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Orientalism Reversed: Critical Analysis of the African Court on Human and Peoples' Rights

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Abstrakt

Diplomová práce používá kritickou teorii a s její pomocí zkoumá historii a fungování Afrického soudu pro lidská práva. Tato judiciální instituce byla založena v roce 1998, avšak až do roku 2013 nerozhodla jediný případ v jádru věci, veškeré stížnosti byly odmítány pro nedostatek jurisdikce. Teprve v roce 2013 vydal soud pouhé dva rozsudky, které se skutkově zabývají situací stěžovatelů. Nicméně nadále existuje reálné nebezpečí, že soud bude fungovat jen pro státy, které mu to dovolí. Takováto nečinnost soudu silně kontrastuje s intenzitou porušování lidských práv na africkém kontinentě. Stejně tak vyvrací ideje liberálního institucionalismu, podle nichž by mezinárodní organizace měly posilovat spolupráci mezi státy a zároveň přispívat k rozvoji vzájemně propojených oblastí: ekonomické spolupráce, demokracie a ochrany lidských práv.

Práce je empirickou jednopřípadovou studií, která se vymezuje proti předpokladům liberálního institucionalismu a využívá kritickou teorii v užším slova smyslu, aby dokázala, že soud byl sice přijat na základě liberálně-institucionálního přesvědčení, ovšem bez reálné ochoty států svěřit mu skutečnou autoritu a omezit svou suverenitu. Soud, jakožto procesní rozšíření hmotněprávních ochrany lidských práv, má pouze zvýšit legitimitu afrických států a zařadit je do klubu civilizovaných národů. Tímto obrací identitární dynamiku orientalismu. Ve výsledku se soud stává kopií bez vlastního originálu a jeho fungování je simulakra v mezinárodních vztazích.

Abstract

This thesis uses the Critical theory to explore the history and functioning of African Court on Human and Peoples' Rights. This judicial institution was established in 1998. However, it did not rule any decision on the merits until 2013. All cases had been refused because it lacked the jurisdiction. Finally in 2013, two judgments were issued that solved the factual situation of applicants. Nevertheless, the danger still exists that the Court will function only if the states will allow it to do so. Such inactivity of the Court is firmly inconsistent with the intensity of human rights violations on the African continent. In the same way, it falsifies the presuppositions of liberal institutionalism that the international institutions should strengthen cooperation between states and contribute to the development of mutually interconnected areas: economic development, democracy and human rights protection.

The thesis is an empirical case study which opposes the liberal-institutional ideas. It uses the Critical theory in narrow sense to show that those ideas played certain role in the establishment of the Court. Nonetheless, the real willingness of the states to empower the Court with authority and limit their sovereignty was absent. The Court, as a procedural enlargement of substantive human rights protection, should thus only increase the legitimacy of the states and serve as a ticket to the club of "civilized nations". By the deliberate adoption of the Court, the dynamics of orientalism has been reversed. As a result, the Court becomes a copy without actual original; it is the simulacra in international relations.

Klíčová slova

Lidská práva, Organizace africké jednoty, Africká unie, Africký soud pro lidská práva a práva národů, kritická teorie.

Keywords

Human Rights, Organization of African Unity, African Union, African Court on Human and People's Rights, Critical theory.

Rozsah práce/Length of the thesis: 150 322 znaků s mezerami/characters with spaces

Prohlášení

1. Prohlašuji, že jsem předkládanou práci zpracoval samostatně a použil jen uvedené prameny a literaturu.
2. Prohlašuji, že práce nebyla využita k získání jiného titulu.
3. Souhlasím s tím, aby práce byla zpřístupněna pro studijní a výzkumné účely.

V Praze dne 13. 5. 2014 Tomáš Bruner …….

Poděkování

Na tomto místě bych chtěl poděkovat konzultantu práce doc. RNDr. PhDr. Niku Hynkovi, M.A., Ph.D., PGDip Res za veškerou pomoc s touto prací. Rád bych rovněž poděkoval PhDr. Otakaru Šoltysovi, CSc. z katedry mediálních studií FSV UK za konzultaci k rovině simulakry a v neposlední řadě také doc. PhDr. Stanislavě Hýbnerové z Právnické fakulty UK za rady v právních aspektech. Poděkování patří také Blance Budkové a Kevinu Martensovi za pomoc s jazykovou korekturou.

Institut politologických studií
Teze diplomové práce

Téma – vymezení, relevance a kontext:
Africký soud pro lidská práva a práva národů založila organizace Africké jednoty (dnes Africká unie) v roce 1998. Po dobu deseti let však soud nerozhodl o jediném případu. I v současné době se jeho činnost potýká s problémy a fakticky doposud ještě nebyl vydán rozsudek nebo rozhodnutí v meritu věci. Veškeré stížnosti soud odmítal pro nedostatek jurisdikce.
Takovéto (ne)fungování judiciální instituce v komplikovaném prostředí, jakým je africký kontinent, otevírá řadu otázek a přímo vybízí ke zpracování formou případové studie.
Problematika obnáší pozoruhodné poznatky v rovině teoretické. Na zkoumaném tématu lze totiž v praxi předvést, jak se liší institucionálně-liberální a kritická teorie mezinárodních vztahů v pohledu na fungování institucí v mezinárodním prostředí a na efektivitu mezinárodního práva. Navíc kritická teorie poskytuje nástroje ke zkoumání fungování této instituce, jejichž využití ostatní teorie neumožňují.
Tématu Afrického soudu pro lidská práva je v českém diskurzu rovněž věnována pouze okrajová pozornost.

Teoretická ukotvení:
Práce vychází z kritické teorie mezinárodních vztahů, jíž na daný případ aplikuje.
Kriticky se vymezuje k paradigmatu institucionálního liberalismu. Podle předpokladů tohoto paradigmatu by měl Africký soud pro lidská práva a práva národů, coby mezinárodní instituce, zvýšit spolupráci států na úrovni ochrany lidských práv a liberalizovat prostředí, ve kterém působí; zároveň by měl značně přispět k ochraně práv konkrétních jednotlivců, případně zajistit náhradu škody v jednotlivých případech porušení lidských práv. Myšlenky liberálního institucionalismu v tomto případě do značné míry vystihují převládající vnímání, jak by měla v ideálním případě fungovat spolupráce „civilizovanosti národů“ a „civilizované společnosti“ a jak vypadají měřítka této „civilizovanosti“.
Soud však doposud nevydal jediné meritorní rozhodnutí, ačkoli na africkém kontinentě prokazatelně dochází k intenzivnímu porušování lidských práv.
Kritická teorie umožňuje zkoumat genealogii soudu a zasadit tak jeho vznik a fungování do širokého kontextu, s odhalením skrytých vazeb a souvislostí. Zároveň řeší vnímání vlastní identity států zřizujících soud a očekávání takovéhoto vnímání u druhých. Klade důraz na bezpečnost jednotlivce spíše než bezpečnost státu, což je důležité pro situaci, kdy by státy měly dobrovolně odevzdat část své suverenity mezinárodnímu soudnímu orgánu ve prospěch ochrany práv jednotlivců. Přitom není svázána předpoklady a axiomy některých dalších teorií.

Výzkumné otázky:
1. Jak došlo ke vzniku soudu a vývoji v jeho fungování v širokém kontextu ostatních událostí?
2. Jak a proč soud funguje, jak je jeho funkce vnímána a prezentována?
3. Jakou roli hraje či může hrát v souvislosti se soudem emancipace?

Metodologie a operacionalizace:

Práce bude empirickou jednopřípadovou studií.
První výzkumnou otázku by práce měla zodpovědět za použití metody kontextualizace, zkoumá tzv. genealogii soudu. Ptá se, jaké faktory hrály roli pro ustanovení soudu a zvažuje, jaký to mohlo mít důsledek pro jeho současnou podobu a (ne)fungování. V tomto ohledu vyjde ze sekundárních pramenů, popisujících vznik soudu, ale také se pokusí dopátrat a dohledat primární prameny – záznamy z mezinárodních konferencí o založení soudu.
Odpověď na druhou otázku bude zprostředkována analýzou právních dokumentů, na jejichž základě soud funguje. Zároveň budou rozebrány jednotlivé rozsudky a usnesení soudu, včetně případných odlišných stanovisek jednotlivých soudců. Bude analyzovány další aktivity soudu, nad rámec judiciálních pravomocí a komunikace, které soud uskutečňuje (zejména webové stránky). Na teoretické rovině budou kriticky zkoumány vazby soudu na tzv. „civilizovanou společnost" a „civilizovanost národů".
Klíčovou roli má v rámci kritické teorie koncept emancipace. Třetí otázka zkoumá, zdali bude v tomto případě aplikovatelný a v jaké podobě.

Shrnutí a kritika sekundárních zdrojů:
V českém prostředí je problematice Afrického soudu pro lidská práva věnována okrajová pozornost, obvykle v rámci publikací zaměřených na mezinárodněprávní ochranu lidských práv (Faix 2011, Scheu 2006, Šturma 1999). Soudem samotným se zabývají dvě krátká pojednání (Lhotský 2011, Němčák 2009), která poukazují zejména na to, s jakými potížemi se fungování soudu střetává, a dílčím způsobem uvažují o příčinách potíží. Nezasazují však fungování soudu do žádného širšího teoretického rámce. Na mezinárodní scéně je soudu věnováno více publikací (viz např. Jalloh 2010, Viljoen 1999, Wachira 2008, Zelena 2007).
Samotné teorie, s nimiž bude práce operovat, mají v odborné literatuře širokou základnu. Stěžejním dílem institucionálního liberalismu, vůči kterému se práce kriticky vymezí a který poskytuje shrnutí převládajícího vnímání „civilizovaných národů", je Keohanovo (2012) *Twenty years of Institutional Liberalism*, případně Doylovo (2005) *Three Pillars of the Liberal Peace*.
Z pohledu kritické teorie bude práce stavět na tezích Kena Bootha (1991, 2005); metodu genealogie využívá například Price (1995). Dále práce zohlední poznatky o peacebuildingu a statebuildingu západních zemí (viz např. Campbell a Chandler a Sabaratnam 2011; Chandler 2010; Richmond a Franks 2009; Richmond 2011). Ze zastánců kritické teorie zaměřujících se na africký kontinent je také nutné jmenovat Williamse (2007).
Samotná úloha ochrany lidských práv v mezinárodních vztazích je na obecné úrovni rovněž dobře popsána, včetně jejího vývoje a kritiky její efektivity (viz např. Budilová 2011, Dunne a Wheeler /eds/ 1999, Buerghental 2006, Cavallaro 2008, Chandler 2002, Neumayer 2005). V případě zkoumání otázek identity a jejího vnímání práce vyjde ze stěžejních děl Campbella (1992) a Saida (viz např. 1978 v reedici 2003, 1981 v r. 2009 a 1993 v r. 2012), teoreticky se může opřít i o vybrané teze Baudrillarda (1994).

Primární zdroje:

Africká charta práv člověk a národů (African Charter on Human and Peoples' Rights). Přijato Organizací africké jednoty (Organization of African Unity) 27. června 1981. Dostupný online [11. 4. 2013]. URL: < http://www.african-court.org/en/images/documents/Sources%20of%20Law/Banjul%20Charta/charteang.pdf >

Protokol k Africké chartě práv člověka a národů o založení Afrického soudu pro práva člověka a národů (Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights). Přijato Organizací africké jednoty (Organization of African Unity) 10. června 1998. Dostupný online [11. 4. 2013]. URL: < http://www.african-court.org/en/images/documents/Court/Court%20Establishment/africancourt-humanrights.pdf >

Africký soud pro práva člověka a národů. *Seznam států, které podepsaly, ratifikovaly/odsouhlasily Protokol k Africké chartě práv člověka a národů o založení Afrického soudu pro práva člověka a národů. Seznam deklarací vložených státy.* Addis Ababa: 2011. Dostupný online [11. 4. 2013]. URL: < http://www.african-court.org/en/images/documents/Court/Statute%20ACJHR/Statuts%20of%20the%20Ratification%20Process%20of%20the%20Protocol%20Establishing%20the%20African%20Court.pdf >

Webové stránky:

Africký soud pro lidská práva a práva národů (African Court on Human and Peoples' Rights; „ACHPR"). [11. 4. 2013]. URL: < http://www.african-court.org/ >

Koalice pro efektivní Africký soud pro lidská práva a práva národů (Coalition for an Effective Affrican Court on Human and Peoples' Rights). [11. 4. 2013]. URL: < http://www.africancourtcoalition.org/ >

Rozsudky a usnesení:

dostupné online [11. 4. 2013]. URL < http://www.african-court.org/en/index.php/2012-03-04-06-06-00/finalised-cases-closed > U rozsudků a usnesení bohužel není uveden den jejich vynesení.

Michelot Yogogombaye v. the Republic of Senegal. ACHPR, rozsudek ke stížnosti No 001/2008.

Femi Falana v. African Union. ACHPR, rozsudek ke stížnosti No 001/2011.

Soufiane Ababou v. People's Democratic Republic of Algeria Application. ACHPR, usnesení ke stížnosti No 002/2011.

Daniel Amare and Mulugeta Amare v. Republic of Mozambique & Mozambique Airlines. ACHPR, usnesení ke stížnosti No 005/2011.

Association Juristes d'Afrique pour la Bonne Gouvernance v. Republic of Cote d'ivoire. ACHPR, usnesení ke stížnosti No 006/2011.

Youssef Ababou v. The Kingdom of Morocco Application. ACHPR, usnesení ke stížnosti No 007/2011.

Ekollo M. Alexandre v. Republic of Cameroon and Federal Republic of Nigeria. ACHPR, usnesení ke stížnosti No 008/2011.

Efoua Mbozo'o Samuel v. Pan African Parliament Application No 010/2011. ACHPR, usnesení ke stížnosti No 010/2011.

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Emmanuel Joseph Uko and Others v. The Republic of South Africa Application. ACHPR, usnesení ke stížnosti No 004/2012.

Amir Adam Timan v.The Republic of Sudan. ACHPR, usnesení ke stížnosti No 005/2012.

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Content:

LIST OF TERMS AND SHORTCUTS:

ACHPR also the Court = African Court on Human and Peoples' Rights;
AFRICAN COMMISSION, also THE COMMISSION = African Commission on Human and Peoples' Rights
AFRICAN CHARTER, also THE CHARTER = African Charter on Human and Peoples' Rights
AU = African Union
ECHR = European Court of Human Rights
IACHR = Inter-American Court of Human Rights
NGO = non-governmental organization
OAU = Organization of African Unity
THE PROTOCOL = the Protocol to the African Charter on Human and Peoples' Rights on Establishment of the African Court on Human and Peoples' Rights
UN = United Nations

Introduction

This thesis examines the functioning of the African Court on Human and People's Rights. The Court is an international judiciary body which was established in the year 1998 by the Organization of African Unity (current African Union). Nevertheless, for the first 15 years of its existence, it did not rule any decision on the merits of any case. During last year, there have been only two judgments that solved the factual situation; in all other cases the Court simply refused the applications. The phrases such as "the Court manifestly lacks the jurisdiction" or "finds it has no jurisdiction to hear the case" have appeared regularly in its judgments or decisions.

It is well known fact that Africa remains the continent where human rights are very often violated. The intensity indexes of human rights violations in most of African countries exceed 6 out of 10, many countries still having 7 or 8 points, Sudan, Chad, Somalia, and the Democratic Republic Congo approaching 10 points (Forreign Policy, Fund for Peace, 2013). Human Rights Watch Annual World Report for 2012 lists 23 African countries where the human rights of inhabitants were significantly endangered. And finally, according to Freedom House analysis (2012), the sub-Saharan Africa percentile of freedom is only 13 %. Despite that, the Court has acted in favour of human rights protection in very limited way.

However, the Court *works;* it especially dedicates an effort to self-presentation. There are the seminars organized by the Court, courtesy calls of some statesmen at the Court and groups of school children visiting the Court on their excursions and trips; all this is presented on the web pages of the Court.

This strange *modus vivendi* of the Court points out several questions and literary *begs* to be examined as an empirical case-study. This thesis uses the Critical theory and other related theoretical concepts to find answers to those questions which are for the purpose of this research formulated as follows: 1. How was the Court established in the wide context of events? 2. How does the Court work; how is this work presented?

The thesis attempts to demonstrate that the countries of African Union, inspired by Western ideas of justice and human rights, established the Court in order to persuade the rest of the World that they are "civilized" as conceptually defined by Edward Said. However, they did not equip the Court with sufficient powers and recognized authority. As a result, the Court does not factually work; it only simulates the functions of a judiciary body. Thus, it is a copy of other international human rights courts, but without factual original, an example of Badrillard's simulacra in international relations.

On the theoretical level, the thesis allows us to falsify the assumptions of liberal institutionalism. This stream of though presupposes that international institutions foster international cooperation and prosperity achieved through this cooperation on the interconnected fields of human rights, economic development and democracy.

The Critical theory, the basic concept of this thesis, aims at revealing hidden power structures and connections. It investigates how the present order was established or institutionalized. Thanks to it, we may critically examine the widespread opinion of liberal-institutionalism and uncover its role in the dynamics behind the functioning of African Court on Human and Peoples' Rights.

Moreover, we may also apply some other concepts such as Baudrillard's simulacra and Said's orientalism and show the particular and unusual way in which they work in this case. This also enhances the importance of those concepts for international relations.

On empirical basis, the thesis sheds new light on the ACHPR as a judiciary institution, it attempts to explain its inefficiency and to scrutinize facts that have not been entirely investigated yet. As far as general relevance of this research is concerned, one may expect that the ACHPR is not the only simulacra in international relations. Consequently, the thesis offers also the way how to investigate this phenomenon and how to uncover the underlying dynamics behind institutionalizing certain idea. Sole legal analysis, with all its problem-solving fixes, would not be able to provide such an explanation. Therefore, the critical IR approach represents valuable tool how to deconstruct the reality of the ACHPR.

In this sense, it is also necessary to announce that this thesis could be perceived as eclectic in several ways. It uses the Critical theory to contest the presuppositions of liberal-institutionalism. In addition, it employs the concept of simulacra together with the concept of "civilized nations". Finally, it also exploits some constructivist literature on norms spreading. We may identify following reason for this approach. The theories of international relations are developed in interaction with the World, influenced by the situation as well as influencing the situation. The complexity of the phenomenon that is being researched here requires to take into account more than just one theoretical concept, since different theories reflect the situation but also shape it at the same time and thus enter the whole spiral of reflections and reactions between theory and practice. As a result, the theory (of liberal human rights and institutionalism) may change into an ideology; the ideology may reverse the classical orientalism and create the simulacra on

the place where we would not expect that – on the place of the human rights court for African continent.

