

A CRITICAL ANALYSIS OF THE AFRICAN COURT ON HUMAN AND PEOPLE'S RIGHTS

Introduction to the African Court as presently constituted

Many have sought a structural solution to the problem of enforcement of human rights in Africa in the form of an African Court on Human and Peoples' Rights whose judgments would be indisputably binding,¹ hence the establishment of the African Court.² The first judges of the Court were sworn in on 2 July 2006, at the 7th AU Summit, and the Court is expected to take off in the nearest future.

The African Human Rights Court Structure

The African Human Rights Court Jurisdiction

The Courts Rules of Procedure

Analysis of the African Court *Vis a Vis* the African Commission

The establishment of the African Court is an indispensable component of an effective regime for the protection of human rights, as norms prescribing state conduct are not meaningful unless they are anchored in functioning and effective institutions such as courts. The African Court will deliver legally authoritative and conclusive decisions,³ and state parties to the African Court Protocol specifically

¹ Harrington (n 4 above) 6.

² Adopted by the Assembly of Heads of State and Government of the OAU in Ougadougou, Burkina Faso, on 9 June 1998 OAU/LEG/MIN/AFCHPR/PROT (111), and came into force on 25 January 2004. However, the 3rd ordinary session of the Assembly of Heads of State and Government of the AU decided to integrate it with the Court of Justice of the AU (Protocol of the Court of Justice adopted by the 2nd ordinary session of the Assembly of the AU in Maputo, 11 July 2003) Assembly/AU/Dec 45 (111).

³ Art 30 Protocol to the African Charter; Viljoen (n 10 above)14.

undertake to implement the findings of the Court, including ordered remedies.⁴ Besides, states will no longer hide under the cover of non-bindingness of decisions as the reason for their non-compliance. The African Court will also provide remedies and bring the African human rights system at par with its regional contemporaries and develop African human rights jurisprudence.

Besides state parties and African intergovernmental organisations, which can go to the African Court directly, individual cases will reach the Court mainly in two ways: Direct access to the African Court by individuals is possible only in respect of states that have made a declaration in terms of article 34(6) of the African Charter.⁵ The other route would be when the African Commission refers a case to the Court after considering the communication.⁶ It is therefore hoped that the African Commission and the African Court will work out some complementary arrangement and avoid duplications. The African Commission consequently will remain a tribunal of first and last instance in respect of most of the individual cases. In terms of enforcement, interestingly, rule 118 of the draft new Rules of Procedure of the Commission⁷ provides that it may refer cases of non-compliance to the African Court where the respondent state party concerned has ratified the African Court Protocol, and such state 'has not complied with its recommendations made in accordance with article 59 of the African Charter within 120 days'. This means that the decisions of the African Commission that remain unenforced by respondent states can be referred to the African Court for enforcement via legally binding measures, as far as they relate to state parties to the African Court Protocol. This is, however, the prerogative of the African Commission, as it may not refer a case of non-compliance where 'there is a reasoned decision by the majority of its members to the contrary'. More so, this is

⁴ Art 30 Protocol to the African Charter.

⁵ Thus far, only the Republic of Burkina Faso has made the declaration.

⁶ Like in the Inter-American human rights system; see American Convention on Human Rights 1969 art 51. See also Inter-American Commission's Rules of Procedure (2003) art 44.

⁷ Draft Rules of Procedure of the African Commission, presented to the 39th ordinary session of the African Commission, by the Working Group on Specific Issues Relating to the Work of the Commission, May 2006 (in file with authors).

a provision of a draft of the Rules of Procedure, which is subject to modifications in light of the ongoing discourse on the 'complementarity' of the African Court and the African Commission.

Notwithstanding this unique possibility, there is no complementary provision in the yet to be drafted rules of procedure of the African Court, obliging it to enforce the recommendations of the Commission. While the Court is obliged under the Protocol to consider cases brought by the Commission, this does not necessarily translate into an obligation to enforce the recommendation of the Commission as it comes, without reopening the case. It is the authors' view that a progressive approach by the African Court towards this provision would be to enforce such referred recommendations. The authors, however, consider it necessary that the African Commission should still have its own implementation mechanism, for its integrity's sake, because having to wait for the Court to enforce its decisions would inevitably delay the availability of relief to victims, especially those who cannot approach the Court directly. Besides, this possibility of referral to the Court for enforcement relates only to the few state parties to thereto. Hence, the Commission remains with the daunting task of giving and enforcing relief for human rights violations to the majority of victims.

