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A COMPARATIVE EVALUATION OF THE PROBLEMS OF THE AFRICAN HUMAN RIGHTS COURT AND AFRICAN COURT OF JUSTICE*

I. INTRODUCTION

The establishment of African Human Rights Court had long been overdue. This was not because the European and Inter-American human rights systems had, over many decades ago, established Human Rights Court in their respective Continents; but because Africa has been known for its egregious violation of human rights; a continent some times called *human rights grave yard.*[1]

However, that Human Rights Court under the African human rights system is established at the *24th hour* does not depict that the idea of establishing the Court is novel. In fact, it is over four decades now (precisely1961), that the idea was sold at the Lagos Conference of Jurists, but was flatly turned down. Then it was felt Africa – a Continent comprising of States that had just started fledging because of the effect of colonialism, was not matured to establish such Court.[2]

Even if this reason was justified in 1961, it could not have been justified twenty years later – 1981, when the African Charter on Human and Peoples' Rights[3] was adopted under the auspices of the Organization of African Unity (now metamorphosed into African Union). It was hoped that Africa would follow the example of its European and Inter-American counterparts that established a dual enforcement mechanism-the Court and the Commission,[4] but to no avail. The Charter established only African

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[1] Anyangwe C., "Obligations of State Parties to the African Charter on Human and Peoples' Rights" 10 *Afric. Journal of Inter'l & Comp. Law,* 1998, at 625.

[2] See Law of Lagos, Jan. 1961, reprinted in 3 *Journal of Inter'l Comm'n,* 1961.

[3] African Charter on Human and Peoples' Rights, 27th June, 1981, OAU DOC CAB/LEG/67/3 rev. 5 21 ILM 58 (1982), [entered into force 23rd Oct. 1986] (here in after African Charter or Charter).

[4] American Convention on Human Rights, adopted by the Inter-American Specialized Conference on Human Rights on 22 of Nov. 1969 (entered into force on 18 July 1978) [hereinafter American Convention], CHAPTER VII "INTER-AMERICAN COMMISSION ON HUMAN RIGHTS" and CHAPTER VIII "INTER-AMERICAN COURT ON HUMAN RIGHTS"; European Convention on Human Rights, adopted on 4 Nov. 1950 (entered into force on 3 Sept. 1953) [hereinafter European Convention], Art 19. However, on 11 May 1994, Protocol No. 11 was adopted to replace the former European Convention. The Protocol abolished the temporary European Commission on Human Rights and temporary European Court on Human Rights and established a permanent European Court on Human Rights to, among other reasons, overcome the problem of delay of

Commission on Human and Peoples' Rights,[5] with a tripartite mandate.[6] But since it was constituted in 1987, the Commission has been severely criticized as a *toothless bulldog* that only *barks but cannot bite*, as it was not created to bite.[7] Some writers have also regarded it as a body that was intended to be a *paper tiger* and it turned out to be a *paper tiger*.[8]

Writers have pointed out many reasons why the Commission cannot *bite*. First, the decisions of the Commission are not binding on State Parties; secondly, African States are still *tied to the apron string* of the much – vaunted principles of state sovereignty and *reserve domain*. Financial predicament also frustrates many activities of the Commission. Confidentiality of the reports of the Commission; lack of compliance with periodic reporting obligation by State Parties and lack of compliance with the decisions of the Commission by some State Parties, *et cetera* are other crucial points.[9]

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cases with the Commission. See Juliane. K., "The Protection of Fundamental Rights under German and International Law", *Afric. Journal of Inter'l & Comp. Law*, Vol. 8, pt. 2, June 1996.

[5] African Charter, *supra* note 3, Art. 30.

[6] *Ibid*, Art. 45.

[7] See Udombana N.J., "Towards the African Court on Human and Peoples' Rights: Better Late than Never", *Yale Human Rights & Development Law Journal*, 2000 at 45; Dankofa Y., "Towards an Effective Safeguard for the Enforcement of Human Rights in Africa – The Need for an African Court", *Ahmadu Bello Univ. Law Journal*, Vol. 21-22, 2003-2004, at 83.

[8] Anne Pieter V.D.M., "The New African Court on Human and Peoples' Rights: Towards an Effective Human Rights Protection Mechanism in Africa?" Vol. 18, No. 1, *Leiden Journal of Inter'l Law*, 2005, at 166 *Cf.* Anthony A.E. "Beyond the Paper Tiger: The Challenge of a Human Rights Court in Africa," *Texas Inter'l Law Journal*, Summer 1997, available at www.africancourtcoalition.org/content_files /files. *Beyond the Tiger.doc.*(last visited 04/03/2006)

[9] See generally, Wachira G,M, "Twenty Years of Elusive Enforcement of the Recommendations of the African Commission on Human and Peoples' Rights: A Possible Remedy", *African Human Rights Journal*, 2006, at 465-492; Umozurike U.O.,"The African Charter on Human and Peoples Rights: Suggestions for More Effectiveness", *Annual Survey of Inter'l & Comp. Law* [Vol. XIII], 2007, at 182-187; Mutua M., "The African Human Rights Court: A Two-Legged Stool?" *Human Rights Quarterly*, Vol.21, 1999, at 345-451; Essien U., "The African Commission on Human and Peoples' Rights: Eleven Years After", *Buffalo Human Rights Law Review*, Vol. 6,2000, at 93-111; Wright R., "Finding an Impetus for Institutional Change at the African Court on Human and peoples' Rights," *Berkeley Journal of Inter'l Law*, Vol. 24, 2006, at 471-473; Frans V."State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994- 2004," *The American Journal of Intern'l Law* [Vol. 101: 1], 2007, at 1-34; Udombana N. J., "Between Promise and Performance: Revisiting States' Obligations under the African Human Rights Charter," *Stanford Journal of Intern'l Law*, Vol. 40, 2004, at 105-142; Yerima T.F., "Over Two Decades of African Commission on Human and Peoples' Rights: Flying or Fledging", *Kogi State Univ. Bi-Annual Journal of Public Law*, Vol. 1, pt. 1, 2009, at 13-35.

Since the adoption and coming into force of African Charter and the establishment of the African Commission, African human rights system has been relegated to a ramshackle structure that was built on a shaky foundation and unless it is rebuilt, African human rights system cannot revamp. One measure adopted to overcome some of the problems was the adoption of the Protocol establishing the African Human Rights Court by the African Heads of State and Government in 1998.[10] In 2000, they also adopted the Constitutive Act of the AU[11] to replace the OAU Charter.[12] The Act created the African Court of Justice as the judicial organ of the AU[13]. There was, however, concern over the proliferation of enforcement bodies in Africa and the question often asked was whether the establishment of African Court of Justice and African Human Rights Court was "a needful duality or a needless duplication".[14] This imperative question was answered in the affirmative when in 2005, the suggestion made by the former Head of State and Government of Nigeria, President Olusegun Obasanjo to merge the two Courts as one Court was accepted with *warm arm.*[15] The process was completed in September 2008, when the General Assembly of the AU adopted the Protocol and Statute of the African Court of Justice and Human Rights (Merged Court).[16]

The Protocol of the Merged Court establishes African Court of Justice and Human Rights;[17] and the moment it comes into force, it shall replace the African Human Rights Court Protocol and Protocol of the African Court of Justice;[18] and any reference to African Court of Justice under the AU Constitutive Act shall be read as reference to the African Court of Justice

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[10] 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 44th ord. Sess. of the Assemb. of Heads of State & Govt. of the AU, Ouagadugou, Burkina Fasso, on June 1998, OAU Doc. OAU/LEG/MIN/AFCHPR/PROT. I rev. 2 (entered into force 25 Jan. 2004) [hereinafter African Human Rights Courts Protocol].

[11] See Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15 (July 11, 2000) (entered into force May 26, 2001) []hereinafter AU Constitutive Act or Act].

[12] *Ibid.* Art.33(1).

[13] *Ibid.* Art.5(5).

[14] 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.

[15] See Coalition for an Effective African Court on Human and Peoples' Rights, available at *http://www.africancourcoalition.org/editorial.asp? Page_id 246* (last visited 24/11/2008).

[16] See Protocol and Statute of the African Court of Justice and Human Rights, available at *http://www.hurisa.org.za.Advocacy /AfricanCourt/single_Legal_instrument* (last visited 03/02/2008) [hereinafter Protocol of the Merged Court and Statute of the Merged Court respectively].

