

AFRICAN UNION

الاتحاد الأفريقي



UNION AFRICAINE

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**PROGRESS REPORT OF THE CHAIRPERSON ON THE
OPERATIONALIZATION OF THE AFRICAN COURT ON
HUMAN AND PEOPLES' RIGHTS**

(Updated as at 15 June 2004)

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OPERATIONALIZATION OF THE AFRICAN COURT ON
HUMAN AND PEOPLES' RIGHTS**

I. INTRODUCTION

1. The Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights came into force on 25 January 2004, thirty days after the deposit of the instruments of ratification by fifteen (15) Member States, in conformity with Article 34 (3) of the Protocol.

2. The operationalization of the Court would entail the following activities:

- i. Election of the Judges;
- ii. Determination of the Seat of the Court by the Assembly of the Union;
- iii. Determination of the terms and conditions of the judges, i.e. remuneration and other benefits;
- iv. Determination of the Budget of the court.
- v. Determination of the staff structure of the Registry of the court;
- vi. Preparation of the Draft Rules of procedure of the Court.

II. COMPOSITION OF THE COURT

3. Article 11 of the Protocol stipulates that "the Court is composed of eleven (11) judges nationals of Member States, elected in an individual capacity from among jurists of high moral character and of recognized practical, judicial, or academic competence and experience in the field of human and peoples' rights. No two (2) judges may be nationals of the same State.

4. State Parties are reminded that the effective functioning of the Court will also require judges with irreproachable integrity, established competence and experience in the area of human rights.

III. QUALIFICATION OF CANDIDATES

5. Article 18 stipulates "the position of judge of the Court is incompatible with any activity that might interfere with the

independence or impartiality of a judge or the demands of the office, as determined in the Rules of the Court”. In this connection, candidates were expected to provide detailed biographical information indicating judicial, practical, academic, activist, and professional and other relevant experience in the field of human and peoples’ rights. In interpreting the question of incompatibility, the Advisory Committee of Jurists in the establishment of the International Court of Justice (ICJ) pointed out that “(A) member of government, a Minister or under-secretary of State, a diplomatic representative, a director of a ministry, or one of his subordinates, or the legal adviser to a foreign office, though they would be eligible for appointment as arbitrators to the Permanent Court of Arbitration of 1899, are certainly not eligible for appointment as judges of the International Court of Justice.

6. Furthermore, Article 14 (2) stipulates, “*the Assembly shall ensure that in the Court as a whole there is representation of the main regions of Africa and of their principal legal traditions*”. However, at the time of preparation of this report, only the following sixteen (16) Member States had ratified the Protocol: Algeria, Burkina Faso, Burundi, Côte d’Ivoire, The Gambia, Great Libyan Arab Jamahiriya, Lesotho, Mali, Mauritius, Nigeria, Rwanda, South Africa, Senegal, Togo, Uganda, Union of Comoros. In view of the foregoing, Member States that have not yet ratified the Protocol are reminded that they should deposit the instruments of ratification/accession with the Chairperson of the Commission if they wish to present candidates for consideration for the office of judge of the Court. Member States are also reminded that the Protocol and the status list of signatures and ratification/accession are available at the AU website.

IV. PROCESS OF NOMINATIONS

7. Article 13 of the Protocol stipulates as follows:

- i. “ Upon entry into force of this Protocol, the Secretary General shall request each State Party to the Protocol to present, within ninety (90) days of such a request, its nominees for the office of judge of the Court.
- ii. The Secretary General of the OAU shall prepare a list in alphabetical order of the candidates nominated and transmit it to the Member States of the OAU at least thirty days prior to the next session of the Assembly of Heads of State and Government of the OAU herein after referred to as the “ Assembly.”

8. The Commission of the African Union vide Note Verbale reference BC/OLC/66.5/4/Vol.V dated 09 February 2004, informed Member States of the entry into force of the Protocol and that the Sessions of the Executive Council in July 2004 would elect judges for subsequent appointment by the Assembly and that the same Session of the Assembly would also determine the seat of the Court. It also sent out a reminder BC/OLC/66.5/8/Vol.V dated 04 April 2004 requesting States Parties to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights to submit nominees for the office of judge of the Court, not later than 10 June 2004.

9. In the note verbale sent out to Member States, the commission had proposed, *inter alia*, that in order to ensure adequate gender representation, each State Party should submit at least one (1) female candidature out of the three (3) candidates that each State Party may propose in conformity with Article 12 (1) of the Protocol. It had also been suggested that Member States should consider giving preference to candidates with experience in more than one of the principal legal traditions of Africa (Civil Law, Common Law, Islamic Law and Custom and African Customary Law.) in order to comply with the requirement of Article 14 (2) of the protocol relating to *representation of the main regions of Africa and of their principal legal traditions*".

