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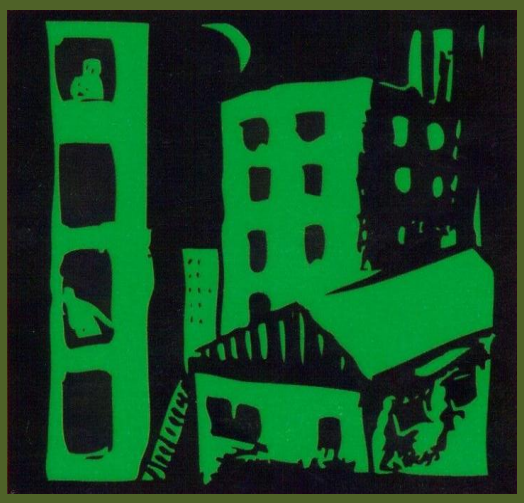

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Seven years in business: Evaluating developments at the African Court on Human and Peoples' Rights

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1 INTRODUCTION

The creation of the African human rights system with the adoption in Nairobi, Kenya, in 1981 of the African Charter on Human and Peoples' Rights (African Charter)[1] under the auspices of the former Organization of African Unity (OAU) and its entry into force on 21 October 1986, was a culmination of the yearning of many African civil society and human rights organisations to have a home-grown human rights mechanism that works to promote and to protect the human rights of the peoples of Africa. It is now common knowledge that the 1961 International Commission

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[1] African Charter on Human and Peoples' Rights OAU Doc CAB/LEG/67/3/Rev.5, adopted on 27 June 1981.

of Jurists' "African Conference on the Rule of Law" was one of the early fires in this regard. One of the resolutions of the conference (the famous "Law of Lagos") was in effect the creation of a human rights court under a proposed "African Convention on Human Rights", which "was to lay down the basis for future efforts for the establishment of rules and mechanisms for the regional promotion and protection of human rights in Africa", and "to give full effect to the Universal Declaration of Human Rights."[2] Granted that it took 20 years after the "Law of Lagos" for the African Charter that sets the tone for a regional human rights regime to be adopted, its adoption was a welcome development. During the early period of this development, the African Commission on Human and Peoples' Rights (African Commission) was the only organ mandated under the African Charter to: 1) engage in promoting human rights; 2) protect human rights; 3) examine state reports; and 4) provide interpretation of the Charter.[3] As part of its protection mandate, the African Commission innovated the hearing of individual complaints for human rights violations brought to it by victims of such violations or their representatives.

Indeed, the processes of the African Commission have evolved from a period of a weak mechanism to the present where it can be confidently said that the Commission has, on the one hand, gained increased confidence in itself in carrying out its mandate and, on the other, attracted the confidence of African and global civil society in its work, particularly in its individual complaint mechanism where there has been some positive and progressive development in the 26 years since the creation of the African Commission. Yet, in spite of the positive development in the work of the African Commission in exercising its mandate, there remained the question of the impact of its decisions on the behaviour of Member States to the African Charter in terms of the bindingness of such decisions and their enforcement. Through no fault of the African Commission, its decisions are, in the main, recommendations and as such have not attracted much serious attention from Member States to the African Charter.

It was against this background of the lack of enforcement of the decisions of the African Commission and the voluntary nature of compliance with its decisions that the push by African civil society for the creation of the African Court on Human and Peoples' Rights (African Human Rights Court) began. This push eventually led to the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol on the African Human Rights Court)[4] on 10 June 1998 in Ouagadougou, Burkina Faso. The Protocol on the African Human Rights Court entered into force on 25 January 2004. Despite some initial setbacks after its entry into force - based on a new African Union (AU) initiative to merge the African Human Rights Court with the yet to be established Court of Justice of

[2] Eze O *Human rights in Africa: Some selected problems* (1984) at 195. See also Ankumah E *The African Commission on Human and Peoples Rights: Practice and procedures* (1996) at 193 and Viljoen F *International human rights law in Africa* (2007) at 420-421.

[3] African Charter Art 45.

[4] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights OAU Doc.CAB/LEG/65.5(1998).

the African Union[5] - the first judges of the Court were only elected on 22 January 2006. Thus, with the election of the judges, the birth of the African Human Rights Court was practically realised. Until such time that the fully merged court as envisaged under the Protocol on the Statute of the African Court of Justice and Human Rights (Merger Protocol)[6] (and the subsequent proposed amendment to it to enlarge the Court's jurisdiction to include international crimes[7]), which was adopted on 7 July 2008 in Sharm El-Sheikh, Egypt, is established, the African Human Rights Court is the current AU institution with a full mandate to make binding and enforceable decisions on human rights violations on the continent. This Court has been in existence for seven years. This article examines the work of the African Human Rights Court in the first seven years of its existence, albeit an early period of its life. It seeks to interrogate developments at the Court within this period in terms of how the Court has approached its mandate as well the challenges that it faces in the fulfilment of that mandate.

2 SETTING UP AND ORGANISING THE COURT

In keeping with Article 11 of the Protocol on the African Human Rights Court regarding the composition of the Court, the first eleven judges were elected in January 2006[8]but

[5] While members of African and global civil society waited for the Court to be operationalised, the AU decided that the African Human Rights Court should be merged with the Court of Justice of the AU following a suggestion in that regard by President Olusegun Obasanjo of Nigeria, the then Chairperson of the AU. The machinery to achieve the merger was put in place by the African Union Commission, leading to a meeting of African legal experts in Addis Ababa from 13-14 January 2005. This meeting resulted in an initial Draft Protocol for the merger. The meeting was followed up by different other meetings to work out a Protocol for the merger. The Executive Council of the AU, however, decided that the Human Rights Court should be operationalised, while efforts were being made to work out its integration with the AU Court of Justice. In this regard, a meeting of legal experts took place in Addis Ababa from 29 March to 1 April 2005, which resulted in four important recommendations: 1) that the African Human Rights Court should be operationalised while the merger was being sorted out; 2) that there should be full ratification of the Protocol on the African Court of Justice to enable it come to force like the Protocol on the Human Rights Court; 3) that after the Protocol on the Court of Justice comes to into force, the AU would be in a better position to integrate the two courts; 4) that the AU should fully operationalise the Human Rights Court by deciding its seat and electing the judges. See Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Doc. EX.CL/162 (VI) contained in EX.CL/Dec.165 (VI) (AU Executive Council Merger Decision). See also Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Assembly/AU/6 (V) contained in Assembly/AU/Dec.83 (V) (AU Assembly Merger Decision). Accordingly, the recommendations were accepted and the first judges of the African Human Rights Court were elected on 22 January 2006.

[6] Protocol on the Statute of the African Court of Justice and Human Rights, adopted July 7 2008 at Sharm El-Sheikh, Egypt. See Decision on the Single Legal Instrument on the Merger of the African Court on Human and Peoples' Rights and the African Court of Justice, Doc. Assembly/AU/13(XI).

[7] Not too long after the Merger Protocol was adopted, the AU began another initiative to amend it to enlarge the Court's jurisdiction to include international crimes. See Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Draft Protocol on Amendments to the Merger Protocol), Legal.ACJHR-PAP/3(II) Rev.4. For detailed analysis regarding enlarging the Court's jurisdiction to include international crimes, see Nmehielle V "Saddling the new African Regional Human Rights Court with international criminal jurisdiction: Innovative, obstructive, expedient?" (2013) 13 *African Yearbook of International Law* (forthcoming).