[17] Protocol of the Merged Court, *ibid.*, Art. 2.

[18] *Ibid.*, Art. 1.

and Human Rights.[19] But, since then, it is now that African Human Rights Court is ready to take off.[20] The scenario in the African human rights system is likened to *digging the grave of a child not yet born.*

However, the Statute of the merged Court specifically states that the African Human Rights Court shall continue to exist for a period not exceeding one year or any longer period determined by the General Assembly of the AU after the entry into force of the Protocol of the merged Court to enable the Court transfer its assets, rights, obligations and prerogatives to the merged Court. Moreover, all cases pending before the African Human Rights Court shall be transferred to the merged Court on the understanding that they will be determined in accordance with the African Human Rights Court Protocol.[21]

The establishment of African Human Rights Court and the Merged Court is a welcomed development in human rights movement in general and African human rights system in particular. This development will, no doubt, strengthen the universality norm and at least discourage the much-vaunted principle of absolute sovereignty or domestic jurisdiction. The Court will aid in the development of human rights jurisprudence in Africa, herald a new era of transparency and accountability as well as attracting more publicity and media exposure. It will also set precedents for African sub-regional Courts and domestic Courts in Africa to follow. Above all, with the establishment of the Court in Africa, the Continent has not only fulfilled its 1961 dream of establishing African Human Rights Court but also debunked the strong argument that settlement of disputes through judicial institution is foreign in African tradition.[22] Indeed, when the Protocol of the Merged Court comes into force, it will be a *flying colour* for Africa to have succeeded in *killing two birds with one stone.*

However, the establishment of Human Rights Court in Africa should not be seen as the arrival of a Human Rights *Messiah* in the Continent. In this article, the writer will pin point and analysis some foreseeable obstacles to the effective functioning of African Human Rights Court, in comparative

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[19] *Ibid.*, Art. 3.

[20] Noting the fact that the Court came into force on 25th January, 2004; by 2nd July, 2006, the first eleven judges of the Court were sworn in; and by September 2007, temporary offices for the Seat of the Court in Arusha, Tanzania were obtained.

[21] *Ibid.*, Arts. 5 & 7.

[22] See Yerima T.F. "New Trend in the African Human Rights System: Prospects of African Continental Human Rights Courts," (forthcoming).

perspective with the Merged Court that may replace it. The writer will reveal that some of the obstacles emanate from the provisions of the African Charter, which render the African Commission a helpless human rights institution. It will be the stand of the writer in this article that unless some steps are taken to revamp the African human right system, efforts taken so far in establishing the African Human Rights Court will turn to an exercise in futility.

II. THE MAIN BURNING ISSUE

The main issue emerging from this new development in the African human rights system is whether the establishment of African Human Rights Court and the Merged Court, in addition to the existing African Commission, is a welcomed development in the African human rights system or that the decision was taken impetuously. That many of the obstacles that hamper the effective performance of African Commission are still *rearing their ugly heads* in the African human rights system, one can argue vehemently that the system is still standing on a shaky foundation and unless it is rebuilt, the African Human Rights Court or the Merged Court can hardly add any value to the African Commission. "The mere establishment of a Court empowered legally to condemn State Parties for human rights violations," a scholar said, "is no guarantee of success. An effective human rights mechanism requires more".[23]

III. THE FORESEEABLE OBSTACLES AND CHALENGES OF THE COURTS

(a) Interpretation and Enforcement of Socio-Economic Rights

One remarkable and distinctive feature of African Human Rights Court as well as the African Court of Justice and Human Rights is that, in addition to hearing cases of abuses of civil and political rights, it also has power to tackle violations of socio-economic rights, as well as collective or peoples' rights.

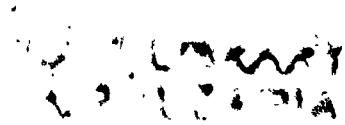
Over the years, there has been a special emphasis on the indivisibility of human rights. It has been argued that civil and political rights cannot be dissociated from economic, social and cultural rights and that these rights do not take precedence over the other. It is on this basis that the Second World Conference on Human Rights in Vienna also declared that these categories of rights are "universal, indivisible, interdependent and

[23] Anne Pieter V.D.M., *supra*, note 8, at 114.

interrelated;"[24] and urged international community to "treat human rights globally in a fair and equal manner, on the same footing, and the same emphasis." Others even argue that socio-economic rights rank higher than the civil and political rights.[25]

Setting aside the question of status, the most important problem to tackle is the justiciability of socio-economic rights. "Justiciability," according to Fon Coomas, "...means the extent to which an alleged violation of an economic or social subjective right invoked in a particular case is suitable for judicial or *quasi* judicial review at the domestic level."[26] He noted that this may vary according to, for example, the characteristics of the case, the wording of the provision that is invoked, the attitude of the judge and the characteristics of the domestic system in particular.[27]

The Universal Declaration of Human Rights[28], one of the sources of law of both African Commission on Human and Peoples' Rights, African Human Rights Court and the merged Court, recognizes both the civil and political rights on one hand and socio-economic and cultural rights on the other hand. Although, most of the civil and political rights recognized by the UDHR have the weight of customary law, because they are so widely accepted and used to measure the conduct of States,[29] the significance of decent living conditions for the protection of human rights does not necessarily depict that the social rights in the UDHR are part of customary international law.[30]



[24] Vienna Declaration and Programme of Action, adopted by the 171 Countries participating in the World Conf. on Human Rights, held in Vienna, 14-25 June 1993, para. 5.

[25] *Ibid.*

[26] Coomans F., "Some Introductory Remarks on the Justiciablity of Economic and Social Rights in a Comparative Context", in Coomans F. (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerpen-Oxford: Inter-Sentia, 2006), at 4.

[27] *Ibid.*

[28] Universal Declaration of Human Rights, adopted and proclaimed by the UN Gen. Assem. in Res. 217 A (III) of 10 Dec. 1948 (hereinafter UDHR).

[29] United Nations, *Basic Facts about the United Nations* (New York: United Nations Information Centre, 2004), at 230. See also *Namibia (South-West Africa)* case (1971) ICJ Reports, at 55, where Vice-President Ammoun noted succinctly: "Although, the affirmations of the Declaration are not binding *qua* International Convention...they can bind States on the basis of custom...whether because they constituted a codification of customary law or because they have acquired the force of custom through a general practice accepted on law."

[30] Julianne K., *supra* note 4, at 381.

In the International Covenant on Economic, Social and Cultural Rights,[31] which turned the socio-economic rights of the UDHR into legally binding obligations, each State party merely "undertake to take steps...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized" in the Covenant.[32]
The African Charter, the primary source of African Human Rights Court (and the Human Rights Section of the merged Court) does not only guarantee socio-economic rights but goes extra mile to place these rights on the same status with the civil and political rights, by declaring that "civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality."[33]

However, the problem lies with judicial enforcement of socio-economic rights at the domestic Courts of Africa. This is because in most African States these rights are not justiciable and Courts are incapable of making decisions about their implementation because they require making political choices, setting priorities, allocating resources and re-arranging budgets[34]. In the words of Fon Coomans:

Such decisions should be left to the political bodies in a domestic system, not to Courts because they relate to policy issues and the implementation of political programmes. These relate to the issue of the separation of powers. Courts would lack the democratic competence and legitimacy to make final judgments about socio- economic issues.Such decisions should be left to the political bodies, the legislature and executive that have a democratic legitimacy. Courts that deal with such socio-economic policy issues become part of a process of political bargaining between competing domestic actors about the allocation of scarce resources, thus creating the danger of politisation of the Courts.[35]

The standard against which to assess the performance of the Government in the area of socio-economic rights realization is another crux of the problem because of the technical nature of the matters involved. This reasoning was affirmed by Judge Sachs of the South African Constitutional Court.[36] It

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[31] International Covenant on Economic, Social and Cultural Rights, adopted by the UN Gen. Assem. in Res. 2200 (XXI) of 16 Dec. 1966 (entered into force on 3 Jan., 1976) [hereinafter ICESCR].
[32] *Ibid.*, Art. 2(1).
[33] African Charter, ,8th para. to the Preamble.
[34] Coomans F., *supra* note 26, at 5.
[35] *Ibid.*
[36] See Judge Sachs in *Du Plessis v. De Klerk* (1996) 5 BC LR 685.

