FIRST INTERNATIONAL SYMPOSIUM OF THE ASSOCIATION OF ASIAN CONSTITUTIONAL COURTS AND EQUIVALENT INSTITUTIONS

PRESENTATION BY THE HONOURABLE SYLVAIN ORÉ, PRESIDENT OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS ON

"THE ROLE OF THE AFRICAN COURT IN SHAPING CONSTITUTIONAL ADJUDICATION IN AFRICA: PROMISES FOR A CONTINENTAL JUDICIAL DIALOGUE"

under Session 3 "International Human Rights Law and Constitutional Adjudication: Convergence and Divergence"

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Greetings by protocol

- Honourable Justice Kim Yi-Su, Acting President of the Constitutional Court of Korea, in your capacity as host of the present symposium
- Honourable Chief Justices and Presidents of Constitutional Courts and equivalent institutions of Asian states attending this gathering
- Distinguished guests and participants
- All protocol duly observed

Vote of thanks

It is my utmost honour and privilege to take the floor before this distinguished audience on an occasion like this where highest judicial officers like yourselves, and members of the academia gather to discuss the past, present and future of constitutionalism in Asia. In the true African tradition, I wish to begin my presentation by thanking the President of the Constitutional Court of Korea Honorable Justice Kim Yi-Su for making it possible for

the African Court not only to visit the Constitutional Court of Korea but also to attend this very important gathering. I would also like to extend my appreciations to Honourable Justice Kim Chang Jong who followed up on the discussions that we had during the courtesy call that he paid to me at the seat of the African Court in Arusha, Tanzania.

I am Sylvain Oré, a citizen of Ivory Coast. I have been a barrister in my country since 1998 and was elected as a Judge of the African Court in 2010 for a term of four years. I am currently serving a second and last term of six years but also a term of two years as President of the Court. Before taking you to the substance of my presentation, allow me to say a few words about the African Court.

The African Court was established by the African Union to complement the work of the African Commission on Human and Peoples' Rights in protection human rights in Africa. The Court was created in 1998 but officially started its operation in 2006 after the 15 ratifications required had been made by State parties to the Protocol creating the institution. The Court is composed of 11 judges including currently 5 Lady Justices. It has jurisdiction to consider cases of violation of human rights guaranteed not only in the African Charter on Human and Peoples' Rights but also in any other international human rights instruments ratified by the state concerned. With respect to access, individuals and NGOs can file cases directly to the Court only when the Respondent state has ratified the Protocol but also made a special declaration to that effect. To date while 30 African states have ratified the Protocol, only 8 of those have made the declaration. Since its inception, the Court has received 155 contentious applications, and 12 requests for advisory opinions; it has completed 31 of those cases, and delivered 11 judgments and 6 advisory opinions.

Since its inception in 2006, the Court received 155 contentious applications. It finalised 31 of them by delivering 11 merits judgments the remainder being judgments and rulings on jurisdiction and admissibility. The Court also issued about 15 orders for provisional measures. Finally, it delivered 11 advisory opinions out of the 12 requests received. Issues examined by the Court range from fair trial to political participation, freedom of expression and the independence of electoral commissions.

With this brief introduction of myself and the African Court, I believe my presentation will be delivered to a more informed and context-conscious audience. Now, let me turn to the topic of the session, which is "international human rights law and constitutional adjudication: convergence or divergence". From that general topic, I chose to address you on a more specific connected question that is the role of the African Court in shaping constitutional adjudication in Africa in the light of a continental judicial dialogue. I will therefore begin by sharing with you a few illustrations of a new trend of the African Court sending signals to domestic courts including constitutional bodies. I will then shed the light on the potential for dialogue be it that national courts with a constitutional mandate or inclination have begun to converse with the African Court whether directly or through their state as an international legal entity.

PART 1: How the African Court has begun to shape human rights adjudication in African national (constitutional) courts

After receiving the list of participants, I decided to amend my presentation slightly at least with respect to the preliminary issues in relation to the relationship between international law and constitutional law; and more specifically between international courts and domestic courts. With the high level audience of constitutional law practitioners, judicial officers and academics gathered in this forum, I do not deem it necessary to provide an elaborate background analysis on the application or enforcement of public international or human rights law in the municipal sphere.