Last but not least, we may testify the relevance of this research for security *per se*. The ACHPR is an emancipatory security project that obviously[1] aimed at promoting the security of every individual. If we borrow the *human security* terms, it should provide freedom from fear of further illegal persecution and to lesser extent also freedom from need; need caused by the insufficiencies of previous human rights protection system. However, the Court has performed its functions rather symbolically. Therefore one may claim that this has been false and failing emancipatory security project. The research should reveal what went wrong and thus implicitly also how to avoid it in the future.

The first chapter of this thesis starts with further theoretical explanation. The related literature is reviewed in the second chapter. The third chapter clarifies the methodology of the thesis. The fourth chapter solves the question of establishment of the Court in wide context of events. The fifth chapter focuses closely on the simulacra hidden in functioning of the Court. Some further reflections and remarks on possibilities of critical emancipation are mentioned in the conclusion.

[1] From the standpoint of African civil society, individuals and NGOs.

1. THEORETICAL PREMISES

This thesis uses the Critical theory as an overall underlying conception, placing it into contrary relation to neoliberal institutionalism. In addition, it employs other related concepts, namely the model of Edward Said's orientalism, discourse of civilized nations, concept of simulacra and state-building. This chapter tackles those theories, reveals their mutual interconnections and explains their relevance for the topic of the thesis.

The theory of liberalism, especially neoliberal institutionalism, shall serve as the most suitable starting point. The following lines explain its tenets and significance for the ACHPR.

In 2000, liberal scholar and economist Richard M. Ebeling claimed that "true internationalism and world peace will come through individual freedom, the free market, and the peaceful and voluntary associations of civil society" (Navari, 2008, 29). As one can observe from this quotation, liberalism in general tends to interconnect peace and prosperity with individual rights, freedoms, (economic) cooperation and civil society. Different streams of liberalism lay emphasis on different terms from this equation. While economic liberalism claims that mutual cooperation together with commercial interactions make war too costly, Kantian liberalism and the democratic peace theorists declare that it is the freedom of individual and democratic constitution that facilitate and catalyze the peaceful coexistence of the countries (Navari, 2008, 32 – 38). Finally, neoliberal institutionalism emphasizes that those are the multilateral institutions[2] that mitigate the gravest perils of international anarchy. Formalizing the processes of cooperative behaviour, international institutions enhance the mutual trust among actors and help them to identify and reach common goals. By achieving this, the institutions maximize the benefits of cooperative behaviour as well as costs of anti-systemic behaviour, which means that the undesirable actions of individual entities – member states – may be successfully averted (Axelrod, 1984). The institutions are persistent and once established, they are very likely to make deep impact on member states, even if the conditions under which they had been founded changed (Keohane,

[2] It is necessary to distinguish the *institutions* in the sociological sense, meaning the relatively stable set of practices and relations established to fulfill certain goal, e.g. the marriage, and the institutions in the language of some IR theorists *stricto sensu* meaning organizations. Both those conceptions often overlap in discourses and in practice (organizations usually encompass certain set of practices and relationships). Here, the word institution refers to organization unless it is provided or obvious otherwise.

1984). Once an institution is established, it further enhances the cooperation, liberalizes the environment (Keohane, 2012, 125), and lowers the uncertainty and transition costs among the actors (North, 1990).

In this regard, in comparison to the threat based alliances, the institutions help to establish a liberal community of law where "potential disturbances are not dealt with by mobilizing superior power but rather are diffused through integration, by reinsurance and by conflict resolution" (Navari, 2008, 43).

Most of the proponents of neoliberal institutionalism above could be labelled as the advocates of rational choice actions. Nonetheless, there is the opposite direction as well – the constructivist institutionalism. Barnett and Finnemore (1999) argue that the importance of international institutions remains not only in influencing payoffs and preferences but also in forming the common identity, setting up shared rules, practices and norms. The identity perception and social expectations thus provide the countries with the motivation to obey certain rules and participate in international institutions even without possible benefits or direct self-interests (Finnemore and Sikkink, 1998)[3].

Having mentioned the facts above, it is only obvious that human rights have a special position in this system of international cooperation that should be bestowed upon the World according to liberal theories. Doyle (2005, 463 – 466) asserts that ideological commitment to human rights is one of the three pillars of liberal peace together with transnational interdependence and republican representation. It is widely understood, e.g. by the European Union policymakers that "establishing the rule of law and protecting human rights are the best means of strengthening the international order," (Quille[4], 2004, 4) and that a priority should be given to "the development of a stronger international society, well functioning international institutions and rule-based international order" (Ibid. 7). For liberal theorists, there is the direct link between fundamental human rights and international security. As Slaughter defines (1995, 538): "Contemporary human rights law, for instance, was founded on the recognition that domestic political conditions have consequences for international security."

Thus, the liberal theories define the peaceful order of cooperation as a desired status of the future world. They perceive human rights protection as both the functional

[3] The reader will find further reference to the role of conformity, expectations, legitimation and overall dynamics of norms below.
[4] Quille referred to a speech of J. Solana.

predisposition and the result of this order[5]. In other words, human rights, as a substantive law phenomenon, are mutually interconnected with this desired order; they promote peaceful coexistence and peaceful coexistence contributes to human rights protection. Adding the flavor of constructivism, one could assert that human rights label and shape the identity of proponents of this peaceful order.

International institutions should be the means how to achieve the desired order and also how to procedurally ensure the protection of substantive human rights. As suitably summarized by Chandler (2003), "governments and international institutions claim human rights as one of the essential pillars of the international system, and they are proclaimed in the same breath as peace, democracy and the rule of law as a universal value of the highest order."

At this point, it should be facile to estimate what role the liberal theories ascribe to the ACHPR. The AU (former OAU) should be an international institution, which reduces transaction costs, promotes cooperation, mitigates the disputes, integrates its members and helps them to achieve their goals, most importantly peace and prosperity. The African Commission and the ACHPR as institutions created by and subordinated to OAU/AU should basically do the same on the field of human rights, since the human rights recognition and protection have crucially important position within this desirable order. Both those bodies should act complementarily, not concurrently. On the macro-level, the African Commission should promote and the ACHPR should enforce the human rights protection. By its judgments and decisions, the ACHPR should establish the human rights protection standards and thus integrate member states. This widely recognized protection of human rights would further liberalize the environment and thereby contribute to the desired international order of peace and security.

It is also important to mention the micro-level. Here, the ACHPR should provide higher level of security for individual human beings and defend their rights. For better understanding of desired functioning of the Court, one may borrow the terminology from related field of Human security. The possibility to appeal to a human rights court represents security *sui generis*. In other words, it enhances individual security by freeing an individual from fear of further human rights violations and from need by

[5] See Slaughter (1995, 538, emphasis added): "The world of liberal States (…) is a world of individual self-regulation facilitated by States; of transnational regulation enacted and implemented by disaggregated political institutions – **courts**, legislatures, executives and administrative agencies – enmeshed in transnational society and interacting in multiple configurations across borders".

adjudicating him the compensations. Moreover, the Court would contribute to the reconciliation and justice perception in concerned communities.

Nevertheless, the ACHPR has neither seriously performed those functions nor fulfilled the hopes so far. For sixteen years, there have been only two judgments on the merits. This fact directly contrasts with the scale of human rights violations on the African continent. However, the Court works, at least in a certain way. The judges swear their oaths regularly; the Court organizes seminars and welcomes ceremonial visits, consisting of ministers, heads of states or simple school excursions[6]. The liberal theories would face the significant problems if they had to explain this *modus vivendi* of the Court.

The argument of this thesis is that the establishment of the Court was undoubtedly influenced by the liberal stream of thought, though numerous questions remain – how was it influenced and what other factors did play role in the establishment of the Court? And most importantly, why is the Court not able to fully use its potential? Raising those inquiries transforms the issue into a case for the Critical theory, which will be explained in following paragraphs.

The Critical theory is understood in the narrow sense, meaning a special stream of thought coming from outside International Relations discipline, but having significant impact on it. In 1937, Max Horkheimer distinguished a critical theory from traditional theories. He claimed that the traditional theory could be understood as a way of the transformation of ideas into institutions[7] that are further presented as natural and objective (Bilgin, 2008, 93), regardless the motives of founding actors and subjective character of the theorist. Though, the task of the theorists should not be to repeatedly reintroduce the existing order of things and repair the loopholes in it, but to understand the origins of that order and to suggest another possibilities of changing that particular order.

The critical approach was further developed by R. W. Cox (1981) or R. Wyn Jones (1999). It stresses that the current state of things contains hidden power structures and relationships and it is the task for researchers to deconstruct and contextualize the alleged reality in order to discover those phenomena. As Booth (2005, 15) suggests, the word "'Critical' implies a perspective that seeks to stand outside prevailing structures, processes, ideologies, and orthodoxies, while recognizing that all conceptualizations of

[6] One could say that the Court promotes human rights. However, this is the initial task of the African Commission.

security derive from particular political/theoretical positions; critical perspectives do not make a claim to objective truth but rather seek to provide deeper understanding of prevailing attitudes and behavior with a view to developing more promising ideas by which to overcome structural and contingent *human wrongs*[8].”

The Critical theory is suitable for theoretical framing of this thesis for several reasons. Firstly, liberalism, or neoliberal institutionalism may be perceived as traditional (in coxian terminology *problem-solving*) theory. According to this theory, the African Union countries should reach higher level of cooperation and harmony through the Court, which should also significantly improve the situation of individuals. However, this has not been happening so far. The Critical theory, standing in opposition to liberalism here, may offer us deeper insight into the causes of the Court’s malfunctioning through several methodological tools. It can reveal relations and structures that stay hidden for the proponents of neoliberal institutionalism. Secondly, it allows us to outline possible alternatives and search for emancipatory options that would enlarge the security of individuals. And thirdly, as the previous point already suggests, it offers an appropriate definition of security in relation to individuals. The Critical theory refuses general definition of security, since it characterizes security as a subjective, derivative concept. However, it agrees that security is an instrumental value, necessity for human beings, for their lives and especially for unfolding full potentials of those lives instead of having to cope with various threats (Booth, 2005, 22).

Nonetheless, within the Critical theory, other detailed concepts have to be introduced in order to get necessary theoretical background and methodological toolkit. Firstly, we have to define the notion of Orientalism. Edward Said (1977) departed from analyses of discourses in Foucaltian sense and understood Orientalism as a network of interests, “a Western style for dominating, restructuring, and having authority over the Orient” (Ibid. 4). According to him, the term Orient is not fixed, but it is rather constructed. Europe employed this term in post-enlightenment period and embedded it to its culture. Orient was (and still is) perceived to certain extent in a romantic fashion, as a place of adventures, exotic sites but also former colonies. Said argues that it was constructed as “the other” identity to Occident, the West. At first, the schism Orient – Occident encompassed Anglo-French relations to India and Middle East. But the perceptions expanded and merged with the division on the West – the East and the

[7] Here meant rather in sociological sense.

North – the South. Thus, within this "imaginative geography", two entities reflect upon each other.

But not only does this Western perception split the territory, it divides the perception of values as well. On the one hand, there is the Orient – a romantic underdeveloped place for adventures, inhabited rather by poor irrational savages. On the other hand, there is the Occident, the West. It is automatically, implicitly deemed flexible, capable, inhabited by rich, rational, and law-obedient citizens. The West is, to put it in one word, "civilized".

Consequently, Orientalism goes hand in hand with the perception of civilized nations' principle. This term, again embodied in discourses and perceptions, has a long history. It was introduced in the 19th century and it replaced the former term "Christian nations" after Muslim Turkey (Ottoman Empire) had been accepted as a member of international community. Basically, both the terms were used to legitimize certain practices among the parties and to turn the excesses from those practices illegitimate. Even before the Westphalian order appeared, in 12th century, papal ban had claimed that the *Christian* warriors could not use crossbows to fight each other. Tolstoy (1905) saw the Russian-Japanese war in 1904 as an act of uncivilized behaviour. Baldwin (1907) claimed that the *civilized* world was willing to accept rule of law and a principle of solidarity. In 1914 ninety-three German professors (1919) called for *civilized* world not to believe the propaganda spread about Imperial Germany in WWI. Those are just some illustrative examples; generally speaking, the behaviour of countries is very often deemed civilized or uncivilized. In this sense, the civilized nations' concept is a kind of benchmark how to evaluate certain state and its practices and also how to treat it. This concept of civilized vs barbarian practice and its influence on international legal realm was theoretically described for example by Gong (1984) or Schwarzenberg (1955). George (1958) applied this division on African continent. She asserts that this division on civilized and uncivilized is culturally rooted within Aristotle's perception of the people as Greeks or barbarians. She further summarizes and theoretically underpins common knowledge that Africa was regarded as purely uncivilized space. Even scientifically, Europe was focused mainly on African natural characteristics rather than on local population. Although slow change began to take place in 18th century with the idea of a "noble savage" (Ibid. 72), this idea was still highly stereotyped and romantic.

[8] Emphasis added; human wrongs may be perceived as the opposition to human rights, which makes the Critical theory appropriate for the issue of the ACHPR.

In the following chapters, this thesis tries to show that the oriental and "civilized" (self-)perception and presentation had a profound impact on the establishment of the ACHPR. As may be deducted from the information on liberalism above, it is currently believed and widely recognized that the human rights recognition and the compliance-verification mechanisms are part of the practice between ***civilized*** nations. And if the West (the Occident) was civilized in this sense, the way how to ***civilize*** the Orient was to spread human rights protection through an international institution – international human rights court.

Besides that, two more affiliate concepts support commonly shared understanding that the civilized country should subdue its judicial sovereignty to international human rights court. Firstly, the legitimacy of international human rights courts is strongly enhanced by the idea of global justice (see e.g. Nardin, 2013, Walzer, 2011) and universal principle of human rights protection.

Secondly, there is the concept of global civil society. This civil society, often referred to but very vaguely defined[9], should go hand in hand with liberal democratization and it should be granted a possibility to correct the mistakes of national jurisdictions in front of this international court. There are close links between global civil society and human rights. As Marchetti and Tocci (eds. 2011, 2) declare, "[t]oday, most of civic activities are framed in terms of the defence of human rights." Chandler (2004) examines how scholars and practitioners understand this term in the discourse. Global society is according to him perceived as an expansion of the rule of law on international level as well as a result of worldwide power transition from states to non-state *civil* actors.

According to its advocates, global civil society should constitute very suitable environment for global justice restoration, and also for human rights court establishment. However, Chandler (2004, 208 – 209) concludes that this global civil society might be more desired and imagined than factually existing and solving problems. The accountability and responsibility may be discoursively diffused in this term. Subsequently, global civil society is rather a wishful thinking product or the

[9] See e.g. Setianto (2007). On the other hand, Kaldor (2003, 584) provides historical overview of the changes of civil society. Starting with Aristotelian definition of community with shared principles, she traces the term back to the ages of early social contract when civil society merged with the state. She captures the change described by Hegel, when the civil society separates from the state and occupies the space "between the state and the family, where the individual becomes a public person, and through membership in various institutions is able to reconcile the particular with the universal."

imagination of higher and better solution created by and as a justification for the inability to address the problems locally.

At this point, the key principles of liberalism and the Critical theory have been explained, together with the notions of orientalism and civilized nations. For the analysis, two more concepts have to be introduced. In 1981, Jean Baudrillard described so called simulacra. He claimed that it is a copy without an original, a situation when the reality is replaced by the signs of reality ("signs of the real"): "The real is produced from miniaturized cells, matrices, and memory banks, models of control – and it can be reproduced an indefinite number of times from these. It no longer needs to be rational, because it no longer measures itself against either an ideal or negative instance." (Ibid. 4)

The legal environment is especially suitable for appearance of simulacra. Leaving the legal positivism aside, law is definitely *a social process*. The consensual foundation of international legal norms, either in form of a custom or a treaty, moves the legal realm very close to constructivism, when introduced norms may *confirm, disconfirm* or *constitute* reality. In case that the new norms just pretend to establish appropriate practice, simulacra may be born.

Taken from another perspective, though all cultures, judicial or mediation procedure is an extremely ritualized set of practices. Ceremonial judicial oaths, the robes of the judges, the obligation to stand up when hearing the judgement, this all represents rituals, which are reproduced in all the judicial discourses. Boyer and Liénard (2006) generally ask: What is the reason for ritualizing certain behaviour? They seek the answer on personal, psychological level. According to their synthetic analysis, ritualized behaviour is the precautionary response to inferred threat. Here, it is possible to upgrade this hypothesis on the psycho-social level. In the judicial sphere, the threat is always present that the parties will refuse to comply with a decision of a court. The set of ritualized practices should enhance the authority of judges and psychically persuade the parties. Though, the more ritualized certain behaviour is, the bigger grows the danger that the actual content, the purpose of the behaviour will slowly disappear and vanish. Repeated rituals may become both the form and the content, the process and the substance; the mean and the end at the same time. The repetition of the discourse establishes further and further copies, with less and less content. Finally, the copies without actual original are being produced; the habitual signs of reality remove the reality itself, establishing simulacra. This theoretical concept could explain the situation

when the Court performs all kinds of activities, although it has been able to deliver just two judgments on the merits.

Last but not least, we have to encounter the concept of state-building. This notion could be described as an effort of developed states and international organizations to spread frameworks of good governance to less developed countries. Through those actions, future interventions in the potentially failing countries should be prevented and averted. Chandler (2010, 1) states that "[a]s a set of international policy prescriptions, the frameworks of good governance are seen as a 'silver bullet' capable of assisting states in coping with the problems of our complex globalized world: facilitating sustainable development, social peace and the development of democracy and the rule of law." In the context of our thesis, state-building could be, to a certain extent, perceived as enhancement of an alleged authority to spread the "civilized" practices, by copying well proven procedures and methods of judicial oversight over human rights and implementing those procedures in a foreign environment.

