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New Trends in the African Human Rights System: Prospects Of African Regional Human Rights Courts*

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Abstract - One of the impacts of the Second World War (WW II) is the movement from the strict reliance on the principle of state sovereignty or domestic jurisdiction to the concept of universality.¹ The concept gave impetus to and culminated in the adoption of plethora of human rights instruments. Under the United Nations auspices, the Universal Declaration of Human Rights was adopted in 1948;² and today it “represents a major milestone in human progress.”³ It is also the “corner stone of contemporary human rights law,”⁴

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New Trends in the African Human Rights System: Prospects Of African Regional Human Rights Courts^{*}

Timothy F. Yerima

I. INTRODUCTION

One of the impacts of the Second World War (WW II) is the movement from the strict reliance on the principle of state sovereignty or domestic jurisdiction to the concept of universality.¹ The concept gave impetus to and culminated in the adoption of plethora of human rights instruments. Under the United Nations auspices, the Universal Declaration of Human Rights was adopted in 1948;² and today it "represents a major milestone in human progress."³ It is also the "corner stone of contemporary human rights law,"⁴

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¹ Magdalena S., *et al*, *Human Rights Reference Handbook* (Costa Rica: University for Peace, 2004), at 14, where the authors stated that: "It was, however, only after the Second World War that political and civil society alike came to realize that national schemes for the protection of human rights did not suffice. Since then, human rights have found their way into a wide range of regional and global treaties".

² Universal Declaration of Human Rights, adopted and proclaimed by the UN General Assembly in Res. 217 (III) of 10 Dec. 1948 [hereinafter UDHR or Declaration].

³ Javier Perez De Cuellar, "Message from the Secretary-General", in United Nations Human Rights: *The International Bill of Human Rights* (New York: United Nations Dept. of Public, 1988), at Vii.

⁴ See Yerima T.F., "Internationalization of Human Rights: A Critical Appraisal and Comparison of the Trilogy of Documents in the UN Systems", *Ikeja Bar Review*, Vol. 1, Pts. 1 & 2, Sept. 2006-March 2007, at 29.

⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocol No. 11) Signed by the Members of the Council of Europe on 4 Nov. 1950 (entered into force on 3 Sept. 1953)[hereinafter European Convention]. Protocol No. 11 was adopted on 11 May 1994 [entered into force in 1998].

⁶ Inter-American Convention on Human Rights, adopted by the Inter-American Specialized Conf. on Human Rights on 22 Nov. 1969 (entered into force on 18 July 1978)[hereinafter Inter-American Convention or Convention].

⁷ While the European system has only a single Human Rights Court that operates on permanent basis (See Protocol 11 *supra* note 5, Art. 19), the Inter-American system, like its African Counterpart, operates a temporary Human Rights Court and a Human Rights Commission (See Inter-American Convention, Art. 33).

because it has given impetus to the adoption of other human rights instruments both at the international, regional and domestic levels.

At the regional level the UDHR gave impetus to the adoption of European Convention on Human Rights⁵ and the Inter- American Convention on Human Rights.⁶ These Conventions guarantee certain rights and freedoms to individuals and also impose certain obligations on state parties to the respective Conventions. They also established mechanisms for the enforcement of the rights and freedoms, which they have guaranteed.⁷

Under the African human rights system the African Charter on Human and Peoples' Rights,⁸ was the first human rights instrument to be adopted as a result of the influence of the UDHR.⁹ The Charter, apart from guaranteeing what has been tagged "three-generation rights,"¹⁰ also established the African Commission on Human and Peoples' Rights with a tripartite mandate.¹¹ But the Commission since it was constituted in 1987 has been relegated as a *tooth less bull dog*,¹² because it has no legal stand to give binding decisions and enforce its judgments. These problems, among others, culminated to the adoption of the Protocol to the African Charter on the establishment of African Court of Human and Peoples' Rights in 1998.¹³ Ten years later, another Protocol was adopted to merge the African Court of Human Rights and African Court of

⁸ African Charter on Human and Peoples' Rights, adopted 27 June 1981 by the 18th Assembly of Heads of State of the Org. of African Unity OAU (entered into force on 21 Oct. 1986) [hereinafter African Charter].

⁹ *Id.*, 4th para. to the preamble.

¹⁰ "First generation" rights are the civil and political rights; economic, social and cultural rights are regarded as "second generation" and group rights are considered as "third generation" or "solidarity" human rights. See Wallace R.M.M., *International Law*, 5th edn. (London: Sweet and Maxwell, 2005), at 226.

¹¹ See African Charter, Arts. 30 & 45.

¹² Udombana N.J., *Human Rights and Contemporary Issues in Africa* (Lagos: Malt house Press Ltd, 2003) at 125.

¹³ Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights, adopted by the 34th Ord. See. of the Assemb. of Heads of State and Govt. of the AU on June 1998 (OAU Doc. OAU/LEG/MIN/AFCHPR/PROT./rev.2) (entered into force 25 Jan. 2004) [hereinafter African Human Rights Court Protocol or Protocol].

Justice as African Court of Justice and Human Rights.¹⁴ But until a year after the Protocol of the merged Court comes into existence, the African Human Rights Court will remain the African Continental Human Rights Body and would determine cases of human rights violations in Africa.¹⁵ The focus of this paper is to appraise the prospects of African Human Rights Court and the merged Court, which will later replace it. But before delving into the crux of the matter, it is crucial to survey the history of the Courts.

II. HISTORICAL SURVEY

Although, the establishment of an African Human Rights Court is a recent development, the idea of establishing the Court is not a new development. It was mooted in 1961 at the Conference of African Jurists in Lagos, Nigeria. The Conference was convened to discuss enforcement mechanisms for the protection of human rights in the newly independent States of Africa.¹⁶ The Law of Lagos, which was the outcome of the resolution of the Conference, called for the adoption of African Convention and establishment of African Human Rights Court to enforce the rights in the Convention.¹⁷ Paragraph 4 of the Law of Lagos specifically declares:

In order to give full effect to the Universal Declaration of Human Rights 1948, this Conference invites African Governments to study the possibility of adopting an African Convention of Human Rights in such a manner that the conclusions of this Conference will be safeguarded by the creation of a

¹⁴ Protocol on the Statute of the African Court of Justice and Human Rights, available at http://www.hurisaorg.za/advocacy/AfricanCourt/Single_Legal-Instrumentpdf (last visited 12/03/2008) [hereinafter Protocol of the Merged Court].

¹⁵ *Id.*, Art. 7. Under Art. 5 of Protocol, cases pending before African Human Rights Court that have not been concluded before entry into force of the Protocol shall be transferred to the Human Rights Section of the merged Court on the understanding that such cases shall be determined in accordance with the African Human Rights Court Protocol.

¹⁶ The Conference, which was organized by the International Commission of Jurists (ICJ), convened almost 194 judges, lawyers and scholars from twenty-three countries for the theme on the Rule of Law, where Dr. Nnamdi Azikwe, the then Prime Minister of Nigeria, in his address first mooted the idea of the establishment of African Human Rights Court. See Kioko B., "The Road to the African Court on Human Rights", *Afric. Society of Inter'l & Comp. Law*, Proc. 10th Annual Conf. 1998, at 75.

¹⁷ See Law of Lagos, Jan. 1961, reprinted in 3 *Journal of International Commission*, 1961.

