

SETBACK FOR THE AFRICAN HUMAN RIGHTS SYSTEM

By Peter Wendoh

In the midst of the current global crisis brought about by the COVID-19 pandemic, two West African states namely, Benin and Cote d'Ivoire have moved to withdraw their Declaration under Article 34(6)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 that grants individuals and NGOs direct access to the Continental Court.

The Republic of Benin through its embassy in Ethiopia issued the notice on 21 April 2020 on the withdrawal of its Declaration that was deposited on February 8, 2016.

It stated that it had reached this decision **due to the African Court interference and intrusions in areas that have not been assigned to its jurisdiction which results into serious disruption of the domestic legal order.**

Prior to the withdrawal, the African Court had ordered the authorities in Benin to temporarily postpone local elections until it had issued a decision on the complaint filed by Sebastien Ajavon, a political opponent of Benin's President.

According to Amnesty International reports, in less than two years, at least 17 journalists, bloggers and political activists have been prosecuted under Law No. 2017-20 of 20 April 2018, which sets out repressive measures that restrict rights to freedom of speech and freedom of the press in Benin. The wave of arbitrary arrests of political activists and journalists together with the repression of peaceful demonstrations rose during the parliamentary elections of 28 April 2019.

On its part, the Republic of Cote d'Ivoire issued a statement on 29 April 2020 stating that **the African Court has undermined the sovereignty and the Ivorian**

¹Article 34(6) provides that '*At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration.*'

Article 5(3) provides that '*The Court may entitle relevant Non Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol.*'

justice system and that the decision to withdraw from Article 34(6) is a result of serious and intolerable actions from the African Court.

The withdrawal by Cote d'Ivoire came barely a week after the African Court ordered in application number 012/2020 *Guillaume Kigbafori Soro & Others vs. the Republic of Côte d'Ivoire*, that the respondent state suspends its arrest warrant against Guillaume Soro and releases¹⁹ of his relatives who have been imprisoned for several months.

Mr. Soro, a former speaker of parliament and a presidential candidate in the upcoming presidential elections scheduled for October this year, was sentenced in absentia to 20 years in prison by an Abidjan court after a one-day trial on charges of money laundering and embezzlement. This decision effectively ruled him out of the presidential elections. He is also accused of 'attempted insurrection'.

Cote d'Ivoire deposited the Declaration on 19 June 2013 but its authorities have moved to withdraw it due to what they term as '*a decision (by the African Court) that is likely to undermine the foundations of the rule of law by creating genuine legal insecurity*'.

Last year, the African Court also asked Côte d'Ivoire to reform its Electoral Commission following an application that had been referred to it by the Opposition.

While supporting the withdrawal, the Foreign Minister Ally Coulibaly reiterated that Côte d'Ivoire was not leaving the court, but found its latest decision 'unacceptable' and 'political' by '*conferring a certain criminal immunity on someone who wants to be a candidate in the next elections.*'

Benin and Cote d'Ivoire now join Rwanda and Tanzania in a series of withdrawal from Article 34(6) of the African Court Protocol, putting a stop to direct access for individuals and relevant NGOs to the African Court. This is a step back towards access to justice and promotion of human rights in Africa considering that only ten (10) States out of the thirty (30)² that have ratified the Protocol

² Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Côte d'Ivoire, Comoros, Congo, Gabon, The Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal,

establishing the African Court have ever deposited the Declaration under Article 34(6). The latest withdrawals leave six (6) States, namely, Burkina Faso, The Gambia, Ghana, Mali, Malawi and Republic of Tunisia as the only countries that allow direct access for individuals and NGOs to the African Court. In the context of the bigger picture, this represents a miserly 11% of the total number of AU Member States³.

It is worrying that all the four (4) countries that have so far withdrawn from Article 34(6) have made the move on the back of what has been perceived by authorities in those countries as 'unfavourable rulings' by the Court. The low number of States that have deposited the Declaration, coupled with the recent flash withdrawals, is a clear manifestation of the unwillingness by States to recognize the authorities of regional human rights systems and unwillingness to abide to human rights commitments on the continent.

This trend when analysed in the context of the controversial immunity clause, Article 46A *bis* of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol)⁴, gives credence to the reservations advanced by critics of this clause who have all along perceived it to be an ideal shield *ab initio*, for those in power from being held accountable. The Article states that:

"No charges shall be commenced or continued before the court against any serving AU Head of state or Government, or anybody acting or entitled to act in such a capacity, or other senior state officials based on their functions, during their tenure in office."

In essence, this clause precludes senior state officials from being tried by the African Court for serious crimes committed in violation of international law. This begs the question, for whom is the (proposed) Criminal Division of the African Court being established?

Under the prevailing circumstances, it thus makes no sense to push for the creation of the Criminal Division of the Court with the jurisdiction to handle serious international crimes when it is apparent that the State authorities on the

Tanzania, Togo, Tunisia and Uganda – source: <https://www.african-court.org/en/index.php/12-homepage1/1208-welcome-to-the-african-court1>

³ AU comprises 55 Member States

⁴ Even with the controversial immunity clause in place, the Malabo Protocol of 2014 has zero ratifications to date.

continent are not willing to promote, recognise and respect the regional human rights system that does not advance their partisan interests and selfish wishes.

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