Before the conclusion of the theoretical part, one more point remains to be made. By mentioning the constructivist approach to international institutions, the stream of thought was tackled that has much to say about norms' spreading and importance in international politics. Although the basic idea of this thesis is to use the Critical theory to comment on basic views supported by liberal world-opinion and neoliberal institutionalism, the constructivist approach may add necessary theoretical background as far as the norms and their dynamics is concerned. Finnemore and Sikkink (1998) explain the role of norms[10], claiming that they shape the behaviour of individuals or states to the same extent as their *rational* choices and valid law (*ius positivum*). Following argument of those authors has a crucial significance for this thesis: "Makings successful law and policy requires an understanding of the pervasive influence of social norms of behaviour" (Ibid. 893). According to this claim, we may explain the lack of success of the ACHPR by uncovering the influence that the social norms (human rights, commitments of civilized countries) had on the establishment of the Court. The theory

[10] Their work adheres to their definition of a norm as "a standard of appropriate behavior for actors with given identity" (Ibid. 891). James Fearon (Finnemore and Sikkink 1998, 892) distinguished the norm and the rule. He claims that the rule sets the standard of certain behavior for getting certain payoff, while the norm basically says "good people do this". However, the payoff in case of norm could be that the actor would be perceived as a good man. Nevertheless, from this rationalist point of view, adherence to human rights protection may be perceived as a rational choice. On the other hand, legalist would argue that the norms are not legally binding and subject to enforcement, but in the same way as a law they do consist of description of certain situation, prescription of plausible behavior in that particular situation and warning of possible sanction ("if X, do Y, otherwise Z will follow"). Both norms and laws mirror certain values.

of those authors also offers us interesting hypothesis answering the question why African countries would adopt the non-functional Court. They argue that the spreading of norms among the states is facilitated by "the combination of pressure for conformity, desire to enhance international legitimation and the desire of state leaders to enhance their self-esteem" (Ibid. 895). Thus, the need to reach the conformity may persuade an actor to obey certain rule without possible benefit or even resulting in inconvenient outcome (Ibid. 904). At the same time, this action may serve the purpose to legitimize the self in the eyes of others (Ibid. 906). Moreover, extraordinary power is granted to the norms congruent with liberalism and capitalism (Ibid. 907), which human rights obviously are. Regarding human rights norms, Sikkink (1998, 520) asserts: "Human rights norms have a special status because they prescribe rules for appropriate behaviour and they help define identities of liberal states. Human rights then become part of the yardstick used to define who is in and who is outside the club of liberal states."

According to those presuppositions, the spreading of the norm of procedural protection of substantive human rights among the states in African region could be perceived as the mean how to legitimize those countries in the eyes of the Occident and an answer for the pressure for conformity.

Finnemore and Sikkink (1998) further explain the life cycle of the norms, allowing us to examine the norm entrepreneurs and institutional platform at the early stage of the cycle, the norm cascade through which the norms are spread and the internalization of the norm at the end.

At this point, it is possible to put all the parts of theoretical mosaic together. As a result, we will get the critical hypothesis that a "civilizing" effort of liberalism (particularly neoliberal institutionalism), possibly manifested through state-building, may result in ineffective simulacra rather than effective human rights protection. To put it in other words, neoliberal institutionalism, concept of civil society and global justice create certain discursive legitimization of the Court and provide the justification for its existence. However, none of those theories is able to explain the malfunctioning of the Court. Therefore, the concepts of simulacra and orientalism are introduced within the framework of the Critical theory. In a subsidiary way, the norms dynamics theory of Finnemore, Sikkink, Rise and Ropp should underpin the conception of norm in social environment.

The OAU/AU countries *willingly* accepted the Court. State-building was not that much enforced or inserted by the Occident, but rather welcomed and established by the

Orient because of internal motivation due to the desire of the OAU/AU countries to become, or at least to be perceived as, “civilized”. This is the crucial point where the reversion of Said’s orientalism could be vested. The constructed division on the Orient and the Occident was taken by the OAU/AU countries as granted. Those countries themselves accepted the division and purportedly attempted to Occidentalize the Oriental self. The classic underlying theoretical dynamics of orientalism and state-building is to command the Oriental other, to transform it to the same form as the Occidental self, or to order the other the practices of the self. In this case, the dynamics seems to be reversed – the Oriental self purportedly chooses to be transformed to, or at least to look like the Occidental other. The result of this effort, which reversed the dynamics of Orientalism, is the ACHPR, the copy of the European Court on Human Rights, which is functioning far more differently than the European Court on Human Rights, the copy without an original, the simulacra.

2. LITERATURE REVIEW

The purpose of this chapter is threefold. Firstly, it summarizes existing literature on key notions that are dealt with in this thesis, such as human rights, their protection in Africa and regional institutions, but it also includes current findings on the ACHPR itself. Secondly, it attempts to sort the existing sources into categories and identify the points of view on and images of the Court provided by the literature. Thirdly, it comments on some points concerning the ACHPR that are insufficiently covered by the literature and also on the points that could represent an obstacle for the conceptual seizure of the topic by the thesis.

The key notion of this thesis, human rights are exhaustively described in general politico-philosophical works (e.g. Beitz, 2009, Evans, 2001) and particularly in the legal literature (e.g. Joseph and McBeth eds., 2010; Forsythe ed., 2009; Kalin and Künzli, 2009; Brems 2001, Šturma ed., 2013; Chocholáčková et al., 2013). However, those lines scrutinize rather the sources of IR scholars focusing on this topic. Forsythe (2012, 3) defines human rights as "fundamental moral rights of the person that are necessary for a life with human dignity"[11] and he claims that human rights have played and will play important role in international relations. He lists several reasons for that. Firstly, they belong to the agenda of important international institutions. Secondly, they are advocated by the most powerful countries but also private authorities. Thirdly, they offer their proponents strong legitimating authority and thanks to all hard and soft law tools to certain extent create particular "human rights ideology". As a result of this persuasive potential and also of changes of state sovereignty, the originally Western concept of human rights spreads rapidly in international environment. Nonetheless, Forsythe (Ibid. 197) emphasizes that there may be a difference between liberal legal frameworks and actual power- and self-interest based practice of the states that pleaded protection of human rights of their citizens. Those findings are fully compatible with the theoretical premises of this thesis. Similar exhaustive account of the interconnections between human rights and international relations is offered by Vincent (1986).

[11] Nevertheless, Donnely (1998) implicitly uses another definition of human rights related to the work of John Locke. According to Locke, people concluded social contract and embodied their rights in a sovereign. However, certain rights remained in their possession – the fundamental human rights. Interesting semiotic inquiry is presented by Douzinas (2007, 8) who claims that human rights is "thin, underdetermined concept" and that the word human in the collocation is a "floating signifier". As a result, the notion of human rights may "denote" plenty of texts, institutions, practices, agencies, personnel and situations.

Even the relationship between human rights and standards of practices between civilized nations was explored, particularly by Donnelly (1998). He employs the genealogical method and traces the establishment of human rights protection as a practice of civilized nations through 19th century till presence. He claims that the norms have always influenced the behaviour of the states and even successfully toppled possible imperialistic motivation of the states for the behaviour that would breach the norm. The restriction of absolute sovereignty principle was revived with the human rights concept and the attention should be paid to how "human rights subtly shape national and international political spaces and identities by demanding, justifying or delegitimating certain practices" (Ibid. 22)[12].

Douzinas (2007, 7) draws similar connection between human rights, self-determination and identity. He claims that:

> "Human rights have both institutional and subjective aspects. As institutional entities, they belong to constitutions, laws, court judgements, international organizations, treaties and conventions[13]. But the prime function of right is to construct the individual person as a subject (of law). Rights are tools and strategies for defining the meaning and powers of humanity. The human and its derivatives, humanism and humanitarianism, are all intimately linked with the work of rights. We acquire our identity in an endless struggle for recognition, in which rights are bargaining chips in our desire of others. The law and rights make a central contribution to the project of becoming subject thorough the reciprocal acknowledgement of self and the (mis)recognition of others." (Ibid.)

Thus, human rights grant not only legal subjectivity but also identity to an individual as well as to the state.

Risse and Börzel (2012) describe three new occurrences on the field of human rights: the emergence of R2P norm and International Criminal Court, the recognition of human rights by private actors, and negative impact of limited statehood. More importantly for this thesis, they distinguish the commitment to human rights (e.g. adoption of international human rights treaty) and actual compliance with human rights regime (factual protection of human rights). As will be described below, the sole commitment is sometimes insufficient. Therefore, four mechanisms how to ensure the compliance are presented; firstly the forceful coercion, secondly the incentives of sanctions and rewards, thirdly the discoursive persuasion and finally the capacity building, e.g. through the international institutions (for details see Table 1 on the following page). Nevertheless, this piece of writing cannot fully address the initial

[12] Further works on the role of norms in shaping the identities and foreign politics are provided by Kratochwil (1989) or Katzenstein (1996).
[13] This is the aspect of human rights studied by legal positivist.

question of this thesis – why does the African Union have an interstate human rights court which is not working although it was willingly accepted and established?

Table 1 (Source – Risse and Börzel, 2012, 5):

Mechanism	Modes of Social (Inter) Action	Functional Cooperation	Underlying Logic of Action
Coercion	Use of Force Legal Enforcement	Derivative of interdepedence	Hierarchical Authority (Herrschaft)
Incentives	Sanctions Rewards	Most important driver of cooperation	Logic of Consequences
Persuasion	Arguing Naming/Shaming Discursive Power	Important; Regulate activities, constrain and enable behavior	Logic of Arguing and/or Logic of Appropriateness
Capacity-building	Institution-Building, Education, Training	Less important	Creating the Pre-Conditions so that Logics of Consequences or of Appropriateness can apply

Further research on domestic acceptance of international human rights norms is provided in Risse, Ropp and Sikkink (eds. 1999). This publication also contains some case studies focusing on adherence to international human rights standards in some African countries (Ibid. 39 – 109). At this point, it is important to repeat that the human rights are interconnected with civil society. Risse, Ropp and Sikkink (Ibid. 5) operate with the notion of transnational advocacy networks, which are "networks among domestic and transnational actors who manage to link up with international regimes, to alert Western public opinion and Western governments." This element of global civil society should contribute to the human rights protection.[14]

Hafner-Burton and Ron (2007) document the spread of human rights through practices and discourses since 1970s' and claim that while the qualitative research on human rights confirms the efficiency of this protection, quantitative researchers might show some scepticism. They also interlink the democratization and human rights and suggest that democracy contributes to the human rights protection, but democratization

[14] The NGOs undoubtedly have the role of watchdog, but while they are granted quite large powers on international scenes (participation on meetings of international organizations, influencing the negotiations and amendments etc.), their possibilities are fairly limited in domestic conditions where the dictatorship or authoritarian regimes thrive (Tomuschat 2008, 283 - 290). Mutua (2004) explained that African NGOs do have significant positive impact on human rights protection. Nevertheless, they have to be supported from the North/West countries, which means that they are not that independent and they tend to promote Western agenda. Moreover, they often focus only on civil liberties, leaving the economic and social rights behind. For further account on NGOs see e.g. Welch (2004).

may entail human rights violations, or enhance protection of some rights while decrease protection of others (Ibid. 380 – 381)[15].

Certainly, critical literature on human rights needs to be explored as well. One of the classical authors that pointed out the caveats of human rights *ideology* is Headley Bull (1977). He argued that human rights undermined the principle of state sovereignty that had guaranteed the rules of the international game (and therefore also peace) since the treaty of Westphalia[16]. He claimed that more evidence of human rights pervasiveness and effectiveness should be provided (Ibid. 167).

The actual effect of human rights was also problematized. Several researches confirmed that the sole adoption of international human rights treaties does not necessarily mean that those rights will be protected and enforced in particular countries (Hafner-Burton and Tsutsui, 2005; Hathaway, 2002; Keith, 1999). Similarly, Neumayer (2005) declares that the international human rights treaties in general have significant positive effect only in appropriate environment, especially in fully democratic states with strong civil society. The presupposition that the character of political regime influences the level of the human rights protection was already expressed above and it was also confirmed by Rise and Börzel (2012, 5). Though, by using purely this approach, one could get into vicious circle: lack of democracy and civil society means lack of informal protection of human rights and enforcement of the conventions. The lack of this enforcement further results in weakening the democracy and civil society etc.

Proposing even more aggressive approach, Shivji (1989, 3) ascertains that "'Human Rights ideology' is an ideology of domination and part of the imperialist world outlook", which is being especially visible in Africa. Those hypotheses may closely correlate with the notions of judicial imperialism or overlegalizing human rights realm (see e.g. Helfer, 2002). Though, this criticism does not tackle following question: Why do the African countries *willingly* accept ACHPR or further human rights tools under the umbrella of AU (or formerly under OAU)? Here again, space opens for our analysis.

More comprehensive critical analysis of human rights is offered by Douzinas (2007) who has been already mentioned above. He argues that the end of the Cold War

[15] Further account on democratization available e.g. in Moravcsik (2000), the importance of international organizations for democratization described e.g. in Mansfield and Pevehouse (2008).

strengthened the hopes for universal validity and prevalence of human rights that were constituted as certain *jus cosmopoliticum*. However, new threats and challenges endangered this construction and security took precedence over human rights. Though, the concept remained as a legitimization for imperial practices using the rhetoric: *It is necessary to shorten human rights because of security measures*; *but it is also necessary to spread this concept around the globe in order to eliminate the nests of its opponents*. Moreover, human rights are often, particularly in liberal market-oriented democracies, exchanged with individual desires and compulsive wishes, when the formula "I have the right for this" means "I want it and nothing should prevent me from getting it" (Ibid. 34 – 50). The critic of ethnocentrism and exclusively Western participation on human rights creation is also offered by Matua (2008).

Finally, critical literature on human rights *stricto sensu* contains Chandler (2003). He confirms that currently, "[t]he discourse on human rights appears to go beyond liberal democratic framework to aspire to a broader normative project of human progress, which celebrates the universal nature of humanity" (Ibid. 2). His argument is that human rights often articulate or fix power balance and strong-weak hierarchy rather than represent struggle for justice and equality. Chandler understands human rights as a concept that's importance for international relations remains in three spheres: universality (citizenship of humanity is granted to everyone), empowerment (to pursue human rights protection) and human centered approach encompassing ethics and morality. He challenges all the three key presuppositions of this new human rights ideology; human rights may be perceived as rather particular and relative concept (instead of universal) that may sometimes serve as an excuse (empowerment) for unlawful intervention[17].

The application of human rights standards on the African continent is also well described. Again, detailed legal analysis is available e.g. in Bösl and Diescho (2009). Regarding more political and transnational point of view, Forsythe (2012, 190 – 195) emphasizes that human rights in Africa often stand in opposition to domestic jurisdiction and state sovereignty. Subsequently, the attempts to protect them on transnational level without the consent of concerned governments often encounter difficulties. This problematic aspect of human rights protection on the continent where

[16] Thus, human rights may serve as an excuse for an intervention (allegedly humanitarian) and erase the sovereignty of a state to larger extent than actually desirable. Further ideas on this topic are provided in Alston and Euan MacDonald (eds. 2008) or Buchanan (2010).
[17] This correlates with Headley Bull's criticism – see previous note or also Chandler (2006).

the violations of those rights are very often reported has caught the attention of scholars for quite a long time (e.g. Adegbite, 1968, Bello, 1981, Zvobgo, 1979). In Zeleza (ed. 2004), it is argued that the idea of human rights universalism collides with relativism on the African continent and in related discourses. Zeleza presents that there were different legal traditions before the colonization of Africa. Western human rights concept unfortunately did not take them into account. Thorough the publication, the argument is repeated that current human rights are Westernized concept, created upon a liberal tradition after the end of the Cold War. Zeleza (Ibid. 11) argues that after the Cold War, new evil enemy empire was needed. Therefore, on the principle of Orientlism, the Islamic culture was created as evil and opposing human rights.

Additional analysis was carried out by Williams (2007); he criticizes Western generalization and romantic stereotypes concerning Africa. He insists that the development of autonomous supranational institutions of formal and informal character will be crucial for the emancipation of Africans (Ibid. 1037).

Finally Udombana (2000, 48) claims that there is a discrepancy between rhetoric and practice of African states concerning human rights: "Nevertheless, while the discourse of human rights has increasingly been spoken by the governments of African states over the past several decades, this rights rhetoric-with few exceptions-has not been translated into rights reality" (Ibid.). Hence, the author describes the difference between commitment and compliance with human rights. He also states that despite rhetorical commitment, insufficient compliance is the reason for establishment of international bodies, such as the Commission or the Court. Unfortunately, following chapters prove that those international bodies or institutions may copy the same discrepancy between rhetorical commitment and factual practice as the states.

Considerable amount of attention is also dedicated to the importance of regional institutions and their respective role on the African continent. Fawcett (2008, 311) uses Keohane's definition of international institution as a "formal organization 'with prescribed hierarchies and capacity for purposive action'" which together with international rules form international regime that had been negotiated and agreed on by states. He claims that regional institutions ought to promote security in particular areas, though their overall success in fulfilling this task is usually limited. Their importance may be seen in promoting communication and enhancing trust among their members as well as creating shared identity (Ibid. 311). Though, the critics of international

institutions[18] traditionally claim that they only legitimate the power of the strong over the weak.

The African Union as a regional institution itself is often studied for its peacekeeping activities (Fawcett 2008, 308). Fawcett (Ibid. 311, 313) describes how it was established under its original name of Organization of African Unity as a multipurpose institution that followed the pattern of Americas, Commonwealth and Arab states after 1945. He argues (Ibid. 314) that its' success in achieving peace and stability among and within member states after decolonization may be perceived as rather imperfect. Finally, he explains, the OAU was transformed into the AU in the third wave of regionalism. The material commitment to human rights of the former Organization of African Unity and problematic enforcement of human rights protection under this organization has been described in detail e.g. in Aluko (1981), Jinadu (1980) or Welch (1981).

Another important body of literature is represented by the authors who focus on the connections between human rights and political regimes and consequently more or less apply their findings on the African continent. Donnelly and Howard (1986) argue that human rights are often dismissed with human dignity. Contrary to the universality of human dignity thorough cultures (and to lesser extent regimes), human rights are rather particular than universal and their full, substantive and procedural protection is usually conditioned by the liberal character of the regime. "Only when autonomy, equality, and at least a moderately high value on belonging are combined – as in liberalism – do we find a commitment to economic and social rights, and not just their substance." (Ibid. 816).

Correspondingly Aidoo (1993, 704) summarizes that in current Africa, "more than even before, the struggle for democracy is by definition taken to mean a struggle for human rights". As some already mentioned scholars, he states that although human rights usually correlate with democracy, the democratic regime does not necessary entail their protection. In other words, democracy may establish but not necessarily guarantee an environment for human rights protection. Subsequently, it is necessary to fight for human rights even if democracy is achieved. Therefore Aidoo (Ibid. 715) calls for independent "*nonpartisan"* human rights organizations.

