

AFRICAN UNION

الاتحاد الأفريقي



UNION AFRICAINE

UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

**REPORT OF THE AFRICAN COURT ON HUMAN AND PEOPLES'
RIGHTS ON THE RELEVANT ASPECTS REGARDING THE JUDICIARY
IN THE PROTECTION OF HUMAN RIGHTS IN AFRICA**

**BY JUSTICE SOPHIA A.B. AKUFFO,
PRESIDENT OF THE COURT**

AT THE

**THE FIRST SUMMIT OF CONSTITUTIONAL, REGIONAL AND
SUPREME COURT JUSTICES**

MEXICO CITY, MEXICO

8 - 9 NOVEMBER 2012

INTRODUCTION

1. The African Union¹ has endeavored to put in place a human rights regulatory framework, which comprises the basic African human rights instrument which is the African Charter on Human and Peoples' Rights (the Charter), supplemented by other treaties, protocols and conventions such as the African Charter on the Rights and Welfare of the Child, The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the African Charter on Democracy, Elections and Governance, the African Youth Charter and the African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa. This regulatory framework is implemented by various institutional structures, among which the Court ranks as the only judicial organ mandated to protect human rights on the Continent through its decisions and judgments.

I. ESTABLISHMENT OF THE COURT

2. In June 1998, the then Organization of African Unity adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol). This Protocol came into force in January 2004 when it received the required minimum fifteen ratifications. Consequently, in January 2006, the first judges of the Court were elected and, in July 2006, they were formally sworn in and assumed their duties.

II. THE COMPOSITION AND ROLE OF THE COURT

3. *Composition*

The Court is composed of eleven Judges, elected in their individual capacities from among eminent African jurists and judges of proven integrity, qualifications and experience; having been nominated by individual Member States. The election is also based on equitable representation of gender, the five major African regions, and major legal systems and jurisdictions. No two Judges may be from the same Member State.

The current composition of the Court is as follows: Hon. Justice Sophia A.B. Akuffo, President (Ghana), Hon. Fatsah Ouguergouz,

¹ This process started with the Organization of African Unity(OAU)adopting a raft of human rights instruments, and then transforming itself into an African Union, through the Constitutive Act of the Union, which vision is of integration on the continent predicated on democratic and human rights principles.

Vice President (Algeria), Hon. Bernard M. Ngoepe (South Africa), Hon. Gerard Niyungeko (Burundi), Hon. Augustino S. L. Ramadhani (Tanzania), Hon. Duncan Tambala (Malawi), Hon. Elsie N. Thompson (Nigeria), Hon. Sylvain Ore (Cote d'Ivoire), Hon. El Hadji Guisse (Senegal) and Hon. Ben Kioko (Kenya).

[[Hon. Joseph N. M. Mulenga (Uganda) (deceased)]]

4. *Role in contentious matters (Article 3)*

The Court has jurisdiction to deal with all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the States concerned. In this regard, and pursuant to Article 9, the Court also has power to promote amicable settlement of cases pending before it in accordance with the provisions of the Charter.

5. *Role in advisory jurisdiction (Article 4)*

The Court may, at the request of a Member State of the African Union, any of the organs of the African Union, or any African organization recognized by the African Union, provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, 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.

6. *Applicable law*

Pursuant to Article 7 of the Protocol, in the determination of matters before it, the Court applies the provisions of the Charter and any other relevant human rights instruments ratified by the States concerned. In this respect, the Charter itself, *inter alia* provides that, in the protection of the rights enshrined in the Charter, recourse may be had to the following sources of law:

- a. the provisions of African instruments on human and peoples' rights;
- b. the Charter of the United Nations;
- c. the Charter of the Organization of African Unity, (which is now the Constitutive Act of the African Union);
- d. the Universal Declaration of Human Rights;

- e. other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights;
- f. as well as the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the Charter are members. (cf Article 60 of the Charter).

Article 61 of the Charter also provides that consideration should be had, "as subsidiary sources to determine the principles of law, to other general or special international conventions, laying down rules expressly recognized by Member States of the Organization of African Unity (now the AU), African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine."

7. Findings and judgments of the Court

The judgment of the Court is final and not subject to appeal. However, the Court may review its judgments. In addition, the Court may also interpret its own judgments and decisions. Where the Court determines that there has been a violation of human and/or peoples' rights, it may issue appropriate orders to remedy the violation, including the payment of fair compensation or reparation. In cases of extreme gravity and urgency, and when deemed necessary to avoid irreparable harm to persons, the Court may adopt such provisional measures as shall be necessary...

