

The Pros and Cons of the Criminal Jurisdiction of the Proposed African Court of Justice and Human Rights

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The problem of enforcement of human rights has always been a challenge in Africa. Many have sought a structural solution to this problem in the form of an African Court on Human and Peoples' Rights (ACHPR) whose judgements would be indisputably binding; hence the earlier establishment of the African Court of Justice (ACJ). This merged court will have jurisdiction to address matters arising from the interpretation and application of the Constitutive Act, the ACHPR instruments that are ratified by the states concerned and other African Union (AU) treaties adopted within the framework of the Organisation of African Unity (OAU). The ACJHR will also have jurisdiction on any matters of international law. It will replace the 1998 and 2003 protocols once it comes into force and will become the main judicial organ of the AU.

Introduction

Since the adoption of the Constitutive Act of the African Union (AU), Africa has been busy constructing a highly complicated institutional architecture designed to ensure justice for the victims of violations of human and peoples' rights, as well as for states within the AU. Prior to the Constitutive Act, the only body that victims of human rights violations could turn to for relief was the African Commission on Human and Peoples' Rights (the 'African Commission'). There was no forum on the continent to handle the numerous conflicts and disputes between states and between individuals and their states. (The African Commission has, however, already

rendered several decisions on alleged violations of human and peoples' rights – the most notable being *SERAC & Another v. Nigeria*, regarding alleged violation by Nigeria of development-related rights in the restive region of the Niger Delta.¹)

Evolution of the justice architecture in the African Union

The African Court on Human and Peoples' Rights (ACHPR) will comprise of two sections: a general section and a human rights section. The ACJHR Protocol was adopted in Egypt in July 2008 and mandated the merger of the ACHPR and the African Court of Justice (ACJ). The ACJHR Protocol

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will come into force only when 15 AU member countries have ratified it. By May 2011, 22 states had signed but only three states had ratified the ACJHR Protocol. Upon entry into force of the ACJHR Protocol, the ACJ Protocol will remain in force for a transitional period not to exceed one year.² Consequently, the draft merger instrument stipulates a transitional period of one year from its entry into force for the ACJ to take the necessary measures for the transfer of its prerogatives, assets, rights and obligations to the new ACJHR. After that, the former will cease to exist.³

The functions of the ACJHR

The ACJHR will function as the main judicial organ of the AU. The court will be constituted and function in accordance with the provisions of the present statute, to promote Human and Peoples' Rights. To achieve this main function, the organ will be responsible for the following activities;

- To collect documents, undertake studies and research on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to governments;⁴
- To formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation; and
- To co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.⁵

Africa's human rights record

Headlines about human rights abuse are common in Africa. Authoritarian regimes, collapsed states, civil and ethnic violence, grinding poverty, violent abuse and discrimination against women, child soldiers, the Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome (HIV/AIDS) pandemic and other human tragedies are the mainstay of international coverage.⁶ Human rights have a rich history in modern Africa, having fuelled the anti-colonial struggle and the battle against apartheid. They have also played a

central role in the critique of repressive regimes that too often filled the political vacuum following independence. While conflict and repression in many states, including Sudan, Somalia and Zimbabwe, continue to be a source of major concern, a culture of respect for human rights is taking root in other parts of the continent.⁷

Advantages of the proposed ACJHR

There are basically three advantages that are brought to the fore by the ACJHR. These are legitimacy, access to justice and enhanced effectiveness. These three are discussed in detail below.

Legitimacy

It is argued that the AU's proposal to establish the criminal jurisdiction court would enable its leaders to escape from prosecution by the ICC. This argument in itself could lead to a wrong conclusion. Rather, it is necessary and appropriate to see the motivation of the proposal in the light of the basic principles that are preserved under the Constitutive Act. The AU currently has accepted the principle of intervention in its member states in certain specific grave circumstances, as opposed to the Organisation of African Unity (OAU's) cornerstone principle of non-interference in the private affairs of member states. The OAU's principle of non-interference led to several tragedies such as the genocide in Rwanda, the protracted conflict in the Democratic Republic of Congo (DRC) and the crisis in Darfur.⁸ The ultimate rationale for incorporating the right of intervention in the Constitutive Act therefore developed from concern about the OAU's failure to intervene and stop the gross and massive human rights violations witnessed in Africa in the past.⁹

The ACJHR's criminal jurisdiction, if decided on, would be better than other jurisdictions, especially that of the International Criminal Court (ICC). This statement is based on the various concerns that African states have about the ICC. They include the use of double standards and selective justice of the ICC in focusing on situations and conflicts in Africa only, while there are similar or even worse situations in other continents.¹⁰ It is argued that the proposed criminal jurisdiction will mainly solve the problems that the ICC has faced in its eight years of operation. There are various international crimes in the continent of Africa which necessitate the intervention of a criminal jurisdiction that will try to punish them. It is true

that there is a need for high political will on the part of African states to make this jurisdiction effective.¹¹

Access to justice

The establishment of a criminal jurisdiction body within the African continent would bring easy access to justice in Africa. The court would be easily accessible for victims and all participants in the international criminal justice system in Africa.¹² It is generally understood that in cases of human rights protection, national systems can work better than regional systems.¹³ However, the same is true of regional human rights systems, which can work better in the protection and promotion of human rights than international systems. This is because of their closeness to the countries and victims of violations involved; they can be easily reached by the societies that they are designed to work for. Therefore, if the regional criminal jurisdiction of the ACJHR is established, it will be more accessible for protection of human rights than is the ICC.¹⁴

