

Impact of the African court of justice on the promotion of human rights

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Abstract : On the African continent, the promotion and protection of human rights is provided for in Article 3(e) and (h) of Constitutive Act of African Union (AU) as adopted on 11 July 2000 and entered into force on 26 May 2001. Article 5(1)(d) of the Constitutive Act of the African Union creates the African Court of Justice as an organ of the African Union. Article 28 of the Protocol on the Statute of the African Court of Justice And Human Rights of 1th July 2008 confers jurisdiction on the Court which also include jurisdiction on human rights matters as provided in the African Charter on Human Rights. In this paper, we shall analyse the extent to which different organs of the African Union, especially the African Court of Justice and Human Rights (ACJHR) has contributed to the promotion of human rights on the African continent during its first decade.

Keywords : human rights, ACJHR, ACHPR

Résumé : Sur le continent africain, la promotion et la protection des droits de l'homme sont prévues à l'article 3 (e) et (h) de l'Acte constitutif de l'Union africaine (UA) adopté le 11 juillet 2000 et entré en vigueur le 26 mai 2001. L'article 5(1)(d) de l'Acte constitutif de l'Union africaine crée la Cour africaine de justice en tant qu'organe de l'Union africaine. L'article 28 du Protocole portant Statut de la Cour africaine de justice et des droits de l'homme du 1er juillet 2008 confère à la Cour une compétence qui inclut également la compétence en matière de droits de l'homme telle que prévue dans la Charte africaine des droits de l'homme. Dans cet article, nous analyserons dans quelle mesure les différents organes de l'Union africaine, en particulier la Cour africaine de justice et des droits de l'homme (CAJDH), a contribué à la promotion des droits de l'homme sur le continent africain au cours de sa première décennie.

Mots clés : droits de l'homme ; CAJDH ; CADHP

Classification JEL : K 40

« The African Union should not abandon its promise to fight impunity.
Unless indicted war criminals are held to account, others tempted to emulate them will not be deterred »

Koffi Annan « ICC Represents hope for victims of atrocities »
in New African. Kent, United Kingdom : IC Publications (2009)

1. Introduction

Human rights are essential prerogatives which underscore the existence of every human being. To deny a person his or her rights is to deny their human nature. The respect and promotion of human rights is one of the crucial conditions for economic, social and political development. Hence, from different declarations of human and peoples' rights in history to the Universal Declaration of Human Rights of 10 December 1948, the major aim is the promotion of human welfare.¹ Although efforts have been made in the last century to promote human rights, there still remains a lot to be done around the globe.

On the African continent, the promotion and protection of human rights is provided for in Article 3(e) and (h) of Constitutive Act of African Union (AU) as adopted on 11 July 2000 and entered into force on 26 May 2001. In this paper, we shall analyse the extent to which different organs of the African Union, especially the African Court of Justice and Human Rights (ACJHR) have contributed to the promotion of human rights on the African continent in the last decade.

2. Historical background of the ACJHR

The establishment of the African Union on 11 July 2000 in Lomé is a notable event in Africa's recent history. The aim of this regional organisation, which came from the Organisation of African Unity (OAU) was to address, with vitality, different problems which plagued the continent which amongst others includes neocolonialism, malgovernance, war, poverty, impunity, corruption, gross and systematic violations of human rights. The Constitutive Act of the AU in Article 18(1) established the ACJ while Article 5(1)(d) recognises the ACJ as one of the organs of AU and this is restated in Article 2(1) of the Statute of the ACJ. However, to understand the ACJ, it is imperative to examine the OAU Charter of 25 May 1963 as regards the promotion of human rights.

Article 2 (1) (e) of the OAU Charter provides for the promotion of international cooperation as regards human rights. However, it was not clear how this would work because there was no organ of the OAU expressly responsible for the promotion of human rights in the Charter, although other matters have been provided for by different institutions and specialised commissions². Unlike the African Union, which focuses on economic aspects, justice and human rights, the major aim of the Charter is to promote the political independence, territorial integrity, and sovereignty of African countries³.

