ACCESS TO AND LITIGATION BEFORE THE AFRICAN COURT ON HUMAN AND PEOPLES’ RIGHTS

PRESENTATION BY

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DURING THE

CONFERENCE ON THE PROMOTION OF THE COURT

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LILONGWE, MALAWI
I have been entrusted with the duty of enlightening you on the topic of Access to and Litigation before the African Court on Human and Peoples’ Rights. Naturally, such a presentation must start from the issue of the jurisdiction of the Court.

A. JURISDICTION OF THE COURT

Articles 3 and 4 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (hereinafter referred to as ‘the Protocol) gives the African Court on Human and Peoples’ Rights (hereinafter referred to as ‘the Court’) jurisdiction over all matters and disputes brought to it relating to
the interpretation and application of the African Charter on Human and Peoples’ Rights (hereinafter referred to as ‘the Charter’), the Protocol and any other relevant human rights instruments ratified by the State concerned.

It also has jurisdiction to give advisory opinions on any legal matter relating to the Charter or any other relevant human rights instrument, provided that the subject matter of the opinion is not related to a matter being examined by the African Commission on Human and Peoples’ Rights (hereinafter referred to as the Commission). Such an opinion can be given at the request of a Member State of the African Union (AU), any AU organ or any African organization recognized by the AU.

The organs of the AU as set out in the Constitutive Act, most of which have been established while others are yet to become operational, are:

a. The Assembly of the Union (Assembly) – comprises of Heads of State and Government of AU Member States or their duly accredited representatives. It is the supreme organ of the Union.

b. The Executive Council – comprises of Ministers in charge of Foreign Affairs or Authorities designated by the Governments of AU Member States. The Executive Council is responsible to the Assembly.

c. The Commission – the Secretariat of the Union which is composed of the Chairperson, the Deputy Chairperson, eight Commissioners, all of whom are elected by the Assembly, and staff members who are appointed.

d. The Permanent Representatives’ Committee (PRC) - it is composed of Permanent Representatives to the AU and other Plenipotentiaries of AU Member States and is charged with preparing the work of the Executive Council.

e. The Peace and Security Council (PSC) – established by an Organization of African Union Summit Decision taken in Lusaka, Zambia in July 2001, and became an organ of the AU through the Protocol on Amendments to the Constitutive Act of the AU of 2003. It deals with the AU’s peace and security issues.

f. The Pan-African Parliament (PAP) – is the organ charged with ensuring the full participation of African peoples in governance,
development and economic integration of the continent. It currently performs only an advisory role, but it will have legislative powers only when the protocol establishing it is reviewed to this effect.

g. The Court of Justice and Human and Peoples’ Rights – once operational, it will be the supreme judicial organ of the AU. By the time the Constitutive Act of the AU was adopted in the year 2000, the African Court on Human and Peoples’ Rights was already legally established through its Protocol which was adopted in 1998, but which had not yet entered into force. The Constitutive Act created the Court of Justice of the African Union as one of the AU organs. In July 2006, the Assembly decided that the Court of Justice of the African Union and the African Court on Human and Peoples’ Rights should be merged to form the African Court of Justice and Human Rights. By then, the Protocol of the African Court on Human and Peoples’ Rights had entered into force in January 2004 and Judges of the Court had been elected by the Assembly in January 2006. The instrument facilitating the merger of the two Courts, The Protocol on the Statute of the African Court of Justice and Human Rights was adopted by the Assembly in Sharm El-Sheikh, Egypt, on 1st July 2008 and is open for signature.¹

h. The Economic, Social and Cultural Council (ECOSOCC) – an advisory organ that is composed of different social and professional groups of the Member States of the AU and which is the primary mechanism for civil society participation in the AU.

i. The Specialized Technical Committees (STCs) – these are established to address sectoral issues and are convened at Ministerial and Senior Government Officials’ Levels.

j. The Financial Institutions – work is in progress to establish the three financial institutions of the Union, which are, the African Central Bank; the African Monetary Fund; and the African Investment Bank.

