Global contemporary challenges to regional human rights protection systems: the case of the African Court

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Introduction

Undoubtedly, the establishment of the African Court is a significant advance in the institutionalization of human rights in Africa. Its creation marked the beginning of a new era for the judicial protection of human rights in the region.

Since it first became operational in November 2006, the Court has done a remarkable job in protecting human rights. Starting from asserting its existence by establishing the Office of the Registry, recruiting its staff, and preparing its rules of procedure to receiving and disposing of several cases,[1] which have shaped the normative terrain of human rights in Africa, and currently positioning itself as the only continental judicial human rights body that African citizens could have recourse for remedy to violations of their rights, are all things that the Court could be proud of.

However, the Court faces many challenges of which some are specific to the Court, and some others are also shared by other

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1 From 2010 (the year it received its first case) to date, the Court received a total of 178 applications (contentious), 13 requests for advisory opinions, 3 applications for review and 4 applications for interpretation of Judgment. Of these, the Court has disposed of a total of 64 cases.

regional human rights courts. In this paper, an attempt is made to briefly highlight these challenges which have in one way or the other affected the operation of the Court.

Jurisdictional limits

One of the main challenges affecting the function of the African Court is the limits placed upon its jurisdiction by the Protocol establishing the Court. Article 5(3) of the Protocol envisages the possibility where individuals and NGOs may have direct access to the Court. This is, perhaps unsurprisingly, a good thing only if this access was not curtailed by unnecessary preconditions. Persuant to the same article, individuals and NGOs can only file cases against a State which, first, have ratified the Protocol accepting the competence of the Court and, second, deposited a special declaration to this effect in accordance with article 34 (6) of the Protocol, which provides:

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

In addition, the NGOs which seek to file cases before the Court should have an observer status before the African Commission on Human and Peoples' Rights. Even having fulfilled this, the Court still retains the discretion (see the term 'may' in Article 5(3)) to "entitle the relevant NGOs to institute cases directly before it".

The fact that direct access to the Court by individuals and NGOs is contingent upon an opt-in system of depositing a special declaration by a State is very unfortunate. Given that the Court is established to protect victims of human rights violations, while allowing an unfettered access to States and other entities,[2] the

[2] See article 5 (1) of the Protocol. It reads as follows: "The following are entitled to submit cases to the Court: a) The Commission. b) The State

restrictive access to individuals, who are the primary targets of such violations, and NGOs, which might advance their (individuals') cause before the Court, somehow defeats the very purpose of establishing the Court.

The problem is quite troublesome when one sees the number of countries which have so far ratified the Protocol and deposited the declaration allowing individuals and NGOs to have direct access to the Court. As at July 2018, only 30 out of 55 African countries have ratified the Protocol and, of these, only eight countries, namely, Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Malawi, Tanzania and Republic of Tunisia have deposited the said declaration. This precisely means that only individuals and NGOs can lodge their grievances against these eight countries directly in the Court. In this situation, where most of the African citizens are unable to seek judicial redress, the Court cannot fully discharge its statutory mandates of protecting human and peoples' rights in Africa.

Limited awareness of its existence among ordinary Africans

For the effective operation of any court, awareness of its existence and function by its users is an indispensable factor. This is significant because awareness as to the existence or function of a court has a direct bearing on its accessibility, i.e., the users cannot access and be beneficiaries of the works of the Court unless they know what it does, where it is located, how it functions and who can appear before it.

When it comes to the African Court, partly because of its relatively young age, only 10 years since it came into being, and partly, as a result of the limited awareness-creating efforts made, most ordinary citizens do not know its existence or functions. A random assessment even among the people in the legal profes-

Party which had lodged a complaint to the Commission. c) The State Party against which the complaint has been lodged at the Commission. d) The State Party whose citizen is a victim of human rights violation. e) African Intergovernmental Organizations".

sion may reveal a very shocking result that very few know and understand the functions of the Court. This lack of awareness has prevented victims of human rights violations, even those who have the opportunity to access and directly institute cases pursuant to article 5(3) and article 34 (6) of the Protocol, from approaching the Court to seek remedies for the violations they have suffered.

In order to fill the awareness gap, the Court has been undertaking several sensitization visits to different African countries, thus far in 32 countries. During such visits, the Court meets and discusses with different government institutions, the academia, NGOs, and other stakeholders concerning its works. The Court uses sensitization visits as important occasions to not only familiarize its functions among ordinary people, but also to nudge States to ratify the Protocol and deposit the declaration that allows individuals and NGOs to have direct access to it. As a result of these visits, in the past, some States have ratified the Protocol and deposited the declaration.

However, sensitization visits are not activities that a judicial institution should normally undertake. Promotional activities neither fall within the mandate of the Court nor are congruent with its inherent institutional (judicial) nature. It is a job that should be ordinarily done by civil societies, the academia and other national and inter-governmental institutions vested with promotional functions. The Court also does not have adequate resources to carry out more frequent similar visits to reach out all African countries and the ordinary citizens.

Besides, despite the encouraging number of States which ratified the Protocol and deposited the necessary declaration for individuals and NGOs to file cases before the Court, the sensitization visits that the Court has undertaken so far have not yielded the desired result both in terms of getting more ratifications and also increasing the awareness of ordinary African citizens with respect to the functions of the Court. The issue of awareness creation therefore remains an outstanding problem in need of different strategies and the involvement of multiple stakeholders.

The absence of human rights-friendly operational environment: low political commitment, social, economic, and cultural problems

It is important to note that the existence of a human rights—friendly environment is crucial for the effective performance of a human rights court. By operational environment, we refer to the availability of learned lawyers, pro-human rights diplomats who negotiate good and comprehensive human rights instruments, strong civil societies, media and citizens who are aware of basic rights and freedoms. In addition, the overall economic and cultural milieus of the society and its members in which a human rights court operates significantly impact its effectiveness.

