


AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA
<p style="text-align: center;">AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES</p>		

CONCEPT NOTE

CONFERENCE ON THE IMPLEMENTATION AND IMPACT OF DECISIONS OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS: STATUS, CHALLENGES AND PROSPECTS

1- 3 NOVEMBER 2021

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**THEME: DECISIONS OF THE AFRICAN COURT ON HUMAN AND PEOPLES'
RIGHTS: A SYSTEMIC APPRAISAL OF STATES' DUTY TO
IMPLEMENT**

I. BACKGROUND

A. Regional human rights law and the African Court on Human and Peoples' Rights

1. The foremost human rights instrument on the African continent is the African Charter on Human and Peoples' Rights (the Charter). For purposes of overseeing its implementation, the Charter establishes the African Commission on Human and Peoples' Rights (the Commission). The Commission is established as a quasi-judicial body and is based in Banjul, The Gambia.
2. Largely in a bid to resolve some of the deficiencies of the Commission, the then the Organisation 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) which established the African Court on Human and Peoples' Rights (the Court). The Protocol was adopted in 1998 and entered into force in 2004. The Court commenced its operations in 2006 and is based in Arusha, Tanzania.
3. As at 10 May 2021, the Protocol had been ratified by thirty-one (31) Member States of the African Union. Out of these thirty-one (31) State Parties, ten (10), namely: Benin, Burkina Faso, Côte d'Ivoire, Gambia, Ghana, Malawi, Mali, Rwanda, Tanzania and Tunisia, made the Declaration required under Article 34(6) of the Protocol, accepting the jurisdiction of the Court to receive cases directly from individuals and NGOs. Subsequently, however, four of these States being Rwanda, Tanzania, Côte d'Ivoire and Benin withdrew their Declarations.¹

¹ See, <https://en.african-court.org/index.php/basic-documents/declaration-featured-articles-2> (accessed 20 November 2020).

B. The Court's judgments

4. As of August 2021, the Court had received a total of three hundred and twenty-three (323) Applications and it had finalised one hundred and five (105) Applications. Out of the finalised Applications, the Court has concluded one hundred and twenty-seven (127) Applications through the contentious procedure and fifteen (15) requests for advisory Opinion.

i. Implementation of the Court's judgments

5. Under Article 30 of the Protocol, all State Parties “undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.” Under Article 29 of the Protocol, it is the Executive Council of the African Union (AU) that has been entrusted with monitoring the execution of the judgments of the Court. For its part, the Court is directed to present a report of its activities to the Assembly of the AU, in particular, details of cases in which a State has not complied with a judgment of the Court.
6. Accordingly, it is clear that compliance may take numerous forms, and invariably involves a combination of political and legal interventions. Additionally, while Article 29 of the Protocol alludes to the role of the Executive Council of the African Union, the provision itself is not prescriptive of the actions/steps that the Executive Council can take or not take in discharging its role. While this lack of detail may be negatively perceived, it also offers an opportunity for engagement by the Court and its stakeholders seeking to improve the implementation of the Court's decisions.
7. According to reports submitted by the Court to the policy organs in accordance with Article 31 of the Protocol, very few of these judgments have been implemented. So far, only one State is reported to have fully complied with the

Court's judgments, some States have partially implemented while a majority of the States against which judgments have been rendered have either not bothered to comply or expressly indicated their unwillingness to do so.² The Court has correctly observed, in its activity reports, that non-implementation of its judgments may seriously undermine not only the discharge of its mandate but also the African human rights system as a whole.³

ii. Impact of Court's judgments

8. Experience has shown that the judgments of the Court have yet to generate significant impact on domestic judicial, administrative or legislative changes, beyond the country against which the judgment was delivered.⁴ The Court has delivered several landmark judgments on issues ranging from freedom of expression, rights of journalists, right of independent candidates to stand for elections, rights of indigenous peoples and decriminalisation of defamation.
9. However, a quick look at the African legal and legislative landscape reveals that the majority of African countries still adopt, maintain and implement laws contrary to the spirit and letter of the judgments already delivered by the Court.
10. Issues settled by the Court through its judgments should be of relevance to countries other than the Respondent State(s). Some of the issues may relate to systemic and/or structural challenges facing several other States on the continent, while some may be of a continental relevance. The impact of the Court's judgments, therefore, often transcends those of the parties in the concerned cases.

