

# **Challenges and Prospects of the African Court of Justice and Human Rights**

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## ***Abstract***

The idea to merge the African Court of Human and Peoples Rights with the African Court of Justice to form a new judicial body called African Court of Justice and Human Rights was initiated by the then Chairperson of the African Union and former President of Nigeria; Olusegun Obasanjo in 2004. The major arguments of President Obasanjo for merging the two courts included cost savings and a need to rationalise pan-African institutions. Four years after the protocol was adopted, the court still lacks the minimum number of 15 States ratifications for it to enter into force. This again is a reflection of the unwillingness of African leaders to fast track human rights promotion and protection in the continent. The Protocol of this court appears to entrench sweeping powers on the Court to try all cases involving human rights violations in the continent and this will mean an abrupt end for the era of impunity for political leaders in Africa. Even though the protocol is yet to receive the minimum number of ratifications, the court have already started functioning based on the transition arrangement enshrined in Article 1 of the merger protocol. This paper therefore will espouse the challenges and prospects of the merged African Court of Justice and Human Rights.

## **1. Introduction**

The adoption of the Protocol of the African Court of Human and Peoples Rights with the African Court of Justice in 2008 (hereinafter merger protocol) herald a new dawn in the history of human rights promotion and

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protection in Africa. This assertion is out of place considering the mandate or responsibility expected to be shouldered by this court.

The desire to create this court was born out of the fact that the existence of the African Court of Human and Peoples Rights<sup>1</sup> and the African Court of Justice<sup>2</sup> was a duplication of functions and waste of scarce resources as the functions of both Courts can be carried out by a well structured and streamlined Court.<sup>3</sup> Besides, the argument of scarce resources, it was observed that the protocol establishing both courts, though different in their formations and functions as one was adopted to settle states disputes and the other for human rights in accordance with the provisions of the Constitutive Act of A.U<sup>4</sup> and the African Charter on Human and Peoples Rights.<sup>5</sup> Both had areas of common jurisdiction not totally different from each other. According to Michelo Hansungule, “there was a genuine fears of real duplicity in the functions of both courts if the A.U went ahead with

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<sup>1</sup>Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Assembly of Heads of State and Government of the Organization of African Unity, Ougadougou, Burkina Faso, June 1998, OAU/LEG/MIN/AFCHPR/PROT.(1) Rev.2

<sup>2</sup>The Protocol of the Court of Justice of the African Union was duly adopted by the 2<sup>nd</sup> Ordinary Assembly Session on 11 July, 2003. The functions of the Court include: collection of documents and undertake studies and researches on human and peoples' rights matters in Africa; lay down rules aimed at solving the legal problems relating to human and peoples' rights; ensure protection of human and peoples' rights; and interpret all the provisions of the Charter. See, African Union., “African Court of Justice”, Available online at <<http://www.au.int/en/organs/cj>> accessed 11 August, 2013.

<sup>3</sup>The idea of amalgamating the two courts was based on overlaps in competence, which has led to a degree of uncertainty within the African community of states, as well as the desire to alleviate the strain on financial resources led to this merger. The formal process of amalgamation was completed with the acceptance of the Protocol on the African Court of Justice and Human Rights on 1 July, 2008 at the 11<sup>th</sup> General Assembly of the AU in Sharm El-Sheikh.

<sup>4</sup>Constitutive Act of the African Union, adopted by the Assembly of Heads of State and Government of the Union, Lome, Togo, 11 July, 2000, entered into force on 26 May, 2001.

<sup>5</sup>The African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5 (1981).

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the task of establishing distinct judicial bodies or otherwise for the continent”.<sup>6</sup>

At the Summit of the Eleventh Ordinary Session of the AU held in Sharm El-Sheikh, Egypt, in July 2008, the Assembly of Heads of State and Government formally adopted the resolution that provided for the political basis for the merger Protocol establishing the new Court (hereinafter merged court).<sup>7</sup> Established under Article 2 of the Protocol, the new Court is governed by two main instruments, i.e. the Protocol and the Statute of the African Court of Justice and Human Rights itself. This is a distinctive additionality to prevailing practice where an institution is usually established by only one instrument often a Protocol rather than two.<sup>8</sup> This newly created court is intended to comprise two sections: a general section and a section for human rights. A total of sixteen judges will work there, whereby each chamber will have eight judges.<sup>9</sup> The Protocol in question will, however, enter into force only once the 15<sup>th</sup> instrument of ratification treaty has been deposited. At present, only three states, namely Mali, Libya and Burkina Faso have taken this step. Thus, it is likely to be quite some time before the amalgamation is actually

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<sup>6</sup>See also Michelo Hansungule, “African Courts and the African Commission on Human and Peoples’ Rights” at 235, available online at <[http://www.kas.de/upload/.../Human\\_Rights\\_in\\_Africa/8\\_Hansungule.pdf](http://www.kas.de/upload/.../Human_Rights_in_Africa/8_Hansungule.pdf)>, accessed 16 August, 2013.

<sup>7</sup>Decisions Assembly/AU/Dec.45 (III) and Assembly/AU/Dec.83 (V) of the Assembly of the Union, adopted respectively at its Third (6-8 July, 2004, Addis Ababa, Ethiopia) and Fifth (4-5 July, 2005, Sirte, Libya), Ordinary Sessions, to merge the African Court on Human and Peoples’ Rights and the Court of Justice of the African Union into a single Court. Available, online at [www.africa-union.org](http://www.africa-union.org); Accessed 10 August, 2013.

<sup>8</sup>The African Court on Human and Peoples’ Rights established by the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights and the Court of Justice of the African Union established by the Constitutive Act of the African Union, are hereby merged into a single Court and established as “The African Court of Justice and Human Rights”.

<sup>9</sup>Protocol on the Statute of the African Court of Justice and Human Rights adopted by the Eleventh Ordinary Session of the Assembly, held in Sharm EL-Sheikh, Egypt, 1<sup>st</sup> July, 2008 (yet to enter into force). Article 16 – 19.

implemented. The positive process of the fusion of the two courts is thus currently running in parallel to the development of the ACHPR. The Protocol of the ACHPR therefore remains decisive until it has been replaced by the new protocol.