Furthermore, Ake (1993) claims that African people had to, or still have to, declare the independence twice; firstly from the colonial rule, secondly from the

[18] One classical example for all is represented by Mearsheimer (1994/1995).

authoritarian indigenous rule. The developed Western countries and societies supported Western-type democracy interconnected with atomized individual interests protected by individual rights and freedoms; they aimed at establishing this democracy as a universal standard especially through institutions like International Monetary Fund or World Bank. Ake (Ibid. 240) specifies that, "[i]n the face of these powerful forces it will be difficult for the movement in Africa to avoid settling for the line of least resistance, that is, for orthodox liberal democracy," even though this liberal democracy is neither appropriate for the African countries[19], nor are they ripe for it.

As far as transition to democracy in Africa is concerned, Bratton and Van den Walle (1994) ascertain that the character of previous regime influences the way of transition to democracy and the success of this transition itself. They emphasize the role of domestic political institutions that foster certain tradition of cooperation, and the importance of masses in transition *from bellow*. Generally, their findings show that dictatorships are less likely to transform to democratic political regimes than one-party plebiscitary regimes or competitive one-party regimes.

Approaching the issue from another point of view, Jensen and Wantchekon (2004) examine the relationship between democratic regimes and natural resources in Africa. They disagree with the opinion that the wealthier a state is and the more natural resources it has, the easier is its way to democracy. According to their research, the democratization proceeds more smoothly in poorer states. In addition, relative wealth of a state may even contribute to the authoritarian character of a state since it supports corruption and desire for power. On the other hand, Dunning (2008) problematizes the estimation that the wealth corrupts democracy or affects it in a negative way. He asserts that material prosperity may have both positive and negative effects for democracy.[20]

As far as the ACHPR itself is concerned, the hugely dominant stream of related literature could be expectedly gathered into the legal category of human rights law scholars (e.g. Buerghental, 2006, Viljoen, 2012a, Zeleza, 2007). The importance of judicial overview and enforcement of human rights in general is usually stressed (Foster, 2006; Scheu, 2006; Šturma, 1999; Šturma, 2003). Within this human rights approach, several works closely focus on the Court itself and eventually attempt to identify possible hurdles in its functioning. With the most of the authors being lawyers

[19] The author regards societies in African countries as often pre-industrial, rather communitarian and based on the notion of duties rather than rights.

and with the prevalence of legal analysis, those works could be characterized in words of R. Cox as problem-solving. They identify following problems that the Court faces.

Firstly and most significantly, the individuals are not able to stand in front of the Court if their home state had not made special declaration allowing them to do so. So far, less than 10 states made such a declaration. And only around a half of the African Union members did ratify the Protocol establishing the Court at all. Thus the majority of individuals from AU member states are not able to reach ACHPR directly. This is most remarkably criticized as a possible justice denial (see e.g. Lhotský, 2011, Němčák, 2010, Viljoen, 2004).

Secondly, the complicated relationship with African Commission is also stressed. The Commission may refer the cases to the ACPHR. At the same time, it may receive the complaints of individuals without any special declaration of their home countries. Though, the relationship between the ACHPR and African Commission could be often perceived as "competition" rather than prescribed "complementarity" (Wachira, 2008, 15 – 17; Zimmermann and Bäumler, 2010, 49). So far, the Commission has been very reluctant to pass the cases to the Court and did that only three times. Two cases have not been resolved yet; one case was struck out since the Commission failed to comply with further requests.

Wachira (2008) further identifies other problems such as lack of women among the judges of the Court, the threatening desire of the countries to ask for the time extension in order to protract the disputes[21]. Vialjoen (1999) on the other hand points out more pragmatic issues, for example the budgetary restrictions, the impermanent character of sessions and limited number of meetings of the Court and the fact that the judges are to be appointed in supposedly political process by the AU countries; but by all countries, not only by the parties to the Protocol establishing the court.[22]

Apart from the problems with practical issues and procedural law, there are also caveats arising from the substantive law. The primary substantive legal document, African Charter on Human and Peoples' Rights, contains no derogation clause (Buerghental, 2006, 798) that would specify which provisions may be suspended and

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[20] This thesis primarily focuses on the norms; the ways and reasons of their (non-)protection. The emphasis is therefore placed on the side of ideas; though, materialistic perception may be useful and will be also used several times.

[21] Indeed, in this way, states successfully delay and postpone the judgments as well as proceedings in front of the Commission.

[22] Thus, even the countries that do recognize the jurisdiction of the Court may have their word in the selection of the judges.

which may not. Thus, the states may successfully restrict the protection of human rights. Moreover, the Charter is full of so called claw-backs. This phenomenon is exhaustively explained by Viljoen (1999, 165):

> „However, despite the near-universal ratification, the African Charter has not become a vehicle for significant human rights improvement on the African continent. One of the reasons for this fact lies in the provisions of the equating the level of supra-national protection with that of the domestic legal system. An example is found in article 10(1), which reads as follows: "Every individual shall have the right to free association provided that he abides by the law." This reflects the intention of the drafting fathers, who did not intend to provide the African Charter with too much "teeth"." (emphasis added)

The claw-backs paradoxically set the African charter on the level of domestic legislation. From the quotation above, it is obvious that individuals may associate, but only within the limits of law – which is understood as national law. Thus, the state may in fact restrict the free association to the extent of factual prohibition. In this particular way, the Charter may be efficiently rendered useless. In the same way, it is often emphasized that several African conventions aim at indigenous people protection, but in fact, all Africans are to certain extent deemed indigenous.

Finally, another important question is opened by Wachira (2008, 7), who evaluates the abilities of the AU to enforce the African Charter and compel the countries that do not comply. According to his analysis, the AU is usually capable to compel its members with middle strength, but it is not able to compel the strong ones or those that are on the good terms with those strong ones. Thus, the matter of securing compliance with ACHPR decisions remains at stake.

As the legal problem-solving approach promises, several authors suggest the way how to overcome those above mentioned problems, very often in the legal terms. Firstly, several authors (Wachira, 2008, 28, Lhotský, 2011, Němčák, 2010) assert that the situation would improve if more states ratified the Protocol and accepted the admissibility of the Court for individuals by special declaration. Wachira (Ibid.) adds that more proactive and cooperative relationship with the Commission could heal the weak spot with the individual complaints' unacceptability, at least until more countries would submit concerned declaration.

Jalloh (2010, 620 – 628) in his analysis of the first judgement of the Court examines purely legal solutions. He concentrates on the relevant provision in the Protocol stating that, "states shall make the declaration" to admit individual complaints. The wording "shall make" may mean rather an obligation or a duty of the concerned

states to make such a declaration, although it was interpreted by the Court as a possibility for the state, or as a duty that can be fulfilled with postponement, "any time thereafter". Jalloh adds that the judges could also use the legal creativity and employ the doctrine of *competence competence* in the future. This doctrine means that the Court itself has to certain extent the *competence* to determine its own *competences*; and to say which cases may be decided and which not. Additionally, the doctrine of *forum prorogatum* (see also Adjovi, 2009), which is practiced by the International Court of Justice, allows the states without necessary declaration to admit the jurisdiction of the Court over the particular case in particular time. But even if the legal interpretation would change, we can agree with Faix (2011, 34) – States that did not allow an individual to reach the Court will be very reluctant to accept the jurisdiction of the Court in this regard through any kind of creative legal interpretation.

Bearing this in mind, Viljoen (2007, 170) considers deeper changes of substantive and procedural law, while Zeleza (2007, 490) champions the substantive aspect in the terms of possible future amendment of the African Charter.

Plenty of the authors mentioned in this chapter (e.g. Viljoen and Louw, 2007, 170; Buerghental, 2006, 804; Neumayer, 2005) rely on non-governmental organizations and their involvement to solve the situation. Indeed, an NGO can possibly get the observer status by the African Commission. By doing this, it would be able to bring the cases in front of the Court and consequently broker the litigation for individuals.[23]

Usually the authors perceive the above mentioned problems of the ACHPR as singular and separated issues with possible convenient solutions at hand. Rarely, those problems are regarded as manifestations of particular structural setting. The valuable exceptions are the mentioned works of Viljoen and Wachira. Those authors carefully investigate the process of the establishment of the Court and scrutinize especially possible motivation of the states behind their attitude towards ACHPR. Viljoen (1999, 165) underlines the cause of *status quo* in following comparison:

> "The Council of Europe brings under one umbrella like-minded states that are in principle committed to the rule of law. The OAU, especially during its founding years, brought together newly independent states jealously guarding their newly found independence and sovereignty."

[23] This is also the case how the only substantive judgment of the Court so far was delivered and the reparations ordered – through the NGO involvement. However, it was already argued that the process of observer status achievement may be expensive and quite complicated.

We will further refer to and develop the findings of those two authors in the research parts of this thesis itself. Nevertheless, at this point, it is important that the quotation from Viljoen above illustrates another feature of the sources within human rights approach. It is the comparative character. The comparative attempts and cross continental references often appear in the reviewed literature. Those attempts usually perceive the ACHPR[24] as a regional manifestation of the universal human rights protection and compare it to other human rights protection bodies and similar courts elsewhere, namely European Court on Human Rights (ECHR) and Inter-American Court on Human Rights (IACHR), which should provide sufficient supra-state legal authority to guarantee the human rights protection (see e.g. Cavallaro and Brewer, 2008). Neumayer (2005, 939) states that the ACHPR is the least developed of the three regional judicial bodies.

Mohamed (1999) argues that on the one hand, the possibilities of NGOs and individuals to interact with the Court (through direct petition or *amicus curiae brief*) are better than in original founding documents of European Court on Human Rights or Inter-American Court. On the other hand, as many previous authors, Mohamed points out that African states may successfully prevent NGOs and individuals from reaching the Court by not submitting concerned declaration allowing their access to the Court. He understands this as a compromise between the willingness to have a Court and unwillingness to subdue to international jurisdiction in individual cases. He stresses that there is no obligation for a state to allow direct access for NGO or individual in the Protocol to the African Charter on establishment of the ACHPR. "In providing for direct individual and NGO access to the European Court of Human Rights, Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms imposes an obligation on States parties thereto not to hinder in any manner the exercise of the right guaranteed. A similar undertaking by African States would have prevented, in principle, at least, the potential use of the provision by states to frustrate direct access to the Court by NGOs and individuals" (Ibid. 204).

Kamau (2011, 24 – 27) also compares the accessibility of the human rights courts on African, European and American continent. She claims that an individual appeal is possible as far as the European Court is concerned. For ACHPR and Inter-American Court it has to be indirect. On the American continent, the complaint should be firstly submitted to the Inter-American Commission. The Commission would decide

[24] Or earlier African protection in general – see Okere 1984.

whether to present it in front of the Inter-American Court, where it would represent an individual[25]. However, the cooperation of African Commission and the ACHPR on transition of individual complaints has been very low even to that extent that both bodies sometimes rather compete or cooperate. Furthermore, Kamau (Ibid. 28 – 32) deals with the admissibility of individuals and NGOs complaints in front of the Court. She claims that the African Court may receive petitions from the NGOs which have the observer status at the African Commission. However, the process of obtaining this observer status is quite expensive and impossible for smaller NGOs. And it has to be stressed that the African Commission is rather a political body. Kamau compares this unsatisfactory system with the Inter-American system, where the Court is accessible by any legal entity recognized in member states. In a similar way, Kamau states that even though the access of individuals to European Court on Human Rights used to be limited as well, the Court itself always favoured the individual access and also attempted to apply concerned legal provisions accordingly.

Generally, it is quite often repeated (e.g.; Viljoen, 1999, 169; Zimmermann and Bäumler, 2010, 52 – 53) that the European Court on Human Rights and Inter-American Court on Human Rights more or less experienced very similar problems during its first years that the ACHPR faces right now. Departing from those facts, one could always claim that the ACHPR has to go through the same – quite protracted and complicated – process of establishment as the ECHR and IACHR did[26]. On the other hand, this argumentation has two important implications. Firstly, it admits that the people are not able to learn and thus condemned to repeat the same mistakes. To use an academic hyperbola, it is quite similar to the assertion that if two world wars originated from Europe, we should expect two world wars originating from Africa. Secondly and more precisely, the similar situation at the beginning of the ACHPR, the ECHR and the IACHR could be interpreted in the way that the structural problems, described here on

[25] But very some cases of very successful protection of peoples' rights were achieved and recorded. See especially Price (2012).

[26] During personal conversations of the issue with legal specialists, I encountered the opinion that the duality of the African Commission solving *individual* complaints and the African Court as *a second, Commission-brokered instance for individuals* was used intentionally, regarding the European experience: "If the individuals were admitted to the Court, every grandma could write a complaint that somebody harmed her doggie. This would overload the Court. Therefore the African Commission should filter the individual complaints and pass them to the Court only if it finds them appropriate for this." However, as we already mentioned, the Commission is very reluctant do to so. And this opinion – with all academic respect – is the expression of common Western misunderstanding and wrong generalization of our experience. To start with, the average life expectancy in Africa (most of the countries still under 60 years) and the level of illiteracy (in some countries still over 50 %) often turns *writing grandmas* in quite scarce phenomenon.

the case of the ACHPR, could be more or less omnipresent. In other words, the clash of the state sovereignty and human-centred approach could have occurred also in other cases, however, in the case of the ACHPR it is the most visible and it also resulted in the simulacra.

Moreover, no comparative work was found that would satisfyingly address the crucial phenomenon concerning the African continent: There is undoubtedly two levelled human rights regime in Africa. The Organisation of African Unity and later African Union developed specific legal mechanisms on the African continent. Those mechanisms should deepen the universal international human rights protection, usually established through certain UN convention. Thus, more strict *African* rules are paradoxically adopted, even though the basic *UN* protection is very often still not provided. We can consider the case of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) broadening the universal protection under UN Convention and Protocol Relating to the Status of Refugees (1951 / 1967). Another example is the Protocol to the African Charter on the Rights of Women in Africa (2003) enlarging the protection under UN Convention on the Elimination of All Forms of Discrimination against Women (1979). Furthermore, we can see that the African Charter on Rights and Welfare of the Child (1999) should broaden the regime of the UN Convention on the Rights of the Child (1989). The common understanding (e.g. Viljoen, 2012a, 305) is that the African agreements take into account the regional specificity and serious situation on the African continent and thus make the universal protection more effective. However, the critical point here would be that very often, even the basic (universal, UN-provided) level of protection is not secured at all. Thus, for the OAU/AU or African states it could have been better to enforce the respect for the universal UN conventions instead of ushering its own regional conventions that very often fail to significantly improve the situation. The following study of ACHPR could shed some light into this problem. The suggestion would be that the regional conventions are used as a communication tool. In other words, those regional conventions should spread the following message worldwide: "We agree that *this* (breaches of rights of children, women or refugees) represents a serious problem, we are aware that the situation may be grave in Africa and we are dedicated to solve it." Thus, the regional conventions may invoke the perception – more or less illusionary – that something is happening, things are changing to the better. Exactly this could be the case of the ACHPR.

Contrastingly, Killander (2010) claims that the human rights promotion has a long and original tradition on the African continent and that it is not Western-implemented. He traces this approach back to the abolitionists and anticolonial movements. Let us examine closely what he says (emphasis added):

> „In December 1958 the All African People's Conference was held in Ghana. The resolutions of the conference made many references to human rights and resolved that 'independent African States ensure that fundamental human rights and universal adult franchise are fully extended to everyone within their states, as an example to imperial nations who abuse and ignore the extension of those rights to Africans'"
>
> With more and more African states gaining independence less focus was given to human rights except as a ***tool*** in the fight against colonialism and white minority rule in southern Africa. In 1963 the OAU was created. A few token references to human rights were included, but it is clear that the human rights language that had been used in opposition was no longer of value." (Ibid. 3)

Interestingly, those lines could also lead to different and deeper conclusions. An alternative explanation could be that at that point (until the 1960s) African countries used human rights rhetoric to symbolically attack the West. They claimed that they adhere to human rights protection (signifying that they are civilized) while the European colonizers do not (signifying they are barbaric). Here, we can see that the human rights appear in the position of the object or useful ***tool*** of politics. Nevertheless, once the sovereignty was safeguarded, full human rights enforcement rhetorically became the burden far too heavy to carry for the African states. Taking this into account, it is only natural to pose the question which will be answered by the research part of this thesis: How does this human rights tool logic work in the case of ACHPR?

Nonetheless, the ACHPR is not the only supra-national court on the continent, which was also reflected by the literature. Hamul'ák (2009) explains that it is an afro-universal or pan-African body while there are several sub-regional mechanisms. Faix (2011, 32 – 39) focuses on the proliferation of these mechanisms or sub-regional judicial[27] bodies and warns that it could bring problems of *forum shopping*. This means that the claimant could choose among several courts and the obstacles of *res iudicata* (the same case already decided) and *lis pendens* (the same case being solved in front of another court) could complicate the disputes. Certain attention is also dedicated to the future merging of the ACHPR and African Court of Justice[28] in one body: African Court of Justice and Human Rights. Both possible positive and negative aspects of this step are discussed (Viljoen, 2012b, Zimmermann and Bäumler, 2010, 52 – 53).

[27] E.g. the judicial bodies under the more or less economic treaties ECOWAC, SADC and COMESA which may also settle human rights disputes.

We may shortly conclude this chapter with several remarks. Firstly, there is a rich literature that interconnects human rights, international relations and liberal democracy. Secondly, there are both advocating and critical pieces of writing concerning human rights in international relations and on the African continent. Thirdly, the key issues tackled by this thesis, such as human rights and African Union, are well described in available literature. Nevertheless, there are only a few publications that focus on the sole development of the Court after it factually started working in 2008. Moreover, those works are practically limited to the human rights legalists' problem-solving approach. Therefore, this thesis attempts to fill in the gap in the current writing on the ACHPR.

[28] African Court of Justice in fact never started working.

3. CONCERNED METHODOLOGICAL ISSUES

The thesis is an empirical single-case study. This methodology is perceived as a research of specific situation (Backter and Jack, 2008) or a detailed analysis of a case which may be defined as an enclosed system with internal functional logic and specific subjectivity (Kořan, 2008, 33). The case here is clear; the ACHPR as a phenomenon in international relations. The "how" and "why" case-study logic forms the basic background for empirical research and also for practical relevance of this thesis, which subsequently examines how the ACHPR works, why it works in that particular way, and – when emphasizing more practical terms – why it offers so little (security) protection for individuals. The substantive specification of the case is therefore clear. The temporal delimitation of the case could cause some concern. The Court was established in 1998. However, the thesis investigates the process of establishment in wider context of events. Therefore the substantive specification is considered as decisive for understanding and the thesis uses also some data from colonial and pre-colonial Africa instead of focusing on the situation after 1998 only.