[8] See AU Assembly Decisions and Declaration Sixth Ordinary Sessions 23-24 January 2006, Khartoum, Sudan, Assembly/AU/Dec.100 (VI) and Doc./EX.CL/241(VIII). The first judges were Sophia A. B. Akuffo (Ghana and current President of the Court), Fatsah Ouguergouz **(**Algeria and current Vice President of

took their oaths of office on 2 July 2006.[9] The AU, however, would only sign the headquarters agreement with the government of Tanzania, the seat of the African Human Rights Court, on 31 August 2007.[10] The choice of Arusha, Tanzania, as the headquarters of the Court was based on Tanzania's offer to host the Court and acceptance of the offer by the AU.[11] Tanzania's offer was predicated on an earlier AU decision that zoned the seat of its judicial organ, including the African Human Rights Court, in the "Eastern Region" of the continent pending its merger with the African Court of Justice.[12]

With the swearing in of the judges, the Court held its first ordinary session in Banjul, The Gambia, from 3-5 July 2006 during which it consulted with the African Commission, the African Committee on the Rights and Welfare of the Child, as well as the Economic Community of West African States' (ECOWAS) Court of Justice.[13] In addition, the judges deliberated on the actual operationalisation of the Court in terms of modalities for drawing up its Rules of Procedure, the election of its first Bureau - the President and Vice-President, administrative issues, such as, the budgetary requirements of the court and the judges' robes, resulting in the establishment of various committees to deal with these issues.[14]At its second session in Addis Ababa in September 2006, the Court elected its first President and Vice-President and charted a course on its administrative and budgetary needs.[15]During its third session in December 2006, the Court deliberated on its draft Rules of Procedure and "on the effective take off of Court activities", which revolved around "budgetary and administrative issues", such as, staffing the Court and other logistic considerations.[16]

It was, however, difficult for the Court to take off immediately the judges were sworn in despite having been allocated its own budget in 2006. The Court lacked its own personnel and had to depend on the African Union Commission (AUC), which dependence had logistic bottlenecks and ramifications. More importantly, the Court did not have "a functional headquarters" that the judges could actually go to as at January 2007, as Tanzania had not finalised the allocation of space for the Court's headquarters and residential premises for the President of the Court.[17] As indicated earlier, the Court's Headquarters Agreement was signed only in August 2007 between the AU and

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the Court**),** Bernard Makgabo Ngoepe (South Africa), Gérard Niyungeko (Burundi and former two term President of the Court), Justice El Hadji Guissé (Senegal), Jean Mutsinzi (Rwanda and former one term President of the Court), Modibo Tounty Guindo (Mali), Kelello Justina Mafoso-Guni (Lesotho), Hamdi Faraj Fanoush (Libya), George W. Kanyiehamba (Uganda), and Jean Emile Somda (Burkina Faso). Mutsinzi, Guindo, Mafoso-Guni, Fanoush, Kanyiehamba, and Somda have since served out their terms and been replaced by other judges elected by the AU.

[9] See *Activity Report of the African Court on Human and Peoples' Rights* (2006), Assembly/AU/8(VIII) at 2.

[10] See Host Agreement between the Government of the Republic of Tanzania and the African Union on the Seat of the African Court on Human and Peoples' Rights in Arusha, Tanzania (Court's Headquarter Agreement).

[11] The Court's Headquarter Agreement, Preambles 10 and 11.

[12] The Court's Headquarter Agreement, Preamble 9. See also AU Assembly Merger Decision .

[13] *Activity Report of the African Court on Human and Peoples' Rights* (2006) at 3.

[14] *Activity Report of the African Court on Human and Peoples' Rights* (2006) at 3.

[15] *Activity Report of the African Court on Human and Peoples' Rights* (2006) at 3.

[16] *Activity Report of the African Court on Human and Peoples' Rights* (2006) at 3.

[17] *Activity Report of the African Court on Human and Peoples' Rights* (2006) at 8.

Tanzania and this was after the judges visited Arusha on 9 and 10 July 2007 and approved the premises that Tanzania offered as the Court's headquarters, albeit a temporary one; as well as the temporary residence of the Court's President.[18]

It was not until 2008 that one could say that the Court became somewhat functional as a judicial body. It adopted its interim Rules of Procedure that year[19], and recruited most of its staff including a Registrar and Deputy Registrar.[20] The Court also received its first and only case for a very long time (*Michelot Yogogombaye v the Republic of Senegal*)[21] that year, which will be discussed below in relation to the Court's exercise of its contentious jurisdiction. The Court adopted its final Rules of Procedure after consultation with the African Commission and their harmonisation with the Rules of Procedure of the African Commission.[22] The Court is required by Article 33 of the Protocol on the African Human Rights Court to consult the African Commission in drawing up its Rules. Also, the fact that Article 6(3) of the Protocol gives the Court a discretion to "transfer" a case to the African Commission makes it important for there to be consultation on the Rules, and as part of the implementation of the relationship between the Court and the African Commission that is underscored by Article 2 of the Protocol that the Court is complementary to "the protective mandate of the African Commission."

It is important to highlight that one of the judges of the Court, Githu Muigai of Kenya, who was elected in 2008, resigned in 2009 and was replaced.[23] While the reason for his resignation is not publicly available, it may not have been unconnected with the lack of judicial activity at the time. However, by 2009 and 2010, the Court had become functional as a judicial institution but was, however, heavily involved in administrative matters rather than elaborate judicial activities. It may well be argued that administrative matters are part and parcel of the work of the Court and therefore inherent in the Court's judicial functioning. To be fair, one should acknowledge that the ability of the Court to function as a judicial institution does not really lie with the Court itself as an institution or with the judges. The Court would have to be moved by the parties that are competent to make use of it; namely, States parties to the Protocol on the African Human Rights Court, on the one hand, and other such parties that have been granted access to it, on the other. The full judicial operationalisation of the Court in this regard was indeed hampered by this lack of effective access to it. This will be discussed in detail in part 4.

[18] *Activity Report of the African Court on Human and Peoples' Rights* (2007), EX.CL/363 (XI) at 5

[19] See Keynote Speech of The Honourable Lady Justice Sophia A. B. Akuffo, President of the African Court on Human and Peoples' Rights during the African Court Coalition Training on the Procedures of the African Court on Human and Peoples' Rights, 8 March 2013, Arusha Tanzania (President Akuffo's Keynote Speech of 8 March 2013 in Arusha) at 4 (on file with this author).

[20] *Activity Report of the African Court on Human and Peoples' Rights* (2009) at 8.

[21] *Michelot Yogogombaye v the Republic of Senegal*, Application No. 001/2008. See *Activity Report of the African Court on Human and Peoples' Rights* (2009) at 4-5.

[22] *Activity Report of the African Court on Human and Peoples' Rights* (2009) at 7.

[23] *Activity Report of the African Court on Human and Peoples' Rights* (2009) at 2.

3 ADMINISTRATIVE AND BUDGETARY OUTLOOK OF THE COURT

For any judicial institution, whether domestic or international, to effectively carry out its mandate, it must be on a good financial footing as well as have efficient administrative personnel. It is no use establishing a human rights court, if it will not be adequately funded and resourced in terms of personnel and facilities. In fact, the success of such a court in the performance of its judicial and other duties will be measured, to a large extent, by the amount of resources available to it. It is in this light that it is vital to evaluate the budgetary and administrative outlook of the African Human Rights Court in the first seven years of its existence.

3.1 The financial situation of the Court

One of the problems identified regarding the effective functioning of the African Commission as the maiden protective mechanism of the African human rights system was the lack of adequate funding and administrative support. During its initial period the African Commission had financial challenges, which the then OAU did not do much to alleviate for a very long time. However, the same cannot be said of the African Human Rights Court, at least in its early life. Despite the fact that the Court had no personnel or functional premises in 2006 when it was operationalised, it had a budgetary allocation from the AU, which it could not effectively utilise due to the obvious administrative challenges it faced.[24]In the last seven years the budgetary outlook of the Court has been progressive, but the budget effectively underspent as demonstrated for the three years – 2010-2012. In 2010 when the Court began to report publicly on its budget, its budget allocation was "7,939,375 USD, comprising 6,169,591 USD as operational budget and 1,569,784 USD as programme budget."[25] Of this total budget allocation, 6,169,591 USD were from AU member states' contributions (operational budget) and the rest classified as "programme budget" came from "foreign partners" - 863,309 USD as an allocation from the European Union (EU) Support Programme for the African Union (EU-AU Support) and 906,475 USD as contribution by the German Technical Cooperation – (GTZ contribution), which the GTZ itself managed.[26] In addition to the above regular budget, in 2010 the Court received the sum of 200,000 USD from the MacArthur Foundation in support of its library.[27] In terms of execution, 62.70% of the operational budget, 32.30% of the EU-AU support, and 34.10% of the GTZ were spent.[28] Similarly, the Court's total budget for 2011 stood at 9,190,135 USD made up of 6,478,591 USD as operational budget of which 69.40% was spent; 1,727,850 USD from EU-AU support, which was underspent at 25.70%; and a GTZ contribution of 983,694 USD of which 27.60% was spent.[29]The Court's approved budget for 2012 was 8,563,992 USD made up of 6,478,071 USD as operational budget and 2,084,921 USD as programme budget.[30]

[24] *Activity Report of the African Court on Human and Peoples' Rights* (2006) at 8.

