



**STAKEHOLDERS' CONFERENCE ON ENHANCING THE
EFFECTIVENESS OF THE AFRICAN COURT ON HUMAN AND
PEOPLE'S RIGHTS
HELD IN DURBAN, SOUTH AFRICA 4TH - 7TH JUNE 2013**

The Konrad Adenauer Stiftung under the aegis of the Rule of Law Program for Sub Saharan Africa in collaboration with the Coalition for an Effective African Court on Human and Peoples' Rights organized a Stakeholders' Conference on Enhancing the Effectiveness of the African Court on Human and People's Rights in Durban, South Africa from 4th to 7th June 2013.

The conference covered a wide range of pertinent issues including especially access to justice under international human rights law and the African human rights systems; the independence of the African Court on Human and Peoples' Rights; the effectiveness of the African human rights system; the roles of key stakeholders such as the National Human Rights Institutions and the Coalition for an Effective African Court on Human and Peoples' Rights in the strengthening of African human rights systems with specific emphasis on the African Court on Human and Peoples' Rights; and a comparative perspective from the European Court for Human Rights.

During the opening session, **H.E. Dr. Horst Freitag**, the German Ambassador to South Africa, **Dr. Dix Holger**, KAS Country Representative, South Africa, **Mr. Dieu-Donne Wedi Djamba**, the Executive Secretary, Coalition for an Effective African Court on Human and Peoples' Rights, and **Prof. Christian Roschmann**, the Director, Rule of Law Program for Sub Saharan Africa set the tone for the deliberations in their respective remarks.

Hon. Justice Harold Nsekela, the President of the East African Court of Justice, in his keynote address underscored the following concerns and their impact on the effectiveness of the African Court on Human and Peoples' Rights;

- The slowness in the ratification of the Protocol and problematic access to the Court;¹
- Fears that the human rights section of the proposed African Court of Justice and Human Rights may run the risk of acquiring 'second class' status with human rights issues being perceived as less significant compared to the inter-state disputes and other matters of 'high state' which are likely to occupy the general section;
- The implications of extending the jurisdiction of the African Court to international crimes in light of the huge jurisdictional mandate that comes with it;
- The lack of statutory relationship between the African Court and the sub-regional courts despite having a shared jurisdiction which is likely to give rise to conflicting jurisprudence; and

¹ 26 State parties have so far ratified the Protocol which is less than half of the total membership of the AU. These are Algeria, Burkina Faso, Cote d'Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Nigeria, Niger, Rwanda, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda. Out of which only 6 States have made the Article 34 (6) Declaration conferring jurisdiction on the Court to receive cases from individuals and non-governmental organizations. These are Burkina Faso, Malawi, Mali, Tanzania, Ghana and Rwanda.

- The lack of capacity and poor structure of the Court, which according to the Court, is attributable to its insufficient funding.

Notable key speakers at the conference included **Justice Pillay Ariranga**,² who presented on the 'access to justice in international human rights law' which generated intensive debate on the challenges of access to justice in the African human rights system, including especially, the slowness in ratification of the Protocol establishing the African Court on Human and Peoples' Rights by African states, limited access to the Court by individuals and non-state organizations unless a country has deposited the requisite declaration, and lack of adequate financial and political support. The evaluation of these challenges revealed an inextricable attachment to the problems facing sub-regional courts in terms of difficulties in enforcement of judicial decisions and threats to the Court.

Mr. Llyod Kuveya's³ presentation highlighted a number of issues that one would analyse insofar as determining the level of independence of any judicial organ at national, regional and international levels, the African Court included. Participants considered the lack of financial autonomy, the manner of appointment of the judges, security of tenure and the impartiality of the judges as some of the key factors affecting the effectiveness of the African Court on Human and Peoples' Rights.

Commissioner Med Kaggwa's⁴ presentation focused on the mandate of the African Commission vis-à-vis that of the African Court, noting *inter alia*, the inescapable network of mutuality and complementarity between the two institutions in the promotion and protection of human rights. Participants explored possibilities of strengthening the relationship between these institutions in order to enhance the protection of human rights on the continent.

Mr. George Kegoro⁵ presented on the role and strategies of the Coalition for an Effective African Court on Human and Peoples' Rights in ensuring that the African Court is effective, accessible and credible and the Coalition's continued push for universal ratification of the of the Protocol Establishing the Court and the Declaration as

² UN Committee on Economic, Social and Cultural Rights and immediate former President of the SADC Tribunal and Former Chief Justice of Mauritius.

³ Senior Legal Advisor, ICJ Africa Regional Programme.

⁴ Chairman of Uganda Human Rights Commission and Commissioner, African Commission on Human and Peoples' Rights.