If we apply the classical division of case studies, this one could be perceived as an instrumental (Kořan, 2008, 35), since it generalizes the findings of the case in regard to certain theories. Therefore this thesis tells and interprets the story of ACHPR and uses this story to falsify the presuppositions of liberal-institutionalism. For this purpose, it employs the Critical theory as an overall theoretical and methodological framework for utilizing other methods[29]. The research was divided into two parts according to two research questions; the results are described separately in chapter 4 and 5.

The fourth chapter answers following research question: **How was the Court established in the wide context of events?** It uses one of the primary methods of the Critical theory – contextualization. Applied on our case, this means the broadening and widening of understanding of the ACHPR history and looking especially for hidden power-structures (further on the method of broadening and widening see Booth, 2005, 14 – 15) in certain context. Similar critical attempts to shed new light on existing order and reveal hidden power relations are often labelled as genealogy. This method was introduced by Friedrich Nietzsche, further developed by Michel Foucalt (e.g. 1977) and

[29] If we would adhere to the particular stream of thought that promotes academic and research rigour, we could demonstrate the casualty process or even distinguish individual factors as outlined in Appendix No 1 on the page 81 of this thesis. However, most of the processes are mutually interconnected and mutually constitutive. E.g. liberal-institutionalism enters this thesis as both a theory and influential world opinion.

famously used by Richard Price (1995). The fourth chapter attempts to contextualize the establishment of the Court and reveal hidden power-structures, although true genealogical description of the Court is beyond its scope. Foucalt (1977, 76 – 77) claims that "[g]enealogy, consequently, requires patience and knowledge of details, and it depends on a vast accumulation of source material". An exhaustive attempt to outline the genealogy of the Court would primarily require mapping out the genealogy of *justice* in several different cultures. Therefore, for the purpose of this thesis, the history of the ACHPR is only placed into wider context in an inquiry that may resemble genealogy in several points.

Consequently, the fourth chapter tells the history of the Court and interprets some facts in wider and broader context in an attempt to reveal hidden structures and relations. It partly analyses and occasionally quotes related historical discourses to support certain assertions with necessary evidence. Especially the role of the notion "civilized nations" and the dynamics of "liberal-institutionalism" may be demonstrated and thus operationalized through those discourses. Last but not least, the fourth chapter operates with the division on Occident and Orient and attempts to show how the perceptions and attitudes changed. As outlined in the first chapter, both of those terms may be explained through imagined geography. Occident is supposed to be the Western World, Orient is a label for the rest of the – less developed, in this thesis African – World.

As a data set, the secondary literature was used, particularly several authors that focus on the history of the Court. The author of this thesis made necessary research to find all concerned primary documents. However, some of them are not available[30]. Therefore the primary documents are referred to and analysed in as many cases as was possible.

The fifth chapter also deconstructs the current order in a critical way. The research question of this chapter is: **How does the Court work; how is this work presented?**[31] Interesting methodological concern appeared during the researching – how to operationalize simulacra and prove its existence[32]. How to show that the reality is replaced by the signs of the reality? For this purpose, the chapter is divided into two

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Therefore, as a proponent of critical approach preferring understanding to explaining, the author of this thesis uses more *holistic* approach and Appendix No 1 is just very simplified flowchart illustration.

[30] E.g. the older Resolutions of the OAU and AU are unavailable.

[31] The original project of this thesis also asked "how the work of the Court was perceived". However, the author of the thesis meant rather: "What should be the desired perception of Court? What message does the Court spread and broadcast about itself?"

[32] The only available work on simulacra in international relations (Walega, 2010) focuses on H. Morghentau.

subchapters. Firstly, the legal functioning of the Court is dealt with by the classical method of legal analysis focusing on decisions of the Court and concerned *ius positivum* – the Protocol on establishment of the Court. Secondly, the overall analysis of other activities of the Court and discoursive analysis of its webpage is presented. This technique should illustrate the simulacra. While the first part proves the absent reality (human rights protection), the second part describes the signs of this reality, demonstrating that the Court is a copy without an original. A simulacra.

As dataset, the fifth chapter uses the decisions of the Court as well as available materials on the webpages of the Court.

The original proposal of the thesis considered asking the third research question – what is the role of emancipation and emancipatory actors such as NGOs in the project. The emancipation and suggestions for transformative emancipatory options are vital parts of the Critical theory. However, the research proved that the ACHPR has been unsuccessful or even *false* emancipatory project so far, or in other words, the attempt for emancipation that failed and left little space for further meta-emancipation. Therefore, this issue is just briefly discussed in the conclusion.

4. JOINING THE "CIVILIZED" NATIONS

The purpose of this chapter is to explore the genesis of the Court in wider context of events and subsequently to identify the role of the perception of "civilized nations" and dynamics of liberal institutionalism in establishment of the Court.

As an attempt for contextualization[33], we have to start the investigation earlier than the majority of other academic papers. Firstly, we have to briefly mention traditional ways of settling the disputes in Africa, since those traditions played important role for latter perception of identities.

The traditional dispute settlement in Africa was based on (legal) customs[34] on the level of a group, a tribe or a community and it is often labelled as *amicable*. The reason for this is that the procedure was meant both to solve the problem and to keep and increase the unity of concerned community. The crucial role was played by chiefs or elders in the community; an emphasis was laid on consensual acceptance of the result by both parties. The community watched the process closely and thus underwent further socialization. In the same way, it enforced the compliance or safeguarded the punishment for possible non-compliance with the result of the process. Apparently, the civil, punitive and administrative law was not distinguished and the process did not take place between two concerned parties, but rather in front of whole community. Anyone could draw the attention of the elders to a problem that allegedly endangered the peace in the community and every member of the community was concerned (AMCS, 2014).

The colonial rule brought Anglo-Saxon legal customs or continental system of written law to Africa, both of them relying on adjudication as officially enforceable and resolute way of dispute settlement. The division on *Oriental* (African) and *Occidental* (Western, European) legal traditions was clearly recognizable and the perception of identities was established.

After briefly explaining the earliest background for establishment of international judicial institution, we may start the investigation in postcolonial era. According to Udombana (2000, 48), most of the African countries embedded the substantive human rights protection in their constitutions immediately after gaining their independence. Nevertheless, the factual enforcement of human rights and their procedural protection was fairly limited in spite of those constitutional commitments.

[33] With a little genealogical flavour.
[34] As conflict resolution in many traditional societies.

Rhyne (1961, 685) described the situation at the beginning of 1960's in the following way:

> "The chiefs, or elders, of tribes usually preside over native courts, although law-trained magistrates increasingly have jurisdiction over matters involving tribal or customary law. These chiefs or elders are often illiterate, and rules of evidence do not apply in native courts. Lawyers are not usually allowed to appear in the native courts – the colonial view that lawyers would hinder and not help justice in those courts still prevails."

We may observe that the identity of Occident (in the quotation represented by a lawyer) was still regarded as hostile and undesirable by the members of African (Oriental) communities. Although the African countries made the self-legitimizing step by embedding human rights in their constitutions, the procedural protection of human rights was still regarded as Occidental.

Mentioning the facts above, it is clear that constitutional commitments to human rights did not improve the factual situation on the field of their protection. And this very fact became further impetus for establishment of an international human rights court.[35]

Already in 1961 the conference was held in Lagos, Nigeria. The topic of this meeting, organized by International Commission of Jurists and attended by nearly two hundred specialists, was the rule of law in newly independent countries. The conference adopted a document called Law of Lagos. Although it primarily demanded the strict division of legislative, executive and judiciary powers within states, it also called for establishment of international human rights court that would be "available for all persons under the jurisdiction of the signatory states" (Conference on Rule of Law in Lagos, 1961, 1). This document (Ibid. 2) persuasively operates with the notion of "modern society" or "a free society practicing the rule of law", which can be regarded synonymously to civilized society and which encompasses the demands for certain level of human rights protection. In addition, the Law of Lagos speaks of the general importance of legal bodies (institutions)[36].

At this point, the establishment of the Court must be also *contextualized* with the role of the Organization of African Unity (OAU). Viljoen (2012a, 411) comments on the earlier efforts of Lagos conference to establish a human rights court in the following way: "these efforts came to naught, as the Organization of African Unity Charter was

[35] As will be shown in the next chapter, the Court unfortunately overtook the functional pattern of the states. It overemphasizes the human rights commitment although it offers severely limited means how to secure factual compliance in the form of procedural protection of human rights.
[36] For further reference see Rhyne (1961).

adopted in 1963 without either a human rights framework or any human rights mechanism whatsoever."

The OAU was founded in 1963 and it was intended rather as a tool to fight colonialism and strengthen the independence of newly born African countries (Udombana, 2000, 55). The founding document, Charter of the Organization of African Unity therefore strongly voiced the protection of independence, non-interference and sovereignty (Ibid. 55), which the founding states "jealously" guarded (Viljoen, 1999, 168). As a result of previous colonial experience, the OAU countries were willing neither to interfere in domestic affairs of their neighbors in favor of human rights protection nor to accept such interferences. Udombana (2000, 57) adds one more cause of this irresponsibility – the African states were often represented in the OAU with the same statesmen that actually stood behind the human rights violations. Interestingly, Udombana (Ibid. 58) claims:

> "OAU has historically been little more than "a mutual admiration club": Member States were expected to see nothing, hear nothing, and say nothing. The result was apathy and irresponsible silence."

From this point of view, it was only the matter of time until the states would demand also the *admiration* from Occidental part of the world. And latter establishment of ACHPR could be perceived as a mean how to gain it.

Nonetheless, the often desperate situation of human rights violations on the African continent was still subject of intensive criticism and calling for solution on the basis of international law. This calling came from the members of civil society, as can be demonstrated on the Lagos Conference and latter lobbying of NGOs[37], and also from outside, from international and also European community.

The UN tried to motivate the African states to establish regional mechanism for human rights protection (Udombana, 2000, 58 – 59). UN Commission on Human Rights sponsored several conferences[38] and seminars with this aim. Those activities peaked in 1977, when UN General Assembly adopted a resolution 32/127 *Regional Arrangements for Protection and Promotion of Human Rights* (1977). This resolution in its first paragraph stated that the General Assembly:

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[37] Once the African Commission was established, it "became a forum where NGOs campaigned for a court" (Viljoen 2004, 8).

[38] Bekker (2007, 151, supra note 1) lists four UN organized conferences focusing on human rights promotion and protection in Africa between the years 1966 – 1973.

> "*Appeals* to States in areas where regional arrangements in the field of human rights do not yet exist to consider agreements with a view to the establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights." (Ibid.)

There was neither reference to practices among civilized nations, nor direct interconnection of human rights with democracy nor economic development mentioned in this document. Though, those issues might have been implicitly present, since the UN General Assembly was "[a]ware of the importance of encouraging regional cooperation for the promotion and protection of human rights and fundamental freedoms." (Ibid.)

Two years later, in 1979, the UN organized another seminar in Monrovia. Already at that time, Kéba M'Baye (1979) connected human rights with "exceptional development of standards" and "proliferation of statements". This specialist, who later participated importantly on establishment of both the Commission and the Court, also explained that the earlier failures to introduce working human rights protection mechanism on African continent had failed because their proponents had been blind towards specificity and traditions of African system. Another background paper (Elias 1979) identified the roots of universal human rights in exclusively Western thinking and legal documents (Magna Charta, French revolution, American Bill of Rights). He also mentioned the importance of economic development. And finally, Osita (1979) stated that:

> "Africa's reaction to this injected value system has been in general of two types – that of rejecting certain practices and the other of accepting them. Amongst the latter some were at par with practices that prevailed in pre-colonial Africa, such as the principle of participation in ones government while others such as two or multiparty system of government were alien to Africa.
>
> Colonial rule meant the denial of the right of Africans to rule themselves. This meant equally that they were denied the right to organize their economic, cultural, political and social affairs. Since it became increasingly necessary to rationalize colonialism as a result of opposition by progressive forces and humanitarian groups, 'the civilizing' missions with it evertone of racial superiority was to provide the justification."

This quotation interestingly realizes the dual reaction of African states to human rights. It also implies the perceived division on civilized and also civilizing (Occidental) world and uncivilized, needing-to-receive-civilizing (Oriental) world.

The UN was not the only body interested in human rights in Africa. Also the European countries maintained quite close connections with former colonies on the field of human rights. The cooperation between European Economic Community and African Countries was embedded already in 1957 founding Treaty of Rome. The legal basis of

this cooperation changed several times and human rights gradually became its pillar as well as its brand (Heyns, 1998, 214 – 215).

While examining those international efforts of the civilized Occident, we may observe the first state-building attempts and actions which establish human rights as a "silver bullet", a recipe for development, peace and prosperity. However, it was no sooner than in 1990s that those efforts gained necessary strength to facilitate the establishment of the Court.

External and internal human rights struggle firstly resulted in drafting and adoption of international convention in 1981 – the African Charter on Human and Peoples' Rights ("Banjul Charter"; "African Charter" or also "the Charter"). Although this Charter embodied substantive human rights law, the double-edged interest of the adopting states influenced this document and mirrored on its articles and paragraphs. On the one hand, the countries wanted to show commitment to human rights and satisfy the internal and external demands. On the other hand, they desired to keep their own powers and independence even in the matter of human rights. As a result, the Charter is full of so called "claw backs"[39]. Those are the provisions that place the Charter on the level of national legislation, or enable the national legislation to provide otherwise than the Charter (for more details see e.g. Neumayer, 2005, 939; Viljoen, 1999, 165). This can be regarded as a clear attempt to maintain the sovereignty of the states.

Udombana (2000, 60) also quotes one statement that was made during the drafting of the Charter:

> "As Africans, we shall neither copy, nor strive for originality, for the sake of originality. We must show imagination and effectiveness. We could get inspiration from our beautiful and positive traditions. Therefore, you must keep constantly in mind our values of civili[z]ation and the real needs of Africa."

This statement is especially important. It demonstrates the commitment to the values of "civilization". However, it proclaims that values of this civilization are special – the argument of African identity is used again ("as Africans, we shall…"). The words "neither copy nor strive for originality" almost perfectly linguistically fit the Baudrillards description of simulacra as a copy without original, but not original itself. When the traditional (Oriental) self was further suppressed by the same dynamics in 1990, the Court-simulacra was born.

[39] This phenomenon was also referred to in the Literature review chapter.

The sole idea of human rights court was discussed already during the drafting of the African Charter. Nonetheless, it encountered strong resistance at that time:

> "The experts who drafted the Charter contended that they favored negotiation and diplomatic and bilateral settlement of disputes in an amicable manner rather than adjudication, arguing that African culture frowned upon litigation, the adversarial and adjudicative procedures common to Western legal systems. Third party adjudication is generally considered confrontational, whereas it is often argued that Africans favor consensus and amicable settlement of disputes." (Udombana, 2000, 74)

At that period, the African (Oriental) identity, including African traditions and legal customs, was used as an argument to refuse the Occidental way of judicial dispute settlement. The analysis of Bekker (2007, 152) reached exactly the same conclusion: "The most widely held view in this regard was that a commission with largely conciliatory functions was more in keeping with African mechanisms for dispute resolution than a court. Closely related to this was the belief that by staking out a different path from that of the European and Inter-American systems, African states were asserting their African identity – their difference."

The Court was also considered "premature" and the possibility of its establishment was postponed for the future. It was also expected that a court could be established under different legal framework than the African Charter and that court would solve criminal issues. Individual access to such a judicial body was not solved at all (Viljoen, 2004, 4 – 5).

Udombana (2000, 75) also quotes a member of African Commission Mokama. He claimed that it is useless to have a court unless the Commission is working properly: "I don't like many institutions which don't work. It is bad enough to have one that doesn't work but to have two or three that don't work would be extremely embarrassing." (Ibid.)

From this quotation, we may observe that functioning of international human rights institution is perceived as a sensitive tool how to influence the international position of a country or an organization – it can either embarrass o increase prestige. Nevertheless, the opinion that a human rights court for Africa is undesirable persisted till 1990s. In this decade, several interconnected and mutually constituted processes shifted the perception of the OAU and African states, or at least of some of them. Following paragraphs describe those processes.

Firstly, the liberal thinking was allowed to flourish after the end of the Cold War. The liberal institutionalism, interconnecting human rights protection, economic

cooperation, development and democracy, became important world paradigm as we have described it in the Chapter I and II. From the other part of theoretical spectrum, *human security* became daily agenda of the UN and foreign policy of several states together with proliferation of ideas of global justice and civil society.

Secondly, partly within the liberal stream of though, the economic development was connected with human rights. Udombana (2000, 77) asserts that "the movement to establish an African Court of Human and Peoples' Rights was also aided by the adoption of the African Economic Community (AEC) Treaty in 1991 by Member States of the OAU." The same author claims (Ibid. 80) that several statesmen expressed their belief during the negotiations that the Court could contribute to economic development on African continent.

Thirdly, several human rights violations, or even tragedies occurred on African continent. The most shocking example was the Rwanda genocide and related events in neighbouring countries. Those events drew the attention of the World towards African system of human rights protection and increased the need for another self-legitimizing step. Bekker (2007, 164) observes that it was in July 1994, during the ongoing humanitarian catastrophe in Rwanda, that the OAU General Assembly of Heads of States and Governments called for the consideration of an African human rights court. "African states wanted to be seen as doing something tangible to address the genocide which had just taken place" (Ibid.). We may also remark that the Court is seated in Arusha, Tanzania, which is also the seat of International Criminal Tribunal for Rwanda.[40]

Last but not least, the international cooperation intensified, for example the Lóme convention between African states and European community was signed in 1989 and amended in 1995. It perceived the respect for human rights, democracy and the rule of law as fundamental principles of cooperation between Europe and Africa. *Inter alia*, the convention contained certain provisions on protection of natural resources and economic and other cooperation and assistance to less developed states[41]. However, as it is visible on Article 5, paragraph 1 of amended Convention, human rights commitment was a cornerstone as well as precondition of this cooperation. In the same way, the financial aid of other international actors such as International Monetary Fund or the

[40] Viljoen (2004, 12) states that the OAU countries at certain moment the states were attracted by the idea that the Court could be seated on their territory which would bring them certain reputation and economic benefits. This could have served as a primary motivation of the first countries that ratified the protocol.
[41] The convention was reprinted in Heyns (1998, 209 – 213).

World Bank was conditioned with the changes on the field of human rights (Wachira, 2008, 7). Human rights became tool for state-building of African states. Bekker (2007, 159) claims that those states had even to compete for this development aid, since the traditional Cold War sources from proxies died out.

