

African Court on Human and Peoples' Rights: A Court for States or for Adjudicating Individual Human Rights Violations?

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Abstract

This paper aims at dissecting, using a purely legalistic approach, the jurisprudence of the African Court on Human and Peoples' Rights (the Court) as it manifests in its decided cases. The aim is to show how the Court has dealt with the state's consent and validity of its seizure as a prerequisite for its jurisdiction. This is important in showing how the Court has fulfilled or failed to fulfill the objective of providing justice to individuals against actions of the state as the primary objective of its establishment.

The review considered those cases that are available online on the Court's website¹, and those reported in the African Court Law Reports.² The paper concludes that African states, as history has it, have been reluctant to submit to supranational monitoring and scrutiny of their human rights records and behaviour. This state of affairs is worsened by the unchecked freedom of states to make and withdraw declarations entitling individuals to access the Court. It is therefore recommended that the aspects in the Protocol that establishes the Court, especially those relating to the competency of the Court to receive individual complaints be reassessed so as they are couched in a manner and terms that facilitate the achievement of the primary objective for the establishment of the Court.

Keywords: *Court, Charter, jurisdiction, rights, individual, access*

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¹ <https://en.african-court.org/index.php/publications/african-court-law-report>

² Volume 1 (2006-2019) and Volume 2 (2017-2018)

1.0 Introduction

Traditionally, international law focuses on relations between states. International human rights laws, on the other hand, places upon states tripartite obligations to respect, protect and fulfill human rights.³ The major aim of human rights law is thus, to protect individuals against abusive actions by states.⁴

It has always therefore been the responsibility of the state, as a primary duty bearer, to ensure that human rights are protected, fulfilled and respected within its territory.⁵ In that regard, the state has to adopt all the measures to reach that end. This includes measures of implementation provided for in the human rights treaties to which a state is a party.⁶ In human rights treaties systems, the texts of the treaties provide for mechanisms of monitoring compliance with the commitments and values in the respective treaties.⁷ The

³ Bishop, J.D., “The Limits of Corporate Human Rights Obligations and the Rights of For-Profit Corporations”, *Business Ethics Quarterly*, Vol. 22, No. 1, Human Rights and Business (January 2012), pp. 119-144 at 119

⁴ Viswanathan, V.N., “Human Rights in a Globalized World- The Indian Experiences” , *The Indian Journal of Political Science*, Vol. 69, No. 1 (JAN. - MAR., 2008), pp. 49- 57 at 50

⁵ De Brabandere, E., “Non-state actors, state-centrism and human rights obligations” *Leiden Journal of International Law*, (2009) 22(1), 191-210.at 201

⁶ Ogwezy, M. C., “Human rights obligations of business: Appraising the potency of John Ruggie's UN framework of protect, respect and remedy by states and corporations” *Nirma University Law Journal*,(2013) 2(2), 51-74 at p. 53

⁷ Domínguez-Redondo, E., “Role of the UN in the Promotion and Protection of Human Rights” in Azizur Rahman Chowdhury and

establishment of the African Court on Human and Peoples' Rights ("the Court") is therefore one of the mechanisms for monitoring compliance with the values enshrined in the African Charter on Human and Peoples Rights (the Charter).⁸ The Court's jurisdiction extends to cases concerning the application and interpretation of the Charter and "other human rights treaties" ratified by the state parties to the "Protocol on the establishment of the Court."⁹ It is also apt to mention here that the Court is established "to complement and reinforce the functions of the African Commission on Human and Peoples' Rights ("the Commission")."¹⁰ Its mandate revolves around the protection of human rights, the mandate that is to be exercised within the parameters relating to respect to state sovereignty as provided for in the Protocol.¹¹ Among the parameters provided are those procedural rules on the jurisdiction and admissibility of cases.¹² It has to be noted that individuals can only access the Court where the state party against which the complaint is sought to be brought has made a declaration recognizing the competency of the Court to accept complaints from individuals. Individual access is important as the establishment of the Court is expected to fulfill one of the most important objectives of

Md. Jahid Hossain Bhuiyan (Eds), An Introduction to International Human Rights Law (2010) at 134

⁸ Adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986

⁹ Article 3 of the Protocol to The African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ("the Protocol")

¹⁰ Article 2 of the Protocol.

¹¹ Article 1 of the Protocol

¹² See Article 3,5 and 6 of the Protocol.

international adjudicatory bodies which is to provide justice to individuals against actions of the state.

The paper argues that the potential of the establishment of the Court will only be realized if the Court is able, in its work and jurisprudence, to anchor the three basic purposes that are associated with national and international adjudicatory bodies which include; “vindicating the rule of law by providing justice in an individual case, protecting rights through deterrence and behaviour modification; and expounding legal instruments and making law through elucidation and interpretation.”¹³

The existence of a mammoth jurisprudence on the African human rights system and access to Court debate is acknowledged. The analysis, however, of how the issues manifest in practice is missing. This paper, therefore, draws from the theoretical and practical plausibility of the access to Court debate in the existing literature to enrich the existing jurisprudence with practical aspects founded on the Court Rules and pronouncements in the decided cases.

2.1. Establishment and expectation

The Court is established under Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court (Protocol) which entered into force on January 25, 2004. The Court was expected to

¹³ **Actions pour la Protection des Droits de l'Homme v Côte d'Ivoire**, Application No. 003/2017

start functioning in 2005;¹⁴ however, this did not happen. The trend of events shows that in January 2006 the first eleven judges of the Court were elected and sworn in in June 2006.¹⁵ Also, by June 2008 the tenure of office for two judges expired before the Court had considered any case. It was not until the year 2009 that the Court delivered its first decision.¹⁶ In its decision, the Court made a ruling on its competency to entertain complaints referred to the Court by an individual against a state which had not made and deposited a declaration recognizing the Court's competency to accept individual complaints.¹⁷ The first decision on merits was delivered in 2013.¹⁸ This delay by the Court in starting its activities is explained as caused by the existence of more work on logistics to be accomplished first than on real issues.¹⁹

In terms of the history leading to the establishment of the Court, records show that the call was in place since 1961. In elucidating this, Udombana writes:

¹⁴ Viljoen, F., "Human Rights Court for Africa, and Africans", *Brooklyn Journal of International Law*, (2004) 30(1), 1-66 at 1