However, during the OAU period, some efforts were made to promote and protect human rights. These, for instance, include the adoption of the African Charter on Human and Peoples Rights on 27 June 1981; the creation of the African Commission on Human and Peoples' Rights on 2 November 1987; and the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights on 10 June 1998.⁴ It must be recognised that, although there were different attempts to promote human and peoples' rights on the African continent, during OAU(1963-2000), their scope and efficiency remained very weak regarding different repetitive, gross and systematic violations of humans rights and international humanitarian law which have been witnessed different African countries such as Burundi, the

¹ Such as French Declaration of the Rights of Man and the Citizen of 1789, American Declaration of the Rights and Duties of Man of 1948, See also M Bedjaoui (dir) *International Law Achievements and Prospects* Dordrecht: Martinus Nijhoff Publishers (1991)11-13

² In Fact Article VII provided for an Assembly of Heads of State and Government; a Council of Ministers; a General Secretariat; a Commission of Mediation, Conciliation and Arbitration and in Article XX it has been provided notably Economic and Social Commission; Educational, Scientific, Cultural and Health Commission; Defence Commission.

³ See Article 3 (c)(i)(j)(k)(l) and Article 5 (h)(i); Article 5(d); Article 4 (h) – (o) of Constitue Act of AU

⁴ This Protocol adopted on 9 June 1998 in Ouagadougou, Burkina Faso and had entered into force on 25 January 2004; See also S Bula-Bula 'Les Fondements de l'Union Africaine'(2001) Available at <http://sbulabula.wordpress.com/publications/les-fondements-de-lunion-africaine/>(accessed 10 September 2011).

Democratic Republic of Congo, Equatorial Guinea, Uganda, Sierra Leone, the Central African Republic, South Africa, Sudan, Rwanda and Zimbabwe, etc. It should also be noted that most of these odious crimes were committed with total impunity. This led to a negative perception on the capability of the OAU to deal with human rights and to fight against impunity in Africa.

For instance, Kabange made the following observation: The OAU was preoccupied with more pressing issues such as unity, non-interference in internal affairs and liberation. Practically, the OAU has served as a talking shop for African states, but has displayed considerable reluctance in intervening in systematic human rights abuses by various regimes in the region¹.

A similar criticism was made by Max who argued that Africa's leaders in the fights for independence led their newly liberated nations into totalitarianism with an ineffectual OAU doing little to put a stop to this African malaise².

A further example of this comes from Adekeye who noted that Africa's post-independence leaders also contributed to conflicts on their own continent³.

Numerous factors have favoured these crimes. One such factor was the Cold War (1946-1991) of which Africa was a theatre of war⁴. Different conflicts on the continent were supported by the then two super powers (USA and Soviet Union), and several dictators flourished which in turn resulted in the mismanagement of states' resources, impoverishment of the people and grave abuse of human rights⁵. The OAU did little to mitigate these occurrences and this was unsatisfactory.

However, on 10 June 1998, the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights was adopted. A few weeks later, on 17 July 1998, the Rome convention on the establishment of the International Criminal Court (ICC) was adopted to fight egregious crimes committed worldwide⁶. This Court has jurisdiction over serious crimes committed in different countries including African countries. Its aim is to protect present and future generations from atrocities which concern the international community as a whole⁷. Unfortunately, both judicial organs did not function in the OAU era because the protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights entered into force on 25 January 2004 while the ICC statute entered into force two years earlier on 1 July 2002⁸.

The era of the AU, which began in 2000, seems to be endowed with two important judicial tools which, if well-harnessed, may allow the AU to correct some failures of its predecessor and change the face of Africa by introducing new paradigms in the application of international justice on the African continent. It may be a serious shift from an Africa characterised by cruelty, the perpetration of aggression, war crimes, genocide, and crimes against humanity to a safer new Africa where justice prevails⁹. Therefore, the fight against impunity is one step forward in the construction of a better Africa. However, the recent actions of the ICC in Africa, notably in Sudan in 2005¹⁰ and in

¹ C J Kabange Nkongolo 'Protection of Human rights in Africa : African Human Rights in Comparative Perspective' Journal Officiel de la République démocratique du Congo (2011). Available at <http://www.leganet.cd/Doctrine.textes/Droitpublic/DH/kabange.II.pdf> (accessed 10 September 2011)

² M Du Plessis. The African Union. In J Dugard (ed), *International law A South African Perspective* Lansdowne (2005).

³ Adekeye Adebajo *The Curse of Berlin Africa After the Cold War*. South Africa (2010) 25.

⁴ Ibid.

⁵ See, for instance, the Regime of Jean Bedel Bokassa in Republic of Central Africa (1966 and 1979), Mobutu in Zaire (1965-1991) Idi Amin Dada in Uganda (1971-1979) Macias Nguema quatorial Guinea (1968-1979) etc.

⁶ L Moreno- Ocampo, The International Criminal Court : Seeking Global Justice' (2007-2008) 40 (1&2) in CASE W RES. J. INT'LL 215-216. <http://www.heinonline.org/HOL/Pag> Available at [e?handle=hein.journals/cwrint40&id=1&size=2&collection=journals&index=journals/cwrint](http://www.heinonline.org/HOL/Pag?handle=hein.journals/cwrint40&id=1&size=2&collection=journals&index=journals/cwrint) (accessed 21 January 2011).