III. PROGRESS AND DEVELOPMENTS IN THE COURT

8. 2006-2008

During this period the Court worked mainly on its administrative operationalization. At the time the judges assumed duty the Court had no registry, no offices or equipment and resources, no budget or any rules of Court. The judges, therefore, during this time, among other things, negotiated a host agreement for the Seat of the Court in Tanzania, devised a registry structure and recruited registry staff, prepared and submitted budget proposals to fund the Court's functions and drafted and adopted its Interim Rules of Procedure.

9. 2008-2010.

By October 2008 the Court had the minimum administrative facilities in place and was ready to discharge its judicial function. Unfortunately the Court received only one application, *Application 001/2008 Michelot Yogogombaye v Republic of Senegal*, brought by an individual against the Republic of Senegal in relation to its intended prosecution of the former President of Chad Mr. Hissene Habre. The Court found it had no jurisdiction as Senegal had not deposited the declaration in terms of Article allowing individuals and non-governmental organizations (NGOs) to bring cases against it at the Court.

10. 2010 – to date

However, since the beginning of 2011, a steadily increasing number of cases have been filed in the Court. As at September 2012, the Court had received twenty-one (21) applications in contentious matters during this period, and three (3) requests for advisory opinions, and conducted two public hearings on contentious issues of public interest. The Court has disposed of 12 of the contentious applications and two of the requests for advisory opinion. In fact, at its 25th Ordinary Session held in June 2012, the Court delivered, in public, its judgment in the public hearing it conducted at its 24th Ordinary Session in March 2012 in respect of *Application 001/2011- Femi Falana v African Union*. With a total of 22 applications received, the Court has, therefore, started to develop its case law and jurisprudence.

11. Seizure of the Court

The Protocol and the Rules of Court make provision for ease of seizure of the Court by requiring no filing or administrative fee to be paid, allowing for seizure by post, fax, email or in person, and requiring an applicant to file only one original copy in any African Union language, the Court being responsible for extra copies and translations and consequent costs.

12. Of the twenty two (22) applications: -

- a. 17 are by individuals
- b. 3 are by NGOs,

- c. 2 are referrals by the African Commission on Human and Peoples' Rights (against Libya and Kenya).

Further, of these 22 applications,

- d. 3 are against non-State Parties to the Protocol (Morocco, Sudan and Cameroon),
- e. 3 are against non-state entities (the African Union (1) and the Pan African Parliament (2)); and
- f. 16 are against State Parties to the Protocol – 6 of which are against 3 States (Burkina Faso, Malawi and Tanzania) that have made the declaration in terms of Article allowing individuals and non-governmental organizations (NGOs) to bring cases against it at the Court.

And finally,

- g. A total of 13 contentious cases and 2 requests for advisory opinions have been disposed of.

13. Unfortunately, the majority of cases received by the Court either involve States, that have not ratified the Protocol or are brought by individuals and NGOs against States that have not deposited the declaration required by Article 34(6) of the Protocol that would allow individuals and NGOs to bring directly to the Court claims against the States.

14. Of the 54 African Union Member States, only 26 are States Parties to the Protocol and of those 26, only 5 have deposited the declaration required in terms of Article 34(6) thereof. This affected the following applications where the Court found that it did not have jurisdiction *ratione personae* over the applications:

- a) *Application 001/2008 - Michelot Yogogombaye v. Republic of Senegal,*
- b) *Application 002/2011 – Soufianne Ababou v. Democratic People's Republic of Algeria,*
- c) *Application 005/2011 - Daniel Amare and Mulugeta Amare v. Republic of Mozambique and the Mozambique Airlines,*
- d) *Application 008/2011 – Ekollo Moundi Alexandre v. Cameroon and Nigeria,*

- e) *Application 012/2011 - Convention Nationale des Syndicats du Secteur Education (CONASYSED) v. République of Gabon*
- f) *Application 002/2012 - Delta International Investments S.A. & Mr. and Mrs. AGL de Lang v. Republic of South Africa,*
- g) *Application 004/2012 – Mr. Emmanuel Joseph Uko and others v. Republic of South Africa*
- h) *Application 005/2012 – Amir Adam Timan v. Republic of Sudan*