¹⁵ Wachira, G.M., (2008) *Op.cit* 3

¹⁶ Possi, A. "African Court and fair trial rights in Tanzania" in *African Human Rights Yearbook / Annuaire Africain des Droits de l'Homme* Volume 1 (2017) P. 311 at 312

¹⁷ See *Michelot Yogogombaye Vrs. The Republic of Senegal*, Application No. 001/2008

¹⁸ Windridge, O., "A watershed moment for African human rights: Mtikila & Others v Tanzania at the African Court on Human and Peoples' Rights" (2015) 15 *African Human Rights Law Journal* 299

¹⁹ Wachira, G.M., (2008) *Opcit* (Report) 3-4

*Indeed, as early as 1961, 194 judges, lawyers, and scholars from 23 African countries had convened in Lagos, Nigeria under the aegis of the International Commission of Jurists for the African Conference on the Rule of Law to call for the "creation of a court of appropriate jurisdiction" to safeguard human rights in the African continent*²⁰

However, the Court was not amongst the institutions provided for in “the Charter” when it was formulated and adopted.²¹ Amongst the reasons attributed to this situation, is the preference of the drafters of the Charter for “negotiation, diplomatic and bilateral settlement of disputes in an amicable manner rather than adjudication.”²² At the time, “the adversarial and adjudicative procedures” were viewed as alien to African values and associated with Western legal systems.²³ It is also to be noted that, at the time the Charter was formulated, there was also insufficient political will among governments in the region to support the Court and, amongst the caution to the experts who were tasked to draft the Charter, was that they should not exceed what African states would accept.²⁴

Some reasons that have been associated with the establishment of the Court in the 1990s included

²⁰ Udombana, N. J., “Towards the African Court on Human and Peoples' Rights: Better Late than Never”, *Yale Human Rights & Development Law Journal*, (2000) 3, 45-111 quoting from Law of Lagos, Jan. 7, 1961, para. 4, reprinted in 3 *Journal of International Commission of Jurists* 9 (1961)

²¹ See the Charter

²² Udombana, N. J., (2000) *Opcit* 74

²³ Udombana, N. J. (2000), *Ibid* 74

²⁴ Udombana N. J., (2000) *Ibid* “unprecedented democratic changes in Africa and the emergence of popular grassroots movements as promising engines of change and catalysts for state accountability.”²⁵

The other reason is “the adoption of the African Economic Community (AEC) Treaty in 1991 by Member States of the OAU which created the provision for the establishment of an African Court of Justice to serve as a regional mechanism for solving disputes among the participating African States.”²⁶ The African Court of Justice was empowered and vested with the jurisdiction over all actions brought by a member state of the AEC Community or by the OAU Assembly alleging violation of the AEC Treaty, a legislative measure, or on grounds of lack of competence or abuse of powers by an organ or member state.²⁷ Together with the above stated, the establishment of the African Court of Justice was also inspired by the experience and successes of the Inter-American and European Courts of Human Rights which had proved to be essential and effective components of a regime of human rights protection.²⁸ The Court was therefore expected to address the normative and institutional deficiencies incumbent in the African human rights system. The establishment of the Court was viewed as having the potential of redeeming the African Human Rights system from its “near-total irrelevance and obscurity.”²⁹

²⁵ Udombana, N. J., (2000)*Ibid*

²⁶ See Article 7(e) and 18(3)(a) of the Treaty establishing the African Economic Community adopted by OAU on 3rd June 1991

²⁷ *Ibid*, Article 18(3)(a)

²⁸ Udombana *Loc Cit* 74-76

²⁹ Mutua, M., “The African Human Rights Court: A two Legged Stool”, *Human Rights Quarterly*, 21(2) May 1999, 351-353 at 351

The Court was therefore seen as a mechanism that will address “the normative weaknesses in the African Charter and the general impotence of the African Commission on Human and Peoples’ Rights,” thereby enabling the system to realize its promise to provide an important deterrent to human rights abuse, and help to further build a strong human rights culture in Africa.”³⁰ The Court, therefore, brought with it a hope for more effective human rights protection by ensuring judicially enforceable, and effective recourse to Africans who have been denied their basic rights as human beings within their domestic jurisdictions.³¹

2.2. Jurisdiction and Access to the Court

The Court is vested with the jurisdiction to determine disputes over any matter concerning “the interpretation and application of the Charter, the Protocol and any other relevant Human Rights instrument ratified by the States concerned.”³² The Court can also render an advisory opinion upon being requested by a member State of the AU, the AU or any of its organs, or any African organization recognized by the AU on any legal matter relating to the Charter or any other relevant human rights instruments. Advisory opinion can only be rendered in respect of a matter that is not being considered by the African Commission on Human and Peoples’ Rights (the Commission).³³ The Court is also

³⁰ Mutua, M Vol. 21 No. 2 May 1999 *Opcit* 351-353

³¹ Udombana, *Loc cit*, 111

³² Art 3 and 7 of the Protocol

³³ Art 4 of the Protocol

vested with the power to determine its jurisdiction in the event of a dispute.³⁴

Direct access to the Court is, by the Protocol and Rules of Procedure, open to the Commission; the State Party which has lodged a complaint to the Commission; the State Party against which the complaint has been lodged at the Commission; the State Party whose citizen is a victim of human rights violation and African Intergovernmental Organizations.³⁵ It should only be emphasized here that the Protocol only gives access to the parties herein named as “*Applicants*” and the said parties cannot in any way be “*respondents*” before the Court.³⁶

According to the Protocol, disputes can only be brought against a State Party to the Protocol in which it is alleged that the State has violated the Charter. It can also be brought in respect of any other human rights instrument that the state has ratified.³⁷ In this regard, the Court has jurisdiction so long as the complaint relates to a violation of a right protected under the ACHPR or any other International instrument ratified by the Respondent State. The other qualification is that the alleged violation should have been committed “within the respondent state,” which is a party to the relevant human rights instrument.³⁸ The Court jurisdiction defined as such can be categorized as personal (*ratione personae*), material (*ratione materiae*),

³⁴ Article 49 of the Protocol

³⁵ Art 5 of the Protocol

³⁶ ***Efoua Mbozo’o v The Pan African Parliament (jurisdiction)***
(2011) AfCLR 95 Para 9 at page 98