⁷ See Preamble of Rome Statute of 17 July 1998.

⁸ W A Schabas *An introduction to the International Criminal Court* 2 ed (2004)19-21.

⁹ Adekeye Adebajo *The Curse of Berlin Africa After the Cold War*.

¹⁰ See the United Nations Security Council, Resolution 1593 (2005), adopted by the Security Council on 31 March 2005, Available at <http://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf> (accessed 10 September 2011).

Libya in 2011¹, suggest that the relations between these organs must be effectively structured to avoid possible political conflicts which may handicap the actions of these judicial organs in the fight against impunity on the continent because of UN Security Council politicization².

3. Jurisdiction of the ACJ

3.1. The jurisdiction of African Court of Justice and Human Rights

Article 18 of the Constitutive Act, the statute, composition and functions of the ACJHR shall be defined in a protocol relating thereto. On 11 July 2003, the Assembly of the Union adopted the protocol of the ACJHR. However, due to the fact that the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights also entered into force on 25 January 2004, there was a necessity to harmonise the jurisdiction of both African judicial organs. As a result, the Protocol on the Statute of the African Court of Justice and Human Rights, which merged both the African Court on Human and Peoples' Rights and African Court of Justice into one court referred to as "The African Court of Justice and Human Rights" was adopted on 1 July 2008 in Sharm El-Sheikh Egypt³.

Article 28 of the Protocol on the Statute of the African Court of Justice and Human Rights provides that the ACJ has jurisdiction over all cases and all legal disputes regarding inter alia "the interpretation and application of the Constitutive Act", "the interpretation and the application of the African Charter on Human and Peoples' Rights", "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 relating to rights, ratified by the States Parties concerned. In addition, the court, when requested, also has the power to render advisory opinions to Member States, the AU 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.

From the above discussion, one can understand that the court has jurisdiction over two broad matters, i.e. disputes related to the interpretation of laws and human rights matters. As regards the court's jurisdiction over interpretation, only the following few entities are competent to file a case before the Court: State Parties to the Protocol, "the 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"⁴. As regards issues of human rights, including any violation of rights provided in the aforementioned different instruments that deal with the promotion and protection of Human Rights in Africa, several entities are entitled to submit a case before the Court including State Parties to the Protocol; the African Commission on Human and Peoples' Rights; the African Committee of Experts

¹ See the United Nations Security Council Resolution 1970 (2011), adopted by the Security Council on 26 February 2011 Available at <http://www.icc-cpi.int/NR/rdonlyres/081A9013-B03D-4859-9D61-5D0B0F2F5EFA/0/1970Eng.pdf> (accessed 11 September 2011).

² D Sarooshi, *The Peace and Justice Paradox : The International Criminal Court and the UN Security Council*. In D McGoldrick (ed) *The Permanent International Criminal Court Legal and Policy Issues* Oregon (2004) 95-97; Security Council referral confirms ICC as a critical international institution(2 March 2011) Available at <http://mg.co.za/article/2011-03-02-security-council-referral-confirms-icc-as-a-critical-international-institution> (accessed 07 May 2011); A Louw 'Africa Should Work With, Not Against, the ICC in Resolving the Libyan Crisis', 21 July 2011. Available at http://www.iss.co.za/iss_today.php?ID=1323(accessed 27 July 2011).

³ See Article 3 of the Protocol on the Statute of the African Court of Justice and human rights of 1 July 2008. Available at <http://www.africa-union.org/root/au/documents/treaties/text/Protocol%20on%20the%20Merged%20Court%20-%20EN.pdf> (accessed 27 September 2011).

⁴ Article 29(1)(a) – (c) of the Protocol.

on the Rights and Welfare of the Child; the African Intergovernmental Organizations accredited to the Union or its organs, 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 Protocol¹.