¹⁸ See Charter of the Organization of African Unity, May 25, 1963, [hereinafter OAU Charter], Arts. XIX, VII(4).

¹⁹ See Protocol of the Commission of Mediation, Conciliation and Arbitration, 3 I.L.M. 1116, 1964, Art. 32.

²⁰ Frans, V., "Some Arguments in Favour of and against an African Court on Human and Peoples' Rights", *The African Society of Inter'l & Comp. Law Proc.* 10th Ann. Conf. 1998, at 22.

Court of appropriate jurisdiction and the recourse there to be made available for all persons under the jurisdiction of the signatory States.

Despite this sound declaration, effort to establish Human Rights Court in Africa was an exercise in futility.

In 1963, with the formation of the OAU, the Organization rejected the draft Charter that provided for the "establishment of a Court of Mediation, Conciliation and Arbitration" in a separate treaty. African leaders rather created an *ad hoc* "Commission of Mediation, Conciliation and Arbitration", as a mechanism for the peaceful dispute settlement among Members of the OAU, to accomplish the purposes of the OAU Charter.¹⁸ The Protocol, which defined the duties and powers of the Commission, later became an integral part of the OAU Charter.¹⁹

Another attempt was made at the Ministerial meeting in Banjul in 1981, when the proposal forwarded by Guinea on the establishment of an African Court to judge crimes against humanity and to protect human rights was turned down.²⁰ According to Justice Kebba M'baye, the expert group considered the idea of establishing an African Human Rights Court, but failed to make a recommendation to that effect since it felt that it was untimely to discuss it.²¹ This conclusion was not surprising because the expert group was instructed "not to exceed that which African States were ready to accept in the field of protection of human rights".²² It was glaring, therefore, that if African Charter had contained more than what it contains now or had established a Court, African leaders would have been reluctant to ratify it. But commentators are of the opinion that drafters of the African Charter would have overcome this obstacle in view of the fact that jurisdiction of the Court needed not be automatic but subject to separate declaration as was done in the case of former European system and the present Inter-American systems.²³ That today the Statute of the African Human Rights Court and Statute of the merged Court make provisions for additional declaration is in line with this observation.

That the proposal to establish African Human Rights Court was out rightly and flatly rejected after lengthy discussions depict that the representatives were reluctant "towards an effective enforcement mechanism" in Africa,²⁴ and, as a commentator pointed

²¹ Council of Ministers 37th Ord. Sess., OAU CM/1149 (XXXVII), at para. 117.

²² Kioko B., *supra* note 16, at 75.

²³ Naldi G.J., and Magliveras K., "The Proposed African Court on Human and Peoples' Rights" Evaluation and Comparison", *Afric. Journal of Inter'l & Comp. Law*, 1996, at 944.

²⁴ Frans V. *supra* note 20, at 22 citing K. M'baye, *Les Droits del' Humme en Afrique* (Paris: Editions A. Podone, 1992), at 164.

out: "In the 1960 and 1970s, the decolonization process and the protection of regional independence and freedom completely dominated African politics".²⁵ African States were strongly opposed to external meddling in their internal affairs and saw internal pressure concerning human rights protection as unwanted interference. No wonder, therefore, that most African leaders, having only then recently emerged from the yoke of colonial oppression, tend to jealously guard their newly – found Sovereign States against any perceived encroachment, even at the expense of human rights protection.²⁶ Article III(2) of the OAU Charter, which stresses full respect for state sovereignty and the principle of non-interference, justifies this point. That is why it took additional 20 years of extensive lobbying and much international pressure after the Lagos Conference before Africa's political leaders were reluctantly willing to accept an African Charter.

It is an indisputable fact that the Charter is a unique human rights instrument that embodies both Universal and African norms. However, its lack of provisions on the establishment of Human Rights Court undermines the Charter as effective human rights instrument. The question that continues to agitate the minds of scholars is why did African leaders prefer the establishment of African Commission to the establishment of African Human Rights Court? Or as a commentator asked: "Why African Governments are willing to submit to the jurisdiction of the International Court of Justice while refusing to even contemplate the existence of a judicial body indigenous to the continent?"²⁷ If one considers and answers this latter question, one would indeed conclude that the reason for the delay goes beyond the reluctance of African leaders to relinquish their hard – won States to external bodies.

²⁵ Anne, Pieter V.D.M., "The New African Court on Human and Peoples' Rights: Towards an Effective Protection Mechanism for Africa". Vol. 18, No. 1, *Leiden Journal of Inter'l Law*, 2005, at 114.

²⁶ Anthony A.E., "Beyond the Paper Tiger: The Challenge of a Human Rights Court in Africa". Summer 1997 *Texas International Law Journal*, available at www.africancourtcoalition.org/content_files/files/beyond_thetiger.dec. (Last visited 04/03/2006).

²⁷ *Id.*

²⁸ Anne, Pieter V.D.M., *supra* note 25, at 115; Se also Dankofa Y., "Towards an Effective Safeguard for the Enforcement of Human Rights in Africa – the Need for an African Court", *Ahmadu Bello University Law Journal*, Vol. 21-22, 2003-2004, at 84; Anthony E.A. *supra* note 26, Udombana N.J., "An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?", *Brooklyn Journal of International Law*, Vol. 28, No. 3, 2003, at 189, where he stated that: "The reason for this anti-Court approach stems partly from the nature of African Customary Law... Traditional African Dispute Settlement places a premium on improving relations between the parties on the basis of equity, good conscience and fair play, rather than on strict legality". Naidi G.J. and Magliveras K., *supra* note 23, at 944, stating that: "African conception of law is averse to third party adjudication, which is considered as confrontational. But alternatively is traditionally based on reconciliation reached through consensus".

²⁹ See Anthony A.E., *supra* note 26.

One other strong reason pondered by scholars for the choice of establishing a Commission and not a Court is predicated on African norms and values or African societies' predilection towards amicable settlement of disputes in lieu of judicial decree. African leaders favoured negotiations, conciliation and other amicable forms as the appropriate methods for dispute settlement, and opposed the confrontational judicial settlement common to the West.²⁸ Kebba M'baye, one of the proponents of this notion had once said:

According to African conception of the law, disputes are settled not by contentious procedures, but through reconciliation. Reconciliation generally takes place through discussions, which end in a consensus leaving neither winners nor losers. Trials are always carefully avoided, they create animosity; people go to Court to dispute rather than to resolve a legal difficulty.²⁹

Commentators have debunked this argument, pointing out that Courts are designed to provide a medium for resolving those agreements after they have defied amicable settlement. According to one of the commentators, "to argue that Courts tend to create animosity rather than promote the resolution of disputes is to flagrantly misrepresent the function and purpose of judicial institutions".³⁰ It has been importantly argued that though, amicable settlement of disputes in Africa is very significant, African traditions and norms do not exclude judicial settlement in cases involving human rights violations; "human rights conflicts in Africa of the 20th Centuries, like elsewhere in the modern world", it is concluded, "are...vertical conflicts between 'strong' States and 'weak' individuals, that cannot be adequately resolved on the basis of dialogue, good faith, or forgiveness".³¹ There is also the imperative and possibility of obtaining a legal condemnation or getting compensation especially where violations of human rights are involved.³²

Setting aside the reasons pondered by scholars for the choice of a Commission and not a Court, the inescapable fact remains that after the OAU adopted the African Charter, human rights situation in African continent continued to be bleak. This is because African human rights were built on shaky and ramshackle foundations. That is why Mr. Adama Dieg, Secretary-General of the International Commission of Jurists, saw the establishment of Human Rights Court in Africa as "an urgent necessity to curb human rights abuses".³³ Against this backdrop, human rights Non-Governmental Organizations (NGOs), and international bodies spearheaded aggressive campaigns for establishment of Human Rights Court in Africa. The relative success of

³⁰ *Id.*

³¹ Anne, Pieter V.D.M., *supra* note 25, at 116.

