THE PRACTICAL RELATIONSHIP BETWEEN THE AFRICAN COURT ON HUMAN AND PEOPLES’ RIGHTS AND THE AFRICAN UNION PERMANENT REPRESENTATIVES COMMITTEE

Presentation by
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AT

THE RETREAT BETWEEN THE COURT AND THE PRC

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1.0 Introduction
The integration of the African Continent is an ongoing process that has gone through a number of measures. From the establishment of the Organisation of the African Unity (OAU) to the current African Union (AU), the integration has made some very remarkable progress, particularly in the adoption of a normative human rights framework and the establishment of organs within the AU to serve the vital purpose of ensuring implementation of this normative framework, the ultimate goal of which is African solidarity and integration. This presentation is limited to only our two organs: the African Court on Human and People’s Rights (the Court) and the Permanent Representatives Committee (PRC) and seeks to explore the practical means whereby we may assist each other in enhancing the integration of human rights protection on the continent.

2.0 The African Court on Human and People’s Rights
While the AU is composed of many organs, which, according to the current structure, undertake responsibilities that are either in the form of judicial, legislative or executive functions, the Court stands alone as the sole judicial arm of the AU. I refer to the Court as the sole judicial organ advisedly, because others, such as the African Commission on Human and Peoples’ Rights and the African Committee on the Rights and Welfare of the Child are quasi-judicial bodies; hence, they do not have the power to issue enforceable decisions, in the form of judgments. I will not venture into the establishment of the Court or its mandate as Hon. Gerard Niyungeko has spoken much about the Court in this context; suffice it to say that among the several factors taken into account by the then OAU in establishing the Court were the issues of effective protection of human and peoples' rights,
freedoms and duties, as well as the concomitant justiciability of rights such as *equality, justice, peace and dignity* which were considered as essential objectives for the achievement of the legitimate aspirations of the African peoples.

The nexus between human rights, peace, security, and stability is established and beyond any reasonable argument. Thus, the Court’s role in protecting human rights, and thereby promoting justice and fostering peace, security and stability is crucial for Africa. I am sure most of you recall the remarks by the AU Commission Deputy Chairperson at the 24th Ordinary Session of the PRC in Addis Ababa in July this year when, in recalling that 2012 is the AU year of shared values, he reaffirmed that *there is no doubt that democracy, good governance and the rule of law as well as the upholding of Human Rights have increasingly taken strong roots in Africa*. That being our primary role, as a Court, we are highly encouraged.

The most basic and fundamental expectation of both Member States and the citizenry of Africa is that this Court, as a Court of Justice, will deliver quality justice at all times. The attributes of Quality Justice are:

- **Independence** – the assurance that ethically, morally, financially, the court’s ability to function impartially and with the utmost integrity and transparency is not and does not appear to be in any way compromised.

- **Competence** – the assurance that whether in terms of qualification, knowledge, experience, jurisdiction, the court can function as

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1. Speech of the AU Deputy Chairperson at the opening of the 24th Ordinary Session of the PRC- AU Website.
expected for the greater benefit of the greater number of ordinary persons.

- Efficiency – the assurance that justice will be delivered in the shortest possible time with the application of the best resources and means available, with the most cost effective processes, so that litigants can know their fate and get on with their lives as early as possible.

- Effectiveness – the assurance of accessibility, timely justice with predictable processes and outcomes (in the sense that judgments will be carried out and victory will not be pyrrhic), so as to forestall self-help and instability.

In this light, the practical relationship between the PRC and the Court has a significant effect on the Court’s capacity to meet the aforesaid expectations.

3.0 The Practical Relationship between the Court and the Permanent Representative’s Committee

a. The value of the Court as an AU judicial institution

As the main judicial organ of the AU, the Court must ensure that the missions, visions and objectives of this continental integration are met, with particular regard to all aspects of the protection of human rights. Whilst the Court may undoubtedly have a role in the realization of the human rights aspects flowing from each of the fourteen (14) main objectives of the AU enshrined in the Constitutive Act of the
African Union (AU Constitutive Act)\(^2\), I will limit myself to four objectives that fall directly within the purview of the Court to underline the value of the Court in the AU framework.