Article 30(f) of the Statute of the ACJHR grants direct access to the court to individuals or Non-Governmental Organizations subject to the provisions of Article 8 (3) of the Protocol on the Statute of the African Court of Justice and Human Rights which is to the effect that a member state may make a declaration accepting the competence of the court to handle cases relating to individuals and NGOs involving a State which has not made a declaration of acceptance. This is a commendable provision of the Protocol as it allows individuals and NGOs access to the ACJHR without the need to wait for a State, against whom a complaint has been made, to make a declaration accepting the competence of the court to receive cases under Article 30(f). This is a radical change from the provisions of Article 34 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, which provides in Article 34(6) that the ACHPR can only exercise jurisdiction on matters relating to NGOs as provided in Article 5(3), only if such a state makes a declaration accepting the jurisdiction of the court. In essence, where there is no declaration of acceptance of jurisdiction by a state, the ACHPR shall lack jurisdiction. The effect of this provision on the attainment of justice and protection of human rights shall be discussed below. It is, however, necessary to point out that it is arguable that the provisions of Article 8(3) of the Protocol on the Statute of the African Court of Justice and Human Rights is against the principle of state consent as the member state need not consent under Article 8(3) before the ACHJR can exercise jurisdiction². One possible way of addressing this issue is to expunge the provisions relating to the declaration of acceptance of jurisdiction so as to allow the Court to assume jurisdiction automatically.

It is noteworthy that the ACJHR has not become operational due to the fact that the Protocol on the Statute of the African Court of Justice and Human Rights is yet to enter into force. Article 9 of the protocol provides that the protocol shall enter into force thirty days after the deposit of the instruments of ratification by fifteen member states. So far, 22 of the 53 members of the AU have signed the Protocol, and three have actually ratified and deposited the Ratification instrument³. This situation shows the extent of Africa's commitment to human rights which is discouraging. As a result, there is a need for the African justice system to add impetus to the fight against impunity to reduce its negativity in the African arena. In fact, one of the important functions of a criminal justice system concerns its deterrent value. In other words, prosecution can enhance a society's ability to deter future violations of human rights⁴. The absence of prosecution encourages the commission of mass violations of human rights and would obviously not contribute to the emergence of rule of law and democracy in Africa. The renaissance of the African continent is dependent on the establishment of a solid system of justice which assures equality and accountability of all individuals.

¹ Article 30 (a) – (f) of the Protocol.

²It may arise relating to the State Sovereignty. See I Brownlie *Principles of Public International law* 7 Ed 289(2008) Oxford : Oxford University Press ; Antonio Cassese *International Law* 2 ed *(2005) Oxford: Oxford University Press 48-49.

³States which have signed the Protocol includes: Algeria (31 January 2009); Benin (14 January 2009); Burkina Faso (21 January 2009); Chad (22 January 2009) ; Côte d'Ivoire(11 June 2009);Congo (28 June 2009); Democratic Rep. of Congo; (02 February 2010) ; Gabon (19 December 2008)Gambia (02 February 2009); Ghana(28 June 2009); Guinea (26 November 2008); Libya (14 May 2009);Mali(24 December 2008) Nigeria (22 December 2008); Niger (28 January 2009); Sahrawi Arab Democratic Republic (25 July 2010); Senegal (15 December 2008) ; Sierra Leone (14 January 2009); Sao Tome & Principe(01 February 2010); Tanzania (05 January 2009); Togo (12 February 2009); Zambia (31 January 2010). Three role models African State which have ratified the Protocol and deposited the instrument of ratification are: Burkina Faso (23 June 2010 and 04 August 2010); Libya (06 May 2009 and 17 June 2009) ; Mali 13 August 2009 and 27 August 2009)

⁴ D Kuwali, From promise to practice: towards universal jurisdiction to deter commission of mass atrocities in Africa, *Africa Security Review* 2010 vol 19 n°1 51 (48-61).

In view of the fact that the ACJHR is not operational at present, it is imperative to consider other judicial mechanisms which promote and protect human rights on the African continent while awaiting the establishment of the ACJHR. The African Court on Human and Peoples' Rights (ACPHR) was established in 1998 and became operational on 1 January 2004. The main responsibility of the ACPHR was the enforcement and protection of human rights before the establishment of the ACJ¹. However, the ACPHR was merged with the ACJ by virtue of the protocol on the Statute of the African Court of Justice and Human Rights which gave birth to the African Court of Justice and Human rights (ACJHR). In its transitional provisions, specifically in Articles 4, the protocol provides that the term of office of the judges of the African Court on Human and Peoples' Rights shall end following the election of the Judges of the ACJHR. Article 5 further provides that cases pending before the African Court on Human and Peoples' Rights that have not been concluded before the entry into force of the protocol merging both courts shall be handled by the human rights section of the ACJHR. Below are some of the decided cases of the ACPHR before its merger with the ACJHR:

1. *Association des juristes d'Afrique pour la bonne gouvernance vs République de Côte d'Ivoire* 006/2011.