⁵ Executive Director, ICJ Kenya and President of the Coalition for an Effective African Court on Human and Peoples' Rights

espoused under article 34(6). The participants observed that the success of the promotional activities of the Coalition required massive sensitization and mobilisation at the national level achievable by reaching out to various stakeholders, state and non-state actors and most importantly the critical mass of the people. Continued creation of awareness on the existence of the court and its mechanisms in ensuring access to justice for the peoples of Africa was highlighted as one of the key activities that the Coalition should propagate across the continent.

Mr. Gilbert Sebihogo⁶ elucidated the critical role played by the African National Human Rights Institutions in complementing and enhancing the effectiveness of the African Court as well as the promotion and protection of human rights in general. However, NHRIs see the lack of political will, low rate of ratification, under-utilisation of the Court and lack of a structured approach in interacting and engaging with the Court as persistent challenges in executing their mandate of monitoring, promoting and protecting human rights and advocacy. While appreciating these challenges and exploring mitigating approaches, the participants urged NHRIs to be more courageous not just in speaking out against human rights violations but also in considering taking active steps in seeking legal redress and audience with the national, sub-regional and the continental courts.

Prof. Oliver Ruppel's⁷ exposition of the European Convention and the European Court for Human Rights enlightened the discussion on the unexplored opportunities relating directly and significantly to the strengthening of the African Court. The comparative perspective from the European Court also offered invaluable leads, experiences and working suggestions towards addressing the numerous challenges facing the African Court.

Way Forward

At the close of the conference, the emerging consensus was that although the African human rights system has made significant advances regarding the recognition, protection and promotion of human rights on the continent, there was need for continued engagement among stakeholders and the citizens in creating ways and mechanisms that improve access to justice in the African Court on Human and Peoples'

⁶ Executive Director, Network of African National Human Rights Institutions (NANHRI).

⁷ Faculty of Law, University of Stellenbosch, South Africa.

Rights specifically and other judicial organs generally, for disenfranchised and vulnerable Africans.

Consequently, the delegates made the following suggestions likely to give impetus to the drive towards enhancing the effectiveness of the African Court on Human and People's Rights:-

1. Popularising the African Court on Human and Peoples' Rights within and across the continent by all the key players starting with the Court itself by *inter alia*, establishing a continental Annual Human Rights Week to popularise the Court and promote human rights advocacy and encouraging internship for students and young lawyers at the Court among other initiatives.
2. Continued lobbying and advocacy for universal ratification of the Protocol establishing the Court and the Declaration as espoused under article 34(6). Towards this end,
 - a. The Coalition for an Effective African Court on Human and Peoples' Rights in partnership with other stakeholders including ICJ Africa and KAS, develop an advocacy tool kit for the ratification of the Protocol and the Declaration
 - b. The African Commission on Human and Peoples' Rights to incorporate mandatory reporting on the progress made by each country in the ratification process in their periodic reports to the Commission
 - c. National Human Rights Institutions and Public Protection Institutions such as the Ombudspersons to continuously monitor, engage and advice state organs on the ratification process
3. Promoting collaboration between sub-regional Courts and the African Court to avoid duplication of efforts.
4. Identifying and capacitating strategic partners including parliaments, judiciaries, civil societies, media, academia and Law Societies in the advancement of successful promotional activities at national, regional and continental levels.
5. Collaborating with Law faculties, scholars and experts in the field of human rights to promote academic legal research and publications on the Court and the African human rights system in general.

Participation

The Conference brought together high level state officials, judicial officers, legal practitioners, scholars and experts in the field of human rights, civil society representatives among others from across the continent.

APPENDICES

a. List of Participants

1. H.E. DR. HORST FREITAG, German Ambassador to South Africa, Pretoria South Africa
2. JUSTICE HAROLD NSEKELA, President, East African Court of Justice (EACJ), Arusha, Tanzania
3. JUSTICE ARIRANGA PILLAY, UN Committee on Economic, Social and Cultural Rights and immediate former President of the SADC Tribunal and Former Chief Justice of Mauritius.
4. DR. ATHALIAH MOLOKOMME, Attorney General, Republic of Botswana
5. JUSTICE (RTD) ANNEL SILUNGWE, Chairman, Technical Committee Drafting the Zambian Constitution and Former Chief Justice
6. MR. MED KAGGWA, Chairman of Uganda Human Rights Commission and Commissioner, African Commission on Human and Peoples' Rights.
7. ADV. LOURENCE MUSHWANA, Chairman, South African Human Rights Commission
8. ADV. JOHN WALTERS, Ombudsman, Republic of Namibia
9. MR. SACKY SHANGHALA, Chairman, Law Reform Commission, Republic of Namibia
10. COMMISSIONER (RTD) LEON WESSELS, University of Free State and Former Commissioner South African Human Rights Commission
11. PROF. HUGH CORDER, University of Cape Town, South Africa
12. AMB. DR. BHADRA RANCHOD, University of Stellenbosch, South Africa
13. PROF OLIVER RUPPEL, University of Stellenbosch, South Africa
14. MR. GEORGE KEGORO, Executive Director, Kenyan Section of the International Commission of Jurists (ICJ Kenya) and President of the Coalition for an Effective African