Allow me to only recall certain key pillars on the state of knowledge and practice in that field with a focus on constitutional law. First, it is now established that the monism and dualism dichotomy regarding the relationship between international and national law is more academic than practical. The trend is that in many dualist states courts have applied international law including through direct reliance. On the other hand, monist countries that are known to apply international law without an act of parliament have declined to do so on dualist grounds such as lack of publication in the official gazette or reciprocity.

A second lesson learnt from the interaction of international and national law, especially constitutional law, is the supremacy conflict between the two sets of norms. Although there is wide evidence that international law has significantly eroded the supremacy of the constitution, daily pronouncements by constitutional courts around the world remind us that the quandary remains unsolved.

Africa has not escaped that trend and the recently concluded trial of Hissene Habré by the African Extraordinary Chambers provided a vivid illustration of how the supremacy struggle between international and national law and courts can lead to deadlock in the administration of justice. The refusal of Senegal courts and executive authorities to implement international law directly in a monist context caused the trial of Hissene Habré to be delayed for more than a decade. A similar experience was that of the Tribunal of the Southern African Development Community (SADC). After it handed down judgment in the matter of Michael Campbell v Zimbabwe, the legality of the Tribunal was challenged and the High Court of Zimbabwe declined to implement on the ground that the international judgment was contrary to the Constitution of Zimbabwe.

Against that background of the relationship between international and constitutional law, the angle of my analysis today will shed more light on the jurisprudential approach to the impact of international law on constitutional law. A handful of cases decided by the African Court lend themselves very well to a discussion on that approach.

- **Right to political participation: Christopher Mitikila v Tanzania**

I begin with a case that has arguably had the most direct impact on constitutional conversation between the African Court and municipal law. In the case, the Applicant alleged that provisions of the Constitution of the United Republic of Tanzania, which obligate candidates to presidential and parliamentary elections to be sponsored by political parties violate his freedom of association and political participation in the African Charter and other international instruments.

Having established the violations, the Court ordered the Respondent to amend its Constitution accordingly. Analysed through a more comprehensive and contextualised lense, the judgment of the Court in this case has further implications than a change in the constitution. While the judgment will not be enforced by domestic courts or be used by them to finalise the case, it will impact further constitutional law related adjudication in domestic courts. In a way, this kind of impact could serve to domestic lend means to domestic courts to avoid their findings facing the quandary of opposing international pronouncements. The interesting development is that Tanzania took some steps towards the implementation of that judgment but did not comply finally due to internal constraints.

- **Freedom of the press and rights of journalist: Norbert Zongo v Burkina Faso**

This case began domestically when investigative journalist Zongo and his companions were burnt in their car allegedly because Zongo was to release a report on corruption practices involving the brother to the then president of the republic. For over a decade, proceedings before domestic courts were either stalled or moved at a very slow pace. In their Application before the African Court, beneficiaries of the late journalist and his companions alleged mainly the violation of the right to life, that of one's cause to be heard and freedom of expression especially the right of journalists to freely perform their profession. In dealing with the violation of the right to life as an exception raised by the Respondent the Court took the position in a preliminary ruling that it lacked temporal jurisdiction. The Court found so because it considered that deprivation of life is an instant

and not a continued violation and the assassination occurred prior to the operation of the Court. Conversely, the Court found that the Respondent violated both the right to have one's cause heard and freedom of journalist.

Although the Court did not issue any order for the Respondent to amend its constitution, fair trial, freedom of expression and the rights of journalists have corresponding provisions in most constitutions and that of the Respondent it not an exception. It follows that through this decision, the interpretation of those corresponding rights in either ordinary or constitutional domestic judicial fora will be impacted. This potential impact and conversation are of a crucial necessity in a post revolution and political transition era in Burkina Faso, where domestic courts have had to reactivate various rights violations proceedings that were stalled under the former regime. Such long unresolved judicial sagas including the case of assassination of Burkina former president Thomas Sankara and actually the reopening and conclusion of the trial of the accused in the Zongo assassination case. Indeed, the latter case has been reinstated in implementation of the African Court judgment. Here, one may as well contemplate reliance on or consideration of African Court pronouncements to avoid repeated international litigation and condemnation.