Enhanced effectiveness

When it comes to international crimes in Africa, an African court with a criminal jurisdiction would be much more effective than another international court, notably the ICC. The ACJHR would be a better and more effective option when it comes to accessing the crime scene, acquiring first-hand information and interviewing witnesses.¹⁵ This would be particularly useful with regard to specific evidence and witnesses that might be destroyed if the evidence-gathering processes took longer. The ACJHR would also be effective in curbing international crimes in Africa, by setting an important deterrent for future perpetrators of such crimes. It is thus assumed that the new jurisdiction of the ACJHR would be very effective in deterring future international crime in Africa.¹⁶

Challenges of the proposed criminal jurisdiction of the ACJHR

The proposed criminal jurisdiction is also faced with challenges which are conflict of jurisdiction with the ICC, lack of financial capacity and political will, lack of compliance and cooperation by African states. These challenges are discussed below:

Conflict of jurisdiction with the ICC

It is believed that the proposed criminal jurisdiction of the ACJHR would create a conflict

of jurisdiction with the ICC. The purpose of the ICC and the proposed jurisdiction of the ACJHR is similar; both would have the power to try international crimes of genocide, war crimes and crimes against humanity. Considering the prior existence of the ICC, designed and created for the purpose of trying international crimes, the AU's proposal to create a criminal jurisdiction is considered as replication of jurisdiction.¹⁷ The proposed criminal jurisdiction is definitely facing total rejection from a number of important quarters, such as international organisations, African institutions and some researchers. African institutions and Non-Governmental Organisations (NGOs) raised their voices concerning the role that African states played in the creation of the ICC and the effect of the new criminal jurisdiction.¹⁸ If the proposal to extend the jurisdiction of the ACJHR to try international crimes of genocide, war crimes and crimes against humanity is decided on, it will affect the existing obligations of the 30 African states towards the Rome statute.¹⁹ This is mainly because these African states will be in the position of having to choose whether to refer cases to the ACJHR or conform to their obligations under the Rome statute.

Lack of financial capacity and political will

Lack of financial muscle is another major challenge to the proposed jurisdiction of the ACJHR. It is argued that the AU lacks financial capacity to sustain the court and its proceedings, particularly in view of the current financial problems of the AU and its organs.²⁰ Therefore it would not be easy for the ACJHR to deal with investigations and prosecutions of complex criminal cases in accordance with the highest standards of due process of law, which are extremely expensive by nature. If the costs of the proceedings were to be drawn from the budget of the ACJHR, it would obviously undermine its work, resulting in another financial crisis which would cause delays and would undermine its credibility.²¹ (An example is the delay in trying Hissène Habré in Senegal because of financial problems.²²) Therefore, the AU needs to see the practical problems that might arise in the future in the light of the various financial problems it has now, before deciding on the establishment of the criminal jurisdiction of the ACJHR.

Lack of political will of African states is considered to be a major challenge for the effectiveness of the proposed jurisdiction. The unavailability of resources and finances is even further subject to the political will of African state leaders, who would fear being prosecuted by the

same court that they are funding.²³ Although the establishment of an effective ACJHR is important for addressing violations of human rights and ensuring accountability of states, which is often lacking at the national level, overburdening the court with criminal jurisdiction would drain the scarce resources of an already overstretched system and distract the court from pursuing its original mandates effectively.²⁴ This would render the investigation and prosecution of crimes ineffective under international law.

Lack of compliance and cooperation by African states

African states are well known for not complying with the recommendations of the ACHPR, with few consequences.²⁵ Even in the case of sub-regional organisations and their tribunals, such as the Southern African Development Community (SADC) Tribunal and the Economic Community of West African States (ECOWAS) Court of Justice, African states tend to avoid obeying the decisions of these tribunals.²⁶ A mechanism of regional cooperation such as holding captives and prisoners for the ACJHR would have to be established and implemented. However, international crimes are committed mainly by sitting presidents or high officials.²⁷ Therefore, it is highly doubtful that other African states would be willing to enforce an arrest warrant issued by the ACJHR. This might be true even if there were a clear link to the commission of international crimes, because of the deep-rooted principle of non-interference in internal affairs of another state in Africa.²⁸

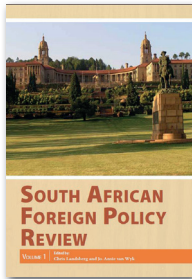
Conclusion

The proposed criminal jurisdiction of the ACJHR is indeed necessary in Africa. The cases of human rights abuse might decline after the establishment of this jurisdiction, as member states of AU would fear being tried by this continental court. It would not be easy for these countries to commit human rights abuse and get away with it, as the ACJHR would always be watching. However, issues such as liberation history are going to challenge the effectiveness of the ACJHR, as countries like South Africa will not find it easy to support the trial of countries that they share liberation history with, such as Zimbabwe, when they commit human rights abuses and other crimes.

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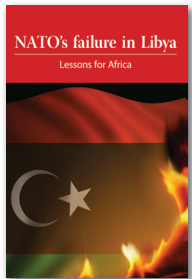
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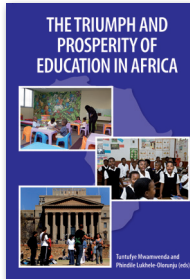
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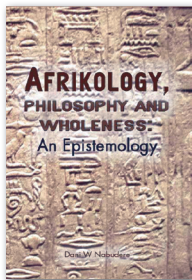
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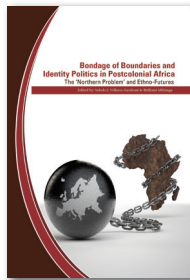
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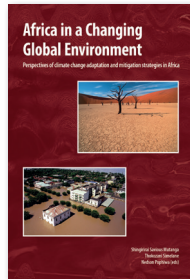
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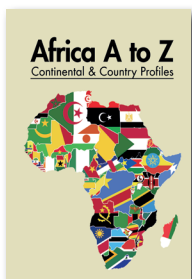
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