At this point, this article will be segregated into three parts for clear understanding of the issues to be espoused. Part one will deal with an overview of the Protocol establishing the African Court of Justice and Human Rights. Part two will treat the possible challenges to be faced by the Merged Court while Part three will inquire into the prospects and sustainability of the merged Court.

## **PART I**

### **2. An Overview of the Protocol Establishing the African Court of Justice and Human Rights**

#### **Jurisdictions of the Court**

In accordance with articles 29 and 53 of the merger protocol, the Africa Court of Justice and Human Rights is empowered to act in both judicatory and advisory capacity.

**Judiciary Powers:** The court has personal, mandatory or compulsory jurisdiction, and every state automatically acknowledges it immediately upon ratification of the Protocol. It also has discretionary or optional jurisdiction, for which a corresponding additional declaration of recognition of jurisdiction is required.<sup>10</sup>

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<sup>10</sup>Andreas Zimmermann and Jelena Bäumlér, "Current Challenges facing the African Court on Human and Peoples' Rights" *KAS International Reports* 7/2012 at. 42-43. Available online <[http://www.kas.de/wf/doc/kas\\_20018-544-2-30.pdf?100630122123](http://www.kas.de/wf/doc/kas_20018-544-2-30.pdf?100630122123)>, accessed 10 August, 2013.

**Mandatory Jurisdiction or Jurisdiction *Ratione Personae***

The Court's mandatory or compulsory jurisdiction applies, according to article 28, if the proceedings are brought by State Parties to the present Protocol; the AU Assembly, the Parliament and other organs of the Union authorized by the Assembly; a staff member of the African Union on appeal, in a dispute and within the limits and under the terms and conditions laid down in the Staff Rules and Regulations of the Union.<sup>11</sup> Other entities so authorised to submit cases for determination by the merged court include State Parties to the protocol; the African Commission on Human and Peoples' Rights; the African Committee of Experts on the Rights and Welfare of the Child; African Intergovernmental Organizations accredited to the Union or its organs;<sup>12</sup> African National Human Rights Institutions; individuals or relevant Non-Governmental Organizations accredited to the African Union or to its organs, subject to the provisions of Article 8 of the Protocol.<sup>13</sup>

Article 53 of the statutes of the merged Court provides that matters may also be referred to the court by a state acting as a third party intervener if it considers that it has interest in a case in which it was not initially involved and it provide thus: "should a Member State or organ of the Union consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. It shall be for the Court to decide upon this request". Sub-paragraph 3 states that: "in the interest of the effective

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<sup>11</sup>Protocol on the Statute of the African Court of Justice and Human Rights, *above n. 9*. Article 29.

<sup>12</sup>*Ibid.*, The Union of the Arab Maghreb, (UAM), the Economic Community of West African States, (ECOWAS), the West African Economic and Monetary Union, (WAEMU), the Economic and Monetary Community of Central Africa, (EMCCA), the Economic Community of Central African States, (ECCAS), the Common Market of Eastern and Southern Africa, (COMESA), the Southern African Development Community, (SADC), the Southern African Customs Union, (SACU), the Indian Ocean Community, (IOC), the East African Community, (EAC) and the Community of Sahel-Saharan States more commonly known by the acronym (CEN-SAD).

<sup>13</sup>*Ibid.*, Article 30.

administration of justice, the Court may invite any Member State that is not a party to the case, any organ of the Union or any person concerned other than the claimant, to present written observations or take part in hearings” subsequently, Article 29(2) provides that: “In the interest of the effective administration of justice, the Court may invite any Member State that is not a party to the case, any organ of the Union or any person concerned other than the claimant, to present written observations or take part in hearings”.

### **Optional or Discretionary Jurisdiction (Clause)**

The new African Court of Justice and Human rights also has optional or discretionary jurisdiction, for which a corresponding additional declaration of recognition of jurisdiction is required. This jurisdiction applies in suits filed by individuals and by non-governmental organizations; these two groups can bring a case before the court only if the accused state has made a declaration accepting the competence of the Court to receive such cases.<sup>14</sup>

Article 30 (b) provides for optional jurisdiction clause in relation to cases submitted by individuals or Non-Governmental Organisations with observer status with the African Commission on Human and Peoples Rights. In other case, the court can recognise individuals and NGOs petition directly in accordance with Section 30 (f). Such Individuals or relevant Non-Governmental Organizations must have been accredited to the African Union or to its organs, subject to the provisions of Article 8 of the Protocol which states that; “any Member State may, at the time of signature or when depositing its instrument of ratification or accession, or at any time thereafter, make a declaration accepting the competence of the

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<sup>14</sup>*Ibid.*

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Court to receive cases under Article 30 (f)<sup>15</sup> involving a State which has not made such a declaration”.

It was argued that the statutes of the African Court System, is in line with the procedural law of other human rights systems which also restrict the individual rights of access to international human rights organs. Whether at the level of the United Nations or other regional human rights system for the protection of human rights, the individual rights of appeal is generally the subject of optional clause, and the organs competent to examine individual petition is made subject to the state having declared its recognition of this competence.<sup>16</sup> It would have been more respectful of the rights of individuals and NGOs if at the very least it was incumbent on the state which does not recognise the competence of the court to make a declaration to that effect. The new judicial framework for the African Court of Justice and Human Rights would have been optimum had the individuals been granted easy and direct access to the new court.

Even if states do not refuse or decline to make a declaration in line with Article 30 (f) subject to the provision of Article 8 of the statutes of the merged Court, the fear of the risk could be overcome only if the African Commission on Human and Peoples Right which is entitled to submit cases to the court were to assert its protective mandate for human rights

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<sup>15</sup>Individuals or relevant Non-Governmental Organizations accredited to the African Union or to its organs, subject to the provisions of Article 8 of the Protocol shall also be entitled to submit cases to the Court on any violation of a right guaranteed by the African Charter, by the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relevant to human rights ratified by the States Parties concerned.

<sup>16</sup>Association for the Prevention of Torture (APT): The African Court on Human and Peoples Right, Presentation, analysis and Commentary: the protocol to the African Charter on Human and Peoples Rights Establishing the Court, Occasional Papers, Geneva, January, 2000, at 4. Available online at <http://www.apt.ch> accessed, 18 August, 2012.

by adopting a much more protective stance than heretofore by instituting these cases on behalf of the individuals and NGOs.