Although it is different in nature and scope, another case, which illustrates potential impact on constitutional adjudication involves Freedom of expression and decriminalisation of press offences. I refer to the case of Issa Lohé Konaté v Burkina Faso. In the instant case, Konaté was sentenced to time in jail, to a fine and his newspaper was suspended for months with significant income lost. This was as a result of articles that he

published in newspapers and where he referred to the prosecutor as a corrupt official who collided with thugs. Due to space constraints, I will only highlight the key findings of the judgment. In determining whether the Respondent's acts amounted to a violation, the Court undertook a proportionality and necessity test. It ultimately found that the sentences imposed were not proportional nor necessary mainly on the ground that public authorities or persons holding public offices should be prone to a greater level of criticism than ordinary citizens. The Respondent was ordered to expunge prison sentences for defamation from its laws, and amend other sentences in line with proportionality. Various monetary orders were also made, which the Respondent reportedly implemented. Distinguished participants, as you can foresee, the Konaté judgment carries similar potential as the one in Zongo not only in terms of enforcing the orders in the domestic system but also with respect to subsequent related cases that will arise in municipal courts namely the Constitutional Court.

The last case that I would like to expand on in this discussion has to do with democracy, elections and political participation.

- **Political participation and independence of electoral commissions: APDH v Côte d'Ivoire**

The Applicant in this case is an NGO that brought to scrutiny the Law establishing the Electoral Commission of Ivory Coast alleging that it violates equality and the principle of independence for being unbalanced in its composition. The main issue for determination was whether an electoral commission whose members originate in a large majority from

the executive or the ruling coalition does exhibit the features of independence and impartiality prescribed by the African Charter on Democracy. The Court took the view that in assessing independence of such a body public perception is paramount rather than statutory independence. The Respondent was thus ordered to bring the Law in line with the provisions of the Democracy Charter.

While the change ordered was legislative and not constitutional, future impact is unavoidable. This so first because the same issues had been for determination before the Constitutional Council of Ivory Coast prior to the case before the Africa Court. Second, and as a result of implementation of the African Court judgment, review of the new (amended) Law will lead to constitutional review, which cannot ignore the findings of the African Court. It is notable that the African Court decision in this matter also appears to have performed a function of review of constitutional law against international human rights obligations.

Finally, without too much emphasis, the Court delivered various judgments in cases involving fair trial rights where it dealt in particular with the issue of whether review of judgment and constitutional petitions can be considered as remedies to be exhausted under the admissibility provisions in article 56 of the African Charter. The Court has consistently found that where the alleged violations had already been examined as part of domestic proceedings up to the Appeal Court, the Applicant are not compelled to recourse to review or constitutional petition as remedies. Such finding may have a fundamental bearing on the determination of subsequent fair trial rights cases in ordinary courts but also of constitutional rights violation cases in constitutional adjudicatory

bodies in Tanzania. The cases I refer to include Alex Thomas, Mohamed Abubakari and Christopher Jonas all against the United Republic of Tanzania.

We can with assurance propose as the jurisprudence of the African Court stands today that, decisions made by the Court have resulted directly or indirectly in state either amending their constitutions or adjusting other laws to meet international obligations in a way that impact constitutional law, constitutional practice and domestic human rights and constitutional adjudication.

I now turn to the second part of the discussion where I undertake to show that whether current or potential, a trend begins to cristalise of domestic courts responding to signals of the African Court or starting a conversation with the Court on its international pronouncements. In this second part, I also refer to cases adjudicated in other African regional courts.

PART 2: Conversations from Domestic - Constitutional - Courts to the African Court: Current and Potential Signals

In African constitutional law literature, cases do not abound of national constitutional courts initiating an active dialogue with regional courts. In any event, this has not occurred as far as the African Court is concerned although the Court is of a relatively recent existence. What is certain as discussed in part 1 of this paper is that passive conversation is unavoidable. However, it may be argued that conversation initiated by domestic actors to regional courts is only a matter of time, granted that the trend illustrated in the first part of this discussion continues to grow.

