Id*. art. 57.
[381] United Nations Economic Commission for Africa (UNECA), 'AMU-Arab Maghreb Union' https://www.uneca.org/oria/pages/amu-arab-maghreb-union (last visited on Jul. 26, 2020).
[382] United Nations Economic Commission for Africa, *AMU*, https://www.uneca.org/oria/pages/amu-arab-maghreb-union (last visited on Jan. 13, 2020).
[383] *Id*.
[384] Arab Maghreb Union, *supra* note 381.
[385] United Nations Economic Commission for Africa, *supra* note 382.
[386] Arab Maghreb Union, *supra* note 381.
[387] *See also* Murray Carole, *Treaty Creating the Arab Union of the Maghreb*, 7 Arab L. Q. 207 (1992).

Table 8.1 Summary of Preliminary Information from International Courts in Africa

International courts	Subject matter jurisdiction	Year created	First ruling	Member States	Binding rulings
African Court on Human and Peoples' Rights	– Contentious jurisdiction – Advisory jurisdiction – Constitutional review – Human rights – Dispute settlement – Administrative review – Enforcement	2006	2009 App. No. 001/ 2008: *Michelot Yogogombaye v Republic of Senegal*	**30**	**62** as of Sept. 2019
Economic Community for West African States (ECOWAS) Court of Justice	– Dispute settlement – Advisory jurisdiction – Human rights	2001	February 8, 2011 *Aboubacar v Central Bank of West Africa and Anor.* (01/11) [2018] ECOWASCJ 79	**15** Benin, Burkina Faso, Cape Verde, Ivory Coast, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo	**131** as of Feb. 6, 2020
East Africa Court of Justice (EACJ)	– Dispute settlement – Administrative review – Enforcement – Constitutional review – Human rights – Appellate jurisdiction	2001	October 1, 2006 *Mwatela & Ors v East African Community* (Application No. 1 of 2005) [2006] EACJ 1	**6** Burundi, Kenya, Rwanda, South Sudan, Tanzania, and Uganda	**189** as of Feb. 6, 2020

Continued

Table 8.1 *Continued*

International courts	Subject matter jurisdiction	Year created	First ruling	Member States	Binding rulings
South Africa Development Community (SADC) Tribunal	– Disputes relating to application of SADC Treaties – Advisory opinions	2005	November 28, 2007 *Campbell & Ors v Republic of Zimbabwe* (SADCT: 2/07) [2007] SADCT 10	**16** Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia, and Zimbabwe	**25** as of Feb. 6, 2020
Common Market For Eastern And South Africa (COMESA) Court of Justice	– Dispute settlement – Appellate jurisdiction – Arbitration	1998	March 29, 2001 *Eastern and Southern African Trade and Development Bank & Anor v Ogang* (Reference 1B/2000) [2018] COMESACJ	**21** Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eswatini, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia, and Zimbabwe	**23** as of Feb. 6, 2020
Arab Maghreb Union (AMU) Judicial Organ	– Disputes relating to the application of treaties and agreements concluded by the Union – Advisory jurisdiction	Non-operative	Inoperative	**5** Algeria, Libya, Mauritania, Morocco, and Tunisia	Inoperative

West African Economic and Monetary Union (WAEMU) Court of Justice	– Contentious jurisdiction over WAEMU Treaties and Agreements – Advisory jurisdiction on WAEMU Treaties and agreements – Arbitration			**8** Benin, Burkina Faso, Guinea-Bissau, Mali, Niger, Ivory Coast, Senegal, and Togo	**37** as of 2018
Organization for the Harmonization of Business Law in Africa Common Court Justice and Arbitration (OHADA CCJA)	– Business-related disputes – Business law – International arbitration	1997	October 11, 2001 *Etablissements Thiam Baboye "ETB" v Compagnie Française Commerciale et Financiere* *"CFCF"* (Judgment 001/2001)	**17** Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Ivory Coast, Congo, Democratic Republic of Congo, Equatorial Guinea, Guinea, Gabon, Guinea-Bissau, Mali, Niger, Senegal, and Togo	Approx. **1,452** as at 2020
Court of Justice of the Central African Economic and Monetary Community (CEMAC)	– Contentious jurisdiction over disputes relating to CEMAC Treaties and agreements – Advisory jurisdiction – Disputes between CEMAC and its employees	2000		**6** Cameroon, Chad, Central African Republic, Congo, Equatorial Guinea, and Gabon,	**22** as of 2006 and **5** advisory opinions.
African Commission on Human And Peoples' Rights (ACHPR)	– Promotion of Human and Peoples' Rights – Protection of Human and Peoples' Rights – Interpretation of the African Charter	1987	October 8, 1988 *Alphonse v DRC*	**54**	**238** as of Feb. 6, 2020. Most recent decision Nov. 15, 2018

has the jurisdiction to examine disputes that might relating to the interpretation of the AMU Treaty. The Presidential Council or a Member State involved in a dispute are empowered to petition the court pursuant to the Judicial Authority's Principal Regulations.[388]

Under the Treaty Creating the AMU (AMU Treaty), the AMU Judicial Organ should be composed of two judges from each state appointed by the state concerned for a period of six years.[389] Half of the members of the Tribunal are renewed every three years.[390] A president should be elected from the appointed judges.[391] The President serves for a period of one year.[392] The role of the judicial authority ought to be to examine disputes relating to the interpretation and application of treaties and agreements concluded within the framework of the Union.[393] It also ought to have the jurisdiction to offer advisory opinions on legal matters as may be requested by the Presidency Council.[394] Matters could also be referred to the Judiciary by Presidency Council or one of the state parties to the conflict.[395] Even if it was operational, there would be no access for natural or legal persons.[396] Finally, its decisions would considered final and binding.[397] The seat of the Judicial Authority was designated to be in Nouakchott, Mauritania.[398]

As noted at the beginning of this chapter, the Judicial Organ is one of the most, if not the most inactive, international courts in Africa.

[388] Robert W. McKeon Jr., *The Arab Maghreb Union: Possibilities of Maghrebine Political and Economic Unity, and Enhanced Trade in the World Community*, 4 Dickinson J. Int'l L. 288 (1992).
[389] Murray Carole, *Treaty Creating the Arab Union of the Maghreb*, 7 Arab L. Q. 207 (1992).
[390] *Id*.
[391] *Id*.
[392] *Id*.
[393] Arab Maghreb Union, *supra* note 381.
[394] Murray Carole, *Treaty Creating the Arab Union of the Maghreb*, 7 Arab L. Q. 207 (1992).
[395] *Id*.
[396] *Id*.
[397] *Id*.
[398] Arab Maghreb Union, *supra* note 381.