[25] *Activity Report of the African Court on Human and Peoples' Rights* (2010), EX.CL/650(XVIII) at 3.

[26] See *Activity Report of the African Court on Human and Peoples' Rights* (2010) at 4.

[27]See *Activity Report of the African Court on Human and Peoples' Rights* (2010) at 7.

[28] See *Activity Report of the African Court on Human and Peoples' Rights* (2010) at 4.

[29] See *Activity Report of the African Court on Human and Peoples' Rights* (2011), EX.CL/718(XX) at 5-6.

[30] See *Activity Report of the African Court on Human and Peoples' Rights* (2011) at 4.

Elaborately highlighting of the budget of the Court and its associated underspending is not intended to criticise the Court's use of it resources; on the contrary, it is rather meant to convey a picture of a Court in its early years was reasonably resourced. To be sure, it is quite clear, and as demonstrated in the various Activity Reports of the Court, that the glaring underspending is associated with the fact that the Court is yet to be fully operationalised in terms of implementing all its programmes and activities, recruitment of all needed personnel, and the required procurement for the Court. The fact, however, remains that the financial outlook of the Court is quite promising and one hopes that as the Court gets busier and fully operationalised, the promising financial outlook will remain and continue to be progressive taking into account the hoped increase in the workload and activities of the Court.

3.2 Administrative functioning of the Court

In terms of its administrative functioning, as required by Article 21(2) of the Protocol on the African Human Rights Court, the President is the only judicial officer who serves "on a full-time basis" among the judges of the Court and is required to "reside at the seat of the Court." Thus, the other judges of the Court serve on a part-time basis in accordance with Article 15(4) of the Protocol. During the past seven years of the Court's operationlisation, the judges appear to have generally engaged in elaborate administrative work with regard to what the current President of the Court refers to as deliberating "on administrative and budgetary issues necessary for the efficient operation of the Court" during its annual four ordinary sessions and the optional annual two extraordinary sessions "depending on the exigencies of matters before" the Court.[31] The administrative duties have ranged from the drafting and consideration of the Court's budget to the recruitment of the Registrar, Deputy Registrar and other staff of the Court, matters of cooperation with "external partners," matters around the implementation of the Court's Headquarters Agreement, participation in AU activities, and various other such administrative duties.[32] The judges' involvement in administrative issues, particularly in the recruitment of the Court's personnel, is predicated on Article 24 of the Protocol which stipulates that "the Court shall appoint its own Registrar and other staff of the Registry… according to the Rules of Procedure." Rule 21(1) and Rule 22(1) of the Court's Rules of Procedure implement the Court's appointment of the Registrar and the Deputy Registrar, respectively. Regarding "other staff of the Registry," Rule 24(1) indicates that the Court, in its discretion and depending on the nature of such positions as it "shall determine", could allow the Registrar to make such appointments "with the approval of the President."

While there is nothing overly wrong with judges of the Court being involved in administrative duties at least in the early life of the Court, it is reasonable to expect that, in keeping with the practice of other international courts, the bulk of the administrative duties, over time, should lie with the Registry under the oversight of the President of the Court, the only judicial officer who is currently required by the Protocol and the Rules to

[31] President Akuffo's Keynote Speech of 8 March 2013 in Arusha at 3.

[32] For details of the judges' involvement in administrative duties, see *Activity Report of the African Court on Human and Peoples' Rights* (2009) at 3.

serve on a full-time basis and thus has both judicial and administrative responsibilities. It is understandable that, as a relatively new Court, the judges would have a role, in consultation with the AU, in defining the administrative structure of the Court, the personnel required for efficient administrative functioning of the Court, and other such matters. However, when the court is administratively fully set up, most of the judges should have minimal or no role in administration since the President serves full-time and resides at the seat of the Court. The President and the Registrar should be able to effectively take charge in ensuring the day-to-day workings of the Court.

With regard to the Registry, the Court has progressively moved in recruiting its administrative personnel; it has an approved personnel strength of 46 of whom it has recruited 40 by the close of 2011,[33] including the Registrar as the chief administrative officer under the President of the Court. For a court that is not yet fully judicially active, the current staff strength of the Court is commendable and necessary for its take off. The Court is, however, concerned that the current administrative structure of the Registry does not allow for efficient functioning of the Court even at this early stage. According to the Court:

> From the administrative point of view, the effective administration of the Court has been severely affected by the shortcomings in the current structure of the Registry, which does not provide for critical staff for the effective management of the Court. There is need to strengthen the capacity of the Registry both in terms of the number of staff and the grades attributed to the positions.[34]

There is no doubt that the Court would require more personnel over time, which will be dependent on how judicially busy and active it becomes. It is, however, important that the current personnel have the critical skills that are essential for the work of the Court and that such personnel are appropriately graded in terms of remuneration levels.

While in the opinion of this author, the current level of the Court's administrative personnel may be said to be fair relative to the work at hand, the ability of Court to perform optimally even at this early stage would be hampered by lack of adequate office space, as the Court is yet to secure a permanent site. The Court was initially housed at the Arusha International Conference Centre (AICC), which proved to be inadequate.[35] Due to the inadequacy of the AICC, "the Tanzanian Government in 2008, provisionally accommodated the Court at the Mwalimu Julius Nyerere Conservation Centre, where the Court is still located, pending the construction of a permanent seat."[36] One hopes that the on-going engagement[37] between the Court and the government of Tanzania on

[33] See *Activity Report of the African Court on Human and Peoples' Rights* (2011) at 6.
[34] *Activity Report of the African Court on Human and Peoples' Rights* (2011) at 6.
[35] *Activity Report of the African Court on Human and Peoples' Rights* (2010) at 11.
[36] *Activity Report of the African Court on Human and Peoples' Rights* (2010) at 11.
[37] See *Activity Report of the African Court on Human and Peoples' Rights* (2011) at 13, which states:

"During the period under consideration, the Government of the United Republic of Tanzania requested the Court to indicate the size of the land required for the construction of the permanent seat of the Court, and the Court made proposals accordingly. The government has further requested the Court to submit a sketchy outline of the design for the type of premises it would prefer. Furthermore, a Memorandum of Understanding setting up a Joint Facilitative Committee has been signed between the Court and the government to facilitate the implementation of the Host Agreement."

a permanent site for the Court would in no time bear fruit, as it is the responsibility of Tanzania under the Court's Headquarter Agreement to provide "a permanent structure at its expense for the Court" that would serve as "its Headquarters."[38]

4 JUDICIAL FUNCTIONING OF THE COURT

As a Court, the focus of much of its observers would be more on its judicial activities and somewhat on other activities that may be inextricably linked to its judicial functions. One could refer to such latter activities as the Court's quasi-judicial functions or activities. The core judicial activities of the Court in the main, involve the hearing of cases in the exercise of the Court's contentious and advisory jurisdictions. How the Court functions in this regard at this early stage of its life has ramifications for the future. Thus, it is vital to consider how the Court has fared in receiving and dealing with cases that have come before it.

