The Justiciability of Economic, Social and Cultural Rights:

The African experience

Paper presented by Hon. Judge Gerard Niyungeko, President of the African Court on Human and Peoples’ Rights, on the occasion of the celebration of 20 years of Constitutional Justice in Mozambique and 7th Anniversary of the Constitutional Council of Mozambique.

Maputo, 3rd November 2010
Honorable Justice Luis Antonio Mondlane, President of the Constitutional Council of Mozambique,

Honorable Justices and Participants,

1. I am pleased to be given an opportunity to make a presentation at the occasion of the Commemoration Conference of the 7th Anniversary of the Constitutional Council, and 20 years of Constitutional Justice in Mozambique.

I then would like to thank the Constitutional Council and its President Hon. Justice Luis Antonio Mondlane for having invited me to attend this Conference, on behalf of the African Court on Human and Peoples’ Rights.

I would also like to congratulate the Constitutional Council and the People of Mozambique for the big progress made in building a strong Constitutional Justice.

At the African Court on Human and Peoples’ Rights, we know that every progress made in constitutional justice is a progress made in the judicial protection of human rights. As we all know indeed, most of Constitutions nowadays devote an important part of their provisions to a Bill of Rights, what means that every Constitutional Court or Council is necessarily a human rights institution/body. With regard to national supreme courts, they are the ones with the final mandate of
establishing national jurisprudence in the field of human rights, quite often, based on the national constitution which itself is inspired by the African Charter on Human and Peoples’ rights. Their activities in this area are in direct relation with those of the Court at the continental level. It will therefore be of prime importance for the Court to establish communication and information channels with these national jurisdictions so that they may take into account its jurisprudence and for it to be well informed about the major trends in their respective national jurisprudence.

And that is one of the reasons why the African Court recently took the initiative of establishing a judicial dialogue between itself and both the sub-regional Courts with a human rights mandate, and the Constitutional and Supreme Courts at the national level. It is within this framework that we spontaneously accepted addressed to the Court.

I. The African Court on Human and Peoples’ Rights

2. Before dealing with the topic that has been given to me, allow me to say a few words on the African Court on Human and Peoples’ Rights, as it is not always well known.

The African Court was established by a Protocol to the African Charter on Human and Peoples’ Rights, adopted by member States of the

The Protocol provides that the Court shall consist of eleven judges, nationals of Member States of the OAU, elected in an individual capacity from among Jurists of high moral character and recognized practical, judicial or academic competence and experience in the field of human and peoples’ rights. It specifies that the composition of the Court must ensure that there is representation of the main regions of the continent and their principal legal traditions, and that there is adequate gender representation.

According to the same Protocol, the Court shall have a dual jurisdiction. The jurisdiction of the Court shall first extend to all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and Peoples’ Rights, the Protocol and any other relevant human rights instrument ratified by the States concerned. Within the framework of this contentious jurisdiction, the Court may be seized by State parties to the Protocol, the African Commission on Human and Peoples’ Rights, African Intergovernmental organizations, individuals and NGOs, provided that the country concerned has accepted the jurisdiction of the Court to receive applications from the latter. Within this same framework, the Court
may try to reach an amicable settlement with the agreement of the concerned parties. The judgments of the Court in contentious matters shall be binding to the parties and shall not be subject to any appeal.

The Court secondly has jurisdiction to provide an opinion on any legal matter relating to the African Charter on Human and Peoples’ Rights or any other relevant human rights instrument, provided that the subject matter of the opinion is not related to a matter being examined by the African Commission on Human and Peoples’ Rights. The Court gives this advisory opinion at the request of a Member State of the African Union, any of its organs or any African organization recognized by the African Union.

In reality, the first judges of the Court were elected by the Assembly of Heads of State and Government of the African Union in January 2006, in Khartoum, Sudan. They were sworn in later before the Assembly on 2nd July 2006 in Banjul, the Gambia.

The Court started functioning in July 2006. As from November 2006, the services of the Court operated from Addis Ababa, Ethiopia but were later transferred to the seat of the Court in Arusha, Tanzania, in August 2007. The government of the United Republic of Tanzania has provided temporary premises for the Court pending the construction of a permanent site.
During the first two years, members of the Court focused on making it operational from the administrative perspective. The Court has thus been able to achieve important results in this regard.