would, therefore, be difficult, if not virtually impossible, for an international human rights institution to find that a country has violated socio-economic rights. A scholar had submitted; and the writer will agree that:

An African Court is likely to suffer from the same dilemma if, as in the case of the Commission, socio-economic claims are not directed to the Court, the inclusion of these rights in the Charter will remain symbolic value only. If cases are in fact, brought, the Court will face the difficulty of making pronouncement that will have very little effect in a setting where economic resources are not available.[37]

U.O. Umozurike[38] had also captured the problem which African Continental human rights body might face in the interpretation of socio-economic rights under the African Charter on the basis that the provisions of burdensome "social services and ailing economies are incompatible."[39] But as Franz Viljoen observed, even if the political role of judges was uncontroversial, and they (judges) possessed the requisite expertise to make decisions on socio-economic issues, Courts will still focus on civil and political rights, as the socio-economic rights are regarded as non-justiciable.[40]

In most African countries, like in some countries in other jurisdictions, economic and social rights are part of the Directive Principles of State policy and, are not enforceable by the Court. For example, section 6(6)(c) of the Constitution of Nigeria, 1999 declares to the effect that no Court has jurisdiction to entertain any matter emanating from Chapter Two, known as "Fundamental Objectives and Directive Principles of State Policy of the Constitution."[41] It is also doubtful (with the exception of South Africa)

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[37] Frans V., "Some Arguments in Favour of and against an African Court on Human and Peoples' Rights", *The Afric. Society of Inter'l & Comp. Law Proc.* 10th Ann. Conf. 1998 at 40.

[38] Umozurike U.O., "The Protection of Human Rights under the Banjul (African) Charter on Human and Peoples' Rights", *Afric. Journal of Inter'l & Comp. Law,* 1988 at 65 &71.

[39] *Ibid,* at 65 & 71.

[40] Frans V., *supra* note 37.

[41] Section 6(6)(c) of the Constitution of the Federal Republic of Nigeria, 1999, *pari materia* with Art. 37 of the Constitution of India, 1950, which provides that the Directive Principles of State Policy, "Shall not be enforceable by any Court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles making laws". For discussion on the "problems with the non-justiciability of ECOSOC rights under the Nigerian Constitution," see Ladan M.T., "Should all Category of Human Rights be Justiciable?" in Ladan M.T. (ed.), *Law, Human Rights and Administration of Justice in Nigeria* (ABU Zaria: Dept. of Pub. Law, 2001), at 78-81. See also Akinseye-George Y., "Socio-Economic Rights and the Sustenance of Democracy in Nigeria", in Akinseye George Y. & Gbadamosi G. (eds.), *The Pursuit of Justice & Development* (Lagos: DIAMOND Publications, 2004), at 77-83.

whether domestic Courts in Africa are capable of interpreting some socio-economic rights such as right to health and the right to education as forming part of the fundamental right to life as the Supreme Court of India has done in a plethora of cases.[42]

African States that practise dualism, the incorporation of socio-economic rights under the African Charter into their domestic laws will definitely compound the problem. In Nigeria, for example, there is clear conflict between Chapter II of the Constitution and the socio-economic rights provisions of the African Charter that are placed in the same pedestal with civil and political rights. While the economic and social rights are non-justiciable by virtue of section 6(6) (c), the civil and political rights, similar to those of the African Charter, are justiciable rights by virtue of section 46 of the Constitution. This has been affirmed by the Supreme Court.[43] In *Abacha v. Fawehinmi,*[44] though the rights alleged to have been violated under the African Charter were civil and political rights, the Supreme Court of Nigeria stated explicitly: "More importantly, the African Charter[45] having been incorporated into the body of the Nigerian Municipal Laws cannot be preferentially treated but should rank at par with other municipal legislation and be subordinated to the constitution" and so on.

The Court stated further that "a treaty enacted into law in Nigeria is circumscribed in its operational scope and extent as may be prescribed by the legislature."[46] This point was recently reiterated by Professor U.O. Umozurike succinctly:

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[42] See *Kesavonanda Bharati v. State of Kerala* (1973) 4 SCC 225; *Maneka Ghandi v. Union of India* (1978) 1 SCC 248, where it was held, *inter alia,* that "In building up a just social order it is sometimes imperative that the fundamental rights should be subordinated to directive principles"; In *Bandhua Mukti Mocha* (1984) 3 SCC 161, it was declared that the non-enforcement of welfare legislation would tantamount to "denial of the right to live with human dignity enshrined under Art. 21 of the Constitution"; *Paschim Banga Khet Majoor v. State of West Bengal* (1996) 4 SCC 37; *Peoples' Union for Civil Liberties v. Union of India* (2001) 7 SCALE 484, where it was held that it is the duty of the State "to see that food is provided to the aged, infirm, disabled, destitute women, destitute men who are in hunger or starvation, pregnant women and destitute children especially in cases where they or members of their family do not have sufficient funds to provide food for them".

[43] See *Ezoukwu v. Ezeonu II* (1991) 6 NWLR (Pt. 200) at 708, where the Court held that "No right outside the provisions of Chapter IV can found an action under the jurisdiction of Court...Clear, unambiguous and serious as the infringed right might be, the Court cannot raise its status to that of a fundamental right, if, in fact, it cannot be spelt out in Chapter IV".

[44] *General Sani Abacha & Ors. v. Chief Gani Fawehinmi* (2000) 2 SCNQR 489.

[45] African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Vol. 1, Cap A9, LFN, 2004.

[46] *General Sani Abacha & Ors. v. Chief Gani Fawehinmi, supra* note 44.

If a treaty is domesticated, the statute doing so is subject to the Constitution. There is room for judicial activism but that only word within limit. If there are two possible interpretations and one leans towards enforcing an economic right indirectly, an activist Court can enforce the right but that is only indirectly. Similarly, a Court can enforce an ECOSOC right indirectly while protecting the civil/political right. Judicial activism is not intended to usurp the functions of the legislature.[47]

It is important to grasp that African Human Rights Court, like the Merged Court, is not an appellate Court. The ruling, orders and judgments of the Court may not "directly annul or repeal any law or judgment or administrative acts by the State concerned which it considers inconsistent with or in violation of any international instrument."[48] African human rights enforcement body cannot, therefore, substitute its own opinion for that of any domestic Court as it is not a Court of Appeal from domestic Court. The writer will agree with the submission that since the ruling of a transnational Tribunal or Court (including African Human Rights Court and the merged Court) cannot annul the decision of domestic Court, it is the State that must bring its domestic laws into conformity with its Treaty obligations.[49] This is important because in most cases where constitutional law recognizes socio-economic rights, "they may remain a *dead letter* due to a judicial inactivity."[50]

As already stated in the foregoing paragraphs, the yardstick African Human Rights Court will adopt to determine whether or not a State has violated socio-economic rights will be a problem; especially in view of the fact that African countries, like other countries, have different economic policies. It will be equally difficult for the Court to decide that such violation has occurred where resources are not available. The Court may also face the problem of demarcating acts which *per se* are not violations of socio-economic rights but which affect other aspects of civil and political rights, such as right to life, right to health and right to education and those that are strictly violations of socio-economic rights. It is illustrated that, though to

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[47] Umozurike U.O., "The Juridicial Nature of Economic and Social Rights in Nigeria", *Abia State Univ. Law Journal*, Vol. 10, 2008, at 46.

[48] Pityana N.B., "The African Court on Human and Peoples' Rights in Municipal Law", available http://www.unisa.ac.za/contents/about/principle/docs/municipal_law.doc. (Last visited, 24/11/2008).