4.1 The court's exercise of jurisdiction

4.1.1 *Contentious jurisdiction of the court*

In the exercise of its contentious jurisdiction, between 2006 and 2010, the Court received only the case of *Michelot Yogogombaye v the Republic of Senegal* which was filed on 7 October 2008.[39] In 2011, however, 14 cases were filed with the Court.[40]The Court received seven further cases in 2012[41] and in 2013 it received two cases[42] as of

[38] See Court's Headquarter Agreement, Art V.

[39]Application No. 001/2008. See *Activity Report of the African Court on Human and Peoples' Rights* (2009) at 4.

[40] Application No 001/2011 - *Femi Falana v. African Union*; Application No 002/2011 - *Soufiane Ababou v.People's Democratic Republic of Algeria;* Application No 003/2011 - *Urban Mkandawire v Malawi;* Application No 004/2011 – *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya*; *Application No 005/2011 - Daniel Amare and Mulugeta Amare v. Republic of Mozambique and Mozambique Airlines*;*Application No 006/2011 - Association Juristes d'Afrique pour la Bonne Gouvernance v. Republic of Cote d'Ivoire*; *Application No 007/2011 - Youssef Ababou v The Kingdom of Morocco*; *Application No 008/2011 - Ekollo M. Alexandre v. Republic of Cameroon and Federal Republic of Nigeria*; *Application No 009/2011 – Tanganyika Law Society and Legal and Human Rights Centre v The United Republic of Tanzania*; *Application No 010/2011 - Efoua Mbozo'o Samuel v Pan African Parliament*; Application No 011/2011 – *Rev. Christopher R. Mtikila v The United Republic of Tanzania*; Applications Nos. 009&011/2011 – *Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher Mtikila v The United Republic of Tanzania* (based on an order of the Court joining Application No 009/2011 and Application No 011/2011 since the two application substantively dealt with the same matter); Application No 012/2011 - *National Convention of Teachers Trade Union v. The Republic of Gabon*; Application No 013/2011 - *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo and Burkinabe Human and Peoples' Rights Movement v The Republic of Burkina Faso*; and Application No 014/2011- *Atabong Denis Atemnkeng v. The African Union*. See list of cases, available at http://www.african-court.org/en/index.php/2012-03-04-06-06-00/list-cases (accessed 15 February 2013).See also *Activity Report of the African Court on Human and Peoples' Rights* (2011) at 2 with respect to the number of cases that the Court received in 2011.

[41] Application No 001/2012 - *Karata Ernest and Others v. Attorney General of the United Republic of Tanzania*; Application No 002/2012 - *Delta International Investments S.A., Mr and Mrs A.G.L. De Lange v The Republic of South Africa*; Application No 003/2012 - *Peter Joseph Chacha v Tanzania*; Application No 004/2012 - *Emmanuel Joseph Uko and Others v The Republic of South Africa*; Application No 005/2012 - *Amir Adam Timan v The Republic of Sudan*; Application No 006/2012 - *African Commission v. The*

March, making a total of 24 supposedly contentious cases since the Court's operationalisation. One common characteristic of majority of these cases is that, apart from the consolidated cases of *Tanganyika Law Society and the Legal and Human Rights Centre and Reverend Christopher Mtikila v The United Republic of Tanzania;*[43] the cases of *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya (*in the early days of the Libya uprising)/ and the *African Commission on Human and Peoples' Rights v Libya* (against the new Libyan government to protect the rights of Saif Al-Islam Gaddafi then in detention);[44]*Urban Mkandawire v Malawi*;[45]*Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo and Burkinabe Human and Peoples' Rights Movement v The Republic of Burkina Faso*;[46]*Karata Ernest and Others v Attorney General of the United Republic of Tanzania;*[47]*Peter Joseph Chacha v Tanzania*;[48]and *African Commission on Human and Peoples' Rights v The Republic of Kenya*(for the protection of the Ogiek people against eviction*),*[49] the Court lacked jurisdiction. This lack of jurisdiction stemmed from the fact that the cases were instituted either by parties that, by virtue of the provisions of the Protocol on the Human Rights Court, do not have direct access to the Court, or against states that are not parties to the Protocol.

Under Article 5 of the Protocol, the entities that have unconditional direct access to the Court are the African Commission, States Parties to the Protocol that are either applicants or respondents before the African Commission, States Parties "whose citizen(s) is (are) a victim(s) of human rights violations", and "African Intergovernmental Organizations."[50]Individuals and non-governmental organizations (NGOs) have conditional direct access to the Court. Apart from the fact that NGOs must have "observer status with the (African) Commission," there is an additional requirement to be fulfilled under Article 34(e) of the Protocol, which Article 5(3) enjoins to enable individuals and NGOs "institute cases directly before" the Court. Thus, under Article 34(6) of the Protocol, for an individual and NGO to file cases directly before the Court, the state party against which the case is filed must have made a declaration allowing the Court to receive such case. Without such a declaration, which could be made at the time the state ratifies the Protocol, or at any other time, the Court would lack jurisdiction in cases filed against such a state. Emphasising this requirement, Article 34(6) strongly states that "... The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration."

Republic of Kenya; and Application No 007/2012 - *Baghdadi Ali Mahmoudi v. The Republic of Tunisia*. See list of cases http://www.african-court.org/en/index.php/2012-03-04-06-06-00/list-cases(accessed 15 February 2013).

[42] Application No 001/2013 – Ernest Francis *Mtingwi* v *The Republic of Malawi* ; and Application No 002/2013 – *The African Commission on Human and Peoples' Rights v Libya*.

[43] Applications Nos. 009 & 011/2011.

[44] Application No 004/2011 and Application No 002/2013.

[45] Application No. 003/2011.

[46] Application No 013/2011.

[47] Application No 001/2012.

[48] Application No 003/2012.

[49] Application No 006/2012.

[50] See Protocol on the African Human Rights Court, Art. 5(1) (a)-(e).

Since the Court became functional more than six years ago, its ability to meaningfully engage in its core judicial activity, namely the hearing of cases within its contentious jurisdiction, has been hampered by the difficulty created by Articles 5(3) and 34(6) of the Protocol with regard to access to the Court for individuals and NGOs. As at the time of finalising this article only seven states out of the 26 States Parties to the Protocol, namely, Burkina Faso, Malawi, Mali, Tanzania, Ghana, Rwanda, and just recently (23 July 2013) Ivory Coast, have made declarations accepting the jurisdiction of the Court to receive petitions by individuals and NGOs.[51]What this has meant is that the Court has not been very active judicially because individuals and NGOs that traditionally keep human rights institutions busy are handicapped. States that have unfettered access to the Court have not lodged cases before it, if at all they we will; and the African Commission is yet to fully and definitively articulate how and under what circumstances it would exercise its direct access rights to the Court in regular cases other than in circumstances substantively requiring provisional measures as demonstrated in its applications to the Court in *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya/Libya*[52] and *African Commission v The Republic of Kenya*.[53]Even though it is very commendable that the Court issued provisional measures in these cases, it does not say much about how the African Commission can be a vehicle for active human rights litigation before the Court in the absence of direct access for individuals and NGOs to the Court.

What can be said, however, is that despite its limited case load due to the problem of individual and NGO access created by Article 34(6) and the failure of the majority of states parties to lodge the required declaration, in properly received contentious cases where the Court is vested with jurisdiction, it has shown itself to be a formidable judicial institution that can boldly articulate and apply the law for the protection of the rights of litigants that come before it. In what could truly be said to be its first "real" judgment in the exercise of its contentious jurisdiction (the consolidated cases of *Tanganyika Law Society and the Legal and Human Rights Centre and Reverend Christopher Mtikila v The United Republic of Tanzania*)[54] on 14 June 2013, the Court unanimously found that by prohibiting the participation of independent candidates in presidential, parliamentary and local government elections, the United Republic of Tanzania was in violation of Article 10 of the African Charter that guarantees "the right to free association" and the right "not to be compelled to join an association", as well as the Article 13(1) right of a citizen "to participate freely in the government of his

[51] The current States Parties to the Protocol as at February 2013 are: Algeria; Burkina Faso; Burundi; Congo; Côte d'Ivoire; Comoros; Gabon; the Gambia; Ghana; Kenya; Libya; Lesotho; Malawi; Mali; Mauritania; Mauritius; Mozambique; Niger; Nigeria; Uganda; Rwanda; Senegal; South Africa; Tanzania; Togo; and Tunisia. See *Activity Report of the African Court on Human and Peoples' Rights* (2011) at 1 and Coalition for an Effective African Court for Human and Peoples Rights (African Court Coalition), Practice Manual on the Procedure of the African Court on Human and Peoples Rights (Arusha, 2013) at 2.