The first objective of the AU is to achieve greater unity and solidarity between the African countries and the peoples of Africa\(^3\). Without doubt, unity and solidarity cannot be achieved in the absence of a reliable mechanism for equitable and independent administration of justice and protection of human and people’s rights and freedoms, which is the eighth objective of the AU\(^4\). It follows, that the OAU, did not establish this Court mistakenly. The Member States must have realized that disputes, misunderstandings and conflict would surely arise which might divide the Continent and its peoples and become a threat to the sixth objective of peace and security\(^5\). To counter that, and to ensure that the AU decisions aimed at achieving integration, solidarity and unity are respected, they established this Court to administer justice amongst the Member States and to their citizens. Thus, it is the role of the Court to implement and ensure, through judicial judgments, the implementation of the African Charter on Human and Peoples’ Rights, and by extension, decisions of the AU in that regard. As mentioned by Justice Niyungeko, in his presentation, this Court may be accessed by both the Member States Parties to the

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\(^2\) Article 3 of the Constitutive Act

\(^3\) Article 3(a) of the Constitutive Act

\(^4\) Article 3(h) ibid

\(^5\) Article 3(f) ibid
Court Protocol and their citizens on both contentious matters and advisory opinions.

Similarly, the Court has a specific role to play with regard to the seventh objective of the AU\textsuperscript{6}, that is, towards promoting democratic principles and institutions, popular participation and good governance in Africa. Democratic principles, popular participation and good governance are core concepts in modern day Africa. Without these, the unity, solidarity, peace and security of the African peoples will always be at risk. Good governance requires respect and adherence to the principles of democracy, rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people’s rights. These are matters that fall squarely within the jurisdiction of the Court, as a court on human and people’s rights. Where these rights are promoted and protected, democracy, rule of law and good governance is safeguarded. Given such safeguards, the immediate and very important consequence is the prevalence of peace, security and stability on the continent.

Therefore, to ignore, in any respect, the continental judicial institution, whose mandate, is ultimately to ensure the peace and security of the entire continent is to risk overall instability. This therefore means that the policy organs of the African Union, of which the PRC is an integral part, have an obligation and responsibility to ensure that the Court has the requisite capacity to discharge its mandate in terms of all

\textsuperscript{6} Article 3(g)
resources, including the budget, the registry staff, the Court structure, and all material requisites.

b. The Court as a non-income generating institution

I hasten to state that this presentation is not intended to present a shopping list of the Court to the PRC. My objective is to draw the attention of your Excellencies to the fact that the Court is a non-income generating judicial institution, whose resourcing must, particularly for its core judicial business, come from the AU. You will, therefore, notice that, whilst the Court accepts donor funding to hold retreats such as this one and to conduct sensitization seminars, visits and conferences, to conduct necessary training, or procure resources like library books and power generators, it has been very careful to ensure that the salaries of judges and staff and all funding for its judicial activities are solely financed by the AU to forestall perceptions of lack of independence from outside influences. Indeed, the Court would rather prefer a situation where it is totally unnecessary for it to rely on any support from any source outside the AU for any aspect of its activities at all. Be that as it may, in matters of finances, the PRC’s role is central in considerations of the Court’s resources, and that role does not end at only considering the budget as it goes further to the monitoring of the expenditure.

Respectfully, I merely wish, therefore, for Your Excellencies to understand that quality justice does not come cheap, but ultimately, it pays a very high dividend for every penny invested in it.

c. The Court’s capacity to protect human and peoples’ rights in Africa
Likewise, the Court's capacity to protect human and peoples’ rights and thereby promote integration, solidarity and peace in Africa largely depends on the extent to which the Policy Organs, beginning with your good selves, Excellencies, are willing to ensure that the Court has an adequate registry structure, with adequate tools, material and infrastructural support.