[49] *Ibid.*

[50] Juliane K., *supra* note 4, at 381.

prevent a group of people from having access to a hospital affects their right to health it is different from violation of the right to health in general.[51] In a similar vein, reduction by Government of the entitlements of employees to Medical care is not the same as violation of the right to health.[52]

In India, where the Supreme Court has interpreted the right to life as an extension of the rights to health, education, *et cetera*[53], the same Court was able to grant the defence of "unaffordability" of the Government. In *State of Punjab v. Ram Lubhaya Bagga*[54], the Court held:

> *No state or country can have unlimited resources to spend on any of its projects. That is why it only approves its projects to the extent it is feasible. The same holds good for providing medical facilities to its citizens including its employees. Provision on facilities cannot be unlimited. It has to be to the extent finances permit. If no scale or rate is fixed then in case private clinics or hospitals increases their rate to exorbitant scales, the stdte would be bound to reimburse the same. The principle of fixation of rate and scale under the new policy is justified and cannot be held to be violation of Article 21 or Article 47 of the Constitution.*

Even in South Africa, where socio-economic rights are patently included in the Constitution as justiciable rights;[55] and affirmed by the Courts,[56] the

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[51] Umozurike K. *supra* note 47, at 46.

[52] Muralidhar, S. "Judicial Enforcement of Economic and Social Rights: The Indian Scenario," in Coomans F. (ed.), *supra* note 18, at 245.

[53] See, for example, *Paschim Banga Khet Majoor Samity v. State of West Benga, supra* note 41, the Supreme Court of India held, *inter alia,* that "failure on the part of the government hospital to provide timely medical treatment to a person in need of such treatments results in the violation of his right to life guaranteed under Art. 21".

[54] (1998) 4 SCC 117, 130.

[55] The Constitution of the Republic of South Africa, 1996, guarantee the following socio-economic rights: S. 25(5) (the right of citizens to access land; S. 26 (the right of everyone to housing; S. 27 (the right of every one to health care, food, water and social security; S. 28(1)(c) children's right to shelter, basic nutrition, social services and health care; S. 29 (the right to basic and further education and S. 35(2)(e) (the right of detained persons to nutrition, accommodation, medical care and reading material).

[56] For example in *Government of the Republic of South Africa v. Grootboom* (2001) 1 SA 46 (CC), it was claimed that the State was under obligation to provide homeless people with shelter. The Court had no hesitation in declaring that the State's Housing programme was inconsistent with the right to housing because it did not make provisions for the housing needs of the "absolutely homeless".

same Courts have been careful to avoid imposing obligations that the Government cannot afford.[57]

Similarly, in the English speaking Caribbean, it has been admitted that while some form of political justice has been won by the masses, economic justice is still a dream to be pursued with greater fixity of purpose.[58] One inescapable reason for this is that the economies of these States (like those of the African countries) are characterized by widespread unemployment, high population growth, low per capita income and wide disparities in wealth.[59]

Distilled from the foregoing points is the undisputed fact that even domestic Courts do find it difficult to enforce socio- economic rights in their respective States; and international enforcement bodies, such as the African Human Rights Court and the merged Court might find it more difficult, in view of the fact that the Courts are not the appropriate forum to address socio-economic rights.

(b) Claw-back Clauses and absence of Derogation Clauses in the African Charter

It is pertinent to reiterate that the civil and political rights guaranteed under the African Charter restrict the rights and freedoms enshrined in the Charter, so far such restrictions are in accordance with domestic laws of States. The Claw- back clauses confine many of the Charter's protections to rights as they are defined and limited by domestic legislation. It is gratifyingly important to agree that the post colonial African States, like the colonial administration, impermissibly restrict most civil and political rights particularly those pertaining to political participation, free expression, association and assembly, movement and conscience; and it is these same rights that the Charter erodes.[60]

The problem of claw- back clauses is further compounded by the absence of the requirement that the restrictions must be in the interest of national security, public safety, public health or public order as provided in some

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[57] See *Grootboom's* case, *supra*, where the Court held that enforceability of socio- economic rights "is a difficult issue, ...which must be carefully explored on a case –by –case bases."

[58] Iton W., "Human Rights in the English Speaking Caribbean: The Case for the Pre-eminence of Economic and Social Rights Revisited", *Afric. Journal of Inter'l Law*, Vol. 1, No. 1, Summer, 1988, at 88.

[59] *Ibid.*

[60] Makau W.M., *supra* note 9 , at 342, 358.

international and regional human rights instruments.[61] It has been pointed out that "an attempt to set a standard for such laws would have been more helpful..."[62]

Some African countries have enacted laws that empowered different State functionaries to issue a detention order against any person engaged in acts prejudicial to State Security. In Nigeria under the past military regimes, for example, this was formulated by making the fundamental human rights provisions of the Constitution impotent while the Court's jurisdiction was ousted generally.[63]

However, enacting domestic laws that restrict the rights guaranteed by the African Charter, even when the State is not at the state of emergency, is not only a feature of African States under military rule but also under democratic dispensation. For example, Robbert Mugabe had led his parliament to pass an Information Bill that would fine or imprison journalist that is found "spreading rummours, falsehoods or causing alarm or despondency under the guise of authentic reports."[64]

The Gambian Parliament had also passed a National Media Commission Bill, which gave the Media Commission the power to grant, suspend or withdraw registration of media practitioners or organizations. The Commission also had the right to investigate and try media practitioners and organizations and impose sanctions of up to six months imprisonment as penalties for non-compliance with the provisions of the Bill; it also ousted

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[61] ICCPR, Art. 4, European Convention, Art. 15; American Convention, Art. 27.

[62] Umozurike U.O., "The Protection of Human Rights under the Banjul (African) Charter on Human and peoples' Rights" *Afric. Journal of Inter'l & Comp. Law,* Vol. 1, No. 1, Summer, 1998, at 68.

[63] Examples of such Decrees are: The Constitution (Suspension and Modification) Decree No. 1 of 1966 & 1984; Federal Military Government (Supremacy and Enforcement) of Power Decree No. 12 1994; The Constitution (Suspension and Modification) Decree No. 107 1993. All these Decrees ousted the jurisdiction of the Court to entertain any civil proceedings arising from anything done pursuant to the provision of any Decree. In *Labiyi v. Anretiola* (1992) 8 NWLR (Pt. 258), p. 139, the Supreme Court of Nigeria held, *inter alia,* that the order of superiority of Law under the military was as follows:

(i) Constitution (Suspension and Modification) Decree 1984;
(ii) Decree of the Federal Military Government;
(iii) Unsuspended provisions of the Constitution;
(iv) Laws made by the National Assembly before December 31, 1983 or having effect as if so made;
(v) Edicts of the Governor of a State; and
(vi) Laws enacted before December 31, 1983 by the House of Assembly of a State, or having effect as if so enacted.

[64] See Nicholas Watt, "Mugabe to Strangle Foreign Reporting", *The Guardian,* Dec. 1, 2001, at 21.

the jurisdiction of any Court or Tribunal from entertaining any matter emanating from the Bill.[65]

Although, Amnesty International had ruled that these restrictions were without justification and that they constituted an affront to the right to freedom of expression and undermine the independence of the Gambian media,[66] it boggles the mind whether if similar matter comes up before the African Human Rights Court or the merged Court, the Court's hands would not be tied strictly in view of the provision of Article 9(2) of the Charter, which states that: "every individual shall have the right to express and disseminate his opinions within the law."

A commentator has pointed out that "since this provision restricts the right to expression within the law, national legislation may legitimately restrict the right to expression" and that "Article 9(2) functions as a claw-back clause."[67] The writer also agrees with N.J. Udombana, that claw-back clauses permit national law to take precedence over international law, and this "would defeat the purpose of codifying certain rights in international law and indeed, the whole essence of treaty making."[68] Also, in the words of E. M. Ankumah, "the numerous claw- back clauses contained in the African Charter provide a treaty parallel. These restrictions could significantly undermine the enjoyment of individual rights...Not all judges have shown themselves to be willing to take up this challenge."[69] Claw-back clauses had placed the African Commission in the unenviable position of deciding what applicable standard should be used in determining what is in accord with a Member State's Laws. In this light, defence might be accorded to the State in the interpretation of its own Law out of respect of Governmental decisions that are purportedly based on legitimate national legislation, even at the expense of human rights.[70]

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[65] Udombana N.J., *Human Rights and Contemporary Issues in Africa* (London: Martinus Nijhoff Publshers
1997) at 210.

[66] *Ibid.*, at 211.

[67] Wara F.O., "Bibliographical Pathfinder: African System for the Protection and promotion of Human Rights", *University of Minnesota, Human Rights Library*, 2002, available at http://www/umn.edu/human/bibliog/africanPathfinder.html (Last visited 04/03/2006).