³⁷ Art 3 and 7 of the Protocol

³⁸ *Ally Rajabu and others Vs. The United Republic of Tanzania* (Application No. 007/2015) temporal (*ratione temporis*) and territorial (*ratione loci*) jurisdiction to hear the case.³⁹

The phrase “within the respondent state” (territorial jurisdiction- *rationae loci*)⁴⁰ which entails that the violation ought to have occurred within the respondent state is likely to be confusing in the instance where more than one state is complicit in the violation committed within the territory of only one state.⁴¹ This particular approach also limits the Applicant’s choice in an event where the Applicant is of the view that substantial justice can be obtained against a state party which participates in the violation outside its territory.⁴² In the same breath, this kind of approach hinges on the traditional approach to international human rights law where the “state” is considered the only duty bearer in respect of the tripartite obligations, respect, protection and fulfillment, and is oblivious of the developments in the area, where there is now a shift towards recognizing non-state actors as duty bearers in respect of human rights

³⁹ *African Commission on Human and Peoples’ Rights v Libya* (2016) 1 AfCLR 153 paragraph 54 at p. 162

⁴⁰ *Ibid* Para 58 at page 164 the Court stated: “...there is no shadow of doubt that the facts of the case occurred in the territory under the authority of Libya”

⁴¹ See for example *Wilfred Onyango Nganyi and Others v Tanzania* (2016) 1 AfCLR 507 where the transgressions are alleged to have been committed by three different states.

⁴² For a definition of what constitutes substantial justice and how this aspect is relevant in determining jurisdiction see *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)* [2019] UKSC 20

Obligations.⁴³ Furthermore, the Court is yet to bring to the fore how such important aspects as “the exercise of physical power and control over an individual” even if not within the territory of the controlling state may be a decisive factor in determining jurisdiction.⁴⁴

It is clear, however, that once it is established that a complaint by an individual meets the criteria set out under Articles 5(3) and 34(6) of the Protocol, the nationality of the person bringing the complaint is not a relevant matter.⁴⁵ It has also been opined that an Applicant before the Court is duty bound to justify his or her interest in initiating the Application. That interest is proven where it is demonstrated that the “action or abstention of the Respondent State applies to the right which the Applicant has or the right of an individual on behalf of which it wishes to seize the Court.” A distinction, however, is to be made between the “capacity to act” and “the interest to act” before the Court. As stated in the dissenting opinion:

The capacity of an entity to act relates to its authority to appear before the Court and therefore comes within the personal jurisdiction of the Court in relation to the Applicant. The interest to act, for its part, refers to the notion of legitimate interest, in

⁴³ Muchlinski, P., “Human rights standards and the responsibility of transnational corporations” *Leiden Journal of International Law*, (2000) 13(3), 712-718.

⁴⁴ *Medvedyev and Others v. France* [GC], no. 3394/03, § 67, ECHR 2010

⁴⁵ *Onyango Nganyi and Others v Tanzania* (2016) 1 AfCLR 507 paragraph 63

*other words, the legally recognized or protected interest, the existence of which the Court has to independently determine in each case. In other words, the capacity to act deals with the Applicant whereas the interest to act relates to the action that he or she undertakes.*⁴⁶

Thus, where an individual's "interest to act" exists, the action can be brought by the entities with the "capacity to act" before the Court. The entities with the capacity to act are only those recognised under Article 5 of the Protocol.

2.3. Individual's Access to Court and State Consent

It should be noted that individuals or Non-Governmental Organizations (NGOs) with observer status before the Commission do not have an automatic right of access to the Court. They can therefore only access the Court when they have fulfilled two conditions, namely; they must have been "entitled to by the Court."⁴⁷ Secondly, the state against which they want to file a complaint had made a declaration accepting the competence of the Court to receive individual complaints.⁴⁸ The requirement of being "entitled by the Court" has not brought up issues so far. However, this

⁴⁶ *Tanganyika Law Society and Others v Tanzania* (2013) 1 AfCLR 34 Para 25 at p. 63

⁴⁷ See Article 5(3) of the Protocol according to which the Court may "entitle" "*Non-Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of the Protocol*"

⁴⁸ Article 34(6) of the Protocol read with Art 5(3)

procedure of individuals and Ngos' access being subjected to "state consent" by way of a declaration was viewed as having the effect of excluding individuals who are primary users and beneficiaries of the Court from accessing the Court. This particular requirement is viewed as capable of rendering the Court meaningless. This shortcoming can only be addressed through interpretation by the Court of the laws in a manner that considers the basic objective for the establishment of the Court and with the understanding that African states have no incentives to refer human Rights cases to international human rights Courts.⁴⁹ Indeed, out of thirty (30) states that have ratified the Protocol, only ten (10) state parties have made and deposited the declaration by October 2020.⁵⁰ This is about 11 years since the Court delivered its first decision and in a span of over twenty-one (21) years since the coming into force of the Protocol. In September 2016, Rwanda made an Application to withdraw its declaration recognizing the Court's competence to receive individual complaints.⁵¹ In another development, Tanzania, Cote d'Ivoire and Benin have also presented

⁴⁹ Makau Mutua, Vol. 21 No. 2 May 1999 *Loc cit* 351-353

⁵⁰ Afulukwe-Eruchalu and Ebenezer Durojaye, "Developing norms and standards on maternal mortality in Africa: Lessons from UN Human Rights Bodies" in *African Human Rights Yearbook / Annuaire Africain des Droits de l'Homme* Volume 1 (2017) P. 82 at 102. See also Windridge, O., "Assessing Rwexit: The impact and implications of Rwanda's withdrawal of its article 34(6)-Declaration before the African Court on Human and Peoples' Rights" in *African Human Rights Yearbook / Annuaire Africain des Droits de l'Homme* Volume 2(2018)

⁵¹ See *Ingabire Victoire Umuhoza v Rwanda* (2016) 1 AfCLR 562

notices of withdrawal of their respective declarations.⁵²

There are therefore now only six member states with declarations that are still intact out of thirty (30) states that have ratified the Protocol and fifty-two (52) states that have signed the Protocol. This state of affairs makes it important for the Court to consider experiences on how the issue has been dealt with in other jurisdictions.⁵³