10. In order to ensure representation of all the regions of Africa, the AU geographical representation formula should, as far as possible, be used unless the required number cannot be obtained from any of the regions, namely, West (3), Central (2), East (2), South (2) and North (2). It is to be observed that for Central Africa only one Member State has ratified and become a State Party.

V. ELECTION OF THE JUGES OF THE COURT

11. Article 14 stipulates "the judges of the Court shall be elected by secret ballot by the Assembly from the list referred to in Article 13 (2) of the present Protocol".

12. The judges of the Court shall be elected by secret ballot by the Assembly at its next ordinary session scheduled in July 2005. However, the Executive Council, upon delegation of power by the Assembly, may elect and appoint the judges of the Court at its next ordinary Session scheduled in March 2005.

13. The candidatures received are as follows in alphabetical order:

- | | | |
|-------|--------------|--|
| i. | ALGERIA | Mr. Fatsah Ouguergouz |
| ii. | BURKINA FASO | Mr. Jean Emile Somda |
| iii. | BURUNDI | Mrs. Domitille Barancira |
| iv. | LESOTHO | Mrs. Kelello Justina Mafoso-Guni |
| v. | LIBYA | Mr. Anwar Salem Al-Mared and Mr. Guma Abdallah Abu-Zaid Al-Roaie |
| vi. | MALI | Dr. Mamadou Diakite, Mr Diarra M'Pèrè and Mr. Guindo Modibo Tounty |
| vii. | RWANDA | Mr. Jean Mutsinzi |
| viii. | SENEGAL | Maitre El Hadji Guisse |
| ix. | UGANDA | Mrs. Robinah Kasirye Kiyingi |

14. In view of the foregoing, the number of candidates received is not sufficient to facilitate election in July 2004. Furthermore, it would also be difficult to comply with the requirements in the Protocol of representation on the basis of geographical regions, gender and principal legal traditions of Africa since most Member States have nominated only one candidate. Additionally, if the elections were to take place in July 2004, the Central African Region will not achieve the proposed representation of two judges because only one Member State from that region has ratified the Protocol.

VI. DETERMINATION OF THE SEAT OF THE COURT

15. The Assembly of the Union shall determine the seat of the African Court on Human and Peoples' Rights from among State Parties to the Protocol, by consensus, failing which by two-thirds majority. It should be noted that at the time of preparation of the report, the following Member States have offered to host the Court:

- The Gambia, and
- Lesotho.

VII. DETERMINATION OF THE TERMS AND CONDITIONS OF THE JUDGES OF THE COURT

16. The terms and conditions of the judges, i.e., remuneration and other benefits, including travel arrangements, accommodation etc. In this regard, it should be pointed out that in conformity with Article 15 (4) of the Protocol, all judges except the President shall perform their functions on a part-time basis. Furthermore, the President is the only

judge who will reside at the seat of the Court [Article 21 (2) of the Protocol].

17. It should also be emphasized that to enable the Court discharge its mandate effectively, it will have to be provided with adequate human, material and financial resources.

VIII. CONCLUSION

18. In addition to the activities stated above, the operational relationship between the African Court and the African Commission on Human and Peoples' Rights will have to be examined as well as the modalities of cooperation between the two institutions. Indeed, in terms of Article 2 of the Protocol, the Court shall complement the protective mandate of the African Commission conferred upon it by the African Charter on Human and Peoples' Rights. It will be recalled that the African Commission has been discharging both responsibilities of ensuring the promotion and protection of human and peoples' rights. Accordingly, it will be necessary, as Article 33 of the Protocol envisages, for the African Court to draw up its Rules of Procedure, in consultation with the African Commission, in order to ensure synergy between the two AU institutions.

IX. RECOMMENDATIONS

19. The Commission wishes to submit the following recommendations:

- i. In view of the fact that the Commission has not received enough candidatures to facilitate election by Council at this session, as per its mandate, the elections should take place during the next session of the Executive Council in February 2005;
- ii. The Assembly authorises the Executive Council to appoint the judges following their election, determine the budget of the Court and the structure of the Registry of the Court, on its behalf.
- iii. The Assembly authorises the Executive Council to determine the seat of the Court from among the States Parties that have offered to host it, in February 2005, on the basis of the Criteria for Hosting AU organs as may be approved.