² For example, Burkina Faso amended its legislation on defamation to make it compliant with the Court's decision in the *Lohé Issa Konaté* Case; Côte d'Ivoire amended its law on the Electoral Commission to give effect to the Court's judgment in the *APDH* Case; Benin amended its law on the operation of the Court for Economic Crimes and Terrorism in implementation of the *Ajavon (merits)* Judgment; and Tanzania has conveyed the need for constitutional reforms following from the Court's judgment in the *Mtikila* Case.

³ See, for example, Activity report of the African Court on Human and Peoples' Rights 6-7 February 2020 (EX.CL1204 XXXVI) 15.

⁴ See eg, R Murray, D Long, V Ayeni & A Somé 'Monitoring implementation of the decisions and judgments of the African Commission and Court on Human and Peoples' Rights' (2017) 1 *African Human Rights Yearbook* 150-166.

For instance, judgments of the Court on fair trial (provision of legal aid), political participation, women's rights (gender based discrimination, inheritance), nationality, freedom of expression (decriminalisation of defamation), safety of journalists, mandatory death penalty or rights of indigenous populations raise issues facing many other countries on the continent.

11. Given that the African Court is a supra-national Court, the expectation is that its decisions would resonate beyond the Respondent State and prompt other countries to amend their laws and policies to conform to the established human rights standards. This would then operate to prevent similar applications being made against other State parties. It is also expected that these judgments will be invoked by advocates and relied on by judges at the domestic level when dealing with cases of alleged human rights violations as well as by human rights activists in their work.

12. These aspects of implementation and impact have found some empirical evidence in the recent adjudication of freedom of expression in some domestic and regional fora. For example, the High Court of Lesotho⁵ and the High Court of Kenya⁶ have made reference to the case of *Konaté v Burkina Faso* in dealing with freedom of expression. As none of these two countries was a party to the freedom of expression cases adjudicated by the Court, the practice portrays a trend to preventive and pre-emptive implementation, that is, to avoid being condemned by the Court in a potential similar case. Such approach conforms to the wider understanding of implementation of human rights as enshrined in Article 1 of the African Charter, which vests the primary obligation to undertake all necessary measures in States, whether legislative, administrative or any other, to give effect to the substantive rights guaranteed therein.

⁵ See, *Basildon Peta v Minister of Law, Constitutional Affairs and Human Rights & Others*, Constitutional Court of Lesotho, CC 11/2016 (18 May 2018)

⁶ See, *Jacqueline Okuta and another v Attorney General and others* Petition No. 397 of 2016, High Court of Kenya (Constitutional and Human Rights Division).

13. At the supranational level, the African Commission's reference to *Konaté v Burkina Faso* also demonstrates a regional influence that the decisions of the Court possess.⁷ This possible spill over of judicial influence is also manifest in the ECOWAS Court of Justice's decision in *Federation of African Journalists & Others v The Gambia* where reference was also made to *Konaté v Burkina Faso*.⁸

14. It is against the above background that the Court intends to hold an international conference which intends to examine the implementation of the Court's decisions, and their impact on the domestic systems of the member States of the African Union.

II. OBJECTIVES

15. The main objective of the Conference is to interrogate the manner in which the Court's decisions are received and implemented domestically across the continent, with a focus on the extent to which pronouncements of the Court impact domestic systems. In line with this general objective, the Conference shall focus on the following specific objectives:

- i. Engage relevant stakeholders on the continent to take stock of the status of implementation and examine the challenges hindering the effective implementation of the Court's decisions;
- ii. Assess the continent-wide impact of the Court's decisions and explore obstacles thereto;
- iii. Devise strategies to ensure a wider impact and better implementation of the Court's decisions; and
- iv. Explore experiences and best practices from (by) similar sister and regional courts on how to enhance impact and implementation.

⁷ See, Communication 426/12, *Agnes Uwimana-Nkusi and Saidati Mukakibibi v Rwanda* § 141.

⁸ ECW/CCJ/APP/36/15 (14 February 2018).