³² *Id.*

³³ See *African Topic*; Issue 10, November 1995, at 11.

the European Court and Inter-American Court also gave impetus to the establishment of the Court.

In pointing out this vital point, N.J. Udombana succinctly stated:

Both the Inter-American and European Courts of Human Rights have gained the grudging respect of political leaders throughout their respective continents. Unlike the regional human rights Commissions State Governments almost universality respect judicial order of the regional human rights Courts. Both Courts have proved to be effective mechanisms for the protection of human rights in their regions.³⁴

One of the efforts made by the NGOs was the session convened by the International Commission of Jurists in Dakar, Senegal in January 1993, in collaboration with the OAU General-Secretariat and the African Commission on the theme: "Strengthening the African Human Rights System". Participants unanimously concurred that time had come for the

dream of establishing an African Human Rights Court to be transformed into reality. But some of the participants recommended that African Commission should be allowed to strengthen first.³⁵

However, the tireless campaigns of the various bodies yielded positive results in 1994, when at the Summit of Heads of State and Government of the OAU, the leaders adopted a resolution requesting the Secretary-General of the OAU to call meeting of Government experts to ponder over the means to enhance the efficiency of the African Commission on considering particularly the establishment of an African Court on Human and Peoples' Rights.³⁶

The first Government Legal Experts meeting on the Establishment of African Court was convened by the Secretary – General of the OAU in collaboration with Government of South Africa in Cape Town in September 1995, where the experts produced a draft Protocol on African Human Rights Court. In drafting the Protocol, Government legal experts were guided by several human rights instruments including, *inter alia*, the European Convention on Human Rights,³⁷ Statutes of the European Court,³⁸ Inter-American Convention on Human Rights,³⁹ Statute of the Inter-American Court,⁴⁰ Statute of the International Court of Justice⁴¹ and most importantly the African Charter. The adoption of the draft Protocol⁴² was really received with *warm arm* and seen as a triumph in the African human rights system.⁴³

The second meeting of Government Legal Experts was convened in Nouakchott, Mauritania in April 1997,⁴⁴ inviting representatives of all Members of the OAU and all resource persons who participated in the drafting of the Protocol at the Cape Town meeting. The delegates did not only consider the draft Protocol, but also examined comments and observations received from 20 Member States.⁴⁵ The Nouakchott draft Protocol differed from that of the Cape Town in a number of ways:

- (i) It introduced an amicable settlement of dispute into the Protocol for the first time; increased the number of ratification required to bring the Protocol into force from 11 to 15 and required the Court to be set in one instead of two Chambers;
- (ii) It authorized the General Assembly of Heads of State and Government to intervene in the process of removing judges from the African Human Rights Court; and it limited automatic access to the Court to the Commission and States Parties to the Protocol;

³⁴ Udombana N.J., *supra*, note 12, at 139.

³⁵ Kioko B., *supra* note 16, at 76.

³⁶ Report of Government Experts Meeting, AHG/Res 230 (XXX), 30th Ord. Sess. of the Assembly of Heads of State and Government, Tunis, Tunisia 1994.

³⁷ European Convention for the Protection of Human Rights and Fundamental Freedom as amended by Protocol No. 11, signed by the Members of the Council of Europe on 4 Nov. 1950 at Rome entered into force on 3 Sept. 1953 [hereinafter European Convention].

³⁸ The European Court of Human Rights Rules of Court (4 Nov. 1998).

³⁹ American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36, 1970 (entered into force July 18, 1978) [hereinafter Inter-American Convention].

⁴⁰ Statute of the Inter-American Court of Human Rights, adopted by the General Assembly of the OAS, Oct. 1979, available at http://www.oas.org/xxvqa/english/doc_referential/Wstatuto_Corte_IDHpdf (last visited 28/11/2008).

⁴¹ Annexed to the Charter of the United Nations [hereinafter UN Charter], which established the International Court of Justice (ICJ), as the Principal Judicial Organ of the UN to enforce its principles. See ICJ Statute, Art. 92. The Statute of the ICJ is an integral part of the Charter. See *Introductory Note* to the UN Charter, *infra*, note 54.

⁴² OAU/LEG/EXP/AFCHPR (1), reproduced in 8 *Afric. Journal of Inter'l & Comp. Law*, 1996, 493.

⁴³ For example, Mr. A. Hagg and Mr. Dullah Omar, the Assistant Secretary-General of the OAU and the South African Minister of Justice respectively "expressed the hope that the proposed Court would be able to make a contribution towards the economic development of Africa". See Naldi G.J. and Magliveras K., *supra* note 23, at 946.

⁴⁴ See Second Government Legal Experts Meeting on the Establishment of an African Court on Human and Peoples' Rights, April 11-14, Nouakchott, Mauritania, OAU/LEG/EXP/AFCHPR.RPT (2), reprinted in 9 *Journal of Inter'l & Comp. Law*, 1997, 423.

⁴⁵ The States were Algeria, Burkina Faso, Burundi, Benin, Cote d'Ivoire, Egypt, Ethiopia, Lesotho, Mauritius, Madagascar, Gambia, Namibia, Niger, Tanzania, South Africa, Swaziland, Senegal, Sierra Leone and Togo.

- (iii) NGOs access was to be strictly limited to exceptional cases involving a series of “serious” and “massive” violations of human rights.⁴⁶

That provision on amicable settlement was not introduced in the initial draft Protocol debunks the argument that the choice of establishing a Commission rather than a Court was predicated on African norms and values, which favoured amicable settlement.

The Ministers of Justice and Attorney-General in their Conference held in Addis Ababa, Ethiopia, considered the draft Protocol and in particular, the issue of access to the Court (Arts. 5 and 6, which till now are controversial provisions under the African human rights system) and the question whether judges should perform their duties on part-time or on full time basis. But it was argued that the issue should be left pending till when the Court had enough work.⁴⁷

⁴⁶ Udombana N.J., *supra* note 12 at 142.

⁴⁷ Kioko B., *supra* note 16, at 81.

⁴⁸ See African Human Rights Court Protocol or Protocol, *supra* note 13.

⁴⁹ Udombana N.J., *supra* note 12, at 143.