In this case, the association sued the Republic of Côte d'Ivoire for violation of articles 2, 4, 5 and 6 of African Charter of Human and Peoples' Rights. In the decision of 16 June 2011, the Court held that it has no jurisdiction over the case as the association does not have an observer status before the Human Rights Commission as provided in Article 5(3) of the protocol on the establishment of the ACHPR. The court referred the case to the African Commission on Human and Peoples' Rights².

2. *Daniel Amare and Mulugeta Amare vs Republic of Mozambique and Mozambique Airlines* 005/2011.

In this case, two individuals sued Mozambique Airlines and Immigrations officials of the Republic of Mozambique for violation of International conventions

In its decision of 16 June 2011, the Court declared that it had no jurisdiction in conformity of Articles 5(3) and 34(6) of the Protocol which provide that the state shall have made a declaration to allow jurisdiction of the Court in a case filed by an individual. Moreover, the court noted *in limine litis* that these individuals had not exhausted local remedies³. Therefore, it decided to transfer the case to the African Commission on Human and Peoples' Rights⁴.

3. *African Commission on Human and Peoples' Rights vs The Great Socialist Libyan People's Arab Jamahiriya* 004/2011.

This case is still at the procedural stage and in its decision of 16 June 2011, the Court decided to extend the deadline to the respondent (Libya) considering that it has inherent power to extend time in the interest of justice.⁵

¹ See Article 3 of the Protocol to the African charter on Human and Peoples' Rights on the Establishment of an African Court of Human and People's Rights. Available at http://www.africa-union.org/rule_prot/africancourt-humanrights.pdf (accessed 28 September 2011).

² *Association des Juristes c. Republic Cote d'Ivoire* 006/2011 of 16 June 2011 (para 11) Available at http://www.african-court.org/fileadmin/documents/Court/Latest_Judgments/English/Ivory_Coast.pdf on 15 September 2011.

³ *Daniel Amare and Mulugeta Amare c. Republic of Mozambique and Mozambique Airlines* 005/ 2011 of 16 June 2011 para. 1, Available at http://www.african-court.org/fileadmin/documents/Court/Latest_Judgments/English/mozambique.pdf (accessed 15 September 2011).

⁴ *Ibid* para. 7 & 10.

⁵ *African Commission on Human and Peoples Rights v The Great Socialist Libyan People's Arab Jamahiriya* 004/2011 of 16 June 2011 para. 9,10 Available at http://www.african-court.org/fileadmin/documents/Court/Latest_Judgments/English/libya.pdf (accessed 13 September 2011); See also order for provisional measures African com VS Libya of 25 March 2011 (where the Court called Libya

4. *Soufiane Ababou vs Republique Algerienne Democratique et populaire* 002/2011

In this case, Mr Soufiane Ababou accused the Republic of Algeria of having incorporated him by force into the Armed Forces of the country. In its decision of 16 June 2011, the Court declared that it has no jurisdiction in accordance with Articles 5(3) and 34(6) of the protocol which provided that the state in question shall have made a declaration to the jurisdiction of the court¹. As a result, the court referred the case to the Commission on Human and Peoples' Rights' as was the case of *Daniel Amare*.²

5. *Michelot Yogogombaye V Republic of Senegal* 001/2008l.

In this case, the applicant asked the court to suspend the AU mandate of July 2006 allowing the Republic of Senegal to institute a proceeding with a view to trying and indicting Hissein Habré,³ and to order the states of Chad and Senegal to institute 'a national " Truth , Justice , Reparation and Reconciliations" Commission to look into all the crimes committed in Chad between 1962 and 2008 and thereby resolve in an African manner the problematic case of the former Chadian head of state Hissein Habré following the South African model that is derived from the philosophical concept of "Ubuntu"⁴. In its decision of 15 December 2009, the court ruled that it had no jurisdiction due to the fact that Senegal had not made a declaration accepting the jurisdiction of the Court by virtue of Article 34(6) of the protocol⁵.

As can be seen from the above cases, a perennial problem is the declaration of acceptance of jurisdiction as stated under Article 34(6) of the ACHPR protocol; a similar provision is contained in Article 8(3) of ACJHR protocol. As a result, the jurisdictional capacity of these courts is limited and human rights violations may go unchecked. Two possible ways to address the problem may be the following: The first is to encourage member states to make declarations accepting the jurisdiction of the court. This may be achieved by granting some form of economic incentives as regards trade with such members by other member states. The technicalities and modality of such an arrangement may be agreed upon by member states. This position can be challenged on the grounds that there is no nexus between the promotion of human rights and economic incentives. However, as mentioned earlier, since the promotion and enforcement of human rights is an important precondition for economic development, it would not be unacceptable to recommend economic incentives for the promotion of human rights. Another way to overcome the challenge of declaration of acceptance of jurisdiction is to amend Article 8(3) of the protocol of the ACJHR to make the jurisdiction of the court automatic upon signing of the protocol by member states. However, this approach may be regarded as coercion because jurisdiction should be a voluntary act.