k. Though not expressly stated to be organs of the Union in the Constitutive Act, the African Commission on Human and Peoples’ Rights and the African Committee of Experts on the Rights and Welfare of the Child (the treaty-monitoring body for the African

¹ Only Libya and Mali have ratified this instrument.
Charter on the Rights and Welfare of the Child) are, through a decision of the Assembly, recognized as institutions within the framework of the AU.²

Distinguished Participants, Ladies and Gentlemen,

African organizations recognized by the AU include the Regional Economic Communities (RECs) recognized by the AU.³ The RECs have been set up pursuant to the Treaty Relating to the Establishment of the African Economic Community of 1991 which sets out the economic integration agenda of the AU and which is incorporated into the Constitutive Act. In line with a decision of the Assembly, there are only eight (8) RECs recognized by the AU.⁴ These are: Arab Maghreb Union (AMU), Common Market for Eastern and Southern Africa (COMESA), Community of Sahel-Saharan States (CEN-SAD), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Intergovernmental Authority for Development (IGAD) and the Southern African Development Community (SADC). Organizations that the Assembly has granted Observer Status to the AU qualify as African Organisations recognized by the AU.

Having tackled the issue of the Court’s jurisdiction, I will now move to who can access the Court.

B. ACCESS TO THE COURT

Under Article 5 of the Protocol, the following entities are granted direct access to the Court:

a) The Commission  
b) The State Party which has lodged a complaint to the Commission  
c) The State Party against which the complaint has been lodged at the Commission;  
d) The State Party whose citizen is a victim of human rights violations;  
e) African Intergovernmental Organizations.

² Assembly/AU/Dec.1 (I) Decision on the Interim Period of the AU taken at its First Ordinary Session held in July 2002 in Durban, South Africa.  
³ The RECs are classified as African Intergovernmental Organizations and in line with article 5(1)(e) of the Protocol are therefore entitled to submit cases to the Court.  
With respect to access by other entities, particularly individuals and NGOs, Article 5(3) of the Protocol provides that ‘the Court may entitle relevant Non Governmental organizations with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34 (6) of this Protocol.’. Article 34(6) of the Protocol provides that ‘At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the jurisdiction of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any application under article 5(3) involving a State Party which has not made the declaration.’ In other words, for an application to be received directly from an NGO or an individual, the State against which the individual or NGO has lodged the complaint must have made the declaration specified in Article 34(6) (hereinafter referred to as ‘the Declaration’). Tanzania is a State Party to the Charter and the Protocol and has made the Declaration.

Requirements for submission of an application to the Court

1. Entities that can submit applications

A submission can only be made in terms of Rule 33 of the Rules of Court5, in accordance with Article 5 as read with Article 34 (6) of the Protocol, by:

a. The Commission
b. The State Party before the Commission (either as Applicant or Respondent)
c. The State Party which citizen is a victim of human rights violation
d. African Intergovernmental Organizations
e. An individual or NGO in terms of Article 34(6) of the Protocol.
f. A State Party with an interest in a case may apply to be allowed to join in, in terms of Rule 53.

2. Addressee

Cases shall be submitted to the Registrar in line with Rules 25 and 34. The Registrar has custody of the seal and official stamp

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of the Court with which to officially acknowledge receipt of any case submitted. The term “Registrar” here is used in its widest meaning: that of the Registry “Office” rather than the person or officer. For in the absence of the person, the office will continue to function.

3. Place

Pursuant to Articles 24 and 25 of the Protocol, cases shall be submitted at the seat of the Court, which is at Arusha, Tanzania.