[68] Udombana N.J., *supra* note 65, at 211.

[69] Ankumah E. A. "The Right to Counsel and the Independence of Judges against the Background of the African Charter on Human and Peoples' Rights," *Afric. Journal of Inter,l & Comp. Law, Vol. 3, Pt. 3 1991, at 582*

[70] Anthony A.E., *supra* note 8.

It is convincing to deduce from the foregoing that as far as claw-back clauses and absence of derogation clauses under the African Charter are concerned, the African Human Rights Court and later the merged Court must take bold step to give strict interpretations to the provisions, following example of the African Commission. For example, in *Amnesty International (on behalf of Benda and Chinida) v. Zambia,*[71] the African Commission ruled that "recourse of these (claw-back clauses) should not be used as a means of giving credence to violations of the express provisions of the Charter." Also, in the *Commission Nationale des Droits de l' Homme et des Liberties v. Chad,*[72] the African Commission reinforced the absence of a general derogation clause in the Charter by holding that under no conditions whatsoever will a State be allowed to derogate from a provision of the Charter, and that not even a state of emergency such as a civil war in Chad justified such derogation. "This position" according to C.O. Obiora, "is much stricter and much more pro-human rights than the position within other international human rights systems."[73] It is hoped that the African Human Rights Court (and later the merged Court) would be able to take such bold step in the interpretation of claw-back clauses and absence of derogation clauses under the African Charter.

(c) Slow Pace of Ratification of the Protocol establishing the Courts

One weakness of the African Human Rights Court is the lack of real support from the AU States that reluctantly agreed to establish it. This is the immediate problem of the African Human Rights Court and there is every sign that it will also be a problem of the merged Court when it successfully replaces the African Human Rights Court.

It is disheartening that though the African Human Rights Court Protocol was adopted in 1998, and came into force in 2004, till date only 24 out of 53 Members of the AU have ratified the Protocol; the remaining 29 Member States have not done so.[74] This is highly deplorable as the Court cannot hear cases against Members of the AU that have not ratified the Protocol. That the establishment of the Court came at a time when human

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[71] No. 212/98, 2000 AHRLR 325 (AHRLR 1999).

[72] Comm. No. 74/92. See also *Dauda Jawara v. The Gambia*, Comm. 100/93.

[73] Obiora C.O., *The African Human Rights System: Activist Forces and International Institutions*, (Cambridge: Cambridge Univ. Press, 2007), at 84.

[74] Mughwai A., "The African Court on Human and Peoples' Rights: Prospect and Challenges", a paper presented at an International Conf. held on 3rd Oct. 2008 in Madrid Spain, available at *http://www.cam.es/docs/ficheros/20081003000769pdf* (Last visited, 29/ 07/ 2009).

rights, good governance and democracy landscape in Africa is underpinned by an applicable framework, it was expected that African leaders would rush to ratify the Protocol that establishes it; but to no avail, there has been reluctance in the continent to ratify the Protocol. It is important to state here that all African States, with the exception of Morocco, are Members of the AU; they are also signatories to the African Charter.

The slow pace of ratification of human rights instruments under the African Human rights system is not novel. The African Charter itself was adopted in 1981 and it took five years before it came into force. This is an indication that it will take many years before the Protocol of the Merged Court will come into force. The AU General Assembly in early July 2008 adopted the Protocol of the Merged Court and the Court would be the principal judicial organ of the AU.[75] The Protocol is now opened for signature and ratification by Member States of the AU and will enter into force 30 days after 15 States have deposited their instruments of ratification.[76] In November 2008, Guinea became the first State to sign the Protocol, but has not ratified it yet. As at March 2009, approximately ten States had signed the Protocol but none of the States had ratified it.[77] That it will take many years before the Merged Court will begin operation is not in doubt; especially that until the Protocol comes into force, Judges cannot be appointed and a Registry cannot be opened.

In fact, it was as a result of the slow pace in the signing and ratification of human rights instruments, which African States have been known for, that the AU Assembly took a decision at its 5th AU Summit in July 2005 to allow the African Human Rights Court operate pending the creation of the Merged Court. The decision was imperative because of the intensive pressure from Non-Governmental Organizations (NGOs), who entertain fear that delay in negotiations and ratification over the integration agreement would cause unnecessary delay in establishing a functioning Human Rights Court or at worst the negotiations would collapse, and consequently the entire process to create an African Human Rights Court

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[75] Statute of the Merged Court, Art. 2(1).

[76] Protocol of the Merged Court, Art. 9(1), provides: "The present Protocol and the Statute annexed to it shall enter into force thirty (30) days after the deposit of the instruments of ratification by (15) Member States".

[77] 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/13587bp0309Sceats.pdf (Last visited 20/07/2009).

would be sunk into oblivion. It was also feared that without pressure on Governments to ratify the Protocol it could easily become a *dead letter.*[78]

(d) Denial of Individual Direct Access to the Courts

It is important to state at the onset that denial of individual direct access is by far the most controversial and debated feature of both African Human Rights Court and the Merged Court. This is predicated on the reason that in Africa, individuals are the most victims of human rights violations. But due to the high rate of illiteracy and poverty most of the victims find it difficult, if not virtually impossible, to seek redress in a law Court when their rights as guaranteed by domestic laws of their States or international law are being violated.[79] Even those who are aware of their fundamental rights under their domestic laws, including their State Constitution, only pursue them in domestic Courts. This is a pointer to the fact that most cases which have come before the African Human Rights Commission where brought by NGOs on behalf of individual victims; it further buttresses that under the Courts system, as in the Commission system, individuals and NGOs are the most beneficiaries of the Courts. Surprisingly, this important fact was sunk into oblivion by the drafters of the African Human Rights Court Protocol.

That individuals would not have direct access to the Court depicts that accessing the Court will be difficult for most victims of human rights abuses in Africa.[80] It is, in fact, tantamount to *giving justice with one hand only to be taken with the other hand.* The indispensable legal consequence of this can not be ignored. As the Supreme Court of Nigeria has stated, "he who cannot reach the Courts cannot talk of justice from the Courts."[81] Denial of individual direct access to the Court shows lack of effective legal protection of human rights in Africa. Only few African countries are willing to make Special Declaration. It is not surprising, therefore, that though the African Human Rights Court Protocol entered into force in 2004,[82] out of

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[78] *Ibid.*

[79] It has been pointed out that a great impediment to the attainment of civil and political rights is constituted by illiteracy, ignorance and poverty. See Umozurike U.O., *The African Charter on Human and Peoples' Rights* (The Hague: Martinus Nijhoff Publishers, 1997), at 22. It has also been pointed out that under domestic human rights system, high rate of illiteracy and poverty have been some of the impediments to the realization and enjoyment of fundamental rights. See Aduba J.N., "The Protection of Human Rights in Nigeria", in Obilade A.O. (ed.), *Text for Human Rights Teaching in Schools* (Lagos: Constitutional Rights Project, 1999), at 120-123.

[80] Sceats S., *supra*, note 77.

[81] *Attorney-General, Kaduna State v. Hassan* (1985) NWLR, 483 at 522.

[82] The Protocol came into force on the 25 Jan. 2004 thirty days after the Union of Comoros had deposited the 15th instrument of ratification in accordance with Article 4(3) of the Protocol.

the 24 States that have ratified the Protocol only Mali and Burkina Faso have entered the necessary Declaration allowing direct access to the Court. The implication of this is that individuals and NGOs of States that have ratified the Protocol but are yet to make such Declaration would need to have access to the African Human Rights Court (and later the merged Court), through the African Commission or the State itself. Though, this method has its own insignificant advantage,[83] it will, on the other side, cause unnecessary delay in the administration of justice.

The individual must show that he has exhausted domestic remedies or that the remedies have been unnecessarily prolonged. The hearing of the substantive suit might be followed by series of adjournments; and even if the judgment is delivered, obtaining Court proceedings from domestic Court(s), that serves as evidence that domestic remedies have been exhausted, will cause another undue delay. True as it was pointed out by the former president of the Nigerian Bar Association: "Denial of direct access to individuals is "a step back" in access to justice for all in Africa that dilutes the effectiveness of the continental judicial system and runs contrary to the provisions on access to justice in several international human rights instruments."[84]

Granting direct access to only States, African Commission and a limited range of African institutions, and denying direct access to individuals and NGOs is not only considered as "a matter of considerable embarrassment"; and "a major obstacle to assessing the Court,"[85] but also "raises many problems and contradicts acceptable standards for human rights protection in Africa."[86] It also raises serious questions about the willingness of African States to submit themselves to judicial scrutiny in the field of human rights. The writer agrees with the submission that when this reluctance is added to

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[83] See Anne Pieter V.D.M., *supra* note 8 at 114, considering this system as "potentially very important".