The African Court Protocol provides for institutional control of the enforcement of its judgments. It provides in article 30 that states are bound to execute its decisions, and that the Executive Council shall be notified of judgments and shall monitor their execution thereof on behalf of the Assembly.⁸ This is akin to the positions under the European and Inter-American systems, where enforcement is vested in an organ of the political body.⁹ Furthermore, the African Court is required to specify instances of state's non-compliance with its decisions in its

⁸ Art 29(2) Protocol.

⁹ nn 77 & 78 above.

annual report to the AU Assembly.¹⁰ Therefore, such reports, once adopted by the AU Assembly, will also assume the status of AU decisions, as earlier analysed,¹¹ in which case, the indicated non-compliance by states may in turn attract sanctions under article 23(2) of the AU Constitutive Act, as envisaged in respect of the African Commission's recommendations.¹²

The working relationship of the African Court and the African Commission

Analysis of the African Court Vis a Vis the European Court of Human Rights and Inter-American Court of Human Rights

Merger between the Africa Court on Human Rights and the Court of Justice

There is, however, a new development in relation to the African Court. The AU has decided to merge the human rights court, that is, the African Court, and the African Court of Justice¹³ through the adoption of an instrument fusing both courts¹⁴ (the draft merger instrument). The draft instrument would replace the initial Protocols establishing the two individual courts.¹⁵ The Court, named the 'The African Court of Justice and Human Rights'¹⁶ (ACJHR) will comprise of two sections, that is, a 'General Section' and a 'Human Rights Section'.¹⁷ Consequently, the draft merger instrument stipulates a transitional period of one year from the its entry into force, for the African Court to take the necessary

¹⁰ Art 31 Protocol.

¹¹ That is, in respect of the African Commission.

¹² Constitutive Act (n 17 above).

¹³ Protocol on the Court of Justice of the African Union, 2nd ordinary session of the AU, Maputo, Mozambique, July 2003.

¹⁴ Draft Protocol on the Statute of the African Court of Justice and Human Rights, EX CL/253 (IX), Annex II Rev submitted to the 9th ordinary session Executive Council of the AU, 25-29 June 2006, Banjul, The Gambia (on file with authors). See art 1.

¹⁵ n 145 above, art 1.

¹⁶ n 145 above, art 2.

¹⁷ n 145 above, arts 5 & 16.

measures for the transfer of its prerogatives, assets, rights and obligations to the new ACJHR. After that, the former ceases to exist.¹⁸

Under the proposed merged court, that is, the ACJHR, *locus standi* has been broadened to include individuals and relevant human rights organisations accredited to the AU or any of its organs. Accordingly, the old requirement of an additional declaration to allow individual and NGO petitions has been dispensed with, and the majority of victims can approach the ACJHR directly. Similar to the African Court, the proposed ACJHR will issue final and binding decisions.¹⁹ and the Executive Council will be charged with the responsibility of monitoring the execution of its decisions, on behalf of the AU Assembly.²⁰ As novel provisions and, quite specifically, the merger instrument, requires that the ACJHR refers cases of non-compliance with its judgments to the AU Assembly, which shall decide upon measures to be taken to give effect to that judgment, and which may thereby impose sanctions by virtue of paragraph 2 of article 23 of the Constitutive Act.²¹

This newly proposed role of the AU in relation to the enforcement of the decisions of the ACJHR quite confirms the previous analyses of the authors in relation to the enforcement of the recommendations of the African Commission and the decisions of the African Court. It brings to the fore, once again, the fact that the AU is the ultimate enforcer of the decisions of the human rights bodies, whatever form they may assume. Hence, without the requisite political will by member states, which is only achievable within the AU structure, even the decisions of the ACJHR are open to blatant disregard by state parties, notwithstanding their acceptance of the binding nature of its decisions.

¹⁸ n 145 above, art 7.

¹⁹ n 145 above, arts 47(1) & (2).

²⁰ n 145 above, art 44 (6).

²¹ n 145 above, arts 47(4) & (5).

Consequently, the effectiveness of a human rights court, either in the form of the new African Court or the proposed ACJHR, hinges on the effectiveness of the current African Commission. It is therefore imperative to improve the decision-making process of the African Commission, as well as the processes of adopting and enforcing its decisions. The assertion that a court will render binding decisions and thus give some credence to the human rights system is true. However, if the political will to promote and protect human rights on the continent is there, states can abide by recommendations taken even by quasi-judicial institutions such as the African Commission. In the same vein, if the requisite political will is absent, the binding nature of the decisions will not make any difference. Whereas this paper advocates the use of sanctions to ensure compliance, the authors note that it is more important for states to voluntarily respect their human rights obligations, and the decisions of the Commission and the Court(s).

Potential challenges of and to the African Court on Human Rights

Proposals of the way forward for the African Court on Human Rights