The development of shutting out individuals and NGOs from having direct access to the new court was orchestrated by a group of states including Egypt and Tunisia and this idea seems to have been motivated mostly by distrust for human rights NGOs. The African Commission has long permitted NGOs to bring cases under the African Charter, even where they are not directly affected by the alleged violation (in other words, unlike in the European Court of Human Rights, standing is not restricted to 'victims'). This reflects the fact that victims and their families are often precluded from bringing cases on their own behalf because of illiteracy and poverty, fear of reprisals or the enormous scale of some human rights violations on the continent. In practice, NGOs have become the main complainants at the African Commission.<sup>17</sup> It is necessary to note that the jurisdiction of the court is limited ostensibly so as not to unduly violate the sovereignty of member states.<sup>18</sup>

### **Subject Matter Jurisdiction or Jurisdiction *Ratione Materiae***

Under this sub-section dealing with the Courts Jurisdiction *ratione materiae*, that is the subject matter jurisdiction, based on the facts available to the court, the court has competence to rule on cases in which one of the contracting parties is accused of breaching human rights. Article 28 of the statute provides that the Court shall have jurisdiction

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<sup>17</sup>Sonya Sceats., "Africa's New Human Rights Court: Whistling in the Wind?" March 2009, IL BP 09/01, The Royal Institute of International Affairs, 2009, at 9-10. Available online at <http://www.chathamhouse.org.uk> accessed 13 August, 2013. See also, Michael .C Ogwezzy; "Promotion and Protection of Human Rights in Africa: Examining the Jurisprudence of the African Court of Justice and Human Rights", *Alexandra University, Faculty of Law, Journal for legal and Economics Research*, December, 2012

<sup>18</sup>N Barney Pityana, "Reflections on the African Court on Human and Peoples Rights", (2004) 4 *African Human Rights Law Journal* at 128. Available online at [http://uir.unisa.ac.za/bitstream/handle/10500/408/ju\\_ahrlj\\_v4\\_n1\\_a9.pdf?sequence=1](http://uir.unisa.ac.za/bitstream/handle/10500/408/ju_ahrlj_v4_n1_a9.pdf?sequence=1), accessed on 20 August, 2013



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over all cases and all legal disputes submitted to it in accordance with the Statute which relates to: the *interpretation and application* of the Constitutive Act; the validity of other Union treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity; the A.U Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned; any question of international law; all acts, decisions, regulations and directives of the organs of the Union; all matters specifically provided for in any other agreements that States Parties may conclude among themselves, or with the Union and which confer jurisdiction on the Court; the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union; the nature or extent of the reparation to be made for the breach of an international obligation.<sup>19</sup>

It is interestingly striking to note that suits under the statutes of the African Court of Justice and Human Rights can be based both on a breach of the Banjul Charter, the Constitutive Act of the AU and on contravention of any other treaty on the protection of human rights that the state in question has ratified.<sup>20</sup> At the African level in particular, this includes the Convention Governing the Specific Aspects of Refugee Problems in Africa, the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on the Rights of Women in Africa. In addition, on a universal level, this includes the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights and various other international human rights treaties whether adopted within the framework of the UN such as Convention

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<sup>19</sup>Protocol on the Statute of the African Court of Justice and Human Rights *above n. 9*. Article 28 (a)-(h).

<sup>20</sup>Andreas Zimmermann and Jelena Bäumler, *above n. 10.*, at 44-45.

against Torture<sup>21</sup> or within the framework of specialised institutions for instance the ILO and UNESCO.<sup>22</sup>

In comparison, pursuant to Article of the Protocol on the African Court of Justice,<sup>23</sup> it is responsible for disputes based on the application and interpretation of the constitutional act of the AU and treaties concluded under the auspices of the AU. All public international law disputes also fall within the jurisdiction of the court while the African Court of Justice may first and foremost be responsible for conflicts between states concerning the interpretation of treaties and conventions of the AU.

### **Sections of the Court**

The Court shall have two Sections; a General Affairs Section composed of eight Judges and a Human Rights Section composed of eight Judges making a total of sixteen judges of the Court.

#### **(i) The General Affairs Section**

In line with the provisions of Section 17 of the statutes of the Court of Justice and Human Rights', the General Affairs Section shall be competent to hear all cases submitted under Article 28 of this Statute save those concerning human and/or peoples' rights issues.<sup>24</sup> Therefore, the

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<sup>21</sup>OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45; Charter on

the Rights and Welfare of the Child, ILM 28 (1989) 1448; African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Doc/OS/34c/(XXIII) Annex; International Covenant on Civil and Political Rights, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85.

<sup>22</sup> Association for the Prevention of Torture (APT): *above n.16.*, p.5

<sup>23</sup>See Article 29 (2) of the Protocol. The provisions governing the Council of Ministers are set forth in Articles 10-13 OAU Charter. <http://www.africa-union.org> > Documents > Treaties, Conventions & Protocols. This Protocol never entered into force before the merger of both Courts in 2008 because not enough states ratified it.

<sup>24</sup>*Ibid.*, Article 17(1).

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human rights section will not deal with cases involving general affairs since this has been settled.<sup>25</sup>

### **(ii) Human Rights Section**

The Human Rights Section shall be competent to hear all cases relating to human and/or people's rights violations by a state party. State Party here is construed to mean state officials or persons acting on behalf of the state like political actors.<sup>26</sup> Article 18 deals with referral of matters to the Full Court When a Section of the Court is seized with a case, it may, if it deems it necessary refer that case to the Full Court for consideration.<sup>27</sup>

### **Composition and Qualifications of the Panel of Judges of the Merged Court**

The merged Court is made up of sixteen Judges who are nationals of States Parties and it shall not, at any one time, have more than one judge from a single Member State and each geographical region of the Continent, as determined by the Decisions of the Assembly, shall, where possible, be represented by three Judges except the Western Region which shall have four Judges. Though upon recommendations of the Court, the Assembly, may review the number of Judges. This is subject to the provisions of Article 3 of the statutes of the Court of Justice and Human Rights.<sup>28</sup>

The statute to the Protocol provides that jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human rights and general international law can be considered for the position of a judge. In addition to personal

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<sup>25</sup>*Ibid.*, Article 28 (a)-(h).

<sup>26</sup>*Ibid.*, Article 17(2).