[52] Application No 004/2011 and Application No 002/2013 9.

[53] Application No 006/2012.

[54] Applications Nos. 009 & 011/2011.

country, either directly or through freely chosen representatives…"[55] Apart from the specific findings of the Court and the order for Tanzania to take legislative and other measures to remedy the violation articulated by the Court, the judgment contains elaborate analyses that elucidate the contours of exhaustion of local remedies, non-discrimination and the right to equality, the right to freedom of association, the limitation of rights under the African Charter, and the concept of continuing violation under the African Charter relative to when a state party ratified the Protocol and when violations complained against to the Court arose, among other principles.

Similarly, on 21 June 2013, the Court delivered its judgment in *Urban Mkandawire v Malawi*,[56] finding that the applicant's failure to argue his appeal in the High Court from a decision of the Industrial Court of Malawi, despite having been advised to do so, but instead proceeded to the Supreme Court of Appeal, which dismissed his case, amounted to non-exhaustion of local remedies under Article 6(2) of the Protocol and Article 56(5) of the African Charter.[57]

Meanwhile, the lack of real contentious cases in the early period of the Court's initial operationalisation seemed to create a perception that it was not going to be busy. Presumably, as a way of keeping itself (judicially) busy, particularly after it did not receive more cases other than *Michelot Yogogombaye v the Republic of Senegal,* between 2008 and 2010, the Court became somewhat "creative" by doing two things – (1) engaging in elaborate promotional or sensitisation activities in States Parties and non-States Parties, and; (2) conducting hearings in cases for which it clearly had no jurisdiction but which may have been spurred by its promotional activities. With regard to 1, the purpose of the promotional activities is to make the Court known by "various stakeholders, and to accelerate the pace of ratification of the Protocol establishing the Court, and the making of the special declaration to authorize individuals and nongovernmental organizations to seize the Court, after exhausting local

[55] Judgment of the African Court in the consolidated cases of *Tanganyika Law Society and the Legal and Human Rights Centre and Reverend Christopher Mtikila v The United Republic of Tanzania*, paras 106 – 126 (decided on 14 June 2013).

[56] Application No. 003/2011.

[57] Judgment of the African Human Rights Court in *Urban Mkandawire v Malawi*, Application No. 003/2011 at paras 40 – 41 (decided on 21 June 2013). The Court has further rendered other very important decisions that give an indication of its preparedness to make a name for itself as a serious court. In *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo and Burkinabe Human and Peoples' Rights Movement v The Republic of Burkina Faso*, the Court unanimously dismissed a preliminary objection by Burkina Faso regarding non exhaustion of local remedies where the state failed to take any action to remedy the violation that the applicants complained of. In that case the Court was of the view that the applicants were not required to exhaust "ineffective remedies." Similarly, in the particular circumstance of the case, the Court was prepared to excuse a delay of three years and four months that it took for the applicants to approach the Court as reasonable "considering the time the Applicants needed to determine the opportunity to seize the Court and prepare their brief". This is the more remarkable because the earliest date the Court could accept any application was after the adoption of its Draft Rules of Procedure. See Pan African Lawyers Union (PALU) (electronic) *Newsletter*, Issue No. 2, June 2013 (on file with author). Finally, in *Ernest Mtingwi v Malawi (*Application No. 001-2013), the Court made it clear that it is not an appellate court to which appeals from decisions of domestic courts lie. See paras 11 – 16 of the judgment.

remedies."[58]The Court appears to attribute the increase in the number of cases it has received from 2011 on, to its sensitisation and promotional activities. In the words of the current President of the Court:

> Seemingly the sensitization efforts that the Court has undertaken thus far are bearing fruit. The response is very encouraging for the Court and shows that stakeholders' confidence in the Court is growing. Thus far the Court has received 23 applications on contentious matters. In addition, thus far the Court has received three requests for advisory opinions.[59]

While one may not fault the Court for claiming credit for its increased judicial activity based on its promotional efforts, it, however, accepts that "of the 23 applications received many have been dismissed due to the Court lacking jurisdiction *rationae personae*"[60], thus alluding to the difficulty raised above regarding jurisdictional access to the Court. But the point remains that the Court did not just dismiss the cases without some elaborate judicial activity. Thus, as indicated in part 2 above, the question arises why the Court should spend its energy and scarce resources to conduct hearings in cases where its lack of jurisdiction is manifestly beyond question. Two of the dismissed cases – *Michelot Yogogombaye v the Republic of Senegal*[61] (*Yogogombaye* case) and *Femi Falana v. African Union*[62] (*Falana* case) illustrate the difficulty that the author has in appreciating the Court's practice in this regard. In *Yogogombaye*, the Court's first case,[63] the applicant brought a case against Senegal aimed at stopping the prosecution of Hissene Habre, former President of Chad, who was in Senegal with the possibility of facing trial for torture allegedly committed during his reign as President of Chad. The simple issue for determination was the jurisdiction of the Court, namely, whether the applicant as an individual could legitimately seize the Court of the matter under the Protocol – particularly whether Senegal as a State Party had made the required declaration under Article 34(6) allowing individual access to the Court, based on which Senegal raised a preliminary objection. Despite the obvious fact that Senegal had not made the required declaration, the Court embarked on a hearing and later issued its first judgement in which it unanimously held "that in terms of Article 34(6) of the Protocol, it has no jurisdiction to hear the case instituted by Mr. Yogogombaye against Senegal."[64]

In the *Falana* case, Femi Falana, a Nigerian human rights lawyer, brought an application against the African Union as a representative body of all 53 member states of the AU. His contention was that the requirement under Article 34(6) of the Protocol was a violation of the various rights under the African Charter, including the right to be heard. Thus, because of this requirement his ability to access the Court had been hampered since his country Nigeria had not made the required declaration. As a result

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[58] *Activity Report of the African Court on Human and Peoples' Rights* (2010) at 8 - 9. See also *Activity Report of the African Court on Human and Peoples' Rights* (2011) at 7 - 12.

[59] President Akuffo's Keynote Speech of 8 March 2013 in Arusha at 6.

[60] President Akuffo's Keynote Speech of 8 March 2013 in Arusha at 6.

[61] Application No. 001/2008.

[62] Application No 001/2011.

[63] For detailed analysis of the judgment of the Court, see Jalloh C "Michelot Yogogombaye v Republic of Senegal" (2010) 104 (4) *American Journal of International Law* 620.