Also European and Inter-American Human Rights Court became actors internationally recognized by political leaders and very significant for the jurisprudence of concerned continent. Viljoen (2004, 9) summarizes that "[t]he end of the Cold War also saw the proliferation of new international judicial mechanisms, linking the adoption of the Protocol to a global trend". Equally the democratization spread thorough Africa and the importance of civil society was growing (Wachira 2008, 7). Under those conditions, Udombana (2000, 80) summarizes:

> "As the only regional human rights system without a court, the issue became one the OAU could no longer ignore-particularly as the spotlight of international media and political attention increasingly focused on massive human rights abuses in Africa in the 1990s. In a world where globalization is the watchword, the creation of a Human Rights Court in Africa had become a necessity. It would signal, in a very significant way, the integration of the African continent into the modern era. The Inter-American and European examples were worth emulating."

Again, the role of international media is stressed as well as integrating (joining the other continents) Africa into the modern (meaning *civilized*) era.

As a result of those mutually interconnected processes and pressures, the need to legitimize the Oriental African self by Occidentalizing it grew – as mentioned above – to the extent of necessity. The OAU did no longer claim that a human rights court, as a procedural protection, stood in opposition to traditional ways of dispute settlement on the continent. Instead of it, the option of the Court was willingly adopted with the desire to mirror the success of European and Inter-American human rights court. This was the point of reversal of Orientalism. Thus, ACHPR was established through the adoption of Protocol to African Charter.

Though, the adoption of this Protocol with several initial drafts of it was also gradual process through which we may trace the tendency to limit the access of individuals to the Court. At the beginning of 1990s, the external and internal pressures on the OAU continued. In January 1993, International Commission of Jurists produced the first draft of the Protocol. The main author of the draft Protocol was Karel Vašák, Czech professor of law who had been living in France since 1969. However, several months later the workshop of NGOs suggested redrafting the Protocol in order to make

it more sensitive to African specificity. Nevertheless, the redraft by International Commission of Jurists openly admitted inspiration by Western international legal bodies (Bekker, 2007, 161).

Finally in June 1994[42], the General Assembly of the African states called for the conference of legal experts to discuss the possibilities of African human rights court. This conference took place in 1995 in Cape Town. In so call Cape Town Protocol, the experts adopted just some minor changes to the original draft of International Commission of Jurists. The result still "mimicked the provisions of the European and American conventions" (Ibid. 164 – 165). Nevertheless, quite importantly, it counted on the individual access to the Court. This individual access was considered automatic and granted, without any special provision or declaration of government required (Viljoen, 2004, 11).

Such a declaration was introduced by following version of the Protocol, Nouakchott draft of 1997. This meant that individual access to the Court was not permitted once a state would ratify the Protocol. On the contrary, special declaration of every single state was supposed to allow the Court to exercise its jurisdiction over the applications submitted by individuals[43]. This draft also increased the number of ratification necessary for the Protocol to enter into force from 11 to 15 (Ibid. 12 – 13). Besides that, it "authorized the Assembly of Heads of State and Government to intervene in the process of removing judges from the human rights court and effectively limited access to the Court to the Commission and States Parties to the Protocol" (Udombana, 2000, 81).

Both the draft Protocols, Cape Town and Nouakchott circulated among governments of OAU countries. The governments were, however, quite reluctant to comment on those documents and even more reluctant to actively support the Court by further actions. Very often the argumentation appeared that the emphasis should be laid on the African Commission and that it is not possible to support the Court, unless the Commission is not working properly[44]. The governments also resurrected the argument that the Protocol should be more sensitive to African traditions (Bekker, 2007, 165).

The third and final conference was held in Addis Ababa in 1997, it included also diplomats and it prepared the latest version of the Protocol – though without crucial

[42] Very probably pushed by the ongoing tragedy in Rwanda.
[43] Here the term individuals stands for both natural persons and NGOs.

changes – to be adopted by Council of Ministers and Assembly of Heads of State and Government of the OAU. Those bodies approved the Protocol without any amendments.

During the negotiations of the final version of the Protocol, the unwillingness of states to accept legal subjectivity of an individual in front of the court and to restrict states sovereignty by recognizing overall jurisdiction gradually manifested. As a result, the accessibility of the Court was strictly limited for individuals and NGOs. In spite of this fact, the ACHPR apparently served its purpose and ejected Africa among civilized continents. Udombana (2007, 46) comments on the establishment of the Court in the following way: "With its adoption, Africa joins the ranks of the European and Inter-American regional human rights systems in providing judicial guarantees at the regional level for the protection of human rights in the continent." In the same way Bekker (2007, 151) uses following phrase: "The promise was that in so doing, African states, for so long denigrated as primitive and barbaric and outside of the realm of civilization, would be granted admission to the so-called civilized nations."

Now we can generalize the development leading to the establishment of the ACHPR. We may observe following process. Because of the colonial experience, the African states had been refusing the idea of international human rights court for quite a long time. Most importantly, the argumentation concerning identity was used – a court would not suit the amicable way of traditional dispute settlement in Africa. This proves the original conviction that the Oriental should be different from the Occidental. However, at the same time the OAU countries made a commitment to substantive human rights, although they refused the procedural protection as Occidental. In fact, the countries feared that the Court would breach their sovereignty too much. Thus, the question of identity was determined by the question of power. However, several pressures and tendencies strengthened thorough the second half of the 20th century[45]. The agenda interconnecting human rights with development, democracy and standards of civilized nations' practices spread and flourished. The situation escalated in 1990,

[44] This is kind of cynical argumentation by the vicious circle. The Commission is not working properly, therefore the Court is needed. It is not possible to establish it until the Commission starts working appropriately.

[45] Using the terminology of the literature on norms described in Chapter I, we could say that the norms proponents among members of civil society and international community got more and more successful and that there was an ongoing norm-cascade that spread and beaconed the normative presuppositions of liberal-institutionalism. This cascade resulted in African commitment to human rights without actual compliance, since the sovereignty and non-interference was the basic founding principle of newly independent states.

facilitated by the gravest human rights violations on the African continent, the stimuli from the West and the success of liberal institutionalism after the end of the Cold War. At that moment, the Oriental got Occidentalized as the OAU willingly accepted the Court. It was the way how to maintain legitimacy and gain place among the *civilized* nations, once the previous commitment to substantive human rights proved insufficient. Since the African Oriental self was in danger of being regarded as uncivilized, it had to willingly Occidentalize and establish the Court as procedural protection of human rights. However, the backdoors were left. As the African Charter has its backdoors in the form of *claw-backs*, the African Court mechanism got the backdoors in the form of strict limitations for individual access. As a result, the Court repeats the same practice as was repeated before – it emphasizes the commitment to human rights, without significantly enforcing the compliance with human rights protection regime. It is a theatre that should perform the play of civilized nations in Occidental requisites. The simulacra that replaces the reality of human rights protection by the signs of this reality. This simulacra will be further described in the next chapter.

5. STRUGGLE FOR JUSTICE, STRUGGLE FOR IMAGE?

This chapter should answer the question: *How does the Court work; how is this work presented?* The aim is to show that the legal functioning of the Court does not offer much protection to the individuals and their security. Despite that, the Court is presented as a fully functioning institution, with high commitment to the human rights protection. The simulacra is vested in this discrepancy. Although the Court does not perform its legal functions, or it has done it in a strictly limited way, its functioning remains on the *presentational* and *persuasive* basis, the Court is just simulated. In order to demonstrate this sufficiently, the chapter is divided into two parts, the first part describes legal (mal)functioning of the Court, the second part focuses on other activities of Court as they are presented on the Court's webpages and it reveals how the simulation is performed and the simulacra is created.

5.1 Legal functioning of the Court

Let us firstly examine – in rather legal positivists' sense[46] – what functions should the Court perform according to the Protocol to the African Charter on the establishment of the Court. The provision of the article 2 of this document states that the Court should "complement the protective mandate of African Commission". Article 3 provides that the Court should have the jurisdiction over "all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned". Second paragraph adds that "In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide."

The accessibility of the Court is further ascribed in article 5 to the African Commission, State Party under certain circumstances and African intergovernmental organizations. The paragraph 3 of this article clarifies that the individuals and NGOs shall have the access to the Court only in accordance with the provisions of article 34, paragraph 6 of the Protocol. This paragraph states:

[46] This subsidiary analysis is necessary for further research that would step out of the legal positivism. Legal functioning of the Court is analysed here as far as real protection of human rights is concerned, however, strictly legally-technical aspects (such as number of judges, amount of meetings per year etc., are omitted, since the reader may easily find out elsewhere and the space here shall furthermore be dedicated to more *societal* analysis.

> "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."

As a result, the accessibility of the Court for individuals is fairly restricted, since only 7 states[47] from all the 53 AU members made such a declaration.

For further analysis, it is also necessary to emphasize that there are no provisions in the Protocol that would oblige the Court to promote human rights. Article 2 states that the Court should complement *protective,* not promoting mandate of the African Commission.

Up to date[48], the Court received 27 applications; 21 submitted by individuals, 3 by NGOs, and 3 by African Commission. 19 cases have been refused, there were only two judgments on the merits and the other 5 cases are pending. To get a better overview, the reader is advised to find the list of cases with the results of proceedings in the Appendix No. 2 (pages 82 – 83 of this thesis); the current overview can be also found online[49].

5.1.1 Cases submitted by individuals and NGOs: Lack of jurisdiction

As mentioned above, if an individual or NGO wants to appeal to the Court, their home country must make a special declaration allowing them to do so. As a result, most of such applications have been refused by the Court. In this subsection, we shortly examine the cases that the Court solved.

The lack of jurisdiction of the Court manifested already in its first case, where a Chadian living in Switzerland submitted an application against Senegal in order to prevent it from prosecuting former President of Chad. The application No. *001/2008 Michelot Yogogombaye v. Republic of Senegal*[50] was refused because the Court acknowledged the argument of Senegal that Senegal had not made the declaration pursuant to article 34(6) of the Protocol. Subsequently, the Court ruled that application

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[47] Burkina Faso, Tanzania, Malawi, Mali, Ghana, Rwanda and Cote d' Ivoire. The list is accesible online [4. 6. 2013]. URL: < http://www.african-court.org/en/images/documents/Court/Statute%20ACJHR/Statuts%20of%20the%20Ratification%20Process%20of%20the%20Protocol%20Establishing%20the%20African%20Court.pdf >

[48] 30/04/2014.

[49] [30. 4. 2014]. URL: < http://www.african-court.org/en/index.php/2012-03-04-06-06-00/cases-status1 >

[50] We refer to the individual judgements or decision by stating the application No and parties directly in the text. The judgements and also separate opinions and dissents are accessible from [30. 4. 2014] URL: <: http://www.african-court.org/en/index.php/2012-03-04-06-06-00/all-cases-and-decisions >

submitted by Yogogombaye as an individual was inadmissible, since Senegal did not accept the jurisdiction of the Court in individual cases. Ten judges out of eleven were in favour of the judgment. Only the judge Ouguergouz expressed his dissenting opinion in which he pointed out several problematic aspects of the relationship between the Court and the Commission[51]. Even though the judgment did not contain any decision on the merits, only procedural refusal, it raised certain hopes. Jalloh (2010, 624) claimed:

> „Though imperfect, one way to overcome the limited direct individual and NGO access to the Court is through creative judicial interpretation. In their first ruling, the judges did not shy away from that monumental challenge, as seen in their interpretation of the relevant legal provisions as well as their liberal treatment of Yogogombaye's application.
>
> The judgment begins by highlighting that Article 3 specifies that, in the event of a dispute between parties over jurisdiction, "the Court shall decide" (para. 30). The purpose of citing that provision, which reaffirms the established *competence de la competence* doctrine, is arguably to underscore judicial primacy in resolving questions of jurisdiction in cases of doubt as to its existence."

However, those hopes vested in creative interpretation of the Protocol and *competence competence* doctrine were not fulfilled. The following judgment (*No 001/2011 Femi Falana vs African Union*) adhered to the same principle of restriction of the Court's jurisdiction for individuals and NGOs.

On 14th February 2011 a Nigerian citizen, lawyer and human rights specialist Femi Falana submitted his application to the Court. He claimed that he had repeatedly attempted to force Nigeria to make declaration under article 34(6) and thus allow him and other individuals direct access to the ACHPR. By failing to do so, Nigeria allegedly violated his right for non-discrimination and other rights. Falana also asserted that the article 34(6) literary demands the states to make the declaration, which is therefore not optional. He wanted the Court to void the article 34(6) and render it invalid since it was incompatible with the article 1 of the African Charter. If the application had been raised against Nigeria, it would be inadmissible. Therefore Falana sued African Union using the argument that it failed to secure the declarations of member states allowing individual access.

African Union *inter alia* replied by the argumentation that Falana „fails to state a claim against the Respondent, either in law or fact, upon which any relief may be granted" (Ibid.). Furthermore it claimed that the African Charter and the Protocol were accepted by individual member states, not by African Union as a whole. As a result,

[51] E.g. at that time, the Court was not automatically notified about individual declaration and it had to

African Union is not a party to those protocols. Neither does the AU bear the responsibility for the fact that the member states did not ratify certain documents or undertake certain steps.

The ACHPR revoked the case *Yogogombaye vs Senegal* and ruled out that Nigeria did not accept the jurisdiction of the Court in individual cases. By the voices of 7 to 3 judges, the Court refused to issue decision on the merits. It also claimed that the legal personality of African Union is different from the legal personality of member states that accepted the Protocol and therefore recognized the Court.

There were several dissenting and separate opinions. The judge Ouguergouz interestingly claimed that constant refusing of cases would serve no justice, but just (at least) draw the attention of the media to concerned human rights cases. This point is particularly important for this thesis since it shows that even the judges are aware of the importance of *re-presentation* of the Court and role of media. Finally, three other judges (Akuffo, Ngoepe, Thomson) issued a dissent. In the same way as Ouguergouz, they also perceived the article 34(6) of the Protocol as incompetent with the article 1 of the Charter. However, they admitted that they were not able to find a provision that would allow the Court to cancel the article 34(6) of the Protocol or anyhow repeal or change its interpretation.

The application *No 14/2011 Atabong Denis Atemnkeng vs The African Union* resulted in same procedural refusal – without substantive resolution. However it was accompanied by separate opinion of the same judges as in the Falana case (Akuffo, Ngoepe, Thomson). They declared that African Union should be held liable for not forcing member states to allow individual access to the Court. Moreover, they asserted: "We agree with the Applicant in his argument that Article 34 (6) of the Protocol to the African Charter of Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol) is incompatible with the Protocol itself and inconsistent with the African Charter on Human and Peoples' Rights (the Charter). It also violates the fundamental right of the Peoples' of Africa to ventilate their grievances in a Court established for that purpose."

It is not without importance that the separate opinion mentions the purpose of the Court. Although the legal purpose of the Court may be strongly neglected so far, the Court may serve well another hidden purpose – the promotional purpose as will be described in the next subchapter.

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request information from the Commission which was located on the other part of African Continent.

Regarding other cases of the Court, the list is often monotonous. Because of the lack of jurisdiction according to article 34(6) of the Protocol, the Court refused the cases No 002/2011 *002/2011 Soufiane Ababou v. People's Democratic Republic of Algeria; No 005/2011 Daniel Amare and Mulugeta Amare v. Republic of Mozambique & Mozambique Airlines; No 007/2012 Baghdadi Ali Mahmoudi v. The Republic of Tunisia; No. 4/2012 Emmanuel Joseph Uko and Others vs Republic of South Africa; No. 005/2012 Amir Adam Timan vs Republic of Sudan*; and also the case *No 008/2011 Ekollo M. Alexandre v. Republic of Cameroon and Federal Republic of Nigeria.*

Similar decisions were reached in the cases where NGOs were concerned. NGOs are additionally required to be granted observer status at the African Commission in order to have direct access to the Court. Therefore, the Court also refused the applications *No 006/2011 Association Juristes d'Afrique pour la Bonne Gouvernance v. Republic of Cote d'ivoire*; *No 012/2011 National Convention of Teachers Trade Union v. The Republic of Gabon, No 002/2012 Delta International Investments S.A., Mr and Mrs A.G.L. De Lange vs The Republic of South Africa.*

The Court also claimed not to have substantive jurisdiction according to article 3 of the Protocol in cases *No 007/2011 Youssef Ababou v. The Kingdom of Morocco* and *No 012/2011 Pr. Efoua Mbozo'o Samwel vs Pan-African Parliament.*

Finally, the Court also refused several applications because of non-exhaustion of the local remedies. This entails the cases *No 003/2011 Urban Mkandawire vs Republic of Malawi, No 001/2012 Frank David Omary and others vs The United Republic of Tanzania* and *003/2012 Peter Joseph Chacha vs United Republic of Tanzania*.

Sixteen years after the establishment of the Court there were only two decisions on the merits. In other words, only two individual applications succeeded to be solved and decided upon. Firstly, the Court decided on the merits of the case concerning the joint applications *No 009/2011 Tanganyika Law Society and the Legal and Human Rights Centre vs The United Republic of Tanzania* and *011/2011 Rev. Christopher Mtikila vs The United Republic of Tanzania*. In 1990s, Tanzania adopted constitutional amendment and undertook several other measures that provided that the candidates for presidential and several other elections must be members of a political party. Thus, the independent candidates were prevented from running for elections. The applicants claimed that Tanzania hereby "violated its citizens' right of freedom of association, the right to participate in public/governmental affairs and the right against discrimination by

prohibiting independent candidates to contest Presidential, Parliamentary and Local Government elections." (Ibid. 4). On the other hand, Tanzania claimed that the case was inadmissible since the local remedies had not been exhausted.

The Court decided that Tanzania violated the right of non-discrimination of its citizens (Articles 2 and 3 of African Charter), the right to free association (Article 10 of the Charter) and the right to participate in the government of the country (Article 14, paragraph 1 of the Charter). It ordered Tanzania to adopt constitutional, legal and other necessary measures to improve the situation. The case was finalized on 13th of June 2013. Till now, Tanzania is still discussing significant constitutional changes on general level and possible replacement of the whole constitution of 1977, so the compliance with this judgment remains to be seen. The Court also adjudicated the reparations to Rev. Christopher Mtikila[52]. As the first judgment of the Court in merits, the resolution was welcomed with hopes. It was regarded as a "victory of democracy" (FIDH, 2013). Adjovi (2013) stated:

> "This is the first judgment of the African Court on the merits, and it has an implication for numerous African countries where independent candidates for election are not allowed. One needs to watch closely its implications on the electoral laws in Africa, while looking forward to the judgment on reparations."

Nevertheless, those implications will substantially and procedurally influence probably only the states (7 out of more than 50) that accepted the jurisdiction of the Court in cases submitted by individuals and NGOs.