15. In some applications, the Court found it lacked jurisdiction *ratione personae* since the NGO making the application did not have observer status with the Banjul Commission as required by Article 5(3) of the Protocol. See *Application 006/2011 – The Association of African Lawyers for Good Governance v. Republic of Cote D'Ivoire* and *Application 012/2011 - Convention Nationale des Syndicats du Secteur Education (CONASYSED) v. Republic of Gabon.*
16. In other applications, the Court lacked jurisdiction *ratione personae* for the reason that the Respondent is not a member of the African Union (See *Application 007/2011- Youssef Ababou v. The Kingdom of Morocco*) or is an entity other than a State Party to the Protocol (See *Application 001/2011 - Femi Falana v. African Union*).
17. In one application in respect of matters of breach of an employment contract, the Court found that it lacked jurisdiction *ratione materiae*. (See *Application 010/2011 – Efoua Mbozo'o Samuel v. Pan African Parliament.*
18. On the other hand, despite this, in accordance with Article 27(2) of the Protocol and Rule 51 of the Rules, the Court may issue provisional measures at the request of a party or on its own motion. In such instances the Court has to establish that it has *prima facie* jurisdiction (See *Application 007/2012 - Baghdadi Ali Mahmoudi v Republic of Tunisia*) and it need not hear the parties. Thus, the Court, acting *suo motu*, issued provisional measures in *Application 004/2011 – African Commission on*

Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya which was an application alleging massive violations of the right to life and integrity of the person.

IV. MAJOR CHALLENGES CONFRONTING THE COURT

19. Though it has started developing its jurisprudence, the Court faces certain challenges. The main challenges affecting the Court stem from the regime of the Protocol: -

- a. The requirement for ratification;
- b. The low rate of ratification; and
- c. The requirement that for individuals and NGOs to directly bring a claim before the Court, the Respondent State must have made the declaration required under Article 34(6) allowing them to do so.

Of the 54 African Union Member States, only 26 are States Parties to the Protocol and of those 26, only 5 have deposited the declaration required in terms of Article 34(6). And as is apparent from the case analysis given above, the majority of applications received by the Court either involve States that have not ratified the Protocol or are brought by individuals and NGOs against States that have not deposited the declaration in terms of Article 34(6) allowing individuals and NGOs to directly bring claims against the States.

20. In addition, there is an overall lack of awareness about the very existence of the Court among Africans across the board, let alone adequate knowledge about who may access the Court, how they may do so and the nature of applications that might be brought before the Court.

V. THE RESPONSE OF THE COURT TO THE CHALLENGES

21. It is in this regard, therefore, that the Court has taken the unusual policy decision to strategically improve its visibility and accessibility to all relevant stakeholders by undertaking activities that inform them of its existence, its mandate and how it may be utilized. Starting with a Colloquium of Human Rights Courts and

Similar Institutions held in October 2010², the Court has since held seminars and conferences in Tanzania, Malawi³, Burkina Faso, Mali, Uganda, South Africa, Mozambique, Gabon, Nigeria, Ghana, Burundi and Ethiopia⁴ and Senegal, and plans to continue to sensitize all stakeholders on how they may utilize the Court for enhanced human rights protection. It is worthy of note that the increase in the number of applications to the Court, since 2011 coincides with the commencement of the Court's sensitization programme.

22. Another part of the Court's strategy of enhancing access by stakeholders is by the development of its Strategic Plan for 2012-2015 in which it gives a significant place to interactions and initiatives with its publics. The Court involved a cross-section of social partners in the development of this plan. Further, the Court, in accordance with Article 10(2) of the Protocol, is elaborating a legal assistance policy and scheme.

VI. THE INSTITUTIONAL FUTURE OF THE COURT

23. Before concluding, this report must mention two developments that will affect the future of the Court:

- a. *The Merged Court*

On 1 July 2008, the Eleventh Ordinary Session of the Assembly of Heads of State adopted the Protocol on the Statute of the African Court of Justice and Human Rights – merging the Court with the African Court of Justice, to create a unified Court with original jurisdiction over human rights and other civil matters, and appellate jurisdiction in the enforcement of the provisions of the African Union Staff Rules and Regulations. This Protocol requires the deposit of instruments of ratification by fifteen Member State to enter into force, and as at July 2012, there were five (5) ratifications.

- b. *Criminal jurisdiction*

² Colloquium of Human Rights Courts and Similar Institutions, Arusha, Tanzania, 4-6 October 2010.

³ Continental Conference on the Promotion of the Court, Lilongwe, Malawi, 9-11 March 2011.

⁴ Regional Sensitization Seminar on the African Court for East and North Africa 22-24 August 2012.

Additionally in January 2009, the Assembly of Heads of State, by decision Assembly/AU/Dec. 213 (XII) mandated the African Union Commission, in consultation with the Court and the Commission, to study the implications of extending the jurisdiction of the Court to cover international crimes. The results of the study process have seen proposals being made for the amendment of the Protocol on the Statute of the African Court of Justice and Human Rights to create a criminal jurisdiction section.

CONCLUSION

The Court constitutes one of Africa's most valuable resources for timely adjudication of disputes related to human and peoples' rights, and for affording effective remedies for the violation of these rights. Though seriously constrained by the challenges already mentioned, the Court is positioned in a state of readiness to receive all applications and requests with which it can competently deal and to tackle head on those challenges and constraints it confronts.