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AFRICAN COURT COALITION DISCUSSIONS: STATES WITHDRAWALS FROM ARTICLE 34(6) OF THE AFRICAN COURT PROTOCOL



A Publication of the Coalition for an Effective African Court on Human and Peoples' Rights

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About the Coalition for an Effective African Court on Human and Peoples' Rights

The Coalition for an Effective African Court on Human and Peoples' Rights (the African Court Coalition) is a non-governmental organisation (NGO) that was formed during the first conference for the promotion of the Protocol to the African Charter on Human and Peoples' Rights establishing the African Court on Human and Peoples' Rights in Niamey, Niger in May 2003. The key purpose for its establishment is to advocate for an effective and independent African Court on Human and Peoples' Rights (the African Court).

Our mission is to ensure that the African Court is effective and accessible through capacity building trainings, education, information documentation and dissemination, research, advocacy, lobbying and networking. The African Court Coalition is a membership based organisation made up with Non-Governmental Organisations (NGOs), human rights institutions, legal and non-legal practitioners and individual members.

About the Discussion Topic

This publication contains comments from members and partners of the African Court Coalition with regards to withdrawals by member states from Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' rights (The African Court Protocol).

For individuals and NGOs with observer status before the African Commission on Human and Peoples' Rights to file cases directly before the African Court, member states must first deposit the required Declaration under Article 34(6) of the African Court Protocol to allow such access. In the span of four years (2016-2020), four member states (Rwanda, Tanzania, Benin and Cote d'Ivoire) have withdrawn from that particular Declaration which in essence limits direct access for individuals and relevant NGOs to file cases before the African Court. Currently there are only 6 member states that have deposited the Declaration under Article 34(6) of the African Court Protocol, these are; Burkina Faso, Ghana, Mali, Malawi, The Gambia and Tunisia. Following such series of member states withdrawals, the African Court Coalition members and partners express their views on the circumstance.

Some comments herein are comments that have been published in other sources but they have been included in this publication with the permission from the authors who are members and/or partners of the African Court Coalition.

COMMENTS FROM MEMBERS AND PARTNERS

The Centre for Human Rights, University of Pretoria

The Centre for Human Rights would like to reiterate that disagreements with decisions of the Courts are expected in any system that values divergent views but such disagreements should not warrant withdrawal by states, given that a withdrawal does not in itself absolve the state party of its obligation to comply with the decisions of the Court. The Centre for Human Rights further reiterates that while it is the sole prerogative of states to make the declaration allowing direct access to individuals and NGOs, states should always keep in mind the primary motivation for making the declaration, which is to ensure access to remedy at the regional level for human rights violations when local remedies prove unavailable, insufficient, or ineffective. While there still remain avenues to seek remedy from the African Court through the African Commission, the practice has shown that this route is extremely underutilised leaving access to remedy from the African Court almost impossible without the article 34(6)-declaration. States should, therefore, be very cautious about exercising the option of withdrawing their article 34(6)-declarations, as such an action diminishes the established right to access justice of its nationals.

The African Court is the central institution in creating an effective regional accountability mechanism that plays a part in providing 'African solutions to African problems'. This observed trend of withdrawals contributes to the polarization of states and a further restriction of access to remedy, an outcome that must be avoided at all cost.

Centre for Human Rights' call: The Centre for Human Rights, therefore, urges the governments of Benin and Côte d'Ivoire to reconsider their decisions to withdraw the article 34(6)-declaration. We also urge the African Union and other stakeholders to use all diplomatic and other means to engage these governments to reverse these decisions. In so far as the decision to withdraw these declarations is based on orders for provisional measures, the withdrawing states are urged to take into account that these orders have no bearing on the eventual finding on the merits of the case.

Should these states notwithstanding maintain their withdrawals, we urge that they fully cooperate with the Court on all pending cases and comply with decisions that emanate from those and previous cases.

We further urge state parties to the Court Protocol that have not yet made an article 34(6)-declaration, to do so. According to Frans Viljoen, Director of the Centre for Human Rights: "We, in particular, urge South Africa, during this year of its AU Presidency, to take a lead in stemming the tide that risk undermining the effectiveness of the African Court as a landmark of justice and human rights, accountability and the rule of law on our continent. Now is the time for South Africa to take old actions to bolster this crucial AU institution."

Full Press statement of the Centre for Human Rights, University of Pretoria available at: <https://www.chr.up.ac.za/press-statements/2073-centre-for-human-rights-expresses-concern-about-the-withdrawal-of-direct-individual-access-to-the-african-court-by-benin-and-cote-d-ivoire>

I think it is crucial to understand the detailed rationale behind these withdrawals. An honest, without judgment, conversation with state representatives to appreciate their reasons would be a first step to assist in identifying ways of moving forward. This may be something that the African Court Coalition, with partners could facilitate.