Having said that, one may argue that the premises of municipally led conversation are taking shape. In the past two years, Respondent States have requested the Court to interpret its judgments in a handful of what could be seen as catalytic conversation cases. In those instances, the Court has had as a preliminary admissibility finding to ascertain that the request for interpretation was for the purpose of facilitating the execution of the main judgments. While this implied dialogue may be said to directly involve only the executive arm of government, the unitary nature of states under international law makes room for an indirect conversation with domestic courts. For instance, if and where the African Court concludes in an interpretation judgment that a specific step must be taken, which involves an action by domestic courts, the latter cannot shy away from abiding by the international obligations of the state. This scenario is certainly illustration by an interpretation judgment issued by the Court in September this year where it took the view in the case of Abubakari v Tanzania that "all necessary measures" to be undertaken by the Respondent to "remedy the violations" do not exclude the release of the Applicant.

It is true that at this relatively early stage of operation of the African Court, states cooperation is still affirming and resistance is not excluded as it is the case in all other international and regional human rights systems. I wish to refer here to a current trend whereby some Respondent states have declined implementing provisional measures ordered by the African Court on the ground that such measures tend to reverse the final findings of superior domestic courts. That instance is applicable mainly in cases involving

the imposition and execution of death sentences in Tanzania. Through various means, the African Court is using extra-judicial dialogue to explain the import of the mechanism of provisional measures which only seek to maintain the status quo until the merit of the matter is considered to avoid irreparable harm or to render the final international decision obsolete.

At the end of this second part, I bring in two cases decided in the Court of Justice of the Economic Community of West African States (ECOWAS), which illustrates an emerging conversation from domestic courts of constitutional jurisdiction. This is only to show that the trend to dialogue and conversation is not only continental but also sub-regional. The first case is that of Hissene Habré, which I referred to at the start of this paper. In that case, after the ECOWAS Court and the International Court of Justice found that Senegal had a duty in international law to prosecute Hissene Habré or hand him over to another willing country for prosecution, Senegal effected amendments to its domestic law including the constitution to make the concerned international crimes justiciable in domestic courts. It must be noted that Hissene Habré was not tried by an international court but by a kind of hybrid court in the form of Extraordinary Chambers operating within the Senegalese domestic courts system. The second that I wish to refer to is that of CDP v Burkina Faso where the Constitutional Council of that country expressly referred to the judgment of the ECOWAS Court, which found that the electoral law providing for a blank disqualification of members or supporters of the previous regime violated the right to political participation.

With these examples from the sub-regional level, I will now conclude the discussion.

CONCLUSION

Honourable Justices, Distinguished Colleagues and participants, that is the state of the relationship between international human rights adjudication and domestic constitutional adjudication in Africa. Like I clearly indicated, the trends highlighted cannot be said to be either final or established. However, these trends are clearly delineated and they are growing. What can be stated with no doubt is that, since its inception, the African Court has been working to shape African human rights law, litigation and adjudication at both supranational and national levels.

It is important to mention that impact, conversation and dialogue have been made possible by the recent advent of a body of norms which stand between traditional public international law with a focus on human rights and constitutional law. Regional treaties on democracy, elections, and good governance have been adopted with the inclusion of a myriad of provisions that are no less than constitutional law principles. Some have argued that Africa now has regional constitutions. If it does, then it could now as well be claimed, as I have attempted to demonstrate in the ongoing discussion, that the African Court and other supranational courts of a similar mandate are operating as regional constitutional courts.

It is my belief that while cooperation will always experience bumps, the trend to an increased conversation and convergence will affirm over the years. One already

operational mechanism that lends itself to this positive occurrence is the African Continental Judicial Dialogue organised every two years by the African Court under the aegis of the African Union. The Dialogue gathers judges of the constitutional and supreme courts of all African countries as well as judges of the sub-regional and continental human rights or regional integration adjudicatory bodies. In the spirit of judicial dialogue, I wish to end my presentation by making a request to the Asian Association of Constitutional Courts and Similar Bodies that we start a conversation for cooperation between our respective regional initiatives. The next African Judicial Dialogue will be held in 2019 and we could make use of the next two years to start building the bridge for what in my view will be a most benefiting cooperation.

Before I avail myself for further interactions on my presentation, allow me to reiterate my appreciation and that of the entire African Court to the President of the Constitutional Court of Korea, Honorable Justice Kim Yi-Su, for making my participation in this Symposium possible. I have no doubt that this is the beginning of an era of fruitful cooperation between our institutions.

Thank you for your kind attention.

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