[64] Judgment of the Court in the *Yogogombaye* case at para 75.

he prayed the Court to declare Article 34(6) of the Protocol "illegal, null and void" and annul the provision. Despite the manifest lack of jurisdiction due to the AU not being a party to the Protocol, the Court conducted an elaborate hearing to be able to come to a judgment a year and four months after the case was filed, finding "that in terms of Articles 5(3) and 34(6) of the Protocol, read together, it has no jurisdiction to hear the case instituted by Femi Falana, Esq, against the African Union."[65] It is important to point out that one may be sympathetic to the dissenting opinion of Judges Akuffo, Ngoepe and Thompson – the minority in the *Falana* case. The learned judges reasoned that the fact that the AU and its organs can request advisory opinions from the Court in addition to the AU's separate legal personality makes it possible for the AU to be sued before the Court.[66] For the minority, Article 34(6) of the Protocol is supplementary to the African Charter pursuant to Charter Article 66, and as such, by preventing individual access to the Court, it is contrary to the Charter's overall imperative for the protection and promotion of human rights.[67] While there may be some sympathy for the minority's reasoning, particularly in the spirit of proactively promoting individual access to the Court, my considered view is that it will be too much legal interpretative proactivity to read Article 34(e) as contrary to Article 66 of the African Charter. Article 66 of the Charter makes provisions for "special protocols or agreements" to supplement the Charter, but does not prohibit such protocols or agreements from catering for specific requirements that States Parties may require when entering into a treaty. More importantly, the minority recognised its predicament in this regard when it accepted the Court's lack of authority to declare Article 34(6) null and void as prayed by Falana, and declared its hope "that the problems raised by Article 34(6) will receive appropriate attention."[68]

In his separate opinions in both the *Yogogombaye* and *Falana* cases, Justice Fatsah Ouguergouz, inter alia, questioned whether the Court should not, under Rule 39 of the Rules of Procedure, preliminarily examine an application and determine its jurisdiction by an administrative process; and where it is clear that a State Party has not made the required declaration, "the application should be rejected *deplane* by a simple letter by the Registry" rather than by an elaborate judicial process that ends in a judgment within the stipulation of Rule 52(7) of the Rules of the Court.[69] According to the Judge, this is particularly so where the Court ""manifestly" lacks jurisdiction to entertain an application."[70]

The questions raised by Justice Ouguergouz are very vital if the work of the Court is to be taken very seriously by both States Parties and the AU. It may appear to many human rights activists, observers and academics that the Court is being judicially creative by engaging in elaborate judicial activities and issuing judgments in the two

[65] Judgment of the Court in the *Falana* case para 46.
[66] Dissenting Opinion in the *Falana* case paras 8.1 - 8.3.
[67] Dissenting Opinion in the *Falana* case paras 13 - 16.
[68] Dissenting Opinion in the *Falana* case para. 17.
[69] See Separate Opinion of Justice Fatsah Ouguergouz in the *Yogogombaye* case para. 40. See also Separate Opinion of Justice Fatsah Ouguergouz in the *Falana* case para 1.
[70] Separate Opinion of Justice Fatsah Ouguergouz in the *Falana* case at para 40.

cases discussed above and the likes of them that have come before it. The Court must not, however, sacrifice judicial thoroughness on the altar of judicial creativity that is not well-founded and that does not stand up to its very own test, the Protocol and its Rules, because at the end of the day the Court would go on to find that it lacks jurisdiction in such cases. The only difference between the *Yogogombaye* and *Falana* cases regarding the issue of jurisdiction and the extent to which the Court should be judicially involved is that there is "manifest" lack of jurisdiction in the *Falana* case and the existence of a legal argument worthy of judicial examination based on a preliminary objection raised by Senegal on jurisdiction in the *Yogogombaye* case. As regards the latter case, it is arguable that, by virtue of Article 3(2) of the Protocol and Rule 26(2) of the Court's Rules which requires the court to determine any dispute about its jurisdiction, the Court could engage in a judicial process in that case rather than deal with the issue of jurisdiction administratively. Yet, if a state has not made the required declaration, irrespective of that state raising a preliminary objection, the Court should find a way of disposing of the matter as expeditiously as possible without unnecessarily expending scarce resources. In regard to the former case, it should be manifestly clear to the Court that the AU cannot be brought before it under the Protocol, in which case it should deal with the issue of jurisdiction administratively and not engage in an elaborate judicial process, as amply reasoned by Justice Ouguergouz.

4.1.2 *Timeframe for issuing judgments*

In the course of observing the judicial work of the Court, one of the questions that has bothered the minds of those that engage in the work of the Court is, when to expect a decision or the judgment of the Court in a contentious matter that is properly before it. It may appear that there is certainty in this regard based on the provisions of Article 28(1) of the Protocol, which clearly states that "the Court shall render its judgment within 90 days of having completed its deliberations." Rule 59 of the Court's Rules reiterates the above provision of the Protocol, emphasising in sub-rule 59(1) that "upon the conclusion of the hearing of a case, the Court shall close the proceedings for its deliberations and judgment." Rule 60(1) adds that "the deliberations of the Court shall be held in camera and shall remain confidential."

It would have been of immense help for the Court to make certain in its Rules when, in terms of a time frame, deliberations would end in a case, since the judges are supposed to begin deliberations when the hearing of a case is concluded. Certainty in this regard is important because the Court, at least presently, has not been involved in elaborate hearings, such as, taking of witnesses and the like; rather, it has heard submissions from the parties in a two to three day hearing whereupon it adjourns for deliberations. Yet, deliberations seem to take quite a long time. For example, the Court concluded the hearing on 15 June 2012 in the consolidated cases of *Tanganyika Law Society and the Legal and Human Rights Centre and Reverend Christopher Mtikila v The United Republic of Tanzania*.[71] As pointed out earlier, the Court delivered its judgment in the case on 14 June 2013, a year. It is thus difficult to establish when deliberations

[71] Applications Nos. 009 & 011/2011. See African Court Coalition News, November (2012) 1 (Copy on file with author).

ended for the 90 days within which the Court is required to deliver its judgment to commence.

To be sure, the Court is a part-time Court in that all the judges except the President serve on a part-time basis. While this may impact on how quickly the Court deliberates and renders its judgments, it is important for the Court to consider rendering judgments quicker, particularly now that its workload cannot be said to be any heavy.

4.1.3 *The court's advisory jurisdiction*

Article 4 (1) of the Protocol empowers the Court to "provide an opinion on any legal matter relating to the (African) Charter or any other relevant human rights instrument" as long as the "subject matter of the opinion" does not relate to a matter that is under examination within the processes of the African Commission. The opinion of the Court under Article 4(1) in this regard would be based on a "request of a Member State of the OAU (AU), the OAU (AU), any of its organs, or any African organization recognized by the OAU (AU)." Rule 68 of the Court's Rules implements the above provision of the Protocol and adds:

> Any request for advisory opinion shall specify the provisions of the Charter or of any other international human rights instrument in respect of which the advisory opinion is being sought, the circumstances giving rise to the request as well as the names and addresses of the representatives of the entities making the request.[72]

The only issue requiring some elucidation from the Court on its advisory jurisdiction is the meaning of the phrase "any African organization recognized by the OAU (AU)." The proper construction of the phrase has implications for the ability of entities other than member states of the AU, the AU itself, or its organs to request an advisory opinion. Do NGOs fall within "African organizations" that the AU recognizes, particularly if such NGOs have observer status with the African Commission or the AU itself? Or is the phrase confined to African sub-regional entities that are inherently AU-recognised organisations? Does it extend to national Human Rights Commissions and institutions? In this regard, Viljoen suggests

> [T]hat all African NGOs that enjoy observer status with the African Commission, a form of recognition by the AU, qualify, so should civil society organizations represented on ECOSOC, and regional economic arrangements, such as ECOWAS and SADC. Other African Organizations should also qualify, in so far as they work in association with the AU or AEC.[73]

The first seven years of the Court did not generate any view from the Court on the above questions. While the Court has to date received four requests for advisory opinions from Mali, Libya (two member states of the AU), the Socio-Economic Rights Accountability Project (SERAP) from Nigeria, and a joint request from the Pan-African Lawyers Union (PALU) and the Southern African Litigation Centre (SALC) (two NGOs),[74] it has yet to

[72] Rules of Procedure of the African Court, Rule 68(2).

[73] Viljoen (2007) at 455.

[74] Request No. 001/2011 by the Republic of Mali, Request No 002/2011 by the Great Socialist Peoples' Libyan Jamahiriya, Request No 001/2012 by the Socio- Economic Rights and Accountability Project (SERAP), and the request lodged by the Pan African Lawyers Union (PALU) and the Southern African

make a determination on this very important point. This is crucial because the requests from the SERAP and the PALU/SALC were struck out on various grounds. According to the Registrar of the Court, the SERAP request was struck out for not meeting the requirements of Rule 68 on advisory opinions,[75] and the PALU/SALC on the ground that "the Court judged that the subject matter (suspension of the SADC Tribunal) related to a matter pending before the (African) Commission."[76] Even the requests made by Mali and Libya did not see the light of day. The former was withdrawn, while the latter "was struck out because the author could not show proof that he was representing the then Libyan government."[77]

In trying to arrive at a definition of an "African organization recognized by the African Union", the Court recently requested input from civil society organisations in the research that it launched on the meaning of the term under Article 4(1) of the Protocol. The Coalition for an Effective African Court on Human and Peoples' Rights (African Court Coalition) mobilised its members to contribute to the Court's research.[78] What remains is for the Court to analyse the inputs receive and possibly issue a directive in this regard.