The experience of the European and the Inter-American systems will show that the systems did not originally grant individuals and NGOs direct access to the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACHR).⁵⁴ In the ECHR, “an individual” could only partake in the proceedings of the Court upon leave of the ECHR and upon demonstration that his intervention in the proceedings is in the interest of justice in the sense that he is not only interested in the outcome of the case but his intervention will also assist the Court in carrying out its task.⁵⁵ This determination was carried out under Rule 38(1) of the Rules of the Court. This continued to be the position until after the adoption and entry into

⁵² Via notices dated 14th November 2019, 28th April 2020 and 24 March 2020 respectively available at en.african-court.org (accessed on 13th July 2020)

⁵³ Afulukwe *ibid* at page 102. See also declarations entered by Member states at <https://en.african-court.org/index.php/basic-documents/declaration-featured-articles-2> (accessed on 13th July 2020)

⁵⁴ Mohamed, A. A.,” Individual and NGO participation in human rights litigation before the african court of human and peoples' rights: Lessons from the european and inter-american courts of human rights” *Michigan State University-DCL Journal of International Law*, (1999) 8(2), 377-396.

⁵⁵ Shelton, D.,, “Non-governmental Organizations and Judicial

force of Protocol 11⁵⁶(*Protocol 11*) that individuals were granted direct access to the ECHR.⁵⁷ As per the provisions of this Protocol 11, the ECHR is empowered to receive and determine complaints from “any person, non-governmental organizations, or a group of individuals” claiming to be the victim of any violation by any state party. The Protocol further places upon state parties an obligation not to hinder the exercise of rights.⁵⁸ Under the provisions of Article 36(2), the president of ECHR is granted discretion, for the proper administration of justice”, to invite “any high contracting party not a party to the proceedings or any person concerned other than the Applicant to submit written comments or take part in the proceedings.” These provisions open up the door for any victim of the violation, regardless of the nationality of the victim and the place of violation, provided that the violation is committed by a state party. In that respect, the individual victim of the violation can approach the ECHR for redress. The provisions granting discretion to the president to invite non-parties to the proceedings is also an important milestone in ensuring access to parties with interest in the proceedings but who are not impleaded and or invited to partake in the proceedings before the Court. This procedure has enabled the filing of several briefs in major human rights cases.

⁵⁶ Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, European Treaties, ETS No.155, Strasbourg, 1 I.V. 1994.

⁵⁷ Mohamed A.A., (1999) *Loc cit* , 384

⁵⁸ See Article 34 of Protocol 11.

These briefs have been influential in the adjudication of human rights cases before the ECHR.⁵⁹

The position is different in the inter-American Court of Human Rights (IACHR) where there is no provision granting individual direct access to IACHR. The Court is, however, hailed for invoking and developing the most comprehensive *amicus* practice. The IACHR has been relying on the provisions of Rule 34(1) of the IACHR Rules of Procedure which are couched in almost similar terms to Article 38(1) of the ECHR Rules of Procedure cited herein above. The records show that “almost all *amicus* briefs submitted are often expressly referred to in the opinions of the Court” and have positively influenced the outcomes.⁶⁰

The use of *amicus* brief has had a positive contribution to the determination of outcomes of the proceedings both in the ECHR and in the IACHR. The Protocol⁶¹ empowers the ACHPR “to receive written and oral evidence including expert testimony and make its decision based on such evidence.” This provision, in its terms, is in *pari materia* with Rules 34(1) of the IACHR Rules of Procedure and 38(1) of the ECHR Rules of Procedure. Given the reluctance of the African states to grant “individuals” direct access to the Court, there is, therefore, an impetus for the Court to liberally interpret the Provisions of Article 26(2) of

⁵⁹ See Mohamed, A. A. *Opcit at page 385-388* where he cites several cases where such briefs were filed and their impact in the proceedings.

⁶⁰ *Ibid* at 391.

⁶¹ See Article 26(2)

the Protocol in the manner that the ECHR and IACHR have done in their practice.

2.4. Declaration and temporal jurisdiction of the Court

The issue of a declaration by the state accepting the Court's jurisdiction to entertain individual complaints brings to the fore the issue of temporal jurisdiction of the Court. Temporal jurisdiction has reference to the date on which the Court's jurisdiction became operational against the relevant state party.⁶² The debate in this aspect centres on two important issues, one is whether the violation is continuing, and secondly, whether the court's jurisdiction is reckoned from the date of entry into force of the Charter or the date the Protocol was ratified by the state party or from the date of the declaration. These issues bring the principle against retrospective effect of international treaties.⁶³ The issue is whether the Court assumes jurisdiction as from the date of the deposit of the declaration. Conversely, is it that so long as the state is a party to the Charter then the deposit of the declaration is an automatic expression of the state's consent to recognize the competency of the Court to receive individual complaints. In that regard therefore, those complaints will be those alleging violations of the rights recognised under the Charter but committed before the deposit of the declaration. The Court was confronted by this issue, but did not, in its decision, make a clearer distinction between the obligations under the Charter and those under

⁶² *Urban Mkandawire v Malawi* (2013) 1 AfCLR 283

⁶³ See Article 28 of the Vienna Convention on the Law of Treaties of 1969

the Protocol and the optional declaration.⁶⁴ In *African Commission on Human and Peoples Rights Vs. The Republic of Kenya*,⁶⁵ however, the Court held that the relevant dates concerning its temporal jurisdiction are the dates when the Respondent became a Party to the Charter and the Protocol, as well as, where applicable, the date of the deposit of the declaration accepting the jurisdiction of the Court to receive Applications from individuals and NGOs, with respect to the Respondent. The importance of this distinction lies in the terms in which Article 34(6) of the Protocol is couched which is very important in determining as to when the state expressed its consent to be bound by a treaty.⁶⁶ The provisions of Art. 36(4) are couched in the following terms:

At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration.

⁶⁴ *Tanganyika Law Society and Others v Tanzania* (2013) *Opcit* para 20 at p. 63

⁶⁵ *African Commission on Human and Peoples' Rights v Kenya* (2017) 2 AfCLR 9 paragraph 64 at p. 23

⁶⁶ In *Michelot Yogogombaye v Senegal* (2009) 1 AfCLR 1 para 21 at page 12 the Court stated: "The fundamental principle regarding the acceptance of the jurisdiction of an international Court is indeed that of consent, a principle which itself is derived from that of the sovereignty of the State. A State's consent is the condition sine qua non for the jurisdiction of any international Court",

irrespective of the moment or the way the consent is expressed”.