The court has the following cases pending before it:

to immediately refrain from any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the Charter or of other international human rights instruments to which it is a party par(25(1); Available at http://www.african-court.org/fileadmin/documents/Court/Cases/Order_for_Provisinal_Measures_against_Libya.PDF - (accessed 17 Septemeber 2011).

¹ *Case Soufiane Ababou C. République Algérienne Démocratique et populaire* 002/2011 of 16 June 2011 parga 7, 10 Available at http://www.african-court.org/fileadmin/documents/Court/Latest_Judgments/English/algeria.pdf

² Ibid para 1.

³ *Michelot Yogogombaye V Republic of Senegal* 001/2008 of 15 December 2009 para 9 Available at http://www.african-court.org/fileadmin/documents/Court/Latest_Judgments/English/JUDGMENT_MICHELOT_YOGOGOM-BAYE_VS. REPUBLIC OF SENEGAL_1_.pdf (accessed 18 September 2011).

⁴ Ibid para 10.

⁵ Ibid para 37 and 46.

1. The first concerns the case of *Femi Falana vs African Union* (Application Number 001/2011 of 24 August 2011), in which the applicant sought the suppression of Article 34(6) of the African Charter on Human and peoples' Rights¹.

2. Another such case is that of *Urban Mkandawire vs The Republic of Malawi* (Application Number 003/2011 of 24 August 2011), in which the applicant requested to be reinstated to the University of Malawi as he thinks he was unlawfully removed from his position in the University of Malawi in December 1999².

3. In the case of *Youssef Abadou vs Kingdom of Morocco* (Application number 007/2011 of 24 August 2011), the applicant accused Morocco of refusing to issue him a National Identity Card, notwithstanding his several requests³.

4. In another case involving *Tanganyika Law Society and Legal and Human Rights Centre vs The United Republic of Tanzania*, (Application Number 0009/2011 of 24 August 2011), the applicant accused Tanzania of violating Articles 2 and 13 (1) of the African Charter on Human and Peoples' Rights and Articles 3 and 25 of the International Covenant on Civil and Political Rights⁴.

5. In *Professor Efoua Mbozo'o vs Pan African Parliament's* case, (Application Number 010/2011 of 6 June 2011), the applicant sought the annulment of the decision of the Pan African Parliament because it failed to renew his contract and asked for reparations due to the unlawful termination of contract⁵.

6. In the case of *Reverend Christopher Mtikila vs The United Republic of Tanzania* (Application Number 011/2011 of 10 June 2011), the applicant accused the Tanzanian government of violating "the rule of law by initiating a constitutional review and subsequent amendments to settle an issue pending before the Courts of Tanzania" act which, according to him, violated Article 2,10,13(1) of the African Charter on Human and Peoples' Rights⁶.

7. There is also the case of *Ekollo Moundi Alexandre vs Cameroon and Nigeria* (Application Number 008/2011) seeking an advisory opinion from Mali relating to the "omissions in the agreement between Mali and the United Nations, regarding the Status of prisoners who have served their prison terms⁷.

From the above discussion, we can see that there have been only five decided cases before the court with seven pending cases and one pending advisory opinion. This number can be said to be too low considering the predominance of human rights violations on the continent. Furthermore, of the five decisions which have been rendered, none has actually allowed the applicant to seek redress as a result of limitation of Court's jurisdiction by virtue of Article 34(6). It is quite worrisome that States seem to be reluctant to file cases before the Courts including even the African Commission on Human and Peoples' Rights to which all the decided cases were referred as they instituted only one case in

¹ http://www.african-court.org/fileadmin/documents/Court/Cases/casae_summaries/application_001_summary_for_the_website_-_without_tracked_changes_august_2011_2_.pdf (accessed on 19 September 2011).

² Available at http://www.african-court.org/fileadmin/documents/Court/Cases/casae_summaries/Application_003-summary_for_the_website_-_updated_-_august_24.pdf (accessed 20 September 2011).

³ Available at http://www.african-court.org/fileadmin/documents/Court/Cases/casae_summaries/Application_007_-_summary_-_august_2011.pdf (accessed 18 September 2011).

⁴ http://www.african-court.org/fileadmin/documents/Court/Cases/casae_summaries/Application_No_009_-_summary_for_the_website_-_AUGUST_2011.pdf accessed 16 September 2011.