Since its establishment, the Court has had a skewed Registry structure, with several key posts either not provided for or having unfavorable grades. I must laud your Excellencies for the recent recognition of these shortcomings, and the consequent revision of the structure of the Registry. Unfortunately, this structure currently exists only on paper. Because of the current AU budget finance policy, we cannot apply the new structure to improve the Court’s capacity and effectiveness. The existing human capacity anomalies (which we had sought to address through the revision of the structure of the Registry), in the structure on the ground has also affected the willingness of external cooperation partners to supplement AU resources with regard to the programme budget of the Court. 7

There is also the need to mention that, steadily, the Court is receiving an increasing number of applications. So far there have been four public sessions, one for the delivery of Judgment and the rest for the hearing of legal arguments as well. It is highly likely that in the foreseeable future, the Court will hold a full trial. It is in the latter event that the capacity of the Court will be critically tested, in terms of

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7 A case in point is the lack of adequate finance staff in the Registry that has resulted in undesirable non-separation of duties, which has, in turn, made the EU reluctant to continue funding the Court’s programmes.
financial, material, logistical and human resources, among other issues.

d. Role of PRC in supporting the Court

Though all AU organs are of equal importance, the PRC is amongst the most critically vital organs of the AU. Composed of Your Excellencies, the Permanent Representatives of the Member States accredited to the Union and other duly accredited plenipotentiaries, your organ is essentially the immediate assistant of the Executive Council. Operating in such proximity to the Council, you play a crucial role of, inter-alia, initiating matters that are finally placed on the agenda of the Council and, ultimately, the Assembly of Heads of States. In all matters critical to the overall effectiveness of the Court, which require decisions of the Policy Organs of the AU, we believe that the role of Your Excellencies is central and that is why it is essential that the Court’s access to the PRC be free and open at all times.

Furthermore, taking into account the relative roles of our two organs, there is also the need to mention the issue of nomination and election of Judges of the Court. Article 12(2) of the Protocol, in dealing with nominations for election of Judges stipulates as follows: -

“Due consideration shall be given to adequate gender representation in nomination process.”
The PRC is involved in the nomination process. However, as is glaringly obvious, of the current ten (10) Judges (I am sure you are aware that our brother judge, Hon. Justice Joseph N. Mulenga passed away in August), the Court only has two (2) Lady Justices; indeed, since its practical inception in 2006, it has never had more than this number, which cannot, by any stretch of the imagination be describes as adequate gender representation. Sadly, in July this year when the opportunity arose, not a single member state even nominated a female candidate. I am positive that this anomaly is not intentional and, as you are all present today, you will take this as a challenge to be addressed in 2014 and beyond.

e. Complementarity between the Court and PRC

The relationship between the organs is akin to that of a national judiciary and the executive arms of the State. Through its judicial protection mandate, the Court’s has a role to promote justice, peace, security and stability on the Continent. Whilst the Executive Council and the Assembly make the policy decisions in such matters, it is in most cases the PRC that initiates and forwards the recommendations thereon. Since these policies have impact on the general role of the Court, the Court ought to be placed in the picture before any decision is made, and indeed, the Court has been so regularly consulted on various issues. It becomes easier to implement what the policy organs have decided where the Court and PRC have a common understanding and it is my belief that that is one of the reasons for this retreat so as to assure a fruitful relationship, in the African Cause.
4.0 Conclusive Remarks

In conclusion, what I have outlined above are some of the practical issues where the Court would appreciate open channels of dialogue with PRC to ensure the effective implementation by the Court of the decisions of the policy organs with respect to the protection of human and peoples’ rights.

The Court, as the main continental judicial organ, entrusted with the powers to administer justice throughout the continent, plays a great role in promoting the prevalence of peace, security and stability in Africa. However, it does not do all this on its own, but with cooperation and support from other AU organs. There must therefore be continuously close relations with the PRC in particular, as the success or failure of the Court rests equally on both organs.

I thank you for your kind attention.