The use of the phrase “shall” seems to lead to a number of questions. One of such questions is, does the provision cited above entails a mandatory obligation on the part of the state party to make a declaration accepting the Court’s jurisdiction to accept individual complaints at the time of ratification or accession to the Protocol? This question was not answered by the Court. The answer was given in a separate opinion and was to the effect that, whether the provision is taken as implying a mandatory obligation to accept individual complaints or not at the time of ratification or not, that alone will have no real legal effect as the provision itself does not set the “time limit.” Further that if the provision is read in the light of Article 5(3) and 34(6) of the Protocol it does not “imply that the Court shall not receive a petition involving a state that has not made a declaration.” In that regard therefore, the filling of the declaration is optional. As such and in the terms in which the provision is couched, the manner and the moment in which the state expresses its acceptance of the Court’s jurisdiction to receive individual complaints may not be an issue of controversy as a state can make a declaration even after the application is made against it.⁶⁷ This “liberal and broad” interpretation would suggest that the Court ought to place all individual Applications on the Court’s general list, notify the States against which the relevant Application is directed, even when it is clear that the state against which the Application has been brought has not made such a declaration. In this regard, therefore, the Court can only determine whether it can “receive” and “determine” the

⁶⁷ *Michelot Yogogombaye v Senegal* (2009) *ibid* paragraph 24,25 and 26 at p. 12.

same after the state party against which the Application is brought has presented its position.⁶⁸ There have been views that a decision to dismiss the Application for lack of jurisdiction, where it is taken without the respondent state being notified, is a violation of the adversarial principle.⁶⁹ In their dissenting opinion, Judges Sophia A.B. Akuffo, Bernard M. Ngoepe and Elsie N. Thomson stated,

*The party which has not made the declaration should bring Applications in every single national jurisdiction before approaching this court. This is a very theoretical approach, virtually impracticable, as opposed to the pragmatic one adopted by the Applicant. The protection of human rights is too important to be left to the vagrancies of such theoretical solutions.*⁷⁰

This approach, although in consonance with the spirit to ensure access to the primary users and beneficiaries of the Court, is not without its difficulties. In the first place, there are views that where it is evident that the Court does not have jurisdiction in respect of the matter then the Court

⁶⁸ *Michelot Yogogombaye v Senegal* (2009) *ibid* at paragraph 39 of its judgment the Court defined the phrase “received in the following terms: “**receive must not be understood in its literal meaning as simply meaning physically receiving nor in its technical sense as referring to “admissibility” rather it refers to the “jurisdiction of the Court to “examine” the Application that is “its jurisdiction to hear the case”.**

⁶⁹ *CONASYSED v Gabon* (2012) 1 AfCLR 100 at page 102 paragraph 3.

⁷⁰ *Falana v African Union* (2012) 1 AfCLR 118 paragraph 8.4 p. 132.

ought not to take a decision on the matter.⁷¹ This is because there is a lot of cases that the Court has to deal with and therefore continuing to deal with matters that obviously the Court lacks jurisdiction would compromise the efficiency of the Court and create a backlog of cases for the Court.⁷² This procedure, of “receiving” individual complaints even against states that have not deposited their declaration, existed up to and until the 26 June 2014 where Applications filed against States that are not Parties to the Protocol or have not made the optional declaration under Article 34 of the Protocol were subject to judicial determination by the Court and dismissed by a decision. After 26 June 2014, similar Applications were dismissed by way of a simple administrative action.⁷³

The procedure is also likely to result in a confusion of two distinct procedural aspects, namely; “court jurisdiction” and “access to court.” According to the decisions, jurisdiction concerns the Court and admissibility concerns the Application. It is therefore desirable that the two aspects be treated separately by starting with the determination of jurisdiction before considering the admissibility of the Application.⁷⁴ That notwithstanding, there seems to be a more pragmatic approach adopted in combining both hearing of the objections and merits as allowable under Rule 52(3) Of the Court Rules. The Court needs always to

⁷¹ *Ekollo Moundi Alexandre v Cameroon and Nigeria* (2011) 1 AfCLR 86 Paragraph 2 at p. 88

⁷² See Application No. 002/2014 *Faustine Uwintje Vs Republic of Rwanda*

⁷³ *Falana v ACHPR* (2015) 1 AfCLR 499 at 502

⁷⁴ See Rule 39 of the Rules of Court

be tolerant of any restrictive rules and apply the rules flexibly given the context of human rights protection.⁷⁵ In the same Tanganyika law society case, the Court was blamed of “technical subtlety” for having determined the Application on the basis of an objection on the exhaustion of local remedies, being the sole and only basis of its conclusion on the matter, but which was not raised by the state party but raised by the Court “*proprio motu.*”

2.5. Personal Jurisdiction- “*Ratione personae*” and the law Applicable

The Court’s jurisdiction in all matters in which the rights alleged to be violated are protected by the Charter or any other International Human Rights Instrument⁷⁶ is categorized as “personal jurisdiction- jurisdiction “*ratione personae.*” This implies that the jurisdiction is conferred by the fact that the state is a party to the protocol and has deposited a declaration recognizing the Court’s competency to accept “individual complaints.” As to who can be the respondent before the Court and the subject matter of the dispute the case on point is that of *Efoua Mbozo’o Samule v The Pan African Parliament.*⁷⁷ In this case, the Court dismissed the dispute concerning a breach of employment Contract between the Applicant and the respondent on the ground that the Application is founded exclusively upon breach of employment contract, “a matter not within the

⁷⁵ *Peter Joseph Chacha v Tanzania*, (2014) 1 AfCLR 398

⁷⁶ *Ally Rajabu and others Vs. The United Republic of Tanzania (Application No. 007/2015)*