One of the problems facing the Court now is that of a slow pace of ratification of the Protocol. More than ten years after its adoption, of the 53 Member States of the African Union, only 25 have so far ratified the Protocol. When we consider that all 53 Member States of the African Union have ratified the African Charter which the Court is mandated to defend, one could see the gap between the pronouncement of the rule and its judicial guarantee.

But the most important challenge currently faced by the Court is that of access to it by individuals and nongovernmental organizations. We said earlier that individuals and nongovernmental organizations do not have direct and automatic access to the Court and that they cannot have access to it, except the State against which there is a complaint has made a declaration accepting the jurisdiction of the Court in this regard. Till date however, of the 53 Member States of the African Union, and of the 24 which have ratified the Protocol, only four, Burkina Faso, Mali, Malawi and Tanzania have made the declaration. This is a serious problem which may affect the judicial functioning of
the Court and its efficiency in the African human rights protection system.

There is therefore an urgent need to carry out massive and intensive campaigns in all the African countries concerned to facilitate the ratification of the Protocol and the making of the declaration accepting the jurisdiction of the Court to receive applications directly from individuals and nongovernmental organizations. To that end, the role of the civil society in Africa, both national and international, and that of the media is crucial. The Court has continued to call on representatives of the Civil Society through the media to fully play this role. It has equally continued to call on external partners who are interested in the promotion and protection of human rights in Africa to lend strong support to the African Civil Society in this respect. It believes that partners which will support the civil society will simultaneously be supporting the Court.

Secondly, the African Commission on Human and Peoples’ Rights may make use of the possibility given to it by the Protocol to seize the Court on certain matters which have been brought before it, based on a judicial policy which it will freely determine itself. Both institutions have agreed to consult each other with a view to harmonizing their respective interim Rules of Procedure. Meetings which focused on
other aspects of their relations and cooperation between them is have taken place between July 2009 and April 2010.

Thirdly, apart from contentious matters, Member States of the African Union may equally turn to the Court to seek advisory opinion on issues relating to human and peoples’ rights. International practice has revealed that for diverse reasons, States are less inclined to bring contentious matters before the Court against other States. Conversely, they may make recourse simply for an advisory opinion, notably in order to improve on the national legal system on the protection of human rights. In the same way, the African Union and its organs may also seek an advisory opinion before the Court notably, during the drafting of new human rights instruments or for any other relevant reason. This goes same for international organizations recognized by the African Union which are authorized by the Protocol to seek an advisory opinion from the Court. To that end, the Court intends to inform the States, AU organs, and the above-mentioned international organizations soon about these possibilities which in themselves could enable the Court to start exercising its judicial functions without delay.
II. The justiciability of economic, social and cultural rights

The legal basis: the African Charter on Human and Peoples ‘Rights

It was not until the adoption of the African Charter on Human and Peoples’ Rights1 in 1981 that the OAU gave normative recognition to the individual and to `peoples' as the subjects of rights. The Charter provides a basis from which to arrive at a more complete picture of the approach to ESCRs from the continental perspective.

The preamble to the Charter clearly demonstrates where the emphasis of the document lies, stipulating that it was henceforth essential to pay particular attention to the right to development, and that civil and political rights cannot be dissociated from economic, social and cultural rights in conception as well as universality2 and goes on to state that "the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights."3.

Furthermore, the African Charter recognizes at least the following ESCRs: right to work; right to health; right to education; right to freely take part in the cultural life of the community (Articles 15-17).

1. OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982)
3. Ibid.
Unlike civil and political rights, ESCRs in the Charter must be protected and enjoyed without any limitations, nor are they to be derogated from in any circumstance. Over the years, there has been a general recognition in African countries of the intrinsic relationship between ESCRs and civil and political rights.

**The African Commission and the protection of economic and social rights**

Let me now come to the very topic of my presentation. With regard to this topic, I think there has been a slight misunderstanding. When I was invited (on the 12th October 2010), I was proposed to present a paper on the following topic “The justiciability of social economic and cultural rights: the African experiences”. My understanding was that I would mainly talk about the African Commission of Human and Rights regarding, economic, social and cultural rights, since the Court has not yet any jurisprudence on the matter. But now I see that I should deal with the decisions of the African Commission on Human Rights’. The good compromise I see is finally to deal with “The justiciability of social, economic and cultural rights in the light of the decisions of the African Commission of Human and Peoples’ Rights”.