4.2 Quasi-judicial Functioning of the Court

As in its judicial and administrative activities, the Court engages in its quasi-judicial functions during its ordinary and extraordinary sessions. These would include the preparation of its Rules of Procedure, and the drawing up and adoption of practice directions or directives. One can also argue that the Court's quasi-judicial activities would also include its promotional activities, which need not take place during Court sessions. To date the Court has held 29 ordinary sessions and five extraordinary sessions; its 29th ordinary session took place from 3 – 21 June 2013 in Arusha. It held its 30th ordinary session from 16 – 27 September 2013 in Arusha and its 31st ordinary session from 25 November – 6 December 2013 also in Arusha.[79] According to Rule 14 of the Court's Rules, the Court holds four ordinary sessions a year, each of which lasts for 15 days. Rule 15 gives the President of the Court the discretion to convene extraordinary sessions, or based on the request of the majority of the judges. It appears that the Court "may hold two extraordinary sessions a year, depending on the exigencies of matters before it."[80] It is envisaged that as the Court gets busier, it may have more ordinary or extraordinary sessions or increase the duration of its sessions beyond the current 15 days.

Litigation Centre (SALC) on the legality of the Southern African Development Community's (SADC) suspension of the SADC Tribunal.

[75] Email of 26 March 2013 from Robert Eno, Registrar of the Court, responding to the author's inquiry regarding the Court's advisory opinion decisions (The Court's Registrar's email of 26 March 2013).

[76] The Court's Registrar's email of 26 March 2013.

[77] The Court's Registrar's email of 26 March 2013.

[78] See African Court Coalition, Call for Contributions, Arusha, Tanzania, 19 March 2013.

[79] See the Court's Calendar of Sessions. Available at http://www.african-court.org/en/index.php/sessions/indicative-table#extra (accessed 24 December 2013).

[80] President Akuffo's Keynote Speech of 8 March 2013 in Arusha) at 3.

As alluded to earlier, the Court adopted its Interim Rules of Procedure in 2008 and its finalised Rules in 2010 after consultation with the African Commission for the harmonisation of the Rules of both mechanisms.[81] It is certain that fine-tuning and revising the Rules of the Court would be a continuous process,[82] as the Court improves its work and gains experiences in dealing with cases that come before it, and how its judicial relationship with the African Commission affects the need to revise the Rules and their harmonisation with those of the Commission. The Court adopted its first Practice Directions aimed at providing guidance to litigants before the Court during its 5th extraordinary session in October 2012.[83]The Practice Directions are somewhat general, providing basic information on how to file a case before the Court, pleading and process formats, request for *amicus curiae*, time limits, requests for interim measures and how to relate with the Court.

It is important to point out that the Court regards promotional activities as part of its quasi-judicial functions. To this end, the Court has embarked on an elaborate "sensitization campaign" that is based on "a three-pronged strategy."[84]According to the President of the Court, the first strategy targets those states that are both parties to the Protocol and have also allowed direct access to NGOs and individuals by making the required Article 34(6) declaration.[85]Through this strategy, individuals, NGOs and general civil society are sensitised on the need to use the Court, as there would be nothing standing in their way in accessing the Court. The next strategy is aimed at States Parties to the Protocol that have yet to make the Article 34(6) declaration; both to sensitise the States Parties and to give a jolt to civil society to "sustain pressure on their government representatives to make the Declaration."[86] Finally, the third strategy focuses on non-states parties to the Protocol through some form of advocacy to nudge them to both ratify the Protocol and make the required declaration. The Court in this regard uses its Activity Report, attendance at AU Summits and meetings, conferences and workshops to make "all stakeholders ... aware of the Court."[87]

Indeed, as observed earlier, the Court credits the rise in the number of cases that came before it in the last two years to its elaborate promotional activities and sensitisation campaign. While, this is well and good, it should not result in cases coming before the Court in respect of which it manifestly and clearly has no jurisdiction, as it would amount to nothing but a waste of the Court's precious time and resources.

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[81] *Activity Report of the African Court on Human and Peoples' Rights* (2010) at 6-7.

[82] In this regard, the Court is already embarking on "general revision" of its Rules and soliciting input from civil society and the general public. See *Activity Report of the African Court on Human and Peoples' Rights* (2010) at 7.

[83] See the Court's Practice Directions. Available at http://www.african-court.org/en/index.php/documents-legal-instruments/other-relevant-instruments (accessed 20 February 2013).

[84] President Akuffo's Keynote Speech of 8 March 2013 in Arusha at 5.

[85] President Akuffo's Keynote Speech of 8 March 2013 in Arusha at 5.

[86] President Akuffo's Keynote Speech of 8 March 2013 in Arusha at 5.

[87] President Akuffo's Keynote Speech of 8 March 2013 in Arusha at 5.

4.3 Relationship between the Court and the African Commission

The importance of the relationship between the Court and the African Commission cannot be overemphasised; it is indeed very vital. Article 2 of the Protocol makes it quite clear that the Court in its relationship with the Commission exists to "complement the protective mandate of the African Commission on Human and Peoples' Rights." It is thus unequivocal that the Commission is an independent and equally important human rights mechanism within the African human rights system that needs to work together with the Court. The complementarity that should exist between the Court and the Commission finds expression in various ways in the Protocol. Article 4 of the Protocol recognises the Commission as one of the entities that could request an advisory opinion from the Court; Article 5 endows the Commission with unqualified access to the Court and recognises the holding of observer status by NGOs with the Commission as one of the conditions precedent for them to have direct access to the Court; pursuant to Article 6(1) of the Protocol, the opinion of the Commission may be requested by the Court "when (it is) deciding on the admissibility of a case" brought by individuals and NGOs under the Protocol; by virtue of Article 6(3) the Court "may consider cases or transfer them to the Commission"; and finally because of the importance of the relationship between the Court and the Commission, Article 33 of the Protocol requires the Court to "consult the Commission as appropriate" in drawing up its Rules of Procedure.

Indeed, the Court recognises the complementarity between itself and the Commission. That is why after its first judges were elected, its first session in 2006 was held in Banjul, the Gambia, the seat of the African Commission, where "it started with briefing sessions" on the Commission and the African Committee of Experts on the Rights and Welfare of the Child.[88] In drawing up its Rules of Procedure, the Court has engaged in consultations with the Commission for purposes of harmonising the Rules of both institutions[89], and holds annual meetings with the Commission. Utilising its direct access to the Court, the Commission has, as of January 2013, filed three cases before the Court – two against Libya[90] and one against Kenya – as indicated earlier. In these cases, the Court issued orders of provisional measures against Libya and Kenya.

The Court has transferred four cases to the Commission relying on Article 6(3) of the Protocol, after finding it lacked jurisdiction to deal with the cases. These cases include *Soufiane Ababou v People's Democratic Republic of Algeria*,[91]*Daniel Amare and Mulugeta Amare v Republic of Mozambique and Mozambique Airlines,*[92]*Ekollo Moundi Alexandre v Nigeria and Cameroon*,[93] and *Association Juristes d'Afrique pour la Bonne Gouvernance v. République de Côte d'Ivoire*.[94] The Court transferred the *Ababou*, *Amare* and *Alexandre* cases on the grounds that while the respondent states – Algeria,

[88] See *Activity Report of the African Court on Human and Peoples' Rights* (2006) at 8.

[89] See *Activity Report of the African Court on Human and Peoples' Rights* (2009) at 7. See also *Activity Report of the African Court on Human and Peoples' Rights* (2010) AT 6-7.