III. PROPOSED TOPICS

16. The Conference will address, among others, the following topics:

- i. Comparative analysis from other regions on the impact of judgments of international [human rights] tribunals.
- ii. Mechanisms put in place to enhance the impact of the Court decisions (Model laws, for example)
- iii. An introduction to the implementation of international tribunals' decisions at the national level
 - Types of measures (legislative measures, policy measures, judicial measures)
 - Evaluating implementation and the level of scrutiny
 - Margin of appreciation in applying the decisions for non-respondent states
- iv. Understanding the implementation of the decisions of the African Court
- v. The implementation of the decisions of international courts in the domestic systems and systemic effects on Member States in the region
 - Experiences from the European Court of Human Rights
 - Experiences from the Inter-American Court of Human Rights
 - Experiences from the ECOWAS Court of Justice
 - Experiences from the East African Court of Justice
 - Experiences from the African Commission on Human and People's Rights
 - Experiences from the African Committee of Experts on the Rights and Welfare of the Child
- vi. Best practices, lessons learnt and challenges on implementation of decisions of the African Court in the domestic systems of the Respondent States

- Experiences from the executive
 - Experiences from the judiciary
 - Experiences from the legislature
 - Experiences from civil society and National Human Rights Institutions (NHRIs).
- vii. Best practices, lessons learnt and challenges on pre-emptive or preventive implementation of and reliance on decisions of the African Court in the domestic systems of African Union Member States
- Cross-jurisdictional comparative analysis on topics of common interests (e.g., right to legal aid or indigenous rights)
 - Experiences from the executive
 - Experiences from the judiciary
 - Experiences from the legislature
 - Experiences from civil society and NHRIs
- viii. Whether and how external enforcement may strengthen implementation: assessing the monitoring role of the policy organs of the African Union and feasibility of the Implementation and Compliance Monitoring Framework
- ix. Conclusions and Recommendations: possible solutions and ways for improving the implementation of judgments of the Court

IV. EXPECTED OUTCOMES

17. It is expected that at the end of the Conference, delegates will come up with clear and practical proposals aimed at improving the implementation of the Court's judgments and taking measures to ensure that the standards established through the Court's judgments are applied in their legal and judicial systems. Such proposals should address measures to be taken at the national and international levels.

V. METHODOLOGY

18. In order to diversify experience sharing, the Court will invite resource persons from within Africa and beyond to make presentations on the selected topics. The Conference will also create space to allow representatives of the various governments to share experiences on the implementation and impact of the Court's decisions and those of other international judicial bodies.
19. It is also envisaged that the Court will publish the full proceedings or main papers presented during the conference in the form of a book.
20. While most of the deliberations will be at plenary, provisions will be made for group consultations/discussions where necessary.

VI. VENUE AND DATE

21. The Conference will be held in Dar es Salaam, Tanzania from 1 – 3 November 2021. Given the unpredictability of the global COVID Pandemic, it is further proposed to hold the Conference in a hybrid manner so that those willing to travel to Dar es Salaam can attend physically while those unable to travel can participate virtually.

VII. PARTICIPATION

22. The Court is acutely aware of the fact that the implementation of its judgments is an activity that primarily occurs within the municipal sphere. For this reason, the Conference will solicit the participation of a wide array of government officials across the continent but will place emphasis on officials from government departments and other governmental and non-governmental sectors that are most likely to be involved in the implementation of judgments of international tribunals.

23. The Conference will, therefore, be attended by representatives from the offices of Attorneys General, Ministries of Foreign Affairs, Justice and Constitutional Affairs, as well as the legislature and Law Reform Commissions. Participation will also be drawn from the national and regional judiciaries as they are one of the main ports of call in relaying the Court's case law . To draw from the experiences of the defenders of human rights at the national level, the Court will also invite representatives from Bar Associations, National Human Rights Institutions and civil society organizations.

VIII. LANGUAGES

24. The Conference proceedings will be conducted in Arabic, English, French and Portuguese with simultaneous interpretation.

IX. FUNDING:

25. Funding for the Conference will be provided by the African Union.

X. FURTHER INFORMATION

26. For further information regarding the Conference contact the Office of the Registrar at the following email address: registrar@african-court.org.