⁵⁰ Other judges included: Sophia A.B. Akuffo (Ghana), Hamdi Faraj Fanoush (Libya), El Hadji Guisse (Senegal), George W. Kanyeihamba (Uganda), Kecello Justina Mafaso-Guni (Lesotho), Fatsah Ougurgouz (Algeria) and Emile Somda (Burkina Faso). The eleven judges took the oath of office on the 2nd July 2006 during the Seventh Ord. Sess. of the African Union Heads of Government in Banjul, the Gambia. See Coalition for an Effective African Court on Human and Peoples' Rights: “The African Court Judges” available at http://www.africancoalition.org/editorial.asp?page_id=62 (last visited 24/11/2008). Note however, that during the 11th AU Summit held in Sharm El-Sheikh, Egypt in July 2008, another election of the judges to the African Human Rights Court took place. Four of the first 11 judges whose 2-year terms had expired in July 2008 were eligible for re-election. But only 3 were nominated by their countries; Hon. Lady Justice Sophia A.B. Akuffo (Ghana), Hon. Justice Bernard Makgwo Ngeope (South Africa) and Hon. Justice Jean Emile Somda (Burkina Faso), Hon. Justice George W. Kanyeihamba (Uganda) was dropped and Justice Joseph Nyamihana Mulenga was nominated to replace him. Other Justices nominated at the Summit include: Mr. Jose Ibraimo Abudo (Mozambique), Mr. Sylvain Ore (Cote d'Ivoire) and Mr. Githu Muigai (Kenya). See African Court Coalition Organization, *supra* note 16. Also, African Court Judges in their meeting in Arusha, Tanzania in their 10th Session, 15th Sept. 2008 elected judge Jean Mutswenzi (Rwanda) and Judge Sophia A.B. Akuffo (Ghana) as the new President and Vice President of the African Human Rights Court to replace Judge Gerald Niyungeko and Judge Modibo Tounty Guindo respectively. See African Court Coalition Organization: “New President and Vice-President for the African Court”, available at http://www.africancourtcoalition.org/editorial.asp?page_id=167. (last visited 04/03/2006).

⁵¹ This was following the proposal by the Chairperson of the Assembly of the AU and Head of the Federal Republic of Nigeria, President Olusegun Obasanjo. There was the concern at the tremendous growing of AU institutions, which the Organisation could not afford to support. For stages of the integration, see Coalition for an Effective African Court on Human and Peoples' Rights, available at http://www.africancourtcoalition.org/editorial.asp?page_id=46.

At the 34th Ordinary Session of Assembly of Heads of State and Government meeting held in Ouagadougou, Burkina Faso, the African leaders finally adopted the Protocol to the African Charter establishing African Court to complement the protective mandate of the African Commission.⁴⁸ Taking into account the stages the Protocol had undergone, it is convincing to agree that “it represents a compromise between different trends in the history of its drafting”.⁴⁹

The Protocol establishing African Human Rights Court came into force on 25 January 2004; and exactly two years after (January 2006), the Executive Council of Ministers of the AU in Khartoum, Sudan elected the eleven judges of the Court.⁵⁰ The establishment of African Human Rights Court fills a gap in the African human rights system by placing it on the same pedestal with the European and Inter-American systems; it provides judicial guarantees at the regional level for the protection of human rights in Africa.

However, immediately the African Human Rights Court Protocol entered into force, the Assembly of Heads of State and Government of the AU took a decision to merge the African Human Rights Court and African Court of Justice to create an African Court of Justice and Human Rights.⁵¹ This dream was fulfilled at the 11th AU Summit held in Sharm El-Sheikh, Egypt when the Assembly of Heads of State and Government adopted the Protocol and Statute of the African Court of Justice and Human Rights.⁵² The Protocol and the Statute annexed to it shall enter into force thirty days after the deposit of the instruments of ratification by 15 Member States of the AU.⁵³ The immediate topic is devoted to the prospects of the Courts.

III. PROSPECTS OF AFRICAN HUMAN RIGHTS

a) *Strengthening Universality and Discouraging Strict adherence to the Doctrine of State Sovereignty*

The concept that human rights are universal can be traced to the internationalization of human rights in 1945, when the UN Charter was adopted.⁵⁴ The period of 20th Century witnessed the revival of natural law; and natural rights.⁵⁵ Prior to that period, the doctrine of state

⁵² Protocol on the Statute of the African Court of Justice and Human Rights, available at http://www.hurisa.org.za/Advocacy/AfricanCourt/Single_Legal_Instrument. (hereinafter Protocol of the merged Court), Arts. 1 & 2.

⁵³ *Id.*, Art. 3 (3).

⁵⁴ The Charter of the United Nations (UN) was signed on 26 June 1945, in Francisco, at the Conclusion of the UN Conf. on Inter'l Orgs., and came into force on 24 Oct. 1945. See Charter of the United Nations and Statute of the Inter'l Court of Justice, 1945, *Introductory Note*.

⁵⁵ Adaramola, Basic Jurisprudence, 3rd edn. (Lagos: Raymond Kunz Comms., 2004), at 40. Stating that: “A vigorous resurgence of natural law philosophy occurred in the twentieth century despite the un bated opposition of jurists such as Han Kelsen and the Scandinavian Realists”.

sovereignty reigned supreme,⁵⁶ though attempts were made on *ad hoc* basis to prohibit some flagrant violations of human rights.⁵⁷

To root the concept of universality of human rights, the General Assembly of the UN did not only adopt the UDHR, but also proclaimed the Declaration "as a common standard of achievements for all peoples' and all nations..."⁵⁸ and imposed obligation on all individuals and Governments to nationally and internationally secure the universal and effective recognition and observance of the declared human rights and freedoms.⁵⁹

Although, the UDHR was not intended to be a binding document at the time it was adopted, it has given impetus to the adoption of other human rights instruments at both the international, regional and domestic levels. The African Charter, one of the regional human rights instruments that the UDHR influenced, reveals that "having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights"⁶⁰ and thereby "recognizing...that fundamental human rights stem from the attributes of human beings, which justified their international protection".⁶¹ This buttresses that, *prima facie*, in terms of substantive

norms, African States have concurred to the universality of human rights

It is, however, not correct to view universality of human rights only from the angle of the adoption of African Charter and other human rights instruments, but also in terms of establishing mechanisms for enforcement of the rights guaranteed by the Charter. But that African leaders established only African Commission with questionable features and ignored establishing African Court indicates that they were not ready to submit themselves to a thorough human rights scrutiny and universality.

It is predicated on this point that the establishment of African Human Rights Court, and indeed the merged Court fills the gap left by the African human rights system; it strengthens the universality of human rights and discourages the strict adherence to the much-vaunted principle of state sovereignty or non-interference; the effect of which the way African leaders treated their citizens were regarded as within the internal sphere of national jurisdiction.⁶² The concept had done a great damage to African human rights system. It was considered as one of the OAU centre creeds, which culminated in the reluctance of the OAU Member States to promote human rights aggressively and to criticize one another about human rights violations.⁶³ That is why the OAU was vilified and relegated as a "Heads of States Club." because the Organisation protected the interests of African Heads of State without addressing the real problems that plague the continent.⁶⁴

It cannot be disputed that the principle of absolute state sovereignty or non-interference, was given teeth to bite because neither the OAU Charter nor the African Charter established an effective enforcement mechanism of its provisions. Some provisions of the African Charter, especially those relating to the African Commission, including provisions on confidentiality, none-binding decisions, absence of effective remedies and enormous powers given to the General Assembly over the affairs and decisions of the Commission relegated the Commission to a research centre.⁶⁵

With the establishment of African Human Rights Court and the merged Court with power to give binding decisions against a State that embark on violation of human rights and the power to award effective remedies to victims of human rights violations, there is at least a glimmer of hope that African States have taken the universality concept seriously.