⁷⁷ Application No. 010/2011

Court's jurisdiction"⁷⁸ and the respondent is not a "state party to the Protocol."⁷⁹ In its holding, the Court emphasized that only "states" parties to the Protocol are amenable to the jurisdiction of the Court.⁸⁰ It is on the same basis that the Court dismissed the Application brought against the "African Union."⁸¹ However, in their Dissenting Opinion Judges, Akuffo, Ngoepe, and Thompson, drawing from the precedent of the International Court of Justice, in *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, opined that "the right to bring international claims carries with it, as a natural legal consequence, the capacity to be sued". As such, since as per Article 2 of the Constitutive Act of the African Union which established the "African Union" confer upon it international legal personality separate from its member states, the AU is therefore subject to International Law and is capable of possessing international rights and duties. In

⁷⁸ See however a Separate opinion by Judge Ouguergouz at page 98 para 12 where he states "It does not seem that the Court intended to conclude that a breach of an employment contract per se does not fall within its material scope of jurisdiction. That would indeed be a hasty conclusion given that such an issue is closely related to the right of every individual "to work under equitable and satisfactory conditions", guaranteed in particular by Article 15 of the African Charter. It is only because this breach relates to an employment contract concluded between the Applicant and the Pan-African Parliament that the Court considers that the matter does not fall within its scope of jurisdiction, without however specifying whether that is a case of material or personal lack of jurisdiction".

⁷⁹ (2011) AfCLR 95

⁸⁰ *Efoua Mbozo'o v The Pan African Parliament* (2011) AfCLR 95 Para 8 at p. 97

⁸¹ *Femi Falana v African Union*(2012) 1 AfCLR 118

that regard, it can as well prefer a claim in defence of those rights and duties. One of such duties is the duty to promote and protect human rights provided under Article 3(h) of the Constitutive Act, such a right will be meaningless if it cannot be enforced against the AU.⁸² It is therefore their conclusion that, even though the AU is not a state but given its legal status it can be cited as a respondent before the Court.

Another case where the issue of the law applicable became a subject of discussion is *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania*.⁸³ The respondent state raised an objection on the ground that “the East African Community treaty” that was being relied upon by the Applicant is not a human rights treaty so as to qualify as a “human rights instrument” for which the Court is given jurisdiction to deal with. In its substantive decision, the Court did not address this issue. The discussion about this issue is in the Separate Opinion by Judge Ouguerouz who underscored that, Article 3(1) & 7 of the Protocol and Rule 26(1) makes reference to “any other human rights instrument ratified by the state party concerned.” In that regard, there are therefore three cumulative requirements that are involved for the instrument to qualify as such and these are; that the instrument in question must be an international treaty hence the requirement that it be ratified by the state; the international treaty must “relate to human rights;” and it must have been ratified by the state concerned. As for the treaty for the establishment of the EAC whose main

⁸² Femi Falana, *Opcit*, Paragraph 8.1.1 at p. 130

⁸³ (2013) 1 AfCLR 34

purpose is not the protection of human rights but which contain only a provision that makes reference to human rights, the judge viewed this as a crucial matter regarding the law applicable and therefore the Court ought not to have ignored it.⁸⁴ The Court had also another opportunity to address this issue in *Frank David Omary and others Vs. United Republic of Tanzania*⁸⁵ where it was confronted by the question of whether the Universal Declaration of Human Rights (“UDHR”) could be considered a “treaty ratified by the state party.” The Court adopted a narrow approach and only answered that question in view of the status of the UDHR having acquired the status of International customary law. In another instance, the Court drew inspiration from Draft Articles of the International Law Commission of the United Nations on the responsibility of the States for internationally wrongful acts to hold Libya responsible for her failure to protect the rights guaranteed under the Charter. The Court did not state the legal basis for its reliance on the said instrument.⁸⁶ As the question regarding the meaning and scope of the phrase “and any other human rights instrument ratified by the state party” will keep resurfacing, the Court ought to make a clear jurisprudence on the same. It would have been much better to borrow from the Inter American Court of Human Rights advisory opinion regarding the interpretation of the

⁸⁴ Paragraph 13 at page 61 and by way of comparison see *Konaté v Burkina Faso* (2014) 1 AfCLR 314 paragraph 36 at page 319 where the Court held that it has jurisdiction to entertain the Application involving, among others, violation of Article 66(2)(c) of the Revised ECOWAS Treaty (Economic Community of West African States).

⁸⁵ (2014) 1 AfCLR 358

⁸⁶ *ACHPR v Libya* (2016) 1 AfCLR 153 Para 50 at p.163.

Meaning of 'Other Treaties' in Article 64 of the American Convention where the Court clearly stated that,

*...the treaty need not be concerned solely or even primarily with human rights, nor did it exclude treaties outside the inter-American system or treaties open to non-American States. The crucial issue was that the treaty had to be for the protection of human rights...; it did not have to be between American States, nor regional in character nor adopted under the auspices of the OAS.*⁸⁷

This definition would have enabled the Court to enforce any treaty with any bearing on human rights regardless of normative or structural frontiers.

2.6. State's Consent: Acceptance or Impediment to Jurisdiction?

The sanctity and legitimacy of the Court will definitely depend on its effectiveness in protecting and promoting respect for and observance of human rights, this being the major objective for the establishment of the Court. The attainment of this objective will depend on the jurisdiction bestowed upon and assumed by the Court. The Protocol guarantees the Commission direct access to the Court and therefore one may expect that the Commission may exercise that right by bringing those cases on behalf of individual victims. The practical difficulty of this is that the Commission does not have any legal obligation to do so. It needs be noted that, the relationship between the Court and the Commission is based on complementarity. In that regard, the Court and the Commission “work as

⁸⁷ Advisory Opinion OC-1/82 of 24 September 1982, paras. 34-38, [1982] 3 HRLJ 140

independent yet mutually reinforcing partner institutions with the aim of protecting human rights on the whole continent.” As such, neither of the two institutions has the mandate to compel the other to adopt any measures whatsoever.⁸⁸

The fact that the Court was also hailed as an institution that will cure the structural, normative, and institutional weaknesses of the Commission should also be underscored. In this regard, it may be impractical to expect the Commission to be effective in seizing the Court with Applications. Up to March 2020, the Court had determined a total of eighty (80) cases out of which only two cases, one against Libya⁸⁹ and the other one against Kenya,⁹⁰ were referred to the Court by the Commission.