In terms of operational environment, the African Court has its fair-share challenges relating to the limited number of human rights experts, weak or few number of civil societies, absence or limited number of free and independent media, and less 'a more than a rhetoric' enthusiasm exhibited by politicians to the human rights agenda. In many parts of the continent, there is still a massive disregard to human rights that human rights violations are seen as parts of 'business as usual' and left with impunity. In most cases, let alone reaching the Courtroom, a large part of cases of gross violations simply go unnoticed.

Most of the African citizens also lack the relevant legal knowledge and the economic capacity to recruit lawyers to bring cases before the Court, even if they wish to. In order to alleviate this problem, the Court has been giving trainings to African legal counsel who have registered in the Court's roster to provide *pro bono* service representing individuals who do not have the capacity to litigate before the Court. This is producing a promising result and the Court is planning to carry out this activity on a more regular level to a larger number of lawyers in Africa, who are willing to advance the cause of human rights.

On some occasions, the Court has also encountered some problems relating to cultural issues. In one of its recent judgments, in the matter of APDF & IHRDA v Republic of Mali, the Court had, for example, to grapple with the issues of the age of marriage and the celebration of marriage without verifying the presence of

consent of future spouses, something that is alleged to have been entrenched as a cultural practice in religious marriages that are common in some sections of the Malian society.

Although the Court upheld the applicable standards of international human rights law to resolve these issues, it was an important occasion for the Court to realize how the cultural realities and traditional values of the African societies may pose a serious challenge to ensure that human rights are respected in the continent. The Court expects to have more similar cases in the future that involve a tussle between modern human rights and some religious and traditional values of the African society.

Execution of its Judgments – Low compliance rate, a global challenge

One of the reasons that led to the establishment of the Court was the low level of implementation of the decisions of the African Commission on Human and Peoples' Rights, because they are considered not binding by the States, among other factors. In the case of the Court, the binding nature of its decisions can be hailed as a triumph. However, this triumph can turn into frustration if the enforcement obligation is not translated from paper to become reality. Under the Protocol, the responsibility for implementing the Court's decisions is entrusted to the AU Executive Council (the Council), a political body. This is understandable. At the international level, political bodies have greater capacity to exert pressure on States than a Court.

The Court has, however, taken the view that the Council's responsibility to enforce compliance does not call into question its inherent powers to monitor the enforcement of its decisions. In the context of such monitoring, the Court may find that its decisions have not been complied with and report to the Council, if necessary. In its decisions, the Court has systematically set a deadline for States to submit a report on the measures taken to implement the decisions.

Notwithstanding what the Protocol says and despite the monitoring efforts that the Court has undertaken, the current reality reveals that much is still expected from States in terms of

complying with the decisions of the Court. Proper enforcement of the Court's decisions requires not only enforcement in relation to the particular case but also its support for similar cases in the country concerned and the continent as a whole. And, in this regard, the political commitment again is lacking.

This being a general global challenge that cuts across many regional human rights courts in the world, it is by no means peculiar to the African Court. Additionally, when it comes to compliance with its decisions, albeit quite few, there are some cases where the decisions of the Court were fully implemented. In the matter of *Zongo and others v. Burkina Faso*, the Republic of Burkina Faso fully complied with the judgment of the Court, including by paying compensation to victims. In order to magnify such good practices, the Court has used different occasions to 'name and acclaim' States which have partly or fully implemented its decisions. Moving away from the traditional 'naming and shaming' approach and exploring the naming and praising strategy may somehow have some positive ripple effects.

Material and human resource

The other challenge affecting the works of the African Court is limited human and material resources. Despite the increasing workload of the Court, judges are still part-time, and the number of the registry staff is quite small. As at 11 July 2018, there are 130 pending cases but the number of legal staff including the Registrar and the Deputy Registrar is only 9, each legal staff on average managing more than 15 cases in addition to other administrative assignments.

The number of staff in other very important departments, including the language unit, is quite small making sometimes difficult to get documents ready in time in the four working languages of the Court.

In addition, the Court is in a temporary premises, having a severe shortage of office space to accommodate even its small number of staff. The problem is expected to persist in the foreseeable near future, as the construction of the permanent

premises is not progressing well. These above-mentioned problems are perhaps unique to the African court.

Conclusions

Just over a decade ago, the African Court was established to complement the protective mandate of the African Commission on Human and Peoples' Rights through judicial decisions binding upon concerned States. Its establishment was a momentous juncture in that it opened a new chapter in the African human rights system by creating an additional source of optimism for African citizens that they can now get judicial redress to the violations of their human rights not only at national level, but also at regional level at the Court where the national system fails to give them adequate remedies.

To live up to this expectation, the Court has since its creation been trying its best level to ensure that human rights are observed and protected, and when violations occurred, victims are compensated. However, the task of discharging this lofty mandate has not been a walk in a park. The Court has had to grapple with many institution-specific challenges such as shortage of human power, material resources, judges working only part-time, and some other problems pertaining to its operational environment, such as limited political commitment to human rights, lack of widespread awareness of its existence and function among ordinary African citizens, economic, social and cultural realities of the African societies, and most importantly, the limits placed upon its jurisdiction in receiving cases from individuals and NGOs.

Furthermore, the Court faces other problems that are shared by most other regional human rights bodies, the major one being low compliance rate/execution of its decisions.

These problems notwithstanding, the Court foresees a bright future for itself and the state of human rights on the continent. It hopes that most of its problems will diminish or perish as new generations of leaders come to power, the economic, social and cultural realities improve and change, and its institutional capacity is ultimately strengthened. What it has been able to achieve in the past is a testament to this bright prospect.