On the other hand, the operation of African Human Rights Court, and the merged Court would not be an affront to the sovereignty of African States, most especially that the contentious jurisdiction of the Courts is optional.⁶⁶ Even though, the Special Protocol of the

⁵⁶ Shaw M.N., *International Law*, 5th edn. (Cambridge: Cambridge University Press, 2004) at 252, where he declared that "Virtually all matters that would be classified as human rights were at that stage universally regarded as within the internal sphere of national jurisdiction; See also Harris D.J., *Cases and Materials on International Law*, 5th edn. (London: Sweet and Maxwell, 2004), at 654.

⁵⁷ For example, the General Act of the Brussels Conference for the Repression of the African Slave Trade, 1890, *Le Louis* (1817) 2 Dods. 210, codified in the Slavery Convention 1926 60 LNTS 253 (as amended by the Supplementary Convention on the Abolition of Slavery (1953), 266 UNTS 3), *et cetera*.

⁵⁸ UDHR, 8th para. to the preamble.

⁵⁹ *Id.*, 6th para. to the preamble.

⁶⁰ African Charter, 4th para. to the preamble.

⁶¹ *Id.*, 6th para. to the preamble.

⁶² See Ijalaye D.A., "The Concept of Domestic Jurisdiction in the United Nations Charter," *Nigerian Annual of International Law*, Vol. 1, Oxford, 1976, at 44; Umozuke U. O., "Human Rights and Democracy in the 20thC: The African Challenges," in Ladan M.T.(ed.), *Law, Human Rights and Administration of Justice in Nigeria*, (Zaria: A. B. U. Press, 2001), at 36)

⁶³ Steiner H. and Hilston P., *International Human Rights in Context: Law, Politics and Morals*, 2nd edn. (Oxford: Oxford University Press, 2000), at 921.

⁶⁴ Magdalena S., *et al*, *supra* note 1, at 15.

⁶⁵ Kayode E., "An Anatomy of the African Charter for Human and Peoples' Rights: Is it of *Hope-Vil non'* in Yakubu J.A. (ed.), *Administration of Justice in Nigeria* (Ibadan: Malthouse Press, 2000), at 174.

⁶⁶ Statute of the African Human Rights Court, Arts. 5(3) and 34(6); Protocol of the merged Court, Art. 8 and Statute of the merged Court Arts. 28 & 30(f).

Courts *per se* is subjected to severe criticism,⁶⁷ it seems it is a device incorporated in the Charter to strike a balance between the non-intervention concept and the universality concept. In the sentiment of a commentator: This optional jurisdiction would essentially permit the African human rights enforcement system to have an independent functioning body while at the same time allowing apprehensive states to accede to the African Charter without fear of coming under the jurisdiction of the Court.⁶⁸

So, the option is for a State to compromise absolute sovereignty by the adoption of the Special Declaration to ensure universal adherence to human rights. Once that is done, African citizens would be afforded access to an institution not affiliated with a particular State or group of States, and the institution would serve to protect African citizens from their own Governments when such protection is in need. There is no doubt, therefore, that with the establishment of African Human Rights Court, and the merged Court, the previous dogmatic approach to preserving State sovereignty may begin to fade in some quarters.⁶⁹

In adopting the African Human Rights Court Protocol, African Heads of State and Government were firmly convinced that the attainment of the objectives of African Charter required the establishment of an African

Human Rights Court to complement and reinforce the functions of the African Commission.⁷⁰ Similar convictions were made under the Protocol establishing the merged Court.⁷¹ NGOs, for example Amnesty International, also saw the establishment of African Human Rights Court as "an extremely positive step towards demonstrating African Government's commitments to realize the spirit and letter of African Charter and ensure the protection of human rights in Africa."⁷²

Notwithstanding the fact that some provisions of the Statute of African Human Rights Court and Protocol of the merged Court are severely criticized, at least on paper and in theory, African human rights system has been placed on the same pedestal with the European and Inter-American human rights systems. The establishment of the two Courts represents the third instalment in attempts since Second World War to create Human Rights Court at the regional level;⁷³ the first being the European Court of Human Rights in 1950, followed by the Inter-American Court of Human Rights in 1979. At present, the European human rights system has only a permanent Human Rights Court. The basis for abolishing the temporary Human Rights Court and Human Rights Commission is justified.⁷⁴ The Inter-American system operates both Human Rights Court and Human Rights Commission *pari materia* with the African human rights system, and efforts are being put in place to establish Human Rights Court for the Caribbean countries. It is, therefore, gratifying to say that having established Human Rights Court in line with the model accepted in other continents, African States have adhered to the universal norm.

b) Development of an African Human Rights Jurisprudence

One remarkable feature of African Human Rights Court and also the merged Court is that the Court would be able to give decisions on some areas which are distinct features of African Charter. In pointing out the imperative need for the development of African Human Rights Jurisprudence, a commentator stated that "human rights protection in any region requires regional human rights jurisprudence. African human rights system needs it most, due to the restricted formulation of many rights in African Charter and the need to inspire domestic Courts."⁷⁵

The African Commission has applied the civil and political rights provisions to a wide range of situations including detention *incommunicado* without trial of at least eleven journalists by Eritrea, where Eritrea was found to have violated rights such as freedom of expression, the right to liberty and the right to fair trial.⁷⁶

Apart from guaranteeing the traditional first generation rights- civil and political rights, which all other international, regional and municipal human rights instruments have guaranteed and/or recognized, the African Charter places the civil and political rights on the same pedestal with socio-economic rights;⁷⁷ "and that

⁶⁷ Pityana N.B., "The African Court on Human and Peoples' Rights in Municipal Law", Seminar for Eastern and Southern African States on the "Ratification of the Protocol to the African Charter...on the establishment of African Court on Human and Peoples' Rights", Gaborone, Botswana 9-12 Dec. 2003, available at <http://www.unisa.ac.za/contents/about/principle/docs/municipalLaw.doc> (last visited 24/11/2008).

⁶⁸ Anthony A.E., *supra* note 26.

⁶⁹ Sceats S., "Africa's New Human Rights Court: Whistling in the Wind?", *International Law*, March 2009/IL BP 09/01, available at <http://www.chathamhouse.org.uk/files/13587bp0309S.ceatspdf> (Last visited 03/12/2009).

⁷⁰ African Human Rights Court Protocol, 7th para. to the preamble.

⁷¹ Statute of the merged Court, 10th para. to the preamble, however, states: "Convinced that the present Protocol shall supplement the mandate and efforts of other continental treaty bodies as well as national institutions in protecting human rights".

⁷² Amnesty International: African Union, Entry-into force of the Protocol Establishing an African Court on Human and Peoples' Rights-A significant Development, (22 Jan. 2004) at <http://web.amnesty.org/library/index/engafri010042004> (Last visited 06/05/2006).

⁷³ Sceats S., *supra* note 69.

⁷⁴ This was to overcome the problem of delay of cases before the European Commission. "A permanently sitting Court will be better able to deal with the increasing case load". See Juliane K., "The protection of Fundamental Rights under German and International Law", 8 *Afric. Journal of Inter'l & Comp. Law*, 1996, at 360.

⁷⁵ Frans V., *supra* note 20 at 27.