<sup>27</sup>See also, Michael .C, Ogwezzy; "Promotion and Protection of Human Rights in Africa: Examining the Jurisprudence of the African Court of Justice and Human Rights", Unpublished Paper, 2012, at 9-10

<sup>28</sup>See Article 3 of the Statute to the Merger Protocol of the African Court of Justice and Human Rights and the Court of Justice of the African Union 2008, *op. cit.*

qualifications, the goal of having a balanced composition plays a crucial role: the judges must represent the five major African regions (South, West, East, North and Central), the various African legal systems of Islamic law, Common and Civil law, African customary law and South African Roman-Dutch law, as well as ensuring that African traditions are taken into account.<sup>29</sup>

The principle of geographical representation is now one of the conditions for composing the Court, as stated in paragraph 3 of Article 3 of the Statute of the new Court.<sup>30</sup> So each geographical region of the Continent, as determined by the decisions of the Assembly shall, where possible, be represented by three Judges except the Western Region which shall have four Judges.<sup>31</sup> Each State Party may present up to two candidates and shall take into account equitable gender representation in the nomination process.<sup>32</sup> Only AU states that have ratified the protocol have a right to nominate candidate judges to constitute the bench of the court. Article 4 of the statutes specifically provides that the Court shall be composed of impartial and independent Judges elected from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris-consults of recognized competence and experience in international law and/or, human rights law.<sup>33</sup>

### **Election of the Judges to the Merged Court**

Article 7 of the protocol laid down the conditions for the election of the judges and it provides that the Judges shall be elected by the Executive Council, and appointed by the Assembly. They shall be elected through

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<sup>29</sup>Andreas Zimmermann and Jelena Bäuml, “*above n. 10*, at 41.

<sup>30</sup>See also Michelo Hansungule, *above n. 6*, at 241.

<sup>31</sup>Protocol on the Statute of the African Court of Justice and Human Rights, *above n. 9*, Article 3(3).

<sup>32</sup>*Ibid.*, Article 5(2).

<sup>33</sup>*Ibid.*, Article 4 .

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secret ballot by a two-thirds majority of Member States with voting rights, from among the candidates provided for in Article 6 of this Statute. Candidates who obtain the two-thirds majority and the highest number of votes shall be elected. However, if several rounds of election are required, the candidates with the least number of votes shall withdraw. The Assembly shall ensure that in the Court as a whole there is equitable representation of the regions and the principal legal traditions of the Continent. In the election of the Judges, the Assembly shall ensure that there is equitable gender representation.<sup>34</sup>

Hansungule analysed this provision in comparison with the provisions in the other Protocols of replaced Courts under the African system and further explained that contrary to the previous arrangements under the African Court on Human and Peoples Right and the Court of Justice, the election of Judges is now the responsibility of the Executive Council and not the Summit of Heads of State and Government, as was the case in the two replaced Courts. Although past treaties provided for the Heads of State and Government to conduct the elections, in practice, this was performed by their ministers in the Executive Council. The Executive Council will elect the Judges while the Assembly execute the appointments of the successful parties submitted to them by the Executive Council. As regards the right to vote, it is not enough simply to be a state party to the Protocol and Statute. In addition, the state party concerned must be entitled at the time of the election to 'voting rights'. Based on Article 23 of the Constitutive Act, some member states have lost their voting rights for a number of reasons, including failure to implement decisions of the AU and its organs, and being in default in the payment of their subscriptions.<sup>35</sup>

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<sup>34</sup>*Ibid.*, Article 7.

<sup>35</sup>See Michelo Hansungule, *above n. 6*, at 242-243

### **Independence of Judges of the Merged Court**

The judges are elected in an individual capacity from among jurist-consult of high moral character and of recognised practical, judicial or academic experience in the field of human rights law. They undertake to discharge their duties faithfully and impartially and the independence of the judges shall be fully ensured in accordance with international law. The Court shall act impartially, fairly and justly. In performance of the judicial functions and duties, the Court and its Judges shall not be subject to the direction or control of any person or body.<sup>36</sup> To further reinforce faith in the independence of the Judges and the Court, Article 13 forbids conflict of interest in the performance of the official duties of the elected judges and it provides thus: “the functions of a Judge are incompatible with all other activities, which might infringe on the need for independence or impartiality of the judicial profession. The judges enjoy diplomatic immunities and privileges necessary for them to discharge their duties; “The Judges shall enjoy, from the time of their election and throughout their term of office, the full privileges and immunities extended to diplomatic agents in accordance with international law. The Judges shall be immune from legal proceedings for any act or omission committed in the discharge of their judicial functions. The Judges shall continue, after they have ceased to hold office, to enjoy immunity in respect of acts performed by them when engaged in their official capacity”.<sup>37</sup> In another circumstance, “where a particular judge feels he/she has a conflicting interest in a particular case, he/she shall so declare. In any event, he/she shall not participate in the settlement of a case for which he/she was previously involved as agent, counsel or lawyer of one of the parties, or as a member of a national or international Court or Tribunal, or a Commission of enquiry or in any other capacity. If the President considers that a Judge should not participate in a particular case, he/she shall notify the judge concerned. Such notification from the President shall, after

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<sup>36</sup>Protocol on the Statute of the African Court of Justice and Human Rights, *above n. 9*, Article 12(1) (2) and (3).

<sup>37</sup>*Ibid*, Article 15(1)-(3).

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agreement by the Court, exclude that Judge from participating in that particular case. Judge of the nationality of a State Party to a case before the full Court or one of its Sections shall not have the right to sit on the case.”<sup>38</sup>

However, the African Court of Justice and Human Rights differs from the two other regional courts as regards independence of the Judges on the grounds that a judge will not hear a case involving the State of which he is a national as provided under article 14(3) of the merged Protocol. Much unlike the Inter-American system, the State concerned may appoint an *ad hoc* judge to hear the case if there is no permanent judge seating in the Court. In the European system, the judge who is a national of the State concerned automatically participates in the case.<sup>39</sup>

As far as professional ethics are concerned, the judges may not carry out any activity which is incompatible with the demands of office or which might interfere with their independence or impartiality.<sup>40</sup>

### **Judgement of the Court and its Mode of Execution**

The Court shall render its judgment within ninety (90) days of having completed its deliberations and all judgments shall state the reasons on which they are based, contain the names of the Judges who have taken part in the decision signed by them and certified by the Presiding Judge and the Registrar. Upon giving due notice to the parties, the judgement is read in open court. The reason for the judgement must be embodied in the judgement of the court and it shall be transmitted to the Member States and the Commission. The Executive Council shall also be notified of the

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<sup>38</sup>*Ibid*, Article 14(1)-(4).