Dr. Tarisai Mutangi, Consulting Researcher, Harare, Zimbabwe

We should focus first on analysing the reasons for the withdrawals. My understanding of reasons is that they are centered on perceived undergonism between application of national and international laws. The African Court's decisions are regarded as inconvenient to national political interests. Accusations of violation of state sovereignty are not correct. To the extent that the Court's jurisdiction touches on sovereignty of states, that should be accepted by state parties. That is what they intended when they adopted the instruments.

- Stakeholders should continue doing what they have been doing in terms of popularizing the work of the Court. More importantly, the African Court Coalition (ACC) and other stakeholders should continue to build the capacity of state parties to understand how regional commitments affect exercise of sovereignty. Once they join regional bodies, scrutiny will definitely touch on sovereignty.
- The African Court should continue to deliver its mandate impartially as it has always been doing. It should also intensify engagement with national authorities, including those of withdrawn states to explain the dynamics and implications of its jurisprudence on sovereignty, but without being apologetic to its mandate.

There is not much to learn from other jurisdictions in terms of stopping withdrawals. The Inter-American system has similar experiences during the scourge of coup de tats in that region. It only managed to insist on withdrawal taking effectiveness within a year of notification; and that all judgments against a withdrawing state party should still be implemented in accordance with the order of the court. All pending cases against such states will be dealt with by the African Court before it relinquishes its jurisdiction over the state party.

Peter Wendoh, Project Advisor, Konrad Adenauer Stiftung, Nairobi Kenya

It is worrying that all the four (4) countries that have so far withdrawn from Article 34(6) have made the move on the back of what has been perceived by authorities in those countries as 'unfavourable rulings' by the Court. The low number of States that have deposited the Declaration, coupled with the recent flash withdrawals, is a clear manifestation of the unwillingness by States to recognize the authorities of regional human rights systems and unwillingness to abide to human rights commitments on the continent.

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This trend when analysed in the context of the controversial immunity clause, Article 46A bis of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), gives credence to the reservations advanced by critics of this clause who have all along perceived it to be an ideal shield ab initio, for those in power from being held accountable. The Article states that: “No charges shall be commenced or continued before the court against any serving AU Head of state or Government, or anybody acting or entitled to act in such a capacity, or other senior state officials based on their functions, during their tenure in office”. In essence, this clause precludes senior state officials from being tried by the African Court for serious crimes committed in violation of international law. This begs the question, for whom is the (proposed) Criminal Division of the African Court being established?

Under the prevailing circumstances, it thus makes no sense to push for the creation of the Criminal Division of the Court with the jurisdiction to handle serious international crimes when it is apparent that the State authorities on the continent are not willing to promote, recognise and respect the regional human rights system that does not advance their partisan interests and selfish wishes.

Ezéchiél Amani Cirimwami, Country Director & Co-founder, Initiatives for Peace and Human Rights (iPeace), Democratic Republic of Congo

In the effort to discharge its mandate to protect human rights on the Continent, the Court relies on cases being submitted to it. As only a handful of states grant individual and NGO direct access, there has never been an inter-state complaint, and the African Commission has referred just 3 cases for a decision, the Court's caseload has historically been small. A substantial number of the cases it has decided and which are pending before it are individual complaints against Tanzania, and whilst there have been only 4 finalised cases concerning Cote d'Ivoire, a number of pending decisions concern complaints against it. The withdrawal of declarations, particularly by countries from which many cases originate like Tanzania and Côte d'Ivoire, will mean that the Court's caseload is likely to be significantly reduced going forwards. This is a deeply concerning development, as without a sufficient number of cases to adjudicate the Court's authority, legitimacy and continuing ability to operate could be seriously endangered.

The Guillaume Soro affair (Cote d'Ivoire) illustrates the insoluble dilemma the Court finds itself in. It has been given a mandate to promote and protect human rights on the Continent; however, in its efforts to discharge this mandate, it faces perpetual backlash from states whose special declarations it depends on to operate. It is to the Court's credit that it has thus far not chosen to mollify or appease states through its rulings despite the ever more likely consequences. Instead, as the Court's granting of interim measures in the Soro case demonstrates, it has proven itself willing to wade into fraught power struggles to protect fundamental rights.

Going forward, in addition to the Court's own efforts, it will be the job of Continental and regional organisations like the AU and ECOWAS to encourage and impel states to uphold their human right commitments. Unlike the Court, these institutions can exercise a range of measures if states fail in this regard, from diplomatic pressure to sanctions. It will also be the job of the African Commission, which possess powers to refer cases to the Court, to be much more proactive in its referrals and perhaps more transparent about when it will refer a case to the Court. This will assist those from states which have either not deposited, or withdrawn, their declarations to nevertheless foresee when their cases might be transferred to the Court for a binding determination.
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Individuals should also consider having recourse to different sub-regional courts, like the ECOWAS Court, which has a strong record of protecting human rights.