⁷⁶ African Comm., Commun. No. 275/2003 (2007).

⁷⁷ For detailed discussions on socio- economic rights, see Udombana N., "The Role of Courts in making Economic, Social and Cultural Rights Justiciable in Nigeria" *Fountain Quarterly Law Journal*, Aug. 2004 at 160-174; Fon Coomas (ed.), *Justiciability of Economic and Social Rights: An Experience from Domestic Systems* (Belgium: Enter Sentia Publishers), 2006.

civil and political rights cannot be dissociated from economic, social and cultural rights.”⁷⁸ Although, the interpretation of socio-economic rights would definitely be one of the serious challenges of African Human Rights Court and the merged Court, ultimately, it would aid in the development of African human rights jurisprudence.

Another problem and challenges of the African Human Rights Court and the merged Court in the development of African human rights jurisprudence, is the interpretation of peoples' rights in the African Charter; and other international human rights instruments. The pronouncements of these Courts on peoples' rights would be significance in view of the inescapable fact that the problems emanating from these rights are enormous. J. Machoski pointed out the problems in the following words:

The crucial question posed both by scholars and law-makers is: who are the subjects and beneficiaries of peoples' rights? By definition, it is suggested that they are the people. But that logical and relatively simple answer immediately raises more questions, namely: who are the people? What is their position in international law? And finally, what are the relationships and borderlines between peoples' rights and human rights, group rights, and also the relationship of states under international law?⁷⁹

Another complex problem of definitions is that of the notions such as “peoples”, “population”, “nation” or “country” and “state”. In the absence of explicit and uniform definitions under the African Charter and other international human rights instruments, it is difficult to establish precisely the subjects of peoples' rights.⁸⁰ So,

⁷⁸ *Id.*, 8th para. to the preamble.

⁷⁹ Macheski J., “Peoples' Rights as a New Form of Human Rights”, in Emmanuel G.B. and Bola A.A. (eds.) *Contemporary International Law and Human Rights* (The Hague: Martinus Nijhoff Publishers Vol. 1, 1991) at 349.

⁸⁰ *Id.*

⁸¹ For example *Western Sahara's case* (1975) ICJ Rep. 12.

⁸² (Comm. No. 75/92 (1996) 3 *Inter'l Human Rights Reports* 136.

⁸³ Obiora C.O., *The African Human Rights System: Activist Forces and Interpretational Institutions* (Cambridge: Cambridge University Press, 2007), at 86.

⁸⁴ Ankumah E.A., “The African Commission on Human and Peoples' Rights: Practice and Procedures” (The Hague: Martinus Nijhoff, 1996), at 164.

⁸⁵ McCorquodale R., “Self-determination Beyond Colonial Context and its potential Impact on Africa”, 4 *Afric. Journal of Inter'l & Comp. Law*, 1992, at 605-606.

⁸⁶ African Charter, Art. 24.

⁸⁷ Comm. No. 155/96, available at www.law.wits.ac.za/humanrights/africa/comcases/155-96.html (Last visited 12/11/2008).

⁸⁸ *Id.*

⁸⁹ *Id.*

there is dire need to develop African human rights jurisprudence in these controversial areas.

Even though the African Commission, like the ICJ,⁸¹ had made some pronouncements on the right to self-determination, the Commission's effort is not seen as anything other than shielding away responsibility. In *Katangese Peoples' Congress v. Zaire*,⁸² the Commission held that under certain exceptional circumstances, a sub-state group (a people) who complains of being encircled by a State Party has the right to secede from that State. Although, this decision was regarded by a writer as: “the Commission's increasingly bold interpretation behavior,”⁸³ another commentator saw it as tactics adopted by the Commission to shield away from making a pronouncement as to whether or not it had the competence to review self-determination claims.⁸⁴ It is, therefore, not in doubt that though the right to self-determination “is widely accepted by African Governments and is consistent with many of the African culture,”⁸⁵ there is need for judicial pronouncements on the right under the African human rights system.

The African Commission has, however, set a pace in the interpretation of the right to a general satisfactory environment as guaranteed under the African Charter.⁸⁶ In the case of *Social and Economic Action Rights Centre (SERAC) and another v. Nigeria*,⁸⁷ the Commission declared that the right to a general satisfactory environment imposes clear obligations upon a Government. In the words of the Commission:

It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure ecological sustainable development of natural resources.

The Commission also laid down a very important principle that the right to food is inseparably linked to the dignity of human rights and is crucial for the enjoyment and fulfillment of such other rights as health, education, work and participation.⁸⁸

Similarly, with regard to Article 21 of the African Charter dealing with the right of all peoples to freely dispose of their wealth and natural resources, *inter alia*, the African Commission held that failure of the Government of Nigeria to involve the Ogoni Communities in the decision that affected the development of Ogoni land and the lack of material benefits accruing to the local population constituted a violation of Article 21.⁸⁹

Although, the principles in the foregoing case refute the argument paddled by many groups, including the UK Government that socio-economic and cultural rights cannot be dealt with by Courts, they cannot be considered as land mark principles in the development of jurisprudence of African human rights system, in view of the fact that the Commission is not a body with binding authority; its decisions are only

recommendatory. There is the imperative need for such pronouncements to be made by a judicial body as the African Human Rights Court and later the merged Court. B.O. Nwabueze had evaluated the crucial role of judicial body in this regard, where he postulated:

A fact-finding Commission is useful, it needs to be reinforced by a machinery with compulsory jurisdiction to interpret and enforce, by the rendering of binding decisions, the provisions of the Charter when efforts at amicable settlement fails. Such is the position in the European Convention on Human Rights.⁹⁰

In other words, the African Commission has no legal stand to develop the jurisprudence of human rights in Africa because, apart from the fact that it is a fact-finding body with only *quasi*-judicial power, its decisions do not bind the Assembly of Heads of State and Government nor the parties before it. It has even been criticized that what the African Charter established is a mere fact-finding, not enforcement machinery.⁹¹

On the contrary, the establishment of African Human Rights Court and the merged Court marked a watershed in African human rights system because the Courts would give binding decisions and award effective remedies.⁹² Being judicial bodies, the Courts would be able to analyze issues before them in detailed, reflect full reasoning for both their contentious and advisory decisions. All these would culminate in the development of a human rights case law.

⁹⁰ Nwabueze B.O., *Constitutional Democracy in Africa*, Vol. 2, (Ibadan: Spectrum Books Ltd., 2003), 84.

⁹¹ *Id.*, 80-81.

⁹² Shu'aib U.M. "The position of the African Court on Human & Peoples' Rights within the African Union" *Lead City University Law Journal*, a pub. of the Fac. of Law, Lead City University, Ibadan, Nig. (LCULJ) Vol. 1, Pt. 1, Jan-June 2008, at 125.

⁹³ African Charter, Art. 59(1).

⁹⁴ Saffari A., "The Enforcement of Human Rights", *The Afric. Society of Inter'l & Comp. Law, Proc.*, 10th Annual Conf., 1998, 299.

⁹⁵ African Human Rights Court Protocol, Art.10 (1) Statute of the merged, Art. 39.

⁹⁶ *Id.*, Arts.10 (1) & 39 respectively.

⁹⁷ *Id.*, Arts. 28(5)(6) & 43(4) respectively.