The restricted access of individuals and NGOs to the Court as illustrated above defies the conventional understanding of international human rights law which is generally understood to have developed mainly to protect the individuals from the inimical conduct of the state.⁹¹ It also undermines the intent to subordinate states to international supervision and monitoring. More so in view of the fact that given the African state reluctance to comply with their international human rights obligations at their own will and good faith, there is no hope that they will be taking cases to the Court to enforce those obligations. It is ironic to expect

⁸⁸ *Femi Falana v African Union* (2012) *Opcit*1 Para 16 at p. 501
⁸⁹ (2011) AfCLR 17
⁹⁰ (2013) AfCLR 193
⁹¹ Mutua, M.,(1996) “The Ideology of Human Rights” (1996) 36
Virginia Journal of Human Rights 589, at 594

such African states to take cases against other states to the Court.⁹² It also suffices to state here that the declaration envisaged under Article 34(6) of the Protocol is both optional and a unilateral act of the state, going by the principle that “state sovereignty commands that states are free to commit themselves and retain discretion to withdraw their commitments,” giving the states making such a declaration the right to withdraw the same at will thereby compromising the spirit of protection of individual rights⁹³ and that of utmost good faith in the treaty law (*pacta sunt servanda*).⁹⁴ A good example in this regard is Tanzania, a state against which a number of Applications have been filed, and the majority of such Applications have been determined in favour of the Applicants. Tanzania has therefore presented its notice to withdraw her declaration and has not as well fully complied with any judgment or decision of the Court.⁹⁵

In a positive way, Article 3(1) of the Protocol by providing that the jurisdiction of the Court extends to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and any other human rights treaty ratified by the state party makes it broader in scope than those from the European and American human rights systems whose provisions in the

⁹² Juma,D., “Access to the African Court on Human and Peoples’ Rights: A Case of the Poacher turned Gamekeeper” *Essex Human Rights Review* Vol. 4 No. 2 September 2007 at page 3

⁹³ *Umuhoza v Rwanda* (2016) 1 AfCLR 562 Para 58 at page 570

⁹⁴ See Article 26 of the Vienna Convention on the Law of Treaties

⁹⁵ As per the review of the cases decided and rulings on execution available at <https://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21>

European and American Conventions on Human Rights respectively limit the law applicable to those Conventions only.⁹⁶ The fact that the Court's jurisdiction extends to all cases and disputes submitted to it concerning the interpretation and application of not only the Charter and the Protocol but also “any other human rights treaty ratified by the state party” entails that the Court can determine and deal with cases arising from other regional and international human rights instruments. As a result of such wide jurisdiction, there is a potential jurisdictional clash between the Court and the Economic Community of West African States (ECOWAS) Court of Justice and the East African Court of Justice⁹⁷ at a certain point in time. Although the issue of jurisdictional clash has not yet surfaced, the same may need to be investigated at some stage.

The Court has been viewed to be interpreting some aspects progressively. For example, regarding the issue of exhaustion of local remedies, the Court has consistently emphasized that, Applicants before the Court are not bound to exhaust extraordinary remedies, such as Human Rights petitions or Review of the local Courts decisions. Further, where the local Court had the opportunity of examining whether the right alleged to be violated was actually violated the applicant will not be under any obligation to

⁹⁶ See for example Article 32 & 34 European Convention on Human Rights and Article 62(3) American Convention on Human Rights.

⁹⁷ Pursuant to the Treaty for the Establishment of the East African Community (EAC Treaty) the Court is vested with jurisdiction to hear human rights cases.

raise the issue specifically.⁹⁸ This is also true regarding the Applicant's duty to specify the specific provisions of the treaty alleged to have been violated.⁹⁹ This spirit ought to be reflected in the interpretation of the Court's mandate and jurisdiction.

However, it is also true that sometimes the Court failed to align itself to the evaluation of international law.¹⁰⁰ This same problem facing the Court was identified as a weakness of the Commission as its decisions were viewed as being formulaic without referencing jurisprudence from national and international tribunals.¹⁰¹ In *Tanganyika Law Society, the Legal and Human Rights Centre, and Christopher Mtikila vs. The United Republic of Tanzania*,¹⁰² three separate opinions shared the view that although the Court was correct in its conclusion that there is a violation by the respondent state, "the reasons invoked in arriving at such a conclusion had not been articulated with sufficient clarity in the judgment." As suggested by B.M. Ngoepe, it is necessary for the Court to learn from other international jurisdictions" in order to be able to develop its jurisprudence and practices. At its nascent stage, the Court cannot "afford to compromise its capacity by enslaving itself to any form of rigidity or any mechanical approach, as things should not be cast on stones. Being pragmatic is a

⁹⁸ **Ally Rajabu and others Vs. United Republic of Tanzania** (2016) 1 AfCLR 590

⁹⁹ *Frank David Omary and Others v Tanzania* (2014) 1 AfCLR 358

¹⁰⁰ Udombana, *Op cit*, 73

¹⁰¹ Makau Mutua, *Op cit*, (348)

¹⁰² Application 009/2011

virtue¹⁰³ and an important direction in the creation of an effective regional human rights Court.

The Court should therefore work towards creating a body of law with precedential value and an interpretation of the substantive law of the African Charter and other key human rights documents to guide and direct states. Such forward-looking decisions would deter states from future misconduct by modifying their behaviour. Individual justice would be a coincidence in the few cases the Court would hear. Moreover, individual courts in AU member states should look to the African Human Rights Court for direction in the development and application of human rights.¹⁰⁴ The Court also needs not conduct its business in a manner that jeopardizes its integrity and authority where, for instance, it is seen as siding with the respondent states. The Court, in the case of *Umuhoza v Rwanda*¹⁰⁵ was viewed as having abdicated its role and undermined its authority when it failed to visit the respondent state's nonappearance on a hearing date with deserving consequences.¹⁰⁶

The above statement is important for the Court to develop jurisprudence that is in tandem with the *raison d'être* for the establishment of the ACHPR whose aim is to protect individuals against the inimical conduct of the African

¹⁰³ **Application No. 009/2011 & 011/2011: Separate opinion by B.M. Ngoepe: Para 3**

¹⁰⁴ Mutua, *Op cit* (362)

¹⁰⁵ (2016) 1 AfCLR 562

¹⁰⁶ See separate opinion of Judge Ouguerouz in *Umuhoza v Rwanda* (2016) 1 AfCLR 540 Para 1 at p. 543.

states. As is vivid in the existing jurisprudence, many if not most, African states are so much preoccupied with sovereignty and maintenance of the status quo than with the protection of individuals and groups within their territories. Unless the Court does that, it will not be able to address the weaknesses of the Commission which was one of the reasons that led to the establishment of the Court. Progressive and practical interpretation of its mandate will enable the Court to fully carry out its mandate in respect to the protection of individuals.