[84] Agbakoba O., "The Creation of the African Court of Justice and Human Rights", available at *www.nbarprograms.org/...THE%20CREATION%200%20THE%AFRICAN%COURT%(last* visted,29/07/2009). The Coalition for an Effective African Court on Human and Peoples' Rights had earlier written an open letter to the AU Assembly and Executive Council containing the same wordings. See Coalition for an Effective African Court on Human and Peoples' Rights, *Open Letter to the AU Assembly of Heads of State and Government,* 11th Ordinary Session and the Executive Council of Ministers, 13th Ordinary Session, 20 June 2008, available at *http://www.africanCourtCoalition.org/editorial.asp?page_id=141*(last visited, 29/07/2009).

[85] Mughwai A., *supra* note 74.

[86] Agbakoba, O., *supra* note 84.

the sheer scale of human rights abuses across the African continent and the still doubtful effectiveness of the AU itself, the challenges confronting African Human Rights Courts begin to look very grave.[87]

Judging from the jurisprudence of African Human Rights Commission, it is doubtful if in practice States will be willing to bring cases against each other. Since its inception in 1987, the African Commission has heard only one case brought by a State against another State. This was a case brought by the Republic of Congo (DR Congo) against Burundi, Rwanda and Uganda for invading its territory, which culminated in the mass violations of human rights by the troops of these States[88] That is why experts have rightly predicted that majority of the cases that would be brought to the African Human Rights Court and indeed to the merged Court would be through African Commission.[89] Consequently, both the African Human Rights Court and the merged Court might be redundant because only few cases would be brought before them. This is a bleak prospect for the Courts.

(e) Enforcement of the Ruling, Orders and Judgments of the Courts

Another area of problem, which scholars have pointed out, concerns the "enforceability" of the Court's ruling. It has been pointed out that "a key problem was the lack of 'visibility' of the Court's judgments."[90] The combine reading of Articles 27, 29 and 30 of the African Human Rights Court Protocol shows that the African Human Rights Court is allowed to make appropriate orders to remedy violations (including payment of fair compensation or reparation) or in cases of extreme gravity and urgency adopt such provisional measures as it deems fit and necessary.[91] It is also required to notify its decisions to all the parties and transmit copies of the same to Member States and Council of Ministers of the AU, which is duty bound to monitor its proper execution.[92]

Although, this is a welcomed development compared to the Commission system (where decisions of the African Commission is not binding but only recommendatory), scholars are of the opinion that giving the gross human

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[87] Sceats S., *supra* note 77.

[88] *Democratic Republic of Congo v. Burunda*, Rwanda & Uganda, Afic. Comm'n on Peoples' Rights, Commission 22/99, adopted at the 33rd Sess. 20th Activity Rep.This was a case brought by Dr. Congo against Burundi, Rwanda and Uganda.

[89] See Anne Pieter V.D.M., *supra* note 8.

[90] See Coalition for an Effective Court on Human and Peoples' Rights, *supra* note15.

[91] African Human Rights Court Protocol, Art. 27(1); Statute of the Merged Court, Art. 45.

[92] African Human Rights Court Protocol, Art. 29.

rights violations that are being embarked upon by Government agents in almost all corners of Africa, it is strongly and highly doubtful if the African Human Rights Court has such efficacy. According to Makau Mutua:"The modern African State, which in many respects is colonial to its core, there has been such an egregious violator that skepticism about its ability to create an effective regional human rights is appropriate."[93]

Franz Viljoen, a re-known scholar has identified some factors that make such judicial role inappropriate in addressing violations of human rights that occur on a massive scale and numerous victims. To him: "A Court gives findings on the facts of individual cases presented to it;" it is ill- equipped to addressing situations involving numerous victims: Courts that operate on part-time basis, as African Human Rights Court, will be incapable of resolving urgent human rights violations. The problem is compounded by the fact that since "cases are usually brought by a small number of victims and not by all affected persons, only those victims who are able to gain access to the Court are granted remedies."[94]

It is submitted that the Merged Court might be faced with the same problem. Under its Protocol, State Parties are mandated to guarantee the execution of judgments of the Court.[95] In addition, where a party fails to comply with the judgment, the Court shall refer the matter to the General Assembly of the AU, which must adopt measures to implement the judgment, including imposition of sanctions in accordance with Article 23 (2) of the Constitutive Act of the AU.[96]

The inescapable question that comes to the fore is whether the use of sanction is of any relevance to victims of human rights violations; most especially where the Court orders payment of fair compensation and the State Party against which the judgment was given fails to comply. Worst still, where the violation is a continuous one and sanction is imposed, this imposition would not stop the State from further violation of human rights. There is doubt as to whether the imposition of sanction will be of any relevance to victims of human rights violation.

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[93] Mutua W.M., *supra* note 9, at 343.
[94] Frans V., *supra* note 37, at 37.
[95] Statute of the Merged Court, Art. 46(3).
[96] *Ibid.*, Art. 46(4)(5).

Under the European human rights system, the High Contracting Parties to the European Convention have undertaken to abide by the final judgments of the Court in any case to which they are parties; and once the Court's final judgment has been transmitted to the Committee of Ministers, which shall supervise its execution,[97] the latter invites the respondent State to inform it of the steps taken to pay any just satisfaction in the form of compensation and for costs and expenses awarded as well as any individual or general measures, which may be necessary in order to comply with the State's legal obligation to abide by the judgment. In the performance of this task, the Committee is assisted, in addition to its own Secretariat, by a Special Department of the Council of Europe's Secretariat known as the "Department for the Execution of Judgments of the European Court of Human Rights." This system will be recommended for African human rights system. Although, under Article 8 of the Statute of the Council of Europe, the Committee of Ministers also has power to impose sanctions on non-compliance States, the Committee exercised such power only once, that is the case of *Denmark v. Greece.*[98]

(f) Concurrent and Conflicting Jurisdiction of the Courts and Sub-Regional Courts in Africa

Apart from the African Human Rights Court and or the merged Court, there is multiplicity of regional Courts and Tribunals established in the continent of Africa which have mandates that are concurrent and conflicting with the mandates of African Human Rights Court. These sub-regional institutions include Court of Justice of the Economic Community of West African States, East African Community Court of Justice, the Southern African Development Community, *et cetera.* A perusal of the laws establishing these respective bodies directly or indirectly give them mandate to interpret African Charter and other international human rights instruments, which the African Human Rights Court also has power to interpret. This is another potential problem of the African Human Rights Court and the merged Court because the Courts and sub-regional bodies would be faced with the problem of concurrent and conflicting jurisdictions culminating to concurrent and conflicting judgments. C.A. Odinkalu rightly identified this problem where he stated that "a brief examination of these Treaties and of the African Human Rights Court Protocol clearly indicates the existence of a rich zone of overlap, potential competition and possible

[97] European Convention, Art. 46.
[98] See *Denmark v. Greece, Case 3322/67.*

complementarity. It also presents rich possibilities of forum shopping in the enforcement of regional human rights standards in Africa." [99]

The role of ECOWAS Court in the area of human rights cannot be denied nor undermined. Although, the primary function of the Court is generally to examine any disputes arising out of the application and interpretation of ECOWAS Treaty,[100] it might also be required to examine litigations arising out of human rights violations in the area covered by the Community. "This complementarity," according to Tall el Mansour, "stems from the fact that the Community's Court of Justice has a chance to take human rights issues into account, at the same time the African Court of Human Rights is given the possibility to set up co-operation mechanism to ensure the respect of human rights."[101]

The writer agrees with the submission that the imperative and inescapable concurrent jurisdiction of ECOWAS Court is justified on the reason that all Members of ECOWAS have not only acceded to the African Charter and to different international human rights instruments but also that the rights in these various instruments have been incorporated and enshrined in their respective Constitutions.[102]

In addition, paragraph 6 to the preamble of the ECOWAS Revised Treaty reiterated the respect, promotion and protection of Human and Peoples' Rights of the African Charter,[103] and included this in Article 4(g) as one of the fundamental principles of the Treaty.
It is also significant that the additional Protocol to the ECOWAS Treaty adopted in 2005 does not only permit persons to bring suits against Member

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[99] Odinkalu C.A., "Complementarity, Competition or Contradiction: The Relationship between the African Court on Human and peoples' Rights and Regional Economic Courts in East and South Africa", unpublished paper presented at a Conf. of East and Southern States on "The protocol Establishing the African Court on Human and Peoples' Rights," Gaborone, Botswana, 9-10 Dec., 2003, at 21.