⁹⁸ *Id.*, Arts. 28 (7) & 44 respectively.

⁹⁹ See Art.31 of the African Human Court Protocol.

¹⁰⁰ Dakas C.D., "The Lessons of History: Understanding the African Charter on Human and Peoples' Rights with Reference to the Legislative History", *Journal of Public Law and Private Law*, a publication of the Dept. of Public and Private Law, Uni. Jos, Fac. of Law, 2003, at 25.

¹⁰¹ Shu'aib U.M., *supra* note 92, at 126.

¹⁰² Idubor R., *Principles of Human Rights-Introduction*, Vol. 2 (Benin: Newera Pubs., 2000), at 79.

¹⁰³ Umozurike U.O., "The Significance of the African Charter on Human & Peoples' Rights", in Awa U.K. and Osibanjo Y. (eds.), *Perspectives on Human Rights*, Fed. Min. of Justice, Law Rev. Series, Vol. 12 at 80.

¹⁰⁴ Mutua A., "A Two Legal Stool?" 21 *Human Rights Quarterly*, at 342-358.

However, the significance of African Human Rights Court and the Merged Court would certainly depend on the quality of the case law they generate especially in the area of socio-economic rights, group rights as well as duties of individuals. Courts and legal practitioners in other regions would watch with keen interest the development of jurisprudence in these areas.

c) *Heralding a New Era of Transparency and Accountability and Attracting more Publicity and Media Exposure*

It is crucial to reiterate that under the Commission system, measures taken with respect to procedures of the Commission remain confidential until such time as the Assembly of Heads of State and Government decides otherwise.⁹³ Consequently, the Commission could not publish vital information such as the names of States against which complaints of human rights violation have been leveled. Thus, the confidentiality clause did protect (as it was intended) States Parties from being exposed of flagrant violations of human rights which African States have been known for. A scholar pictured the record of human rights violations in Africa where he said:

The record of human rights violations in Africa has been appalling considering the previous murderous regimes of Mathius of Equatorial Guinea, Idi-Amin of Uganda and Jean Bedel Bokassa of Central African Republic...Ethnic wars in Rwanda, and Burundi, the civil wars in Liberia, Somalia, political unrest in Egypt and Mauritania do not add up any credit to the record.⁹⁴

It is predicated on the foregoing fact that the establishment of African Human Rights Court and the merged Court, heralds a new era of transparency and accountability in human rights cases. The Courts would conduct proceedings in open Court,⁹⁵ though secret proceedings could be held in exceptional cases;⁹⁶ judgments of the Courts and reasons for the judgments must be read in an open Court⁹⁷; and there is room for dissenting opinion.⁹⁸ The Court themselves are required to submit report of their work during the previous year specifying cases in which a State fails to comply with their Court's judgment.⁹⁹

This procedure, no doubt, will attract more publicity; it will give room to assess the role of African Human Rights Court, and later the Merged Court in the development of the jurisprudence of human and peoples' rights, which under the Commission system, is considered, "a Herculean task".¹⁰⁰ The activities of the Court being in secret would definitely attract media attention to expose States that embark on flagrant violation of human rights.¹⁰¹ The significance of such publication cannot be underscored: it is "a particularly effective means of putting pressure on government"¹⁰² or a "potent weapons against human rights denials";¹⁰³ and it is also a device to "mark out the violator."¹⁰⁴ The

device is more effective under the Statute of the merged Court, because where a State fails to comply with judgment of the Court, the Assembly might impose sanctions in accordance with Article 23(2) of the AU Constitutive Act.¹⁰⁵ Even if the State against which the sanction is imposed does not stop embarking on violation of human rights, which is very possible, the imposition could succeed in exposing the State as a human rights violator.

d) Fulfilling Past Dreams and Changing African Outmoded Perception on the Establishment of an African Human Rights Court

It is apposite to reiterate that though, the establishment of Human Rights Court is a recent development, the idea dates back to 1961 at a Conference on the "Rule of Law" organized by International Commission of Jurists (ICJ) in Lagos, where African leaders were called upon to adopt a Human Rights Convention for the continent and to create a Court that would be accessible to victims of human rights violations.¹⁰⁶ But the proposal was flatly rejected. It was, therefore, not surprising that twenty years after the Conference, when the African Charter was adopted, the idea to create African Human Rights Court had been sunk into oblivion, despite the fact that human rights abuses in Africa had been and has reached its peak.

The strongest reason often given by scholars is that the preference of a Commission to a Court was predicated on "the nature of African customary law and long-time dispute settlement practice."¹⁰⁷ It has been argued that African norms and values favoured negotiation, conciliations and other amicable forms as the appropriate methods for dispute settlement and would oppose the confrontational judicial settlement; common in the west.¹⁰⁸ The choice of a Commission

was justified on the basis that it functions in a way similar to the OAU Commission of Mediation, Conciliation and Arbitration, which conforms to the African approach to dispute resolution.¹⁰⁹ But it is doubtful, whether this reason is genuine. Scholars have argued that, though in Africa the significance of amicable dispute settlement may be stressed more than elsewhere, African traditions and norms do not, especially in cases involving human rights violations, exclude judicial settlement.¹¹⁰ The assumption that litigation was avoided in the pre-colonial Africa is a myth or a fallacy, when one took a cursory glance at the political traditions of societies in that period. In the demonstration of A.E. Anthony:

The Amhara of Ethiopia...historically thrived on litigation and the vigorous examination and cross-examination of witnesses. In a similar vein, in present-day Congo, the Tio people had a strong tradition of jurisprudence...with specific rulings for penalties... Likewise, among the Akomba of present-day Ghana, the Council of Elders existing in each separate community was responsible for rendering judgment on matters insoluble by reconciliation. Each party to a dispute was charged with presenting its case and thereafter was required to abide by any decision that was reached by the Council of Elders. Moreover, a series of sanctions was imposed by the Court based on the extent to which an accused deviated from Akomba customary law...¹¹¹

The foregoing statements are pointer to the tacit fact that reference to typical African norms and values or customs could have motivated the choice for a human right Court.¹¹² It is, therefore, not surprising that, though the African leaders did not give reason for the choice not to establish a Court, Judge Keba M'baye revealed the reality at the 1985 Conference on the African Charter to the effect that the establishment of such a Court would be "premature".¹¹³ The reason for the choice not to establish a Human Rights Court, therefore, was to protect the sovereignty of the newly independent African States against any perceived intervention even at the expense of human rights promotion and protection.¹¹⁴

Two decades after most African States had regained their independence, African leaders were still simply reluctant to subject themselves to a *supra-national* Court.¹¹⁵ Even of more recent, some scholars still held firm that "the creation of a Court will mainly be of symbolic value".¹¹⁶

That African Heads of State and Government today have established a human rights Court depicts that the dream of the 1961 at the Lagos Conference has been fulfilled. It also indicates a change of perception of

¹⁰⁵ Statute of the merged Court, Art. 46(5).

¹⁰⁶ Inter'l. Comm. of Jurists, *Afric. Conf. on the Rule of Law*, Lagos (Nig.), 3-7 Jan. 1961 – Report on the Proceedings of the Conference, 1961, at 9. See also Kioko B., *supra* note 16; Anthony A.E., *supra* note 26.