⁵ Available at http://www.african-court.org/fileadmin/documents/Court/Cases/casae_summaries/Application_No_010.pdf (accessed 16 September 2011).

⁶ Available at http://www.african-court.org/fileadmin/documents/Court/Cases/casae_summaries/application_011_-_summary_for_the_website_-_august_2011.pdf (accessed 16 September 2011).

⁷ Request for advisory opinion From the Republic of Mali of 12 May 2011; Available at http://www.african-court.org/fileadmin/documents/Court/Cases/casae_summaries/summary_of_request_for_advisory_opinion_for_the_website.pdf (accessed 16 September 2011).

2011 involving Libya. The African judicial process does not appear efficient in the fight against crime and impunity. Thus, there is a need for concerted and renewed efforts in this regard.

A clear hurdle in the access to justice is the limitation on individuals and NGOs as regards direct access to court by virtue of Article 5(3) of the Protocol on the establishment of the ACHPR which is linked to Article 34(6) relating to declaration of acceptance of the Court's jurisdiction. So far only Burkina Faso, Ghana, Malawi, Tanzania have made such declaration. It is obvious from the decided cases that most of the currently pending cases before the court will face the same problem of jurisdiction as the decided cases.

4. Impact of ACJ on human rights

The impact of ACJHR has not been felt considering that it is yet to become operational. Irrespective of this, important steps have been taken on the continent in terms of the protection of human rights. These include the establishment of the ACPHR, which is currently operational and the adoption of the protocol on the merger of both the ACPHR and the ACJHR. However, as earlier mentioned, none of the cases decided by the ACPHR has yielded satisfactory results as most of them have been stalled as a result of jurisdictional constraints. Apart from the above reasons, there are some identifiable factors which appear to be delaying the emergence of ACJHR. Such factors include:

4.1 Judicial factors

Individuals are not allowed to directly access this court, except when their states have made declarations accepting the rules of the court¹. Only a few states have made such declarations. Besides, in a situation where there is a violation of human rights against a citizen of any given State, instead of judicial redress, states generally tend to adopt a political solution. Furthermore, before bringing a case before the ACJHR, it is necessary that all local remedies be exhausted. It is worthy of note that, in a situation where local remedies have been exhausted, referral of matters to the ACJHR will not be necessary². It must be noted that exhaustion of local remedies may not be practicable in most African countries as the judiciary is more often than not under the control of the executive³. In this regard, the recent decision of the Constitutional Council of Côte d'Ivoire, during the post electoral dispute of November 2010, is very illustrative⁴.

4.2 Cultural factors

Due to the political manipulation of the justice system which is prevalent in Africa, victims of human rights violations resort to other means of seeking redress outside the formal justice system and this sometimes involves dialogue or other traditional methods which may sometimes be technically unsophisticated⁵. Although these practices may contribute to peace in African society, they cannot adequately deal with all the problems related to the perpetration of mass atrocities and crimes committed on the continent. Without abolishing these practices, there is a necessity to integrate

¹ See Article 33(1) of the ACJHR Protocol.

² See Article 40(5) of the rules of court and Article 56 of the African Charter on Human and Peoples Rights.

³ Boshab, E., « Le Conseil national pour l'unité nationale et la réconciliation, une institution à promouvoir dans les institutions africaines pour la prévention des conflits ethniques et la protection des minorités : cas du Burundi » (2006) in *Liber amicorum Marcel Antoine Lihau*, Bruxelles, Bruylant, Kinshasa, P.U.K 115, 116

⁴ S Bula-Bula (note 60 Above).

⁵ P Akele Adau, *Le citoyen – justicier : la justice privée dans l'Etat de droit*, (2002) Kinshasa, éd. ODF ; S Mugangu Matabaro 'Les Droits de l'Homme dans la Région des Grands Lacs Bilan et Perspectives' in *Les Droits de l'Homme dans la Région des Grands Lacs, Réalité et Illusions* (2003, Edit Academia Bruylant, Louvain – La-Neuve 423-426(419-426). C Kabati Ntamulenga 'La problématique de l'intervention du Parquet dans le recouvrement de la créance' in *Revue Annuelle de Doctrine Paroles de Justice* e (2009) Kinshasa, Belgium 61-74

and emphasise the education of the African people and raise awareness about the diverse issues of human rights proclaimed in modern international and regional human rights instruments and ways to seek redress when they are violated. Undoubtedly, education is one of the big challenges for the African continent. At the Annual Thabo Mbeki Africa day lecture at the University of South Africa on 25 May 2011, Benjamin Mkapa, the former President of Tanzania, in reference to the challenge of education on the continent, said:

There is the Poverty of Knowledge. This too diminishes our freedom. It incapacitates our struggle to improve our material and social welfare. Illiteracy limits our access to written knowledge for development. Ignorance blinds us to political and economic rights, nationally and internationally. Education is therefore priority number two because it raises the dignity of the person and the nation¹.