<sup>39</sup>See Sidiki Kaba, “10 keys to Understand and Use the African Court on Human and Peoples’ Rights, A User’s Guide for Victims of Human Rights Violations in Africa and Human Rights Defenders”, FIDH, November, 2004 at 30.

<sup>40</sup>Association for the Prevention of Torture (APT), *above n.* 16, at. 6.

judgment and shall monitor its execution on behalf of the Assembly.<sup>41</sup> With respect to judgements, the Statute provides that decisions are to be taken by a majority of Judges, with a casting vote by the Presiding Judge in the event of “an equality of votes”. This provision is made in addition to the rights provided to Judges in Article 44 to have dissenting opinions.<sup>42</sup> Other conditions, such as the duty on the Court to render judgement within 90 days of having completed deliberations, the requirement that Judges are to state the reasons on which their judgements are based, and the obligation to notify the parties of the judgement in the case are a rendition of the 1998 Ouagadougou Protocol. However, there is one particular innovation, namely that Article 43(6) mandates the Executive Council, which is also to be notified of the judgement, “to monitor its execution on behalf of the Assembly”. This is a direct response to the frustrations over unimplemented African Commission recommendations or decisions. Article 43(6) is a *mutatis mutandis* extract of its equivalent in the European Convention on Human Rights.<sup>43</sup>

Article 46 provides that “the decision of the Court shall be binding on the parties” and that such decision is final. Furthermore, in an innovative manner, the Statute provides that the parties shall comply with the judgement made by the Court in any dispute to which they are parties within the time stipulated by the Court and shall guarantee its execution. Paragraphs 4 and 5 enjoin the Court to report to the Assembly any party that fails to comply with the judgement, and the Assembly is mandated to

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<sup>41</sup>Statutes of the merger Protocol of the African Court of Justice and Human Rights., *above n.* 18. Article 43(1)-(5).

<sup>42</sup>*Ibid.*, Article 44. It provides that if the judgment does not represent in whole or in part the unanimous opinion of the Judges, any Judge shall be entitled to deliver a separate or dissenting opinion.

<sup>43</sup>See, Ovey, Claire & Robin White, *European Convention on Human Rights* 3<sup>rd</sup> edn. New York: Oxford University Press Inc., 2002 at 420-436. See also Michelo Hansungule, *above n.* 6, at 247.



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punish the defaulting party-including by the imposition of sanctions as provided in Article 23(2) of the Constitutive Act of the AU.<sup>44</sup>

More still on execution of the judgement of the merged Court, the Council of Ministers of the AU is responsible for monitoring execution of the judgment on behalf of the Assembly, in its annual report to the AU Assembly; the Court must specify instances of non-compliance. Although the Executive Council (Council of Minister) is monitoring the execution of judgments on behalf of the Assembly,<sup>45</sup> the compliance of states with legally binding decisions will mostly depend on their level of political commitment and the participatory role of civil society.<sup>46</sup> Hence the execution of the Court's Judgement is basically voluntary.<sup>47</sup> The Court has delivered up to the present time four out of nine judgments, and the first one came in December 2009.<sup>48</sup>

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<sup>44</sup>Article 46(3) Statute of the merger Protocol of the African Court of Justice and Human Rights 2008.

<sup>45</sup>See Article 43 and 46 Statute of the merger Protocol of the African Court of Justice and Human Rights 2008..

<sup>46</sup>F. Viljoen, "African Court on Human and Peoples' Rights (ACtHPR)", in Wolfrum R. (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2009, available online at <<http://www.mpepil.com>>, accessed 14 August, 2013.

<sup>47</sup>The Protocol Creating the Court of Justice foresees the possibility for the Conference to sanction Member States failing to abide by a Court's decision; the Protocol concerning the African Court on Human and People's Rights does not give any constraining force to the Court's decisions. The new Protocol of the merged Court allows then the extension and outreach of the sanctions to the field of human rights. The merged Court also has the power to order specific remedies, including compensation. (See, Stephanie Dujardin "For a Rapid Operational Start of the African Court of Justice and Human Rights" E.U-Africa, e-alert... Contribution to Editorial, No.3/November, 2006, at 3 available online at [http://www.fes.de/cotonou/.../ngo/.../E-ALERT\\_EN\\_08JANUAR07.PDF](http://www.fes.de/cotonou/.../ngo/.../E-ALERT_EN_08JANUAR07.PDF)> accessed 14 August, 2013).

<sup>48</sup>European Parliament., "The Role of Regional Human Rights Mechanisms", Directorate-General for External Policies, Policy Department, November, 2010 at 71, available online at <<http://www.europarl.europa.eu/activities/committees/studies.do?language=EN>> accessed 17 August, 2013

It is necessary to state that even if the judgement of the court is final, an application for revision of a judgment may be made to the Court based upon discovery of a new fact of such nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, provided that such ignorance was not due to negligence. The proceedings for revision shall be opened by a ruling of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the revision admissible on this ground. The Court may require prior compliance with the terms of the judgment before it admits proceedings in revision which shall be made within six months up on the discovery of the new fact and no application may be made after the lapse of ten years from the date of the judgment.<sup>49</sup>

### **Advisory Opinion of the Court**

By virtue of Article 53 of the protocol to the merged Court of Justice and Human Rights, the Court has the jurisdiction or power to give advisory opinion on any legal question at the request of the Assembly, the Parliament, the Executive Council, the Peace and Security Council, the Economic, Social and Cultural Council (ECOSOCC), the Financial Institutions or any other organ of the Union as may be authorized by the Assembly.<sup>50</sup> To buttress the format of the Courts jurisdiction on advisory opinion, the protocol provides further that such request for an advisory opinion shall be in writing and shall contain an exact statement of the question upon which the opinion is required and shall be accompanied by all relevant documents and such a request for an advisory opinion must not be related to a pending application before the African Commission or the African Committee of Experts.<sup>51</sup> Article 55 dealing with method of delivery of advisory opinion provides that, “the Court shall deliver its

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<sup>49</sup>Protocol on the Statute of the African Court of Justice and Human Rights, *above n. 9*, Article 48

<sup>50</sup>*Ibid*, Article 53.