[100] See ECOWAS Revised Treaty, Arts. 6 & 15.

[101] Tall el Mansour, "The Relationship between the ECOWAS Court of Justice and the Future African Court on Human and Peoples' *Rights*", available at *http://www.africancourtcoalition.org/content-files/files/RelationshipbetweenECOWASCourtandAFricanCourt.doc*. (Last visited, 06/05/200).

[102] *Ibid.*

[103] Under para. 11 to the preamble of the African Charter, African Heads of State and Government were: "Firmly convinced of their duty to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa".

States, but also extends the Court's power to include review of violations of human rights in all Member States.[104]

The case of East African Community Treaty is not different from what has been discussed in the foregoing paragraphs. The fundamental principles, which Partner States to the EAC Treaty undertake to abide by, include: good governance, democracy, respect of the rule of law, accountability and transparency, social justice and equal opportunities, gender equality and the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter.[105] The Treaty also created unrestricted freedom of movement of persons, rights of residence and establishment within the EAC.[106]

Article 6(2) of the EAC Treaty relates to the obligations of the Partner States to protect human rights in accordance with the African Charter. In addition, the Court is mandated to "ensure the adherence to law in the interpretation and application of and compliance with the Treaty."[107] It is submitted from the forgoing that the EAC Court of Justice has power to interpret the provisions of Article 6(2) and other provisions of the Treaty relating to human rights under the African Charter.

Unlike the ECOWAS Revised Treaty and EAC Treaty, the SADC Treaty does not expressly mention African Charter. But that some provisions of the Treaty expressly deal with some fundamental rights and other related concepts as enshrined in the African Charter and other international human rights instruments is very glaring. Moreover, the process of regional integration in South Africa is predicated on the guarantees of democratic rights, observance of human rights and the rule of law.[108] Member States also agree to be subscribed to a set of fundamental principles including: "human rights, democracy and rule of law."[109]

Lastly, as in other international human rights, which SADC Members are signatories SADC Member States undertake obligations to eliminate discrimination on grounds of gender, religion, race, political opinion, ethnic

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[104] See Additional Protocol A/SP.1/01/05 quoted in ECOWAS CCJ, "Court of Justice of the Economic Community of West African States," *supra*.
[105] East African Community Treaty, Art. 6(2).
[106] *Ibid.*, Art. 104(1).
[107] *Ibid.*, Art. 27(1).
[108] SADC Treaty, para. 7 to the preamble.
[109] *Ibid.*, Art. 4.

origin, culture or disability.[110] Moreover, under Article 14 of the SADC Treaty, the Tribunal's contentious jurisdiction extends to, *inter alia,* the interpretation and application of proposals and subsidiary instruments adopted within the SADC, and acts and institutions of the Community.

Aside the foregoing provisions, which the SADC Tribunal has an indirect mandate to interpret, the subsidiary Organ on Politics, Defence and Security (OPDS), subsequently constituted by SADC Assembly of Heads of State and Government, has the mandate, which extends to the promotion and enhancement of "the development of democratic institutions and practices within Member States, and to encourage the observance of universal human rights as provided for in Charters and Convention of the (O)AU and the UN."[111] The writer agrees with the submission of a scholar that this provision is wide enough to give the Tribunal subject matter jurisdiction over the interpretation and application of the African Charter, being one of the instruments recognized as a source of law and authority for the OPDS.[112]

Deducible from the foregoing discussions is the indispensable conclusion that the mandate to interpret the African Charter, the Protocol to the African Charter on the Rights of Women in African, the African Charter on the Rights and Welfare of the Child and other human rights instruments adopted under the AU auspices and other sub-regional bodies in Africa, is not the monopoly of African Human Rights Court nor the Merged Court.
In the same vein, unlike the European and Inter-American Courts of Human Rights that are restricted to the implementation and interpretation of their governing Conventions and Protocols, the African Human Rights Court and later the Merged Court can apply any instrument or source of law concerning human rights that is ratified by all the States concerned. This, by implication, means that the Court will address new issues of human rights including those emanating from Treaties that established sub-regional Courts and Tribunals as well as international human rights instruments.

However, unlike the African Human Rights Court, Article 22(1) of the ECOWAS Treaty expressly enshrines the principle of exclusivity of competence. It declares that "no dispute regarding interpretation or

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[110] *Ibid.*, Art. 6(b).
[111] See *Communique Following the Summit of Meeting of SADC Heads of State and Government in Gaborone*, Botswana, 28 June, 1996 quoted in Odinkalu A.O., *supra* note 99.
[112] Odinkalu A.O., *Ibid.*

application of the provisions of the treaty may be referred to any other form for settlement except that which is provided by the Treaty or this Protocol." The writer submits that this provision conflicts with the provisions of Articles 3 and 7 of the African Human Rights Court Protocol and Article 28 of the Statute to the Merged Court, which allows the Courts to apply both international and regional human rights instruments, including Protocol of the ECOWAS Court of Justice. An application might be brought before the African Human Rights Court, involving the interpretation of human rights provisions under the ECOWAS Treaty and a preliminary objection might be brought that the Court has no jurisdiction to entertain the matter by virtue of Article 22(1) of the Protocol of the ECOWAS Court of Justice. No doubt, as rightly pointed out by a scholar:

> *To hold tenaciously to this application will be to hamstring the Human Rights Court. Indeed, there is good reason to suppose that both the EAC Court and ECOWAS Court of Justice will eventually face situations in which they must pronounce on human rights, possibly invoking the Banjul (African) Charter. The African Court should be aware of this potential jurisdictional conflict and should resolve to entertain any human rights issue in the continent.*[113]

Although, it has been submitted that this problem can be tackled by the Court itself because the African Human Rights Court Protocol gives the Court power to decide whether it has jurisdiction where the question of jurisdiction comes before the Court,[114] the writer prefers the recommendation proffered by Mr. Tall el Mansour that in order to avoid duplication and duplicity, it is crucial in practice for the Court to have an exchange of information and possible joint investigation between it and African Commission and other sub-regional human rights bodies.[115] This recommendation is also imperative for the merged Court.

(g) Problems of Funding and Resources

It is important to reiterate here that, the African Human Rights Court, like the Merged Court, has not been established to replace the African Commission but to complement its interpretational mandate. One of the problems, the African Commission faces, among other problems, is that

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[113] Udombana N.J., *supra* note 65, at 164.
[114] *Ibid.*
[115] Tallel Mansour, *supra* note 101.

apart from being chronically under resourced, it also faces the problem of under funding. A scholar captured the problem in the following words:

...many super national institutions in Africa are suffering from chronic financial incapacity and their leaders constantly receive less than adequate resources... The problem is compounded by the fact that African States have routinely defaulted in meeting their financial obligations to the continental body.[116]

As it is now, on paper, Africa has established three human rights enforcement mechanisms: the African Commission, African Human Rights Court and the Merged Court. The African Union would not only need a standard building for African Human Rights Court and later a more expanded building for the Merged Court, but would also need to equip the Courts; provide Registry staff, crop of lawyers, well equipped library and documentation centre, qualified linguists to translate Court documents and interpreters.[117] The Court would also need permanent quarters for the president (and Vice president in case of the merged Court) who functions on permanent basis.[118] Other staffs of the Registry, especially Registrar of the Court would also need permanent quarters. Although, the site of the Rwandan Tribunal has been allocated to the African Human Rights Court for a start, it is our recommendation that the use of the place should only be for a short period.