The second case on the merits was the judgment on application *No. 013/2011 Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudou and the Burkinebe Human and Peoples' Rights Movement v. Burkina Faso*. In 1998, an investigative journalist and director of the weekly newspaper Mr Norbert Zongo and his companions were murdered. His beneficiaries sued Burkina Faso, since the country allegedly did not sufficiently investigate the crime and prosecute the murderers. Burkina Faso defended itself claiming that the applicants did not exhaust the local remedies and that the case was being investigated and solved in front of local courts. The press release (ACHPR, 2014) on the case quotes the argumentation of Burkina Faso that "the matter of the assassination of Nobert Zongo was given considerable media coverage in Burkina Faso judiciary".

[52] Despite all the effort, the author of this thesis was unable to find out whether the calculation of reparations was submitted and whether the reparations were factually paid.

The Court finally decided that Burkina Faso did not violate the African Charter in the sense that it would not have adopted sufficient legislative measures to implement it. However, according to the Court, Burkina Faso "failed in its obligation to take measures, other than legislative, to ensure that the rights of the Applicants for their cause to be heard by competent national Courts are respected." Therefore Burkina Faso violated the right for fair trial under article 7 of the African Charter and some other human rights documents, since it did not sufficiently investigate the assassination and prosecute the perpetrators.

Despite those two new cases, the Court has overwhelmingly lacked jurisdiction to decide the cases submitted by individuals and NGOs, in spite of the fact that nearly all of the cases are submitted by those entities. In addition, those two judgments on the merits concern the countries that made the necessary declaration. On the one hand, there are more pending cases concerning the countries that made the declaration. Thus, the number of decisions on the merits could grow. On the other hand, this situation may result in even stranger *dual regime* situation overrun by following paradoxes.

Firstly, the Court may *work* and so far perform its legal functions for several chosen countries that made the declaration. Nevertheless, the countries allowing individual access to the Court will probably have their judicial system on sufficiently high level (otherwise they would probably be reluctant to accept the authority of the Court over the individuals' applications).

Secondly, the partial legal functioning of the Court for some states may reinforce the simulacra for other states as described in the next subchapter. The first decision on the merits of the Court was propagated on the webpages, there was a special media advisory note for the journalists that literary prescribed them the role to "cover the public hearing report and disseminate information".[53] Such advisory notes were not released in other cases. So the fact that the Court works for a few states may help to *simulate* that it works for all the AU countries. Moreover, it was mentioned also in the second case concerning Burkina Faso that the process gained intensive attention of the media.

Thirdly, the countries that accept the jurisdiction of the Court will be paradoxically punished for that. There will be more applications against them, which

[53] ACHPR 2013a. See online [30/04/2014]. URL: < http://www.african-court.org/en/images/documents/New/MEDIA_AVISORY_NOTE.pdf >

could depict them as less "civilized" than the other countries that did not allow individual access at all. This fact may further prevent the countries from accepting jurisdiction of the Court in cases submitted by individuals. Tanzania may serve as an illustrative example – it is the country where the Court is seated and which made the declaration. As a result, 5 applications have been already raised against Tanzania.

5.1.2 Cases submitted by the Commission: Complementing protective mandate?

The Protocol claims that the Court should complement the protective mandate of the Commission. Consequently, it may seem only natural that the Commission should be kind of sifter which would refer to the Court only the cases that it is unable to tackle on its own. Several sources discussed in the chapter 2 declare that the European system also contained this kind of dual mechanism that should have saved the European court before overloading with *minimis* cases which can be solved by the Commission.

However, we already dealt with this argument in the literature review. It presupposes that the African Commission should cooperate with the Court more intensively. Nevertheless, this has not been happening so far. The Commission made just three applications to the Court.

Firstly, within the application *No 004/2011 African Commission on Human and Peoples' Rights vs The Great Socialist Peoples' Libyan Jamahiriya*, the Commission sued Libya for "serious and massive violation of human rights". The Commission took the legal action on 3rd March 2011, just a few days before the UN Security Council started negotiating the non-flight zone resolution. The Court issued certain provisional measures and during further proceedings demanded certain legal actions of the Commission upon the defendant's request. Nonetheless the Commission did not comply and only asked for a time extension several times. After granting those extensions, the Court struck out the application since the prolonged time limit had passed without any activity of the Commission.

The other two cases brought in front of the Court by the Commission have not been decided yet. Both of them involve politically sensitive issues. The application *No 002/2013 The African Commission vs the Republic of Libya* voiced the complaint of Saif Al-Islam Gaddafi, second son of Muammar Gaddafi that his human rights are suppressed. Provisional measures were issued by the Court to remedy the situation till

the Court's decision. Those measures were practically ignored by Libya.[54] The case is still pending.

The application *No 006/2012 African Commission vs Kenya* was meant to protect the indigenous minority of Ogiek people in Mau Forrest. The government of Kenya intended to remove them from their place of residence. The Court issued provisional measures that the community shall not be removed until the Court's decision. The case is still pending.

What do the cases submitted by the Commission have in common? Firstly, large attention of the audience around the world was caught by the events relating to those cases. The events in Libya were clearly carefully observed as a security issue. In the similar way, the dispute over the residence of Ogiek community is a very sensitive problem of protection of indigenous minorities and their environment. Secondly, there were provisional measures issued by the Court. One could say that the political motivation and possible attention of the foreign ("outside") audience enhances the performance of the Court.

Nevertheless, such cooperation did not occur concerning the cases "transferred" from the Court to the Commission. The Court refused to solve several cases[55] on the basis of the lack of jurisdiction and it referred them to the Commission. One could expect that the Commission would refer those cases back to the Court, or even make an application itself to voice the complaints of the original applicants. None of that happened.

5.1.3 Cases submitted by states and advisory opinions

Through the history of the Court, no application was submitted by any country. If a country wants to solve human rights violations allegedly committed by another country, it may use direct and probably more convenient tools such as diplomatic espousal, retorsions or even unarmed reprisals against the perpetrator of the norm. And if the country violates human rights itself, it will obviously not complaint to the Court and sue itself.

According to article 4 of the Protocol, the Court may also issue advisory opinions concerning the interpretation of the African Charter on any other relevant

[54] The report on Libyan non-compliance is accessible online [30/04/2014]. URL: <http://www.african-court.org/en/images/documents/Reports/AFCHPR_Interim_Report__Non_compliance_by_a_State__-_Libya.pdf >

[55] No 002/2011, 005/2011; 006/2011; No 008/2011 as quoted above.

document on the request of AU member states, AU, any of its organs or an organization recognized by AU. So far, there have been five requests for advisory opinions[56]. The Court either struck out the request or did not publish the result of proceedings. The importance of advisory opinion as a public doctrinal interpretation is this questionable.

In conclusion, we can see that the Court could be functioning and easily accessible only for the Commission and the states. Though, the states are not interested; they have been always in the position of defendants in front of the Court. One may hardly expect that a state could sue itself because it violated the rights of its citizens. The Commission has exercised its right to bring a case before the Court only three times with still uncertain results and with rather political motivation. Moreover, the Commission did not seem to be willing to return to the Court the cases which the Court handed over to it. On the other hand, the individual access to the Court is fairly limited. Even if we accept the optimistic outlook that some more states will allow individuals to reach the Court, the perils of the above described dual regime will persist and may be even enhanced.

Annual reports of ACHPR contain the recommendation to invite the member states to accept the Protocol and make the declaration allowing individuals to access the Court. Despite that, the assessment section usually starts with words: "The Court wishes to thank the Policy Organs of the African Union and, in particular, the Assembly of Heads of State and Government, for providing the financial resources required for its functioning" (see e.g. ACHPR, 2010; ACHPR, 2011; ACHPR, 2012a).

5.2 Other (non-legal) Activities of the Court

After examining the legal inactivity of the Court, we may look into its other activities. The amount of non-legal activities of the Court is striking rather than surprising. It reaches from receiving courtesy calls, attending workshops and ceremonies to organizing essay competitions for undergraduate students. Let us look closely at growing number of those activities in last four years.

The focus on last four years is deliberate. Till that year, the activity reports of the Court contain just brief notes about personal occupation of the Court and some

[56] The overview is accessible online [30/03/2014]. URL: < http://www.african-court.org/en/index.php/2012-03-04-06-06-00/advisory-opinion >

budgetary issues. There are some earlier notes about establishing links with the European Court on Human Rights and Inter-American Court and the cooperation with the EU. However, till 2010 there were no signs of more intensive activities.

In 2010, the Court attended or organized more than 20 promotional activities. The report of the Court (ACHPR, 2010, 10 – 11) claimed that those activities were carried out in order to spread the knowledge about the Court and persuade the states to accept the Protocol and make the declaration allowing individual and NGO access to the Court. However, we may once more emphasize that the promotion of human rights should be done by the Commission and the persuasion could be done on the level of African Union ministers, which would be probably more effective and respective to the division of labour between judicial and political institutions. Despite that, the report (Ibid.) lists 19 specific activities. The Court e.g. attended the ceremonial opening of Commonwealth Judicial Education Institute or the launching ceremony of the Decade of African Women or the workshop on reducing abortion on the basis of human rights. It also participated in several international meetings (the international workshop in Geneva; session of the Brandeis Institute of International Judges, 4th World Forum of Human Rights). One may ask whether this participation should have persuaded African countries to accept the authority of the Court (how?), or enhance an international cooperation (what for, if the Court did not work?), or rather present the Court as a judicial body of *civilized* African Union. Moreover, the term *sensitization* was firstly coined in 2010. The term itself is very interesting because it comes from medical branch (neurology and immunology) and should originally mean the way how to create a strong response. Since 2010, the Court has organized visits to countries to *sensitize* them for human rights.

In 2011, the promotional activities of the Court were further enhanced by the financial support of the European Union (ACHPR, 2011, 9) through the "55 Million Euro Support Programme to the African Union" (Ibid. 14), although the Court received funding from this programme even earlier. The sensitization transmuted to the whole campaign (Ibid. 9):

> „With the main objectives of raising public awareness about the Court, encouraging the ratification of the Protocol and making of the Declaration under Article 34(6) of the Protocol of the Court; sensitizing would-be applicants on how to access the Court and the procedures before the Court; encouraging the public to utilize the Court in settling human rights disputes and encouraging the utilization of the Court to render advisory opinions, the Court embarked on a sensitization campaign across the continent."

The sensitization campaign met with little success. Since 2011, only two more states have decided to make the declaration allowing individual and NGO access to the Court. No further country ratified the Protocol on the establishment of the Court. However, the sensitization, with all the significance ascribed to this medical term, may serve as a very suitable substitute to simulate an activity, if the desirable activity cannot be performed. Thus, in 2011, the Court organized Continental Conference on its promotion and six sensitization seminars together with several courtesy visits of states' high authorities in order to persuade concerned countries to accept the Protocol or allow individual and NGO access to the Court. Moreover, the Court participated on 21 other promotional activities, such as attendance to Africa Day Celebration, Inaugural Colloquium of Legal Scholars on Human Rights, and lecture series on Human Rights Development Initiative. The Court also organized an essay competition for undergraduate students as well as started shooting a documentary about itself[57].

In 2012, the Court (ACHPR, 2012a) undertook 3 sensitization visits and organized one seminar. It made three courtesy calls and received 12 visits (German Government deputies, American Bar Association, Miami Law School). It also participated in more than 20 other promotional activities, e.g. 2nd World Conference on the Right to Education in Brussels, Conference "Rule of Law and Transitional Justice: Towards Triangular Learning – the case of Colombia" in Venice, General Assembly of Association of Mexican Judges in Mexico City, and Pan African Forum on Children.

Finally in 2013, the Court organized 5 sensitization visits, three seminars and one conference and participated in 19 promotional activities. It received following visits – Table 2: Visits of the Court in 2013 (source of the table: ACHPR, 2013b, 26):

No.	Organization	Date	Nature of visitors
1	The School of St. Jude – Tanzania	1 February, 2013	168 students and 8 teachers
2	CRADLE – The children Foundation - Kenya	22 February, 2013 From 2:30pm	A group of 4 Executive members
3	Commission of Human Rights and Good Governance – Tanzania	22 February 2013 from 10am	A group of 20 staff members
4	The Advocates for Human Rights, International Justice Program – Tanzania	7 to 8, March, 2013	1 person
5	Tumaini University, Faculty of Law, Tumaini Law Society	27 March, 2013	60 students

6	MS-Training Centre for Development Cooperation – Tanzania	30 May, 2013	15 Trainees
7	Leiden Dutch University – The Netherlands	3 July 2013	19 Dutch students,
8	Joint Africa-EU-Strategic Partnership on Democratic Governance and Human Rights (DGHR) -	3 July 2013	Two Senior Executives
9	Management Board of the GIZ Germany	23 September, 2013	5 Board Members.
10	World Bank - USA	25 November 2013	1 person

Is possible to ask a question – what is the Court promoting? It may be promoting itself, but as we have shown above in most of the cases it has little to offer for individuals and NGOs. It may be promoting a distant possibility of human rights protection, or it may be *promoting* a pure and simple fact that it is currently just *promoting* human rights.[58] And again, from the theoretical point of view, the cyclic replication of the discourse creates further individual promotional simulacra.

The cyclical promotion (promotion of the fact that the Court promotes human rights) is clearly visible also from other materials on the webpages of the Court. The webpage contains several speeches of the judges[59]. Those speeches usually introduce the Court on the general level. Some of the speeches are quite open about the problems that the Court faces – the low level of ratification of the Protocol and only several states willing to accept Court's jurisdiction in individual cases. In this sense, the promotional and persuasive character of the Court is sometimes advocated. Nevertheless, we may repeat that the persuasive negotiations could be more effectively led on the level of the whole African Union, e.g. by the Council of Ministers. Moreover, even if the ratification of the Protocol or consequent declaration were enforced, there is no guarantee that the compelled state would comply with the judgements of the Court[60].

In spite of occasional explicit criticism, the speeches depict the Court as able to overcome current problems and in stand-by mode to protect and promote human rights.

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[57] Also mentioned below.
[58] In the simplified version the communication could be as follows: "We are dedicated to human rights, therefore we promote them. Because we promote them, we are dedicated to them. If you undertake certain steps, we may enhance the protection of individual human rights in the distant future. But so far, it is necessary to promote them and that is what we are doing."
[59] All accessible online [30/04P2014]. URL: <http://www.african-court.org/en/index.php/news/speeches>
[60] The situation may result in a dual regime of rhetorical commitment and factual non-compliance as described above.

In addition, they more or less directly interconnect the Court with international human rights system and international values, as described in the previous chapters, and also with the civil society. Following quotations are quite remarkable:

> "In their wisdom, African leaders decided that it was necessary to establish a Court that would hand down binding and enforceable decisions on human rights violations, in contrast to the Commission which can only make non-binding recommendations." (Niyungeko, 2011, 2 – 3)

> "The Court's jurisdiction and the applicable law provide it with a wide toolkit for the development of the African human rights system and jurisprudence and charting new grounds for human rights in Africa and, indeed, internationally." (Ramadhani, 2011a, 8)

> "However, international courts, like this one, are forced to do so [actively propagate itself] because the people and the institutions they are meant to serve are not aware of their existence, role and effectiveness." (Ramadhani, 2011b, 1)

> "The Court considers CSOs [civil society organizations] as an important stakeholder and CSOs can therefore interact with the Court through various ways ranging from the judicial, institutional to the practical." (Thompson, 2011, 9)

Those quotations clearly try to depict the Court as a local franchise of international human rights and civil society trademark that was established *thanks to the wisdom of African leaders*.

At this point, we may also focus on the documentary about the Court (ACHPR, 2012b). Although it firstly claims that "any citizen may address human rights claim to the court" (Ibid. 05:19), it also mentions the obstacle of necessary declaration. However, it again stresses and propagates the fact that the Court *propagates* itself and human rights (10:55 – 11:40). There are several interesting comments made in the video (underlined cursive added):

> "Oil spills in Niger delta, the plundering of Congo's minerals and toxic wastes dumping in Cote d'Ivoire with support of corrupt authorities are examples of *irresponsible business practices* shaping *our booming* economies." (01:00)

> "With the adoption and the ratification of the African charter on Human and Peoples' Rights in 1980's, *Africa joined Europe and Americas* as one of three regions with its own human rights instrument." (01:20)

It is clearly visible from the emphasized text how certain expressions are shaped within the discourse. Firstly, the video willingly admits that there are certain things wrong, the pronoun "we" refers to the same identity. Secondly, there is a clear implicit claim that with the adoption of the African Charter Africa joined the club of *civilized* continents (nations). The overall message is clear – "we admit that things are not perfect

yet, though we are getting more and more *civilized*". The video furthermore states that "the people want to learn how [the ACHPR] complements protective mandate of African Commission" or that "most Africans are eager to travel to Arusha to seek the answers to those questions [concerning functioning of the Court]".

Furthermore, the documentary is emphasizing the commitment of the ACHPR to human rights protection and promotion. At the end, one of the judges interconnects the culture of justice, culture of democracy and the culture of human rights. Furthermore, there are following assertions (emphasis added):

> "What benefits would the member states receive for gi*ving up some of their sovereignty* to allow the Court to function by ratifying the Protocol and the Declaration?"
> "Human beings must always have an outlet, especially when it comes to human rights, they must always feel that the horizon is not a wall, they can continue on. So it is good to have a continental court… *It's not giving up their sovereignty, rather reinforcing their sovereignty." (*Ibid. 17:50*)*

Not only does the answer prove a high commitment to human rights, it demonstrates the legitimizing power of human rights as well. The sentence about reinforcing the sovereignty of states clearly means that the legitimacy (and thus also sovereignty) of the states can be enhanced by adhering to human rights and especially by accepting the authority of the Court.

Concerning the visual part, the video is full of stereotype and illustrative pictures – people with guns, logos of organizations and of African continent (enhancing common identity), judges with their robes etc.

If we further investigate the communication through images, it is necessary to mention the gallery of the Court which contains a great number of pictures from various events, again often depicting judges in their robes and other stereotype pictures (see Appendix 3 of this thesis; pages 84 – 86).