<sup>51</sup>*Ibid*, Article 53(2)-(3).

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advisory opinion in open court, notice having been given to the Chairperson of the Commission and Member States, and other International Organizations directly concerned”.<sup>52</sup>

Though examples from the International Court of Justice (ICJ), other courts in other jurisdictions have shown that advisory opinions are generally not binding but the gap in this provision of Article 53 is that, it did not state, whether the advisory opinion of the court is binding or not on the parties upon which the advisory opinion was given. In practice, however, such opinions when given by the court could serve as a reference for a dynamic and progressive interpretation of the African Charter on Human and Peoples Rights and other human rights instruments as stipulated under its subject matter jurisdiction under Article 28 of the merged protocol.

Having undertaken a detailed examination of the jurisprudence of the merged court, this article will turn to the second part which will understudy the challenges that the court will face in the course of its operations.

### **Part II**

#### **3. Challenges to Be Faced by the Merged Court**

The challenges facing the merged courts of Justice and Human rights are numerous and breath-taking.

A. The African Commission continues to retain its important role in promoting human rights in Africa and will continue to monitor state compliance with the African Charter via routine reporting and other processes including special rapporteurs. Moreover, so long as direct access to each of the merged court remains difficult for individuals and NGOs, the Commission as against the merged Court will continue to be a first port of call for human rights cases against states. It will also be the main forum for cases against states which are not parties to

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<sup>52</sup>*Ibid*, Article 55.

the agreements which set up the merged courts, thereby witting the relevance or importance of the merged court and weakening the development of its jurisprudence.<sup>53</sup>

**Other challenges include:**

B. Ratification of the Protocol Establishing the Merged Courts: The success of the court will depend on the will of the states to adhere to the protocol by ratifying it.<sup>54</sup> while all AU member states have ratified the African Charter, and are thus subject to oversight by the African Commission, to date ratification of the Protocol to the Statute to the African Court of Justice and Human Rights, has been carried out by only three States, namely Libya, Mali and Burkina Faso, out of a total of 54 African states and twenty-two signatures have been received in addition to the three ratifications accessions and deposits.<sup>55</sup> Therefore a ratification campaign is urgently required to ensure AU-wide coverage for the merged court.

C. *Awareness of the Merged Court at the Continental Grassroots Level:* Due to the enormous size of Africa in geographical and population terms coupled with widespread illiteracy, it therefore means that the awareness of the merged court at the grassroots level will prove very challenging. Hence it is important that the courts hold sessions outside Tanzania and undertake promotional visits to member states;

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<sup>53</sup> *Ibid.*, at 12-14.

<sup>54</sup> Association for the Prevention of Torture (APT) *above n.* 16, at. 8.

<sup>55</sup> On the Status of ratification of the Protocol to the Statute to the African Court of Justice and Human Rights, only three (3) States, namely Libya, Mali and Burkina Faso, has ratified the protocol as at August 2010 and till date. Out of a total of 54 African states. 22 Signatures have been received in addition to the three ratifications accessions and deposits. Available online at [http://www.africancourtcoalition.org/index.php?option=com\\_content&view=article&id=87%3Aratification-status-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights&catid=7%3Aafrican-union&Itemid=12&lang=en](http://www.africancourtcoalition.org/index.php?option=com_content&view=article&id=87%3Aratification-status-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights&catid=7%3Aafrican-union&Itemid=12&lang=en) accessed, 15 August, 2013

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however, the awareness raising efforts of civil society and National Human Rights Institutions (NHRIs) will almost certainly be pivotal.<sup>56</sup>

- D. *Lack of Resources*: African states have a poor record of providing adequate funding to the continent's human rights institutions and this may become a problem for the merged courts with dual chambers that will attract and be saddled with high case load.<sup>57</sup>
- E. *Rules of Procedure and Determination of the Judges*: The effectiveness of the court will to a certain extent depend on the skill and clear sightedness with which the rules of procedure are drawn up and the determination shown by the persons elected to the post of judges who will bear the great responsibility and heavy burden of setting the African Court of Justice and Human Rights in motion.<sup>58</sup>
- F. *Problem of Compliance with their Judgments of the Merged Court*: A true test of the success of the merged court will be the level of state compliance with their judgments. Of course, there is a seemingly effective monitoring process which has been created for the merged courts by virtue of Article 46 of the protocol of the statutes to the merged court and Article 23(2) of the Constitutive Act of the African Union.<sup>59</sup> However, their effectiveness ultimately hinges on the political willingness of African states, acting through the Council of Ministers on behalf of the AU Assembly, to impose sanctions where necessary. This can be expected to cause problems for the courts given their dependency on the AU Assembly to compel execution of their judgments.<sup>60</sup>

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<sup>56</sup>Sonya Sceats, *above n. 17*.

<sup>57</sup>*Ibid.*

<sup>58</sup>Association for the Prevention of Torture (APT), *above n.16*, at. 8.

<sup>59</sup>Constitutive Act of the African Union, adopted by the Assembly of Heads of State and Government of the Union, Lome, Togo, 11 July, 2000, entered into force on 26 May, 2001.

<sup>60</sup>According to Frans Viljoen and Lirette Louw, "a leading study on the African Commission revealed that the lack of any effective follow-up system had been a key cause of low compliance with the admittedly non-binding recommendations of this body. However, this same study also concluded that it is political rather than legal factors that are most likely to determine compliance levels. Herein lies the major dilemma

G. *Context of Egregious Human Rights Violations*: There is much scepticism about the ability of the merged Court to deliver solutions when confronted with large-scale human rights abuses like torture, rape, human trafficking and genocide. Clearly the merged court will only be able to deal with a few of such cases under its human rights section. Moreover, there are no guarantees that the most serious cases will reach the court because even if the victims of grave abuses know about the existence of the court, they (and even if any NGO supporting them) will probably lack standing before the court. For many victims, this will merely compound a pre-existing situation of powerlessness and their inability or disinclination to submit their persons to the ordeal of litigation.<sup>61</sup>

The next subsection will appraise the prospects of the merged court in its desire to promote and protect human rights in the continent.