2.7. Execution of Courts Judgments and Decisions

According to the Protocol, the Court is duty bound to deliver its judgment within 90 days of having completed its deliberation.¹⁰⁷ In its judgment, the Court can, once it makes a finding that there is a violation, make appropriate orders to remedy the violation including payment of fair compensation and reparations.¹⁰⁸ Once the Court has delivered its judgment, it is the Council of Ministers that is vested with jurisdiction to monitor its execution on behalf of the Assembly¹⁰⁹ and the Court has to submit, in each regular session of the Assembly, a report of its work during the previous years.¹¹⁰ The state parties have also undertaken to comply with the decisions of the Court and guarantee execution of the judgments of the Court.¹¹¹

¹⁰⁷ *Ibid* Article 28(1).

¹⁰⁸ Article 27 of the Protocol

¹⁰⁹ *Ibid* Article 29(2)

¹¹⁰ *Ibid* Article 31

¹¹¹ *Ibid* Article 30

Although the above stated is the position of the law, compliance and execution of the Court's judgments and orders have, so far, proven to be amongst the greatest challenges facing the Court. So far, the Court has issued a total of 37 judgments and decisions that need to be complied with and/or executed. However, it is only Burkina Faso that has so far complied with the judgment of the Court. Some states have only partially complied and others have openly indicated that they will not comply with the orders and judgments of the Court.¹¹² This non-compliance with the Court orders is associated with the lack of mechanisms to assist the executive Council to accomplish the task of monitoring execution. This situation needs to be addressed for if it is left as it is, it will destroy the *raison d'être* of the Court and undermine public confidence in the effectiveness of the Court.¹¹³

In its own effort to address this non-compliance problem, the Court attempted to ask states to identify focal points in the State 'within the relevant Ministries,' to facilitate communication between the Court and Member States for purposes of facilitating continuous communication about the implementation of decisions.¹¹⁴ This strategy did not improve the situation as once there is an individual personnel change, the chain breaks and continuity become problematic.¹¹⁵

¹¹² See paragraphs 56-58 the Activity Report of the Court for January-December, 2019.

¹¹³ Ibid para 59.

¹¹⁴ Report of the activities of the African Court 2016, paragraph 51 and 60(ix)

¹¹⁵ Ibid

The implementation of the African Court's judgments and decisions is key to its legitimacy and effectiveness. Individuals who submit their complaints to Court need to be sure that the violations they are complaining about will be effectively addressed and redressed accordingly. The African Court's willingness to develop a framework to clarify its role in monitoring how states respond to its decisions is very important and is in urgent need. Thus, the processing of the proposed "Draft Framework for Reporting and Monitoring executions of judgments and other decisions of the Court" (draft) needs to be expedited. In the proposed draft there will be an obligation on the part of the states to submit an execution report to a new monitoring unit. This report will help the court to assess the extent of compliance and in case of noncompliance other mechanisms including compliance hearings, on-site visits, the adoption of judgments, and the execution of memorandums of understanding between the parties may be invoked. The monitoring implementation report will then be transmitted to the Assembly through various African Union policy organs. The draft, therefore, provides a mechanism and an additional tool and pressure on states to comply with the judgments and decisions of the Court.

3.0. Conclusion

The expectation that the establishment of the Court will inaugurate an era of strengthened judicial protection of human rights on the continent as far as individuals are concerned is fast fading away. As is evident in the foregoing discussion, African states have demonstrated reluctance and unwillingness to sincerely submit to

supranational scrutiny and monitoring. The withdrawal of Rwanda, Tanzania, Benin and Côte d'Ivoire of their declaration are some of the evidences of the unwillingness by the African states. It may also be apt to point out here, just as an example, the sidelining and disbandment of the Southern Africa Development Community (SADC) Tribunal after it was seen as acting decisively against states parties¹¹⁶ as a demonstration of African states attitude towards supranational scrutiny. The instances shown here are also evident of how the unguided claim of sovereignty can be used as a barrier to the protection of human rights. It should be noted that out of the eighty (80) decided cases, forty-nine (49) were against Tanzania. There is so far, no state that has filed any suit against any other state, and, in a few cases, it is only the Commission that has filed cases in Court. The rate of making declarations to recognize the Court's competency in respect of individuals and complaints by NGOs is not promising. In this situation, the Court is almost being rendered impotent and redundant as far as its primary role is concerned. The tension between the Court's mandate to ensure the protection of human rights while at the same time respecting the state's sovereignty is appalling. This situation can now only be redressed by the African Union General Assembly. This needs political will and commitment by the state parties because while the Court is mandated, by the provisions of Article 35(2) of the Protocol, to propose amendments to the Protocol, the provisions of Article 35(3) of the same

¹¹⁶ Katrin Nyman-Metcalf and Ioannis Papageorgiou, "Why should we obey you? enhancing implementation of rulings by regional courts, in African", *Human Rights Yearbook / Annuaire Africain des Droits de l'Homme* Volume 1 (2017) P. 167 at 177

Protocol provide that amendments shall be effective only upon acceptance of the amendments by the state parties. The other escape route may be through liberal and pragmatic approach to Article 26(2) of the Protocol to enable the Court develop “*amicus*” practice. The practice is shown to be useful and effective in ECHR and IACHR in informing and developing human rights jurisprudence and protection by supranational Courts.

Therefore, unless the Court becomes so jealous of its jurisdiction and mandate, and the African states deliberately change their attitudes towards the Court and its role, individuals' rights which are mainly to be protected through the Court will be in jeopardy as individuals will have no forum to vindicate violations of their rights. The pace of ratifying the Protocol and accepting the Court’s jurisdiction to entertain individual complaints is not promising and there is no indication that the situation is going to improve at all.

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