Full article by Ezéchiel Amani Cirimwami which is co-authored by Tetevi Davi for EJIL:TALK! available at: <https://www.ejiltalk.org/another-one-bites-the-dust-cote-divoire-to-end-individual-and-ngo-access-to-the-african-court/>

Advocate Yare Fall, President, Lawyers without Borders - Senegal

For all those who, like us, have fought hard for so many years to advance the rule of law on our continent, these two successive events (Benin and Cote d'Ivoire withdrawals from Article 34(6) of the African Court Protocol) have naturally led to a deep sense of dismay. It is absolutely essential to react and act quickly, because and as a result of the globalization that is taking place before our eyes, the stability of the legal framework in which we are in any case condemned to live is at stake.

As we know, international justice is entirely based on the necessary and difficult balance that must be struck between the inviolable sovereignty of states and the necessary independence of those responsible for rendering justice. For this reason, we believe, in our humble opinion, that the work to be envisaged immediately will consist more in convincing decision makers that, on the one hand, accepting to submit to the law ipso facto entails abandoning a part of one's sovereignty.

As it was said by Lessia Oukrainka, "Rights without obligations is anarchy". On the other hand, however, it is also imperative to reassure everyone, by doing as much as possible, that this sacrifice must be underpinned by an independent and strong judiciary, not only for its status, but also and above all for its legitimacy, because it is credible by the depth and density of its science.

Advocate Henri Wembolua Otshudi, President of the Alliance for the Universality of Fundamental Rights (AUDF) NGO, Democratic Republic of Congo

A number of years after the African Court Protocol came into force, questions are still raised on whether African heads of states and governments are genuinely willing to accept the jurisdiction of the African Court. It should be noted that most member states have not yet allowed direct access for their citizens to refer cases to the African Court in order to have their rights guaranteed by the Banjul Charter and other duly ratified and recognized international instruments. With the latest withdrawals of Declarations that allow direct access for individuals and NGOs, the future of the African Court looks bleak.

Limitation of access before African regional and sub-regional mechanisms as well as the threat of withdrawal of African states from the International Criminal Court can be interpreted as the denial of human rights and lack of respect for African people.

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The African Court Coalition should take initiatives to lead awareness-raising campaigns among intellectuals, the general population, African leaders and the international community. The Agenda 2064 for Africa, the Sustainable Development Goals and all major projects in Africa must integrate the aspect of respect for human rights through regional mechanisms.

Donald Deya, CEO, Pan African Lawyers Union (PALU), Arusha, Tanzania

While what has happened (FOUR Article 34(6) renunciations in 4 years) is regrettable, the said States have NOT withdrawn from the Court. They have merely reduced the ability of their citizens and CSOs to sue them DIRECTLY (which, of course, is very sad, BUT is not the end of the world). The said States are still bound by the Court.

The Inter-American Human Rights System does NOT have direct access at all. The only way the Court gets cases is referrals from the Commission. They have learnt to be quite efficient in that context (including the use of law firms on a pro bono basis). We could learn to do the same. A change of guard at the Secretariat of the African Commission on Human and Peoples' Rights (Banjul) might just provide the fresh impetus to revisit the impasse between the Court and the Commission and make them recommit to serving the African people with as much humility, efficiency and efficacy as they can muster.

It is Member States, at national level, that exercise their sovereign right to ratify, accede, renounce or repudiate international treaties. In principle, if not in reality, they are accountable to their citizens, and therefore citizens (using Parliament, Courts, the streets, the social media 'streets', etc) can hold governments to account, including 'reversing a reversal.' Let's see how to engage at the national level including forcing our political parties to have a Chapter (or more) in their respective Manifestos on their approach and policies on regional integration and continental unity.

Protecting the current and future permutations of the African Court has predominantly been left to civil and political (human) rights activists, and, in the last decade, to international criminal justice/transitional justice activists. In my conversations with colleagues from economic justice advocacy (those confronting corruption and illicit financial flows), there is a palpable interest in at least the future of the African Court with an international criminal jurisdiction (which has the crimes of corruption, money laundering, illicit exploitation of natural resources, the 3 trafficking crimes etc, and which has provisions for corporate criminal liability, in addition to individual criminal accountability). We can really expand the constituency in support of the African Human Rights System beyond 'the usual suspects' who quickly come to mind. Let's open our minds to that.

Remember that, in our most difficult period in the relations between Africa and the International Criminal Court (ICC), while some African States were threatening to pull out of the ICC, some other African States were joining the ICC at the same time as others were threatening to leave! Africa (like the rest of the world) is not monolithic! So, in terms of where to direct our energies, we can still be recruiting new Article 34(6) States, even as others pull out, or attempt or threaten to.



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