### Part III

#### 4. Prospects of the Merged Court

With the establishment of African Court Justice and Human Rights 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

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confronting both of Africa's new continental human rights courts: while African states are clearly willing to create pan-African institutions designed to safeguard human rights, they may lack the political will to submit themselves to true scrutiny by these bodies, as battles over access suggest, or to reform their practices when these are found to have violated human rights. Of course this problem is not unique to Africa, as demonstrated by the challenge of securing compliance by states such as Russia and Turkey with judgments of the European Court of Human Rights". (See generally., Frans Viljoen and Lirette Louw, "State compliance with the recommendations of the African Commission on Human and Peoples' Rights 1994-2004", *American Journal of International Law* Vol. 101:1 (2007), 1-34).

<sup>61</sup>Sonya Sceats., *above n.17*.

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human rights violations, there is at least a glimmer of hope that African States have taken the universality concept seriously.<sup>62</sup>

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;<sup>63</sup> 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.<sup>64</sup> The Inter- American system operates both Human Rights Court and Human Rights Commission which is almost *pari materia* with the African human rights system though with a General section. It is, therefore, gratifying to say African States have adhered to the universal norm of establishing efficient human rights judiciaries at regional level to address continental human rights problems.

A. *Rendering Likely Enforceable Judicial Decisions*: Even though the African commission still retains its important role in promoting human rights in Africa and will continue to monitor state compliance with the African Charter via routine reporting and other processes including special rapporteurs. The fact is that the orders of the commission lacks enforceability as they are not judicial decisions, the merged Court will provide a veritable opportunity for the promotion

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<sup>62</sup>Timothy F. Yerima, "New Trends in the African Human Rights System: Prospects of African Regional Human Rights Courts", *Global Journal of Human Social Science*, Volume 12. Issue 2. Version 1.0, January, 2012 at 72-73.

<sup>63</sup>Sonya Sceats., *above n.17*.

<sup>64</sup>See Juliane K., "The Protection of Fundamental Rights under German and International Law", 8 *African Journal of Inter'l & Comp. Law*, 1996, at 360.

and protection of human rights in Africa since its decision will be binding on the parties before the court.

- B. *Wider Judicial Jurisdiction*: The fact that the jurisdiction of the court has been widened by virtue of Article 28 of the merger protocol means that the court will have the opportunity to deal with matters not just related to the interpretation of the African Charter on Human and Peoples Right but other international human rights treaties that would have been entered into by member states. Though this status is not unrelated with its dual mandate achieved from the merger protocol in which the structure of the new Court was defined in the Statute under Article 16 to have two Sections: a General Affairs Section and a Human Rights Section.

According to Michelo Hansungulu, “a unique feature is the inclusion of “All acts, decisions, regulations and directives of the organs of the Union”. Another singular facet is the inclusion of “agreements State Parties may conclude among themselves” as long as they confer jurisdiction on the Court. Bilateral agreements between states parties may probably now be amenable to the Court’s jurisdiction. With regard to “or any other legal instrument relating to human rights ratified by the States Parties concerned”, the intention is to reach out to those treaties not specifically mentioned in the Statute and to treaties and instruments yet to be adopted.”<sup>65</sup>

- C. *Development of an African Human Rights Jurisprudence*: According to Yerima, 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

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<sup>65</sup> See also Michelo Hansungule, *above n. 6*, at 244.



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rights protection in any region requires regional human rights jurisprudence.<sup>66</sup> 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.”<sup>67</sup> 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;<sup>68</sup> “and that civil and political rights cannot be dissociated from economic, social and cultural rights.” Although, the interpretation of socio-economic rights would definitely be one of the serious challenges for merged African Court, ultimately, it would aid in the development of African human rights jurisprudence.<sup>69</sup>

Again the fact that the jurisdiction of the merged court is based on a large range of legal instruments, which complement the African Charter and fill in possible gaps were there exist constitutes a real move forward vis-à-vis the two others regional Courts. An applicant can submit a case before the merged African Court by invoking the violation of a Human Rights provision part of a convention ratified by the concerned State<sup>70</sup>, which guarantee a larger scale of rights than

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<sup>66</sup> Timothy F. Yerima, *above n. 62*, at 73.

<sup>67</sup> V. Frans, “Some Arguments in Favour of and against an African Court on Human and Peoples’ Rights”, *The African Society of Inter’l & Comp. Law Proc.* 10<sup>th</sup> Ann. Conf. 1998, at 27.

<sup>68</sup> See Udombana N. “The Role of Courts in making Economic, Social and Cultural Rights Justiciable in Nigeria” *Fountain Quarterly Law Journal*, August 2004, at 160- 174; Fon Coomas (ed.), *Justiciability of Economic and Social Rights: An Experience from Domestic Systems* (Belgium: Enter Sentia Publishers), 2006.

<sup>69</sup> Timothy F. Yerima, *above n. 62*.

<sup>70</sup> The OAU Convention governing the specific aspects of refugee problems in Africa: adopted on 10 September 1969, entered into force on 26 June 1974, The African Charter on the Rights and Welfare of the Child: adopted in July 1990, entered into force on 29 November 1999, the OAU Convention on the prevention and combating of terrorism: adopted on 14 July, 1999, entered into force on 15 January 2004, The Convention on the Prevention and Punishment of Genocide, 1948, the International Covenant on Civil and

those of the Charter, notably in the field of the protection of women's rights or economic and social rights.<sup>71</sup>

D. *Publicity and Transparency*: The Protocol of the merged court provides that it shall conduct its proceedings in public unless the Court, on its own motion or upon application by the parties, decides that the session shall be closed and this will be in exceptional circumstances.<sup>72</sup> The merged court also has the mandate to explain the reasoning behind its judgments, the Parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the Member States and the Commission.<sup>73</sup> There is also the opportunity to review same when the need arises and the court may also request prior compliance with the terms of the judgment before it admits proceedings in revision.<sup>74</sup> By reporting its activity openly, the Court is more likely to attract media attention and exposure as well as generate more interest and awareness<sup>75</sup> thereby heralding a new era of transparency and accountability in prosecuting states actors who operate with impunity. It is crucial to reiterate that under the African Commission, measures taken with respect to procedures of the Commission remain confidential until such time as the Assembly of

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Political Rights, 1966, the International Covenant on Economic, Social and Cultural Rights, 1966, the International Convention on the Elimination of all Forms of Racial Discrimination, 1965, the Convention on the Elimination of all Forms of Discrimination against Women, 1979, the Convention against Torture and Other Cruel, Inhuman and Degrading Punishment and Treatment, 1984, and the International Convention on the Rights of the Child, 1989.