4. Format

Submissions shall be in writing. Rule 34(1) requires that only one copy of the application needs be submitted to the Registry. Such copy must be in one of the official languages of the Court. The official languages of the Court are the same as those of the AU. The official languages of the AU are set out in the Constitutive Act of the African Union as amended by the Protocol on Amendments to the Constitutive Act which provide that ‘The official languages of the Union and all its institutions shall be Arabic, English, French, Portuguese, Spanish, Kiswahili and any other African language’. Rule 34 requires that the application must be signed by the applicant or his or her representative, particularize the details of the applicant and respondent and specify the alleged violations and order sought, as well as proffer proof of exhaustion of local remedies. Rule 27 allows an applicant to designate a lawyer or any other person of their choice to assist and/or represent him in the proceedings, giving the applicant a wide choice of who to designate as representative.

5. Time limits

No statute of limitations seems to apply as to when a matter can be brought before the Court. The rules set no limits save for Rule 40(6) which provides that “a reasonable time from the date local remedies were exhausted”, unless the Court had set a date. Article 3 of the Protocol in extends the Court’s jurisdiction “to all cases and disputes submitted to it”. This leaves the Court with a very wide discretion as to when it may receive submissions.
6. Fees

There are no filing fees.

However, once a case is submitted, the Registrar shall “upon receipt” [Rule 25(2)(c)] transmit copies of it to the Judges of the Court [Rule 35 (1)] and all relevant parties in terms of Rule 35 (2). While no exact time period is laid down, the effect of Rule 25 (2) (c) is to stress on immediacy. The Respondent, and any other interested party as detailed in Rule 35 (2), on the other hand, has very specific time limits to comply with. Upon receipt of the application, they must notify the Registrar of their representatives’ names and addresses within 30 days (Rule 35(4)). And within 60 days (unless otherwise ordered by the Court), the Respondent must file his reply to the application (Rule 37).

7. Follow up after submission of an application

a) Registrar’s Role
Upon receipt of an application, the Registrar shall establish authenticity thereof (Rule 25), register it, and acknowledge receipt (Rule 36). He shall make necessary copies and translations (Rule 25) and shall transmit a copy to the other party, to the President and Members of Court, as well as to other AU organs as may be necessary (Rule 35). He shall require the parties to file their pleadings in terms of the rules (Rule 25). And when these are concluded, will notify the parties of the date of hearing (Rule 42).

b) Applicant’s rights and obligations
The Applicant shall be entitled to receive acknowledgment of his application (Rule 36), and to his application being copied, translated and transmitted to the persons/organs entitled to receive same (Rules 25 and 35). He shall be entitled to be notified of any request for him to file further documents or pleadings (Rules 39 and 41), and to be informed of the date of a hearing (Rule 42) or other disposal of his application (Rule 38). He shall be obliged to comply with the rules and any requests or directions by the Court (Rule 41).

c) Respondent’s rights and obligations
Conversely, the Respondent shall be entitled to receive any application against it and to be accorded the opportunity to reply
(Rule 35 and 37). It shall also be entitled to be notified of the date of hearing or any request order or direction of the Court and shall be expected to comply therewith (Rules 39 and 41).

Distinguished Participants, Ladies and Gentlemen, naturally there have to be admissibility criteria for consideration of applications.

C. ADMISSION CRITERIA FOR APPLICATIONS

For applications by individuals and NGOs, Article 56 of the Charter lays down the admissibility criteria which is incorporated into the Court’s Protocol by Article 6 thereof. In this regard, the application must:

1. Disclose the identity of the applicant, even where the applicant has requested anonymity;
2. Comply with the Constitutive Act of the AU and the Charter;
3. Not contain any disparaging or insulting language;
4. Not be based exclusively on news disseminated through the mass media;
5. Be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
7. Not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union.

In addition to the above requirements, pursuant to Rule 34, all applications should indicate:

1. The names and addresses of the persons designated as the applicant’s representatives;
2. A summary of the facts of the case and of the evidence that will be adduced;
3. Clear particulars of the applicant and of the party or parties against whom the application has been brought;
4. Specification of the alleged violation(s);
5. Evidence of exhaustion of local remedies or of the inordinate delay of such local remedies;
6. The orders or injunctions sought; and
7. Where an applicant on his/her own behalf or on behalf of the victim wishes to be granted reparation, the application should include the request for reparation.