4.3 Political factors

Although democracy and the rule of law are amongst the objectives of the AU², an observation of the actual political facts reveal that there is a need for positive action towards the attainment of these ideals. This assertion is demonstrated by the grave political *Tsunami* which recently hit North Africa (Tunisia, Egypt, Libya) and it seems that the list of States which may need political change in Africa is not exhaustive as this *Tsunami* may move from North to South, and East to West without avoiding Central Africa. The political uprising in Northern Africa underscores the importance of African states inentrenching the fundamental values of rule of law and fundamental human rights for the benefit of their respective populations so as to avoid any form of revolution.

Thus, without being afro-pessimist, because there are still some African states which are making some progress, it is important to be realistic and objective about the solution to African problems, especially as regards human rights. The adoption of African instruments on human rights merely as slogans without any practical machinery in the enforcement of fundamental human rights will be of no benefit to the continent as a whole. As such, there is a need for positive “political will” on the part of African leaders to ensure that fundamental human rights are protected and promoted. The establishment of the ACHPR and ACJHR are steps in the right direction toward the promotion of human rights in Africa³. The road towards the fight against injustice, impunity and war crimes in Africa is still long. It is suggested that African states, as a matter of urgency, need to ratify the protocol on the ACJHR so as to replace the outdated transitorial ACHPR.

5. Conclusion and recommendations

The welfare of human beings remains the priority of all international organizations including the African Union. The promotion and protection of human rights must be emphasised as one of the core factors for African development. The fathers of African independence fought for several decades for a free and unified Africa. They fought neocolonialism and imperialism during the OAU period and failed to promote and protect human rights which led to the perpetration of heinous crimes against the African people⁴. The birth of the African Union came at a time when war crimes and impunity

¹ B Mkapa Annual Thabo Mbeki Africa day lecture (2011) 6. Available at <http://www.unisa.ac.za/contents/colleges/docs/TMALI-AfricaDaySpeech-HE-BenjaminMkapa-25May11.pdf> (accessed 20 september 2011).

² In Article (m) of the Act constitute of AU the following principles are stated: respect for democratic principles, human rights, the rule of law and good governance;

³ Kabange note 5 above.

⁴ Kwamé Nkrumah, *L'Afrique doit s'unir*, Paris, 1994, F Fanon *Toward the African Revolution* London Writers and Readers 1980.

were rampant on the continent and a source of concern. Although different steps such as the establishment of African Court of Human and Peoples' Rights (2004) and the adoption of the protocol on the creation of African Court of Justice and Human Rights in (2008) have been taken to promote human rights on the Africa continent, it is clear that a clog in the wheel of justice is the provisions of Article 5(3) and Article 34(6) of the protocol establishing the ACPHR. The effect of this has been mitigated by the provisions of Article 30 and Article 8(3) of the protocol of the ACJHR. However, due to the fact that this protocol has not entered into force, the ACPHR protocol still remains applicable. Thus, we are stuck with the practical challenge of the provisions of Article 5(3) and Article 34(6) of the ACPHR.

There is still a need for concerted efforts to be made to facilitate the entering into force of the 2008 protocol to make the ACJHR operational. There is also the need for cooperation with other judicial organs such as the ICC, which is currently proactive in Africa in the fight against violations of human rights. The harmonious relations between the African Court of Justice and ICC may be very useful because the aim of both judicial organs is to promote and protect human rights and support the fight against impunity. However, such judicial cooperation should not be confined to the African Court of Justice and ICC as it should be extended to include sub-regional and regional judicial organs such as the ECOWAS Court of Justice, the East African Court of Justice, The SADC Tribunal, and the European Court of Human Rights. In addition, it is recommended that the jurisdiction of the court be expanded to expressly include criminal matters with respect to acts committed by individuals rather than the state. The inclusion of criminal jurisdiction of the court will add impetus to the promotion and protection of human rights on the continent¹.

49. Interview of Justice Gérard Niyungeko (Judge and current President of ACHPR At SAFM on 27 October 2011 at 9am.

¹ Interview of Justice Gérard Niyungeko (Judge and current President of ACHPR at SAFM on 27 October 2011 at 9 am