<sup>71</sup>See Sidiki Kaba, "10 keys to Understand and Use the African Court on Human and Peoples' Rights, A User's Guide for Victims of Human Rights Violations in Africa and Human Rights Defenders", FIDH, November, 2004 at 37.

<sup>72</sup>Protocol on the Statute of the African Court of Justice and Human Rights, *above n. 9*. Article 39

<sup>73</sup>*Ibid.*, Article 43(2) and (5)

<sup>74</sup>*Ibid.*, Article 48(3)

<sup>75</sup> Yemi Akinseye-George, "New Trends in African Human Rights Law: Prospects of an African Court of Human Rights", 10 *University of Miami International and Comparative Law Review* 159, 172 (2002).

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Heads of State and Government decides.<sup>76</sup> Imperatively, the fear of public condemnation will ideally deter future human rights abuses by states actors. The Protocol of the merged court further provides that if “the Court finds that there has been a violation of human or peoples’ rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.”<sup>77</sup>

Yerima captured this scenario in the following manner; “The Courts would conduct proceedings in open Court, though secret proceedings could be held in exceptional cases; judgments of the Courts and reasons for the judgments of the African Court on Human & Peoples’ Rights within the African Union” must be read in an open Court ; and there is room for dissenting opinion. 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. This procedure, no doubt, will attract more publicity; it will give room to assess the role of ... the Merged Court in the development of the jurisprudence of human and peoples’ rights, which under the Commission system, is considered, “a herculean task”. The activities of the Court being in secret would definitely attract media attention to expose States that embark on flagrant violation of human rights. The significance of such publication cannot be underestimated: it is “a particularly effective means of putting pressure on government” or a “potent weapons against human rights denials” and it is also a device to “mark out the violator.”<sup>78</sup>

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<sup>76</sup>African (Banjul) Charter on Human and Peoples’ Rights, adopted June 27, 1981, O.A.U Doc CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October, 1986. Article 59 (1).

<sup>77</sup>Protocol on the Statute of the African Court of Justice and Human Rights, *above n. 9*. Articles 46 and 45 respectively.

<sup>78</sup>Timothy F. Yerima *above n. 62*.

E. *Establishing Judicial Precedents for Sub-Regional Judiciaries, Quasi-Judicial Commissions, and Domestic Courts*: The decisions emerging from the African Court of Justice and Human rights in the near future will serve as a source of judicial precedents for other regional human rights judiciaries addressing human rights problems and treaty based offences or violations considering the fact the double barrel African Court will develop Jurisprudence from both sections of the court. The decisions will serve as precedents for other regional courts and quasi-judicial commissions in Africa and elsewhere, while same decisions will serve as persuasive precedents for domestic courts. Furthermore, with established principles of *stare decisis* on these decisions, there will be uniformity in regional and domestic legislations in Africa. This is important because the provisions of African Charter have been incorporated in the municipal laws of some African countries that practiced dualism system;<sup>79</sup> 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.”<sup>80</sup>

It is pertinent to state that there are certain areas of law 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

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<sup>79</sup> 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, LFN 2004).

<sup>80</sup>See *General; Sani Abacha & 3 Ors. v. Chief Gani Fawehinmi* (2000) 2 SCNQR 489 at 496 per M.E. Ogundore JSC at 514. See also the decision in *Jonah Gbemre v. Shell Petroleum Development Corporation of Nigeria Ltd and Or.*, (Suit No FHC/B/CS/53/05, Federal High Court, Benin Judicial Division, 14 November, 2005). See *Communication 225/98 CLO v. Nigeria*, See also *Communication 60/91 Constitutional Rights Project v. Nigeria.*, see also *Communication 155/96 - Social and Economic Rights Action Center v. Nigeria.*

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up to the cases decided by 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 checkmate the violating States.<sup>81</sup>

- F. *Greater Judicial Independence from the A.U Assembly*: The Protocol provides several assurances that the judges of the Court will be neutral decision-makers. First, the Court itself decides which communications to consider. This stands in contrast to the Charter in that the required communications previously had to be submitted to both the secretary general of the African Union (AU) and to the chairman of the Commission. Second, the Protocol requires the recusal of any judge who: (a) is a national of any state party to the case to be heard; or (b) has previously taken part in the case in any capacity. Finally, the Court will establish its own rules of procedure setting forth a list of activities in which judges may not engage due to potential incompatibility with judicial duties. The judges' independent judgments as well as the Court's independence from the Assembly in deciding which cases to hear are potentials that could be make the merged courts promising for litigating human rights abuses by African States.<sup>82</sup>

### **5. Conclusion**

Considering the expanded jurisdiction of the African Court of Justice and Human Rights with the possession of a human rights section and a general affairs section, the court has the prospect of addressing various legal issues that will beset the continent in the near future in terms of violations of human rights and general international law applicable to states that are parties to the protocol to the merged court. It is not out of place that the

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<sup>81</sup>Timothy F. Yerima, *above n.62*.

<sup>82</sup>See Carolyn Scanlon Martorana, "The New African Union: Will It Promote Enforcement of the Decisions of the African Court of Human and Peoples' Rights?" *The Geo. Wash. Int'l L. Rev.* Vol. 40, 2008, at. 599-601.

limitations placed on individuals and NGOs from bringing direct application before the court except that such states have made a declaration to that effect is a setback for the merged court and a great hurdle for quick realisation of justice against impunity by African Leaders or states actors. It is still doubtful the relationship, cooperation and delimitation of competences between merged court and other judicial bodies of regional and sub-regional communities will need to develop over time. The hope remains that the amalgamation of the two courts of the AU will lend new impetus to the further development of a supranational court system in Africa.<sup>83</sup> Though, it is not unexpected that one of the greatest challenges that will face the merged court is how to deal with issues of diversity in the African continent. In contrast to its sister courts in Europe and the Americas, the African Court of Justice and Human Rights will face the difficult task of dealing with a considerably more heterogeneous group of members.<sup>84</sup>

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<sup>83</sup>Andreas Zimmermann and Jelena Bäumlner, *above n.10*, at. 53.

<sup>84</sup>*Ibid.*, at. 52.