In line with Article 6(1) and Rule 29(4), when deciding the admissibility of a case, the Court can decide to solicit the opinion of the Commission, with an indication of the time limit within which the Court wishes to recieve the opinion.

D. Proceedings

Rule 27 provides that the procedure before the Court can be written or oral. The proceedings are conducted in the working languages of the Court. Rules 18(2) and (3) provide that, the working languages of the Court shall be the working languages of the African Union (Arabic, English, French and Portuguese) but the Court may select one or more of these languages as its working languages, and may permit an applicant to use a language of their choice.

Pursuant to Rule 43, cases shall be heard in open Court unless the Court of its own accord or at the request of a party decide otherwise in the interest of public morality, safety or public order. The Court shall give reasons for so deciding.

Pursuant to Rule 45(1), the Court has a wide basis for fact finding as it may hear as a witness or expert or in any other capacity any person whose evidence, assertions or statements it deems likely to assist in carrying out its task. Rule 45(2) empowers the Court to ask any person or institution of its choice to obtain information, express an opinion or submit a report to it on any specific point while Rule 45(3) empowers the Court to conduct an enquiry, carry out a visit to the scene or take evidence in any other manner. This Rule provides the basis for the Court to consider applications for appearance as amici curia on issues before it.

It is noteworthy that the Court can, at any stage of the proceedings, decide to transfer an application to the Commission. Article 6(3) and Rule 5 are instructive in this regard.

E. SPECIFIC PROCEDURES

There are several specific procedures the Court can undertake. It can issue interim measures (Rule 51), consider preliminary objections (Rule
52), give leave for intervention by entities interested in an application before the Court (Rule 53), give leave for joinder of cases and pleadings (Rule 54), give judgments in default (Rule 55) and out of Court settlements (Rule 56) as well as promote amicable settlements (Rules 27(1)(c) and 57). Amicable settlements are reached in accordance with the provisions of the Charter.

Distinguished Participants, Ladies and Gentlemen, the question begs as to what is the nature of the Court’s findings.

F. FINDINGS OF THE COURT

1. When the Court finds that there has been a violation of human or peoples’ rights, it will issue appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court can issue Interim measures as necessary (Rule 57). An example of a situation which calls for adoption of interim measures is when a death sentence is to be executed and the appeals process has not been exhausted.

G. JUDGMENT OF THE COURT

The Court gives its judgment within ninety (90) days of having completed its deliberations (Rule 59(2)). Its judgment is final and not subject to appeal. However, in light of new evidence, which was not within the knowledge of a party at the time the judgment was delivered, a party may apply for review of the judgment. This application must be within six months after that party acquired knowledge of the evidence discovered (Rule 67). The Court may also interpret its own decision (Rule 66).

H. COSTS

Rule 30 provides that unless otherwise decided by the Court, each party shall bear its own costs

I. LEGAL ASSISTANCE

Article 10(2) of the Protocol empowers the Court to, in the interest of justice provide free legal representation. This provision is incorporated in Rule 31 which adds that within the limits of the financial resources available, the Court can decide to provide free legal representation
and/or legal assistance to any party. The Court is working on developing a legal aid scheme for indigent applicants.

J. ENFORCEMENT OF JUDGMENTS

In terms of Articles 29 and 30 of the Court’s Protocol, there shall be notification of the judgment to all relevant parties, and the States parties undertake to comply with the judgment of the Court within the stipulated time and to guarantee its execution. In this regard the Court shall notify the Executive Council of the African Union in order for it to monitor execution. (See also Rule 64 of the Rules of Court).

CONCLUSION

It is apparent that the Rules of Court have been promulgated with the objective of facilitating access to the Court to applicants. This is apparent through inter alia, the provisions on the language and copies for submission of applications, there being no filing fees, the language of proceedings, the bearing of translation costs for submissions, legal aid/assistance. What remains is to test these provisions through submission of applications, so as to evaluate whether indeed they will provide recourse to applicants.

I thank you for your attention.