Court on Human and Peoples' Rights

15. MR. GILBERT SEBIHOGO, Executive Director, Network of African National Human Rights Institutions (NANHRI)
16. MR. DIEU-DONNE DJAMBA WEDI, Executive Secretary of the Coalition for an Effective African Court on Human and Peoples' Rights
17. MR. LLOYD KUYEYA, Senior Legal Advisor, International Commission of Jurists (ICJ) Africa Regional Programme

18. MS WAME BAGWASI, Attorney General Chambers, Republic of Botswana
19. DR. HOLGER DIX, KAS Country Representative, South Africa
20. PROF. CHRISTIAN ROSCHMANN, Director, KAS Rule of Law Program for Sub Saharan Africa
21. MR. PETER WENDOH, Project Advisor, KAS Rule of Law Program for Sub Saharan Africa
22. MR. STEVE OGOLA, Researcher, KAS Rule of Law Program for Sub Saharan Africa

b. Conference Synopsis

The twenty-first century has shown signs and signals of much hope for the human rights situation in Africa. Over the last two decades alone, the human rights situation on the continent has improved considerably. This improvement has occurred in part because of the development of regional and sub-regional institutions that promote the protection of human rights. The establishment of the African Court as the premier judicial organ is the strongest signal that the recognition, protection and promotion of human rights is no longer a contemplative subject but a crucial ingredient in the human rights systems in Africa.

The African Court was established with the core mandate of strengthening the African human rights system and ensuring the protection and fulfilment of fundamental rights and duties on the continent through its advisory and contentious jurisdiction. The Court has jurisdiction over all matters of interpretation and application of the African Charter on Human and Peoples' Rights, the Protocol and any other relevant human rights instrument ratified by the States concerned. The Court is meant to complement and reinforce the functions of the African Commission on Human and Peoples' Rights.

The Court was established by virtue of Article 1 of 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 was adopted by Member States of the then

Organization of African Unity (OAU) in Ouagadougou, Burkina Faso, in June 1998. The Protocol came into force on 25 January 2004 after it was ratified by more than 15 countries. Currently, twenty six (26) States have ratified the Protocol⁸. The fact that less than half of the African Union member States have ratified the Protocol establishing the Court undermines the extent of African states' commitment to the protection and promotion of human rights and the intention to bring themselves within the purview of this Court.

Although an invaluable addition to the machinery for the protection of human rights in Africa, the restrictive access to the Court may undermine its utility. According to the Protocol⁹, the Court may receive complaints and/or applications submitted to it either by the African Commission of Human and Peoples' Rights or State parties to the Protocol or African Intergovernmental Organizations. Non-Governmental Organizations with observer status before the African Commission on Human and Peoples' Rights and individuals from States which have made a Declaration accepting the jurisdiction of the Court can also institute cases directly before the Court. As of June 2013, only six countries¹⁰ had made such a Declaration.

The independence of the Court is undermined primarily by the lack of adequate funding which to a large extent hinders its capacity to discharge its mandate. Without a sufficient budgetary allocation, the impartiality and independence of the judges at a personal level¹¹ as well as the efficiency of the Court at an institutional level¹² may be greatly jeopardized. Thus allowing the Court to be independent of the African Union, which allocates funds for its work, remains a challenge to be tackled.

It is against this backdrop that Konrad Adenauer Stiftung under the aegis of its Rule of Law Program for Sub Saharan Africa and the Coalition for an Effective African Court on Human and Peoples' Rights convened this forum to brainstorm and broaden the scope of consensus on the best approaches to be adopted by the Court and other key stakeholders in ensuring that access to the Court and administration of justice is improved.

⁸ Algeria, Burkina Faso, Burundi, Cote d'Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda.

⁹ Article 5 and the Rule 33

¹⁰ Burkina Faso, Ghana, Malawi, Mali, Tanzania and Rwanda

¹¹ The Court is composed of eleven Judges, nationals of Member States of the African Union. The first Judges of the Court were elected in January 2006, in Khartoum, Sudan. The judges are elected for a six year or four year term renewable once. The judges of the Court elect a President and Vice-President of the Court among themselves who serve a two year term. They can be re-elected only once. The President of the Court resides and works on a full time basis at the seat of the Court in Arusha, while the other ten (10) work on a part-time basis.

¹² As at June 2012, the Court had received 24 applications, half of which had been decided upon.

Main Objective

To explore the roles of key stakeholders in fostering the effectiveness of the African Court on Human and Peoples' Rights.

Specific Objectives

- To advocate for the ratification of the Protocol by all African States;
- To advocate for direct individual access to the Court;
- To explore ways of enhancing the Court's independence, capacity and effectiveness by examining the strengths and weaknesses of the Court.
- To explore ways of transforming the Court into an effective forum for adjudicating individual human rights violations.