The African Commission on Human and Peoples’ Rights is the first regional human rights body established to monitor States’ compliance with their obligations under the African Charter. For over twenty years of its existence, the Commission has developed a rich jurisprudence on human rights in general, and ESCRs in particular. The Commission’s case law clearly demonstrates the indivisibility, interdependency and interconnectedness of all human rights, and the state responsibility to ensure that all rights are protected. It also reveals that the enjoyment and/or protection of ESCRs are not dependent on a country’s socio-economic or political development.

In one of its first decisions dealing with ESCRs, in the case of Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria, the Commission made it clear that ESCRs are not vague or incapable of judicial enforcement. The case also illustrates how the Charter can be interpreted generously to ensure the effective enjoyment of rights, even those not expressly guaranteed therein, such as the right to food and the right to adequate housing.

The communication alleged that the Nigerian government collaborated with Shell, an oil exploration company to contaminate air, water and soil in the Ogoniland, thereby endangering the health of the People.

4. Communication No. 155/96
In its decision, the Commission held that the government had violated the right to health and the right to a clean environment, and that the government’s failure to monitor oil activities and involve local communities in decisions, violated the States duty to protect its citizens from exploitation and despoliation of their wealth and natural resources. The Commission also held that the implied right to housing which is derived from the express right to property, health and family, was violated by the destruction of houses and harassment of residents who returned to rebuild their homes. Finally, destruction and contamination of crops by government and non-state actors violated the duty to respect and protect the implied right to food.5

The Ogoni case is significant for several reasons. First, the Commission declared that all rights - both civil and political rights and social and economic rights - entail four layers of both negative and positive duties (i.e. the duties to respect, protect, promote and fulfill). Second, that “although the right to housing or shelter is not explicitly provided for under the African Charter, when housing is destroyed, property, health, and family life are adversely affected. Third, the Commission became

5. Ibid.
one of the first regional human rights monitoring bodies to find a State in violation of the right to food.6

The decision of the African Commission in the Ogoni case represents a giant stride towards the protection and promotion of economic, social and cultural rights of Africans.

In the combined cases of Human Rights Organisations & al v Soudan and 296/05 – Centre on Housing Rights and Evictions v Soudan7, the Commission reiterated its decision in the Ogoni Case, by holding that: “the destruction of homes, livestock and farms as well as the poisoning of water sources, such as wells”, amounted to a violation of Article 16 of the African Charter.

It was alleged in those cases that following the emergence of an armed conflict in the Darfur region of the Sudan, militiamen known as ‘Janjaweed’ engaged in forcibly evicting, killing, and raping thousands of Black indigenous people in that region.

The significance of this decision is that it provides further elaboration on the right to adequate housing including the prohibition on forced eviction. Second, it reaffirms and elaborates on the right to water as an implicit right under the African Charter.

6. Id, paras 64–66.
7. Communications 279/03 and 296/05
In Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v Zaire, the complainants alleged amongst other things, that public finances were mismanaged, basic services were degrading, there was a shortage of medicines and that the universities and secondary schools had been closed for two years.

The Commission held in those cases that the failure of the government to provide basic services necessary for a minimum standard of health, such as safe drinking water and electricity and the shortage of medicine constituted a violation of the right to enjoy the best attainable state of physical and mental health.

In its recent decision in Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, the Commission found the Kenyan government in violation of the rights of the Endorois community, inc It was alleged in that case that in the 1970s, the Kenyan government evicted hundreds of Endorois families from their land in the Rift Valley to create a game

8. Communications Nos. 25/89, 47/90, 56/91, 100/93

reserve for tourism. The Endorois, an indigenous people, had been promised compensation and benefits, but these were never fully implemented, and the community’s access to the land was restricted to the discretion of the Game Reserve Authority.

This case marks the first time the Commission recognized indigenous peoples’ rights over traditionally owned land and their right to development under the African Charter. Including their collective right to free disposition of natural resources, and to development. It was alleged in that case that in the 1970s, the Kenyan government evicted hundreds of Endorois families from their land in the Rift Valley to create a game reserve for tourism. The Endorois, an indigenous people, had been promised compensation and benefits, but these were never fully implemented, and the community’s access to the land was restricted to the discretion of the Game Reserve Authority.

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Conclusion

Treating ESCRs entitlements as mere political programmes undermines the fundamental principle that human rights are inalienable. In 1986, a group of distinguished experts in international law meeting in Maastricht observed that, as human rights and fundamental freedoms were indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political rights and ESCRs rights.