To sum up, we have two judgement of the Court on the merits against more than one hundred promotional activities performed and often carefully presented on the webpages of the Court[61]. The Court does not work, although it seems to be. It simulates the work. It promotes. It promotes its human rights promotion, reproducing the discourse of (factually absent) human rights protection. The impression could be gained

[61] The bureaucracies, as the Court undoubtedly is, usually tend to expand, proliferate and enlarge the scope of their activities (see e.g. Haggerty 2004, 393). However, this is not enlargement of activity. This is replacing original activity with another activities only signifying the primary activity.

that the aim of the Court is not to be a *judiciary* body but a *political* and *promotional* body, as a living advertisement on non-existent justice or the artificial theatre that should *re-present* a part of "civilized society". Using the theatre metaphor, it reminds a stage where all the Westerns requisites of justice have been willingly accepted and copied on the basis of reversed Orientalism. However, the very performance is missing. Thus there is a copy[62] without an actual original. All those indicia seem to point out that the Court is the simulacra in international relations, the simulacra that performs individual simulations and that replaces the reality (of human rights protection) with the signs of the reality.

This situation is surely frustrating and ironical in several ways, especially concerning many victims of frequent human rights violations as well as the judges of the Court that have to perform many other promotional activities instead of doing the job that they are trained for and dedicated to. Unfortunately or even tragically, to strive for uncertain improvements, the judges can only repeat following pleas[63]:

> "In January this year the Court had been in Arusha, Tanzania, for three years but had received only one case though it had been ready for adjudication since 2008. (…)
>
> We hope and pray that Uganda, the Pearl of Africa, will be the next State, that is, the sixth African Union Member State, to deposit a declaration permitting direct access to the Court by individuals and NGOs, and that Uganda will use the advisory opinion facility of the Court. (…)
>
> Our humble prayer, Your Excellency, is Let the Pear of Africa shine by making a declaration permitting individuals and shine by making a declaration permitting individuals and NGOs to access the Court after exhaustion of local remedies. Your Excellency, I come from Zanzibar, an Island in the Indian Ocean with lots of oysters from which we extract pearls. So, I know the value we place on Pearls.
>
> In your hands, Your Excellency and dear colleagues, we vest our prayer." (Ramadhani, 2011b, 2 – 5).

[62] The aim was to copy the European Court on Human Rights as a prototype of judicial mechanism of civilized society. As a result of specific conditions on African continent, mentioned in previous section, the copy is very different from the original.

[63] Extract from the opening statement of the judge of the ACHPR at the seminar for human rights organizations in Uganda on 19/08/2011.

Conclusion

During the process of establishment of the ACHPR, we may observe how the desire to be perceived as *civilized* and to legitimize the self may reverse the logic of Orientalism. The presuppositions of liberal institutionalism were gradually taken as granted by the African countries. The Oriental self has willingly accepted and so far *performs* signs of Occidental identity. Those signs are manifested in declaratory commitment to substantive human rights protection and in procedural human rights protection institutionalized within the ACHPR. However, only the *signs of reality* are performed, the reality itself in the form of human rights protection has not been established. The fear of sovereignty loss forced the adopting states to avoid establishment of this reality and motivated them to create an institution that only *signifies* this reality. Therefore, the Court is simulacra in international relations. It is a copy of more successful human rights courts that contains too many special features to be a copy. It is an irrational duplicate without original; unique example of an institution that is sentenced by the structural setting to reproduction and repetition of human rights discourse without factual possibility to transform the commitments into compliance. The webpage of the Court is a beacon transmitting the message about human rights protection and civilization, although factual practice differs significantly. If (Occidental) neoliberal paradigm asserts that interconnections make the countries less self-interested and more cooperative, then this is just a theatre play in front of the requisites of neoliberal theatre.

There have been two cases decided by the ACHPR on the merits so far and there is the possibility that this number will grow. However, the situation may even more paradoxically result in dual regime. The countries (probably already "judicially developed") willing to fully recognize the authority of the Court will be metaphorically punished by its judgements, while other countries (that lack proper judicial system and desperately need the Court) will not recognize its authority. The register of cases submitted against them will stay empty. There will not be any applications against the gravest violators of human rights, since there would be point in suing the country that did not allowed individual access to the Court.

The only thing that the Court can do and factually does against this is to persuade and promote – and thus enhance the simulacra. All this despite the fact that the

promotion of human rights should be carried out by the African Commission and that the AU at the higher level could persuade the member states much more persuasively.

The situation must be especially ironic and even tragic for the victims of human rights violations as well as for the judges of the Court[64]. Those professionals have to take up their role in the play on civilized nations' society members, instead of judging the cases and procedurally protecting human rights.

Last but not least, the ACHPR has received and receives significant funding from international and European community. Is the purpose of this funding to foster the simulacra? What else can be done? If the Critical theory ascribes so important role for emancipation, are there any emancipatory alternatives in this case?

At this point, it is necessary to mention that the ACHPR contains some features of emancipatory project. Its founding was proposed and facilitated by NGOs, most importantly International Commission of Jurists[65]. It is being closely watched by some international NGOs, most significantly Friedrich Naumann Stiftung. Moreover, one of the successful applicants in front of the Court was NGO – Tanganika Law Society. The NGOs also gather in the Coalition for An Effective African Court. However, the NGOs are usually in the same ironical position as the judges of the Court – with their hands tight and with one possibility left – to beg, promote and persuade.

And even if the majority of African states is persuaded or forced to recognize the authority of the Court as a whole as well as in individual cases, there is no guarantee that the states will comply with the judgments of the Court[66]. The structural problem – unwillingness to give up own sovereignty – will prevail.

In this regard, the ACHPR has been an emancipatory attempt that failed and turned in false emancipation, a simulation of emancipation based on the logic of reversed Orientalism. Currently there are few more possibilities for true emancipation than to realize this, reveal the false emancipatory attempt and start from the beginning – solving the unwillingness of concerned states to give up their sovereignty.

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[64] The author of this thesis would like to express his admiration to the judges of African Court on Human and Peoples Rights, skilled and devoted specialists who have to face up to the extremely unfriendly structural setting of the institution.

[65] However, this is rather an association of experts than classical NGO with meritorious and humanitarian aims. The professional interest of lawyers could be obvious – to have an international legal body in front of which they could pursue the interests of their clients without possible undesirable political influence, which could still manifest during the negotiations in front of domestic courts.

[66] In such cases, the Court should report non-compliance to the African Union, which could compel concerned country to comply. However, if the AU is neither willing nor able to compel the countries to make declarations for individual access, one can hardly imagine that it would effectively enforce compliance.

Currently, a different protocol waits for necessary number of ratifications. This *Protocol on the Statute of the African Court of Justice and Human Rights* should merge the ACHPR with African Court of Justice (this court has not issued any decision yet). Not surprisingly, this Protocol contains the provision (Article 8, paragraph 3) that states:

> "Any Member State may, at the time of signature or when depositing its instrument of ratification or accession, or at any time thereafter, make a declaration accepting the competence of the Court to receive cases under Article 30 (f) [submitted by individuals or NGOs] involving a State which has not made such a declaration."

This provision has the same meaning and will have the same impact as the article 34(6) of the Protocol on establishment of ACHPR. The original verb "shall (make the declaration)" is even replaced by softer "may". Even more ironically, the countries that have already made the declaration regarding ACHPR may not do so again while ratifying this new Protocol. In the same way, it is discussed whether ACHPR should solve also criminal cases.[67] However, unless some structural or even paradigmatic changes and other discoursive shifts occur, those changes are likely to follow the pattern of huge self-legitimizing performance and human rights commitment in spite of limited actual protection and compliance. Thus, the ACHPR or its successor may unfortunately serve as self-legitimating mean for African states rather than as a tool how to ensure security of all individuals on the continent through procedural safeguarding of their human rights.

[67] The *ethics creep* pushing the normative institutionalizing forward obviously does not stop because of inefficiency of the old institutions.

Summary

This thesis uses the Critical theory (in narrow sense) to explore the history and functioning of the African Court on Human and Peoples' Rights. As an empirical case study, it opposes the ideas of neoliberal institutionalism. According to those ideas, the Court should facilitate international cooperation on the field of human rights and thus strengthen three mutually interconnected pillars of liberal peace – human rights, democracy and economic cooperation.

However, the Court is not working like that. It just pretends to be working.

Through the method of contextualization and genealogical inquiry, the thesis investigates the history of the Court. It proves that it is a history of conflict between the desire for sovereignty and the need to be perceived as civilized together with several pressures from below (civil society) and from outside (European and international community). The result is a compromise – a Court that just pretends to be working and thus grants its founders the ticket to the club of "civilized nations".

Interestingly, this reverses the classical dynamics of Orientalism as described by Edward Said. The African Oriental self firstly refused the idea of the Court. However, later in the 1990s, the Court was accepted. This was the result of several processes, including the spread of liber-institutional thinking after the end of the Cold War, enlarged pressure after some greave human rights violations and also success of the European Court of Human Rights and the Inter-American Court of Human Rights. Consequently, the ACHPR was adopted as a tool of legitimization through Occidentalizing the Oriental. Nevertheless, the desire of states to maintain their power and sovereignty resulted in strict factual limitation of the jurisdiction of the Court. Therefore the Court is not able to exercise its powers and admit applications submitted by individuals and NGOs in most of the cases.

Accordingly, the Court mostly just pretends to be a human rights Court, without granting the factual procedural protection of human rights. There have been only two decisions on the merits so far. And even more importantly, further decisions on the merits may be expected only in the cases concerning few countries that allow individual access to the Court. Subsequently, the Court may function in dual regime.

In spite of strictly limited procedural possibilities of strengthening human rights protection, the Court works quite intensively – it organizes seminars, sensitization visits and propagates itself. Thus it performs a huge play on international scene. A play that

should grant the founding states the admittance to the club of civilized countries. Therefore it suits Baudrillard's description of simulacra, since it is a copy without original that just reproduces human rights discourses, without granting factual protection.

Although one of the driving forces behind the establishment of the Court was civil society, it may be perceived as an emancipatory attempt which has been failing so far. The states succeeded in promotion of their interests and in limiting powers and authority of the Court.

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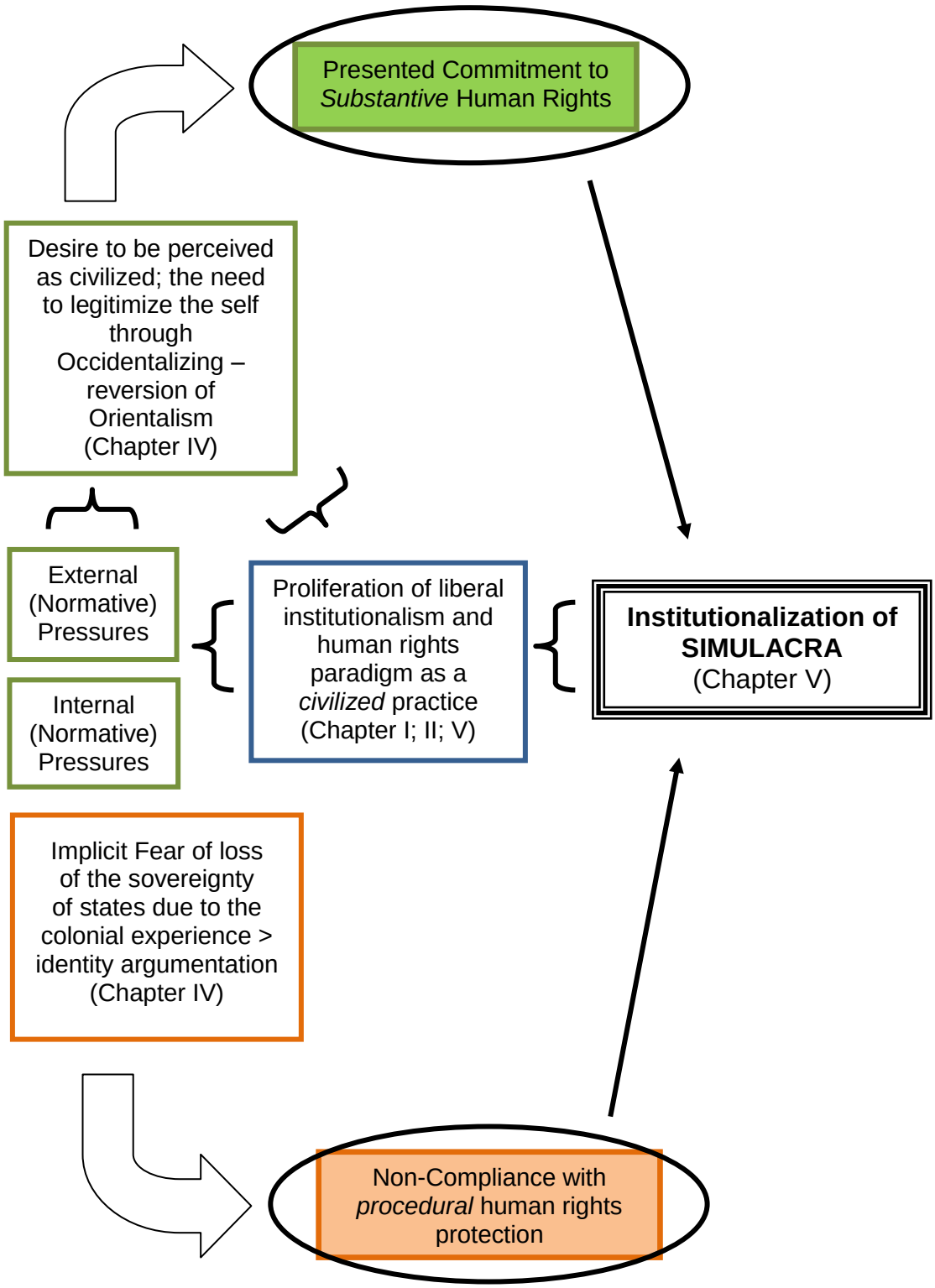
List of Appendices

Appendices

Appendix No 1: The Flowchart of establishment of the ACHPR as institutionalized simulacra (simplified and illustrative flowchart)



Appendix No 2: Overview of the Cases of the ACHPR (table up to 30/04/2014)[68]

	APPL.NO	APPLICANT	DEFENDANT	STATUS	RESULT:
1	001/2008	Michelot Yogogombaye	The Republic of Senegal	Finalized on 15/12/2009	**Refused** - the Court lacked the jurisdiction according to art. 34(6)
2	001/2011	Femi Falana	African Union	Finalized on 26/06/2012	**Refused** - the Court lacked the jurisdiction according to art. 34(6)
3	002/2011	Soufiane Ababou	People's Democratic Republic of Algeria	Finalized on 16/06/2011	**Refused** - the Court lacked the jurisdiction according to art. 34(6)
4	003/2011	Urban Mkandawire	Republic of Malawi	Finalized on 21/06/2013	**Refused** - local remedies have not been exhausted art. 6(2)
5	004/2011	African Commission on Human and Peoples' Rights	The Great Socialist Peoples' Libyan Jamahiriya	FInalized on 15/03/2011	**Refused –** application struck out since the Applicant failed to respond to request
6	005/2011	Daniel Amare and Mulugeta Amare	Republic of Mozambique and Mozambique Airlines	Finalized on 16/06/2011	**Refused** - the Court lacked the jurisdiction according to art. 34(6)
7	006/2011	Association des Juristes d'Afrique pour la Bonne Gouvernance	Côte d'Ivoire	Finalized on 16/06/2011	**Refused** - NGOs have to have observer's statute before the African Commission according to art. 5(3)
8	007/2011	Youssef Ababou	Kingdom of Morocco	Finalized on 02/09/2011	**Refused** - lack of jurisdiction *rationae materiae*
9	008/2011	Ekollo Moundi Alexandre	Republic of Cameroon and Federal Republic of Nigeria	Finalized on 23/09/2011	**Refused** - the Court lacked the jurisdiction according to art. 34(6)
10	* 09/2011	Rev. Christopher Mtikila	United Republic of Tanzania	Finalized on 14/06/2013	***Judgment on the merits; joint together with 11/2011***
11	010/2011	Pr. Efoua Mbozo'o Samwel	Pan- African Parliament	Finalized on 30/09/2011	**Refused** - lack of jurisdiction rationae materiae
12	* 11/2011	Tanganyika Law Society and the Legal and Human Rights Centre	The United Republic of Tanzania	Finalized on 14/06/2013	***Judgment on the merits; joint together with 9/2011***
13	012/2011	Convention Nationale des Syndicats du Secteur Education	Gabon	Finalized on 15/12/2011	**Refused** - the Court lacked the jurisdiction according to art. 34(6)

[68] Based on an overview online [30. 4. 2014]. URL: < http://www.african-court.org/en/index.php/2012-03-04-06-06-00/cases-status1 >

14	013/2011	Beneficiaries of the Late Norbert Zongo et al.	Republic of **Burkina Faso**	Finalized on 28/3/2014	***judgment on the merits;***
15	014/2011	Atabong Denis Atemnkeng	The African Union	Finalized on 15/03/2013	**Refused** - the Court lacked the jurisdiction according to art. 34(6)
16	001/2012	Frank David Omary and others	The United Republic of Tanzania	Finalized on 28.3.2014	**Refused** - local remedies have not been exhausted art. 6(2)
17	002/2012	Delta International Investments S.A., Mr and Mrs A.G.L. De Lange	Republic of South Africa	Finalized on 30/03/2012	**Refused** - the Court lacked the jurisdiction according to art. 34(6)
18	003/2012	Peter Joseph Chacha	United Republic of Tanzania	Finalized on 28.3.2014	**Refused** - local remedies have not been exhausted art. 6(2)
19	004/2012	Emmanuel Joseph Uko and Others	Republic of South Africa	Finalized on 30/03/2012	**Refused** - the Court lacked the jurisdiction according to art. 34(6)
20	005/2012	Amir Adam Timan	Republic of Sudan	Finalized on 30/03/2012	**Refused** - the Court lacked the jurisdiction according to art. 34(6)
21	006/2012	African Commission on Human and Peoples' Rights	Republic of Kenya	Pending	Pending
22	007/2012	Baghdadi Ali Mahmoudi	Republic of Tunisia	Finalized on 26.6.2012	**Refused** - the Court lacked the jurisdiction according to art. 34(6)
23	001/2013	Ernest Francis Mtingwi	Republic of Malawi	Finalized on 15/03/2013	**Refused** - no jurisdiction to receive the application; art. 3
24	002/2013	African Comission on Human and Peoples' Rights	Libya	Pending	Pending
25	003/2013	Chrysanthe Rutabingwa	Republic of Rwanda	Pending	Pending
26	004/2013	Lohé Issa Konaté	Republic of Burkina Faso	Pending	Pending
27	005/2013	Alex Thomas	Republic of Tanzania	Pending	Pending

Appendix No 3: Selected Pictures from the Gallery of African Court on Human and Peoples Rights (images)[69]

[69] Available online [30. 4. 2014]. URL: < http://www.african-court.org/en/index.php/news/photo-galley >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