[90] Application No 004/2011 and Application No 002/2013.

[91] Application No. 002/2011.

[92] Application No. 005/2011

[93] Application No. 008/2011

[94] Application No. 006/2011

Mozambique and Nigeria/Cameroon – are parties to the Protocol, they had not made the required Article 34(6) declaration.[95] The *Association Juristes d'Afrique pour la Bonne Gouvernance* case against Côte d'Ivoire was transferred to the Commission based on the added reason that the NGO that submitted the application to the Court did not have observer status with the Commission as required by Article 5 of the Protocol.[96]

The practice of the Court in which it relies on Article 6(3) of the Protocol to transfer to the Commission cases in respect of which it lacks jurisdiction, rather than administratively dismissing them, has come under the severe criticism from Judge Ouguergouz as having no basis in law.[97] He rightly reasoned that the transfer of cases to the Commission that is envisaged under Article 6 (1) and (3) of the Protocol is only for purposes of the admissibility of a case or cases that the Court already has jurisdiction and that are pending before it.[98] According to the learned Judge, this reasoning is supported by Rule 119 of the Rules of the Commission, which unlike Rule 29 of the Rules of the Court, clearly envisages only an admissibility role for the Commission on behalf of the Court in cases transferred under Article 6(1) and (3) of the Protocol.[99]Despite the lack of clarity in Rule 29 of the Court's Rules, Ouguergouz maintains that there is enough in the provisions of the rule to conclude that it is only in cases where the parties are properly before the Court that Article 6 transfer is required for purposes of admissibility only rather than for the Commission's determination of the cases on the merits.[100]

One cannot agree more with Judge Ouguergouz. The Protocol does not envisage the transfer of cases in respect of which the Court does not have jurisdiction to the Commission. This practice has the implication of burdening the Commission with more cases than it can handle. While litigants may see the Court as an avenue for "more effective" determination of their cases, they must ensure that in cases brought before the Court, it unequivocally has jurisdiction. The Court must resist the temptation of transferring such lack-of-jurisdiction cases under Article 6 of the Protocol. This is one area where the Rules of the Court need urgent harmonisation with those of the Commission.

One other very important area of the relationship between the Court and the Commission is how the Court can function to reinforce the protecting mandate of the

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[95] See Decision on *Soufiane Ababou v People's Democratic Republic of Algeria* (fn 91)at Para. 13(1) & (2); *Daniel Amare and Mulugeta Amare v Republic of Mozambique & Mozambique Airlines* Application No.005/2011 at para 10(1) & (2); and *Ekollo Moundi Alexandre v. Nigeria and Cameroon* Application No. 002/2011 at para 12(1) and (2). See also *Activity Report of the African Court on Human and Peoples' Rights* (2011) at 2 – 3.

[96] *Association Juristes d'Afrique pour la Bonne Gouvernance v Côte d'Ivoire* Application No. 006/2011 at paras 7 – 11(1) & (2).See *Activity Report of the African Court on Human and Peoples' Rights* (2011) at 3.

[97] Dissenting Opinion of Justice Fatsah Ouguergouz in *Ekollo Moundi Alexandre v. Nigeria and Cameroon*, para 12.

[98] Dissenting Opinion of Justice Fatsah Ouguergouz in *Ekollo Moundi Alexandre v. Nigeria and Cameroon* paras 13 – 15.

[99] Dissenting Opinion of Justice Fatsah Ouguergouz in *Ekollo Moundi Alexandre v. Nigeria and Cameroon* paras 1 – 20.

[100] Dissenting Opinion of Justice Fatsah Ouguergouz in *Ekollo Moundi Alexandre v. Nigeria and Cameroon* para 19.

Commission as articulated under Rule 118 of the Commission's Rules of Procedure. Under this rule, the Commission, in exercising its Article 5(1) right of direct access to the Court in the Protocol, could submit an application to the Court regarding a communication it had considered where a "State has not complied or is unwilling to comply with its recommendations … within the period stated in (the Commission's) Rule 112(2)."[101] The question here is, how would the Court treat such a case brought by the Commission? Would it require the respondent state to comply with the recommendations of the Commission by making such recommendations an order of the Court? Or would the Court consider the case *de novo*. The view coming from the Court is that the Court would not "rubber-stamp" the recommendations of the Commission; it would rather hear the case anew within its own procedures.[102]

While there is need to recognise the independence of the Court and not require it to merely "rubber-stamp" the recommendations of the Commission, it is important for the Court to devise a procedure that does not involve an elaborate process, taking into account the time and resources already spent by victims. Also, the propriety of the initial decision of the Commission should be taken into account in determining the extent to which the Court would subject the Commission's case to a *de novo* consideration.

4.4 The Human Rights Court as a court in transition

It is important to bear in mind that as things presently stand, the African Court is a court in transition. It is expected to merge with the African Court of Justice pursuant to the Merger Protocol. As part of the merger, the Court could also subsequently be part of a judicial institution endowed with jurisdiction for international crimes if the additional initiative in this regard under the Draft Protocol on Amendments to the Merger Protocol is approved by the AU. The Court and the African Commission have been part of the process aimed at extending the jurisdiction of the Court[103] and appear to support the initiative. According to the President of the Court, "if the jurisdiction of the Court is extended to cover serious international crimes this will be an important opportunity for the Court to contribute to the development and consolidation of international criminal law and to establish a viable human rights culture on the African continent which takes into consideration the continent's specificities."[104]

While there are varying views[105] on the desirability, practicality, or otherwise of the AU initiative to both merge the African Court and the African Court of Justice and extend the merged court's jurisdiction to include international crimes, the point should be made that this should not adversely affect the human rights enforcement mandate and effectiveness of the Court.

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[101] Rules of Procedure of the African Commission on Human and Peoples' Rights 2010, Rule 118(1).

[102] The Registrar of the Court conveyed the above view of the Court on this issue during the African Court Coalition Training on the Procedures of the African Court on Human and Peoples' Rights, 8 March 2013, Arusha Tanzania.

[103] See *Activity Report of the African Court on Human and Peoples' Rights* (2011) at 12.

[104] President Akuffo's Keynote Speech of 8 March 2013 in Arusha) at 11.

[105] See Nmehielle (2013).

5 CONCLUSION

The African Court on Human and Peoples' Rights has come to stay, after a long and elusive history to establish an effective human rights mechanism that would ensure the protection of the human rights of Africans against contemporary home-grown governance. Despite the early challenges in its operationalisation, the initial seven years of the Court show a Court that is beginning to take shape on both administrative and judicial fronts. Challenges, however, remain in the Court's judicial functioning in terms of access to the Court for the right cases. The lack of Article 34(6) declaration by a majority of the States Parties to the Court's Protocol leaves it with a limited constituency in its utilisation for human rights protection and enforcement. This challenge has led to the Court countenancing or entertaining cases in respect of which it manifestly lacks jurisdiction in the name of being judicially active and creative, which may appeal to the sentiments of those who are eager to see the Court make "some" advocacy impact. The Court has rendered two very important judgements in the *Mtikila* and *Mkandawire* cases against Tanzania and Malawi, respectively, albeit they took a while to come, and a very important ruling in the *Zongo* case against Burkina Faso. The lack of clarity as regards the meaning of the requirements that a judgement of the Court must be delivered 90 days after deliberations needs to be dealt with. The Court should be able to clearly indicate when deliberations begin and when they should end to enable determination of the time when the 90 days should begin to run. The Court must continue to define and refine its relationship with the African Commission and by extension the African Committee of Experts on the Rights and Welfare of the Child in order to forge an all-inclusive and formidable African human rights system.

There is no doubt that it is still early days in the life of the Court, and as such, the Court will go through a period of transition, make mistakes and find itself based on those mistakes. Let us hope that by the time we look at ten years of the Court's existence, many of the issues raised in this interrogation of the Court's development after seven years, would have been dealt with in a manner that shows a judicial institution that has effectively progressed in its work and consolidated the opportunity to protect the rights of Africa's peoples.

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