The inference one can draw from the foregoing is that African Human Rights Court needs sufficient financing, which is a serious problem, especially now that another arrangement is on-going for the more expanded Merged Court. Rachel Murray had predicted that the African Human Rights Court would be beset by the same sorts of resource problems which confronted the African Commission, giving the paucity of resources available to its parent body-the (O) AU.[119] This line of reasoning is seen as a strong one that cannot be faulted: "...the Court is unlikely to escape the effective effects of these same problems."[120] That the African Commission suffered from a "capacity deficit" and other problems was confidently

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[116] Udombana N. J., *supra* note 14 at 862.
[117] *Ibid*, at 859-864.
[118] Under Article 8(4) of the merged Court, both the President and Vice- President of the Court serve on permanent bases.
[119] Murray R., *Internal Law, Human Rights in Africa: From the OAU to the AU* (Cambridge: Cambridge University Press, 2004), at 29.
[120] See Obiora C. O., *supra* note 73, at 74.

admitted by the Commission in a number of occasions.[121] This is the most reason why it was recommended strongly that the Secretariat of the African Commission should be backed up with material and human resources to increase its efficacy as a Secretariat.[122] It was also suggested that Member States of the (O) AU must support the Commission morally and financially or else they would be undermining the African Charter and its Commission.[123] It is not surprising that the African Human Rights Court is likely to face the same problem because efforts are being made to prepare the African Human Rights Court for its first cases. "In practical terms," a commentator said "the premises for this Court still need to be adapted and basic support system for the registry and judges need to be put in place."[124] Although, the AU had provided an initial budget of $2,250,000 for African Human Rights Court to commence operation, there must be serious financial commitment by Member States of the AU to make both African Commission and African Human Rights Court and indeed the subsequent Merged Court function effectively. But there is indication that the African Human Rights Court and later the merged Court would have no option than to rely strongly on foreign donations as the African Commission. Even now, a Member of a NGO *Federation Internationale des Droit del'Homme* and a European Commission representative, have voiced concern at the Court's lack of "financial independence" and sought the assistance of the European Union.[125]

In fact, some years ago, Foreign Governments had provided funds for the initial establishment of African Court. In particular, the European Foreign and Commonwealth Office (FCO) had provided the sum of 92,573 and 61,500 dollars to projects that is "aimed at promoting early ratification of the Protocol for the African Court on Human and Peoples' Rights," and "to

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[121] For example in 1989, the Assembly asked the Sectary – General of the OAU to "find, prior to next financial year, appropriate solutions to the budgetary, financial and personal problems raised by the African Commission." See OAU Res. Relating to the Afric. Comm. On Human & peoples' Rights. AHSG, Twenty-Fifth Ord. Sess.(24-26 July, 1989) AHG/Res. 188(xxv)

[122] 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 240.

[123] Saffari A., "The Enforcement of Human Rights in Africa with Reference to Tanzania." 8 *Revision of the African Commission on Hum. & Pples' Rts, 1999, at 302-303.*

[124] Sceats S., *supra* note 77.

[125] Coalition for an Effective Court on Human and Peoples' Rights: "The Creation of the African Court of Justice and Human Rights", available at *http://www.africancourtcoalition.org/content_files/files/PressReleaseDirectAccessJun08pdf*(last visited 02/12/2008).

enhance the capacity of the African Commission on Human and Peoples' Rights in Africa through the creation of an African Court on Human and Peoples' Rights" in 2002 and 2005 respectively.[126]

Fatsah Ouguergeuz, a judge of the African Human Rights Court, has not only suggested that an endowment fund, managed by a Board of Trustees, as enjoyed by the Caribbean Court of Justice, might solve the financial problem of the Court, but also asked for the European Parliament to continue showing interest in the African Human Rights Court and the Merged Court and raise profile, and the question of funding with the European Union Executive.[127] That the African Human Rights Court has started seeking foreign donations is not surprising. It has been estimated that since the creation of the African Human Rights Court, more than US $12.5 million has already been expended; and the yearly budget of the Court is US $7 million.[128] There is every indication that with the establishment of the Merged Court, the yearly spending of the Court would double since what is now known as the "African Human Rights Court" would only be a Section of the Merged Court.

IV. THE WAY FORWARD

There is dire need to reconcile some provisions of the African Charter with other international and regional human rights instruments. These include provisions on claw-back clauses, absence of derogation clauses, individual duties, *et cetera.* The African Human Rights Court and later the Merged Court should endeavour to give vibrant and holistic interpretations of the provisions of African Charter by reconciling what some scholars thought are irreconcilable under the Charter. African States, parties to African Human Rights Court Protocol and Protocol of the Merged Court should be willing to make the Special Declaration allowing individual direct access to the Courts. In the long run, there is need to expunge the provisions of the instruments denying individual direct access to the Courts.

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[126] FCO, Human Rights Annual Report 2003, Annex II: FCO Funding for Human Rights, 258 (2003), available at *http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/SowPage&c=Page&cid=1028302592088; & FCO, Human Rights Annual Report 2005, Annex II: GOF Projects, 258 (2005), available at http://www.fco.gov.uk/servlet/Front? Pagename= OpenMarket/ Xcelerate/ShowPage&c=Page&cid=1028302592088..*

[127] Coalition for an African Court on Human and Peoples' Rights, *supra* note 125.

[128] *Ibid.*

The permanent status of the judges should not be limited to the president of the African Human Rights Court or to the President and Vice- President of the Merged Court. This is necessary because with the establishment of the Courts, with power to give binding decisions and award remedies, there is a glimmer of hope that many cases will be filed in the Courts. Moreover, if the 90-day requirement within which the Courts must deliver judgment, after taking evidence, should be a reality, not myth, there is need to change the temporary status of the judges to permanent status.

The African Human Rights Court and later the Merged Court must embark on a speedy trial in dispensing justice. They must avoid the practice of the African Commission where a case took more than five years before it was disposed off.[129] This is important because delay in trials itself is a violation of human rights; and incurable damage might have been done to the victim(s) of the human rights violation.

The African Commission should embark on elaborate public awareness campaign on its mandate and the existence of African Human Rights Court and later the merged Court. The Commission should also relax its rule of exhaustion of local remedies provided in Article 56 of the African Charter to enable individual have access either directly or indirectly to the African Human Rights Court and later to the Merged Court.

Above all, for African Human Rights Court and later the merged Court to meet the inspiration of Africans, State Parties should have the political zeal to comply with their obligations under the African Charter. They should comply with their financial obligation, obey the decisions of the Court and submit their periodic reports on human rights promotion and protection in their respective States. The African Human Rights Commission should be given adequate resources to enable it function effectively. That African Human Rights Court has been established does not mean that attention should be diverted from the Commission to the Court. The Court, like the Merged Court, is not established to replace the Commission but to compliment its protective mandate. More over, since many individual cases will be brought to the African Human Rights Court through the

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[129] See, *Social and Economic Rights Action Centre v. Nigeria*, Comm. No. 155/95, reproduced in Fifteenth Annual Activity Report of the African Commission, 2001-2002, where the Commission received communications in the case on March 1996, but it did not examine them until 27th October, 2001 (a period of more than five years).

Commission, there is need for the Commission to be more effective than ever before.

V. CONCLUSION

Africa and Africans are now laughing last laudably for the establishment of human rights judicial bodies to enforce the rights guaranteed in the African Charter on Human and Peoples' Rights and other international human rights instruments ratified by African States. But that they are laughing last does not mean automatically they are laughing better; they have to laugh with caution or else they will ultimately laugh worse and the establishment of the enforcement bodies will be laughable.

It is glaring that there is a plethora of problems that are impediments to the effective performance of African Human Rights Court; and these problems will definitely affect the performance of the Merged Court when it finally replaces the African Human Rights Court. It is the stand of the writer that if the recommendations proffered in this article are ignored, there will be doubt as to whether the African Human Rights Court and later the Merged Court can give any meaning and positive effect to the African Charter and other international and regional human rights instruments ratified by African States .For Africa and Africans to argue vehemently that their human rights system has been placed on the same pedestal with the European and American systems, the suggestions proffered in this article should be taken seriously. There is still hope and even if it is late, it is never too late. The writer agrees with the conclusion drawn by a scholar that the establishment of African Human Rights Court is "better late than never".[130] It is hoped that the Court will leave a legacy for the Merged Court to follow.

[130] Udombana N.J. *supra* note 65.