¹⁰⁷ Kayode E., *supra* note 65 at 175.

¹⁰⁸ Naldi G.J. and Maghiveras K., *supra* note 23, at 944; Philip A., "The African Charter on Human and Peoples' Rights – An Effective Weapon for Human Rights", 4 *Afric. Journal of Inter'l & Comp. Law*, 1992, at 237; Anne Pieter V.D.M., *supra* note 25, at 115.

¹⁰⁹ Anthony E.A. *supra* note 26.

¹¹⁰ Anne Pieter V.D.M. *supra* note 25, at 115-116.

¹¹¹ Anthony E.A. *supra* note 26.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Udombana N.J., "An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?", *Brooklyn Journal of Inter'l Law*, Vol. 28, No. 3, 2003, at 818.

¹¹⁵ Kunig, "The protection of Human Rights by International Law in Africa", *German Year Book of Inter'l Law*, 1982 at 38-39.

¹¹⁶ See personal Communication by Michaelo Hansungule of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, University of Lund, Sweden, March 1997.

Africa and Africans on the establishment of African Human Rights Court. A scholar captured this change in perception, where he said:

In the public perception, also in modernized Africa, a meaningful rule of law has come to be associated with the existence of impartial Courts. Without the existence of a Court, a system of human rights protection is seen as toothless. The establishment of a Court that gives binding judgments will foster the perception that the rights under the Charter are enforceable, and that the system should be taken seriously. Such perceptions are prerequisites for the development and sustained legitimacy of the State.¹¹⁷

e) *Setting Precedents for Sub-Regional Institutions and Domestic Courts*

Developing African human rights jurisprudence is not only relevant for African Human Rights Court and the Merged Court but also African sub-regional and domestic Courts. The power to interpret the African Charter is not the monopoly of African Human Rights Court (later the Merged Court) and African Commission;

¹¹⁷ Frans V., *supra* note 20.

¹¹⁸ These institutions include: Court of Justice of the Economic Community of West African States, East African Court of Justice, South African Development Community Tribunal, *et cetera*.

¹¹⁹ For example, Nigeria since 1983 incorporated the provisions of the African Charter into its Municipal Law in compliance with Section 12 of the constitution of the Federal Republic of Nigeria 1979 (now 1999) known as African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. 10 Laws of the Federation of Nigeria (LFN 1990) (now Cap. A9 2004).

¹²⁰ *Gemera; Sani Abacha & 3 Ors. v. Chief Gani Fawehinmi* (2000) 2 SCNQR 489 at 496 per M.E. Ogundore JSC at 514.

¹²¹ Madhuku L., "The Impact of the European Court of Human Rights in Africa: The Zimbabwe Experience", 8 *Afric. Journal of Inter'l & Comp. Law*, Vol. 8, Pt. 4, Dec. 1996 at 934.

¹²² *State v. A. Juvenile* (1987) 2, 246 per Dumbutshena CJ.

¹²³ Frans V., "The Relevance of the Inter-American Human Rights System for Africa", 11 *Afric. Journal of Inter'l & Comp. Law*, 1999, at 660.

¹²⁴ These cases include: *Tyre v. United Kingdom* (1978) 2 ECHR (corporal punishment); *Echle v. Germany (Federal Republic)* (1983) 5 EHRR & *Foti v. Italy* (1983) 5 EHRR 313 (right to a speedy trial); *Soering v. United Kingdom* (1989) 11 EHRR (delay in the execution of the death sentence); *Abdulaziz Calales and Balkandali v. United Kingdom* (1985) 7 EHRR 471 & *Berrehab v. Netherlands* (1989) 11 EHRR 322 (the right to freedom of movement and its relationship with family life); *Golder v. United Kingdom* (1975) 1 EHRR 524, *Silver v. United Kingdom* (1983) 5 EHRR 347, *Handyside v. United Kingdom* (1976) 1 EHRR 737, *Christians against Racism & Facism v. United Kingdom* App. No. 8440/78 & *H. v. Austria* 15 EHRR 77 (freedom of expression and assembly). On detailed discussions of application of these cases by the Zimbabwean Supreme Court, See Madhuku L., *supra* note 121, at 934-943.

there also exist in Africa proliferation of sub-regional institutions with direct or indirect mandate to interpret the African Charter.¹¹⁸ The decisions of African Human Rights Court and the Merged Court would serve as precedents to these Courts.

In the same advantage, domestic African Courts would make frequent use of the jurisprudence of African Human Rights Court and later the Merged Court. This is important because the provisions of African Charter have been incorporated in the municipal laws of some African countries that practiced dualism system;¹¹⁹ and having been incorporated, the provisions of the Charter become part of domestic law with international flavour that "possesses 'greater vigour and strength' than any domestic Statute."¹²⁰ Some provisions of the African Charter upon which the decisions of the African Human Rights Court and later the decisions of the merged Court will serve as precedents to municipal Courts include provisions on claw-back clauses, individual duties, socio-economic rights *et cetera*.

Moreover, there are certain areas which are not covered by the African Charter or other international human rights instruments that are applicable in Africa but which a case might arise begging for urgent attention. A judge of a Municipal Court might look up to the cases decided by the African Human Rights Court and the merged Court to tackle the problem at hand. By so doing, the hands of domestic judges would not only be strengthened; but might also justify decisions that could embarrass States. In addition, decisions of African Continental Courts would not only encourage African domestic Courts to rule to the same end,¹²¹ but also African domestic human rights jurisdiction would be enriched.¹²²

Although, the African Commission was constituted over two-decades now, its decisions cannot and would never serve as precedents for African domestic Courts for the simple reason that the Commission is not a judicial body with power to give binding decisions. That African domestic Court will make use of the decisions of African Human Rights Court and the merged Court as precedents can be evidenced from the fact that "domestic African Courts have made frequent use of the jurisprudence of the European Court... case-law as a guide to constitutional interpretation."¹²³ It is our prediction that African domestic Courts will make use of the decisions of African Human Rights Court and later the merged Court more than they have made use of the decisions of the European Courts because, while the decisions the former Courts are binding, those of the later are only persuasive.

For example, it has been fished out that in many cases decided by the Zimbabwean Supreme Court on the Bill of Rights; the Court has not only referred to many of the European Court of Human Rights judgments,¹²⁴ but also treated the judgments as if they are a binding

body of law.¹²⁵ “The result of this process”, according to a scholar “has been to develop enriched and respectable domestic human rights jurisprudence.”¹²⁶

IV. CONCLUDING REMARKS

It is not in doubt from the foregoing discussions that the establishment of African continental Human Rights Courts is a welcomed development in the African human rights system. However, “the mere establishment of a Court empowered legally to condemn state parties for human rights violations is no guarantee of success. An effective human rights mechanism requires more.”¹²⁷ The success of the Courts, therefore, depends on the extent which African leaders will be willing and able to tackle some impediments which render the African Commission a *paper tiger*. These include substantial amendment of the provisions of African Charter, the willingness of the State parties to meet their financial obligations, compliance with the rulings, order and judgments of the Courts, *et cetera*. If only these can be done, Africa, which is laughing last for the establishment of the Court, will laugh better.

¹²⁵ Madhuku L., *supra* note 121.

¹²⁶ *Id*

¹²⁷ Anne Pieter V. D. M., *supra* note 25, at 114.

