

**THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS:
PROSPECTS AND CHALLENGES***

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INTRODUCTION

The African Court on Human and Peoples' Rights (hereafter 'the African Court') is one of the newest continental courts. The other such courts are the European Court of Human Rights and the Inter American Court of Human Rights. The African Court joins these courts and other international institutions in the struggle to advance the frontiers of human rights everywhere. It is hoped that the African Court shall play its part in this struggle. In this presentation, an attempt is made to sketch, in broad strokes, the basic features of the African Court, its jurisdiction, composition, powers and procedure. Similarly, we analyse its activities to date, current prospects and future challenges.

ESTABLISHMENT

The African Court was established by an Assembly of Heads of States and Governments of the then Organization of African Unity (OAU) in Ouagadougou, Burkina Faso on the 10th June 1998. Its founding statute is called the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereafter 'the Protocol'). Article 34(3) of the Protocol states that the Protocol shall come into force 30 days after 15 instruments of ratification or accession have been deposited with the Secretary General of OAU.¹ The Comoros deposited the required 15th instrument of ratification on the 25th December 2003. Consequently, the Protocol came into force on 25th January 2004. As of July 2008, out of the 53 member states of the African Union 24 states had ratified the Protocol.

JURISDICTION

The jurisdiction of the African Court is provided for under Article 3 of the Protocol. It states that the African Court shall have jurisdiction in all cases and disputes referred to it concerning the interpretation and application of the African Charter on Human

¹ In 2000 the Summit Meeting of the OAU Heads of States and Governments held in Lome, Togo adopted a Constitutive Act to Establish the African Union (hereafter 'the AU'). The Act replaced the Charter for the Establishment of the OAU. Under the Act, there is to be established the African Court of Justice as one of the organs of the AU. A protocol to the Constitutive Act establishing the Court of Justice was adopted in 2003 but it has never entered into force. On 28th June 2008 the 13th ordinary Session of the Executive Council of the African Union in Sharm-el-Sheikh, Egypt adopted a new protocol to the Statute on the African Court of Justice and Human Rights. This new protocol merges the statutes founding the African Court and the AU Court of Justice. However, since the African Court of Justice has not yet been established, my analysis is concerned with the African Court human and peoples' Rights.

of Heads of States and Governments shall ensure that there is adequate gender representation and representation of the main regions of Africa and of their principal legal traditions. My view of this provision is that the principle of regional and legal systems balance was by and large adhered to for the judges come from all the regions of Africa and from the major legal systems. However, considering that out of the eleven judges of the Court there are only two women judges there is a big gender imbalance.

The other glaring imbalance relates to the age of the judges. It is common knowledge that all of the appointed judges are above the age of fifty years. The youth of Africa who constitute the vast majority of the peoples of the Continent are certainly not represented. In this regard it is clear that African continent pays a high premium on old age and associates it with wisdom.

ACCESS TO THE COURT

Article 5 of the Protocol accords "*locus standi*" to the African Commission, the states parties, the state party against whom a complaint has been lodged at the Commission, a state party whose citizen is a victim of human rights violation and African intergovernmental organizations. Thus, for instance, compared to the States of Mozambique and Tanzania, whose Citizens were victims of xenophobic violence in South Africa had the option of going to the African Court, Zimbabwe, however, would not enjoy this right since it has not ratified the Protocol, and is therefore not a party. Access to the African Court by individuals and/or non-governmental organizations is severely restricted. Such individuals and/or NGOs may only file a petition against a particular state party if the latter shall have made a declaration accepting the competence of the Court to receive cases against it.⁶ As of August 2008 only two states, Burkina Faso and Mali, had made declarations under this provision accepting the African Court's jurisdiction to consider cases from individuals and non-governmental entities.

Without doubt, this is a major obstacle to accessing the Court. The challenge ahead is for the Court itself, civil society organizations, the academic institutions and individuals to vigorously campaign for the removal of the limitation. This can be achieved by a suitable amendment of rules 5(3) and 34(6) of the Protocol. Alternatively, there is a need to put pressure to bear upon the remaining states parties to make the requisite declarations without further delay.

HEARINGS AND REPRESENTATION

It was mentioned earlier that the African Court has already prescribed its own rules of procedure upon consultation with the African Commission. With regard to

⁶ Article 34(6)

- The process of recruiting the staff of the Registry of the Court, including the Registrar and his/her deputy is near completion. Staff members are appointed in accordance with the norms of the AU.
- The Court has put in place the necessary administrative structures and equipment to operationalize its functions.
- Since the Court was launched in July 2007 it has held several sessions. The meetings culminated in the adoption of the Interim Rules of Court in June 2008. This is an important milestone as no court can discharge its functions without rules of procedure.
- Considering that both the Court and the African Commission complement each other, we are informed that the two institutions have held joint meetings to harmonize their rules of procedure. The last such meeting resulted into the establishment of the Court Rules as stated above. The African Commission is currently reviewing its own rules to provide for its special relationship with the Court.

CHALLENGES

The challenges facing the African Court include the following:

- **The slow pace of ratification of the Protocol by the AU member states.** As indicated earlier, only 24 member states have ratified the Protocol establishing the Court. The remaining 29 member states have not done so to date. This is highly deplorable as the Court cannot hear cases against member states that have not ratified the Protocol.
- Related to this is the Court's prohibition to receive any individual or NGO petition involving a state party that has not made a declaration accepting the competence of the Court. It is a matter of considerable embarrassment

2. Modibo Tounty Gouindo	(Mali)	2006-2012
3. Jean Mutsunzi (Current President)	(Rwanda)	"
4. Fatsah Ouguergouz	(Algeria)	2006-2010
5. Hamdi Faraj Hanoush	(Libya)	"
6. Kellelo Justina Mafoso – Guni	(Lesotho)	"
7. El Hadji Guisse	(Senegal)	"
8. Sophia Akuffo	(Ghana)	2006-2008; 2008-2014
9. Bernard Ngoepe	(South Africa)	"
10. Jean Somda	(Burkina Faso)	2006-2008
11. George Kanyeihamba	(Uganda)	"
12. Githu Muigai	(Kenya)	2008-2014
13. Joseph Mulenga	(Uganda)	"

The tenure of the Hon. Justices Akuffo and Ngoepe expired in 2008 and they were reappointed for another term of six years. The tenure for the Hon. Justices Somda and Kanyeihamba were not renewed upon expiry in July 2008. The Hon. Justices Muigai and Mulenga were appointed at the Sharm el – Sheikh Summit meeting. They took their Oaths of Office at a public ceremony in Arusha, Tanzania on the 15th September, 2008.

publishes a quarterly newsletter called 'Do it Right'. The coalition also produced a guide to the Protocol in 2005. It issued a revised edition of the guide in September 2008.

- **Budgetary allocations.** Article 32 of the Protocol provides that the budget of the Court shall be borne by the AU in accordance with the criteria laid down by the AU in consultation with the Court. It is a real challenge for the AU member states to commit themselves to allocate sufficient funds to enable the Court to operate smoothly. Often, continental and regional institutions such as the Court are starved financially. They end up failing to discharge their mandates adequately. This is also a serious problem in the municipal courts.

CONCLUSION

The African Court joins other continental and international courts in the struggle for human rights. I would be over optimistic if I were to submit that the Court shall end individual and collective human rights abuses on the continent of Africa. Africa has had more than its fair share of horrific abuses. However, the very establishment and operation of the Court shall provide an important deterrent to such violations. In the long run it shall help deal a fatal blow to a culture of impunity and immunity that is still prevalent on the continent.