

# THE OPTIONAL JURISDICTION OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS: TOWARD ENHANCED HUMAN RIGHTS PROTECTION



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## Abstract:

Human rights in Africa are increasingly benefiting from enhanced protection through the establishment of monitoring mechanisms set to ensure the effective implementation of the provisions of the African Charter on Human and Peoples' Rights. These mechanisms are primarily embodied in the African Commission and the African Court on Human and Peoples' Rights. Endowed with a distinctive optional jurisdiction, the Court allows individuals and non-governmental organizations with observer status before the African Commission to bring cases directly before it. Despite the obstacles and challenges that the Court continues to face in conducting its monitoring functions, it however represents an authentic achievement for the African continent in the field of human rights supervision that requires enhanced support and reinforcement.

**Key Words:** African Court, optional jurisdiction, monitoring, judicial oversight.

## الشرط الاختياري للمحكمة الإفريقية لحقوق الإنسان والشعوب:

### نحو تعزيز حماية حقوق الإنسان

**ملخص:** أصبحت حقوق الإنسان في القارة الإفريقية تحظى بحماية أوسع من خلال وضع آليات الرقابة على تطبيق ما جاء في الميثاق الإفريقي لحقوق الإنسان والشعوب. وهي آليات تتمثل أساسا في اللجنة والمحكمة الإفريقيتين لحقوق الإنسان والشعوب التي تتمتع باختصاص اختياري خاص، مع حق اللجوء أمامها لكل من الأفراد والمنظمات غير الحكومية التي تتمتع بصفة مراقب أمام اللجنة الإفريقية لحقوق الإنسان والشعوب. رغم العراقيل والصعوبات التي تواجهها المحكمة في أداء وظيفتها الرقابية إلا أنها تبقى مكسبا للقارة الإفريقية في مجال الرقابة على حقوق الإنسان، يحتاج إلى مزيد من الدعم.

**الكلمات المفتاحية:** المحكمة الإفريقية، اختصاص اختياري، الرقابة، رقابة قضائية.

## Introduction

Africa has followed the path taken by other continents of the world regarding the issue of human rights, by adopting the *African Charter on Human and Peoples' Rights*, approved by the Member States of the Organization of African Unity on June 28, 1981. In order to avoid imposing additional burdens on African States long affected by colonialism, the Charter refrained from establishing specific protections for certain vulnerable groups such as women and children, while it remains distinctive among regional human rights instruments in that it emphasizes not only rights but also the duties of individuals within their communities.

The Charter also provided for instruments responsible for implementing its provisions, notably the *African Commission on Human and Peoples' Rights*, by adopting on June 10, 1998, a project to establish a judicial oversight body, namely the *African Court on Human and Peoples' Rights*, to enter into force in 2004. This development brings the African human rights model into alignment with other international and regional agreements on the subject, that have taken important steps in establishing judicial oversight mechanisms considered as essential for the protection of human rights, given their impact on the enforcement of rights. Particular reference may be made to the European model, which has granted individuals the right to bring cases before the *European Court of Human Rights* to claim the rights set forth in the Convention and its protocols, without the condition of acceptance from the States Parties concerned.

The African Union is working to support human rights and peoples' rights oversight instruments on the African continent, while also working to expand the list of persons authorised to appeal to the African Court on Human and Peoples' Rights. Among these are individuals and non-governmental organizations (NGOs) with observer status before the *African Commission on Human and Peoples' Rights*.

Accordingly, this paper seeks to examine the different modalities through which individuals and NGOs may access the African Court on Human and Peoples' Rights.

To address this central question, the paper is divided into two main sections:

The first focuses on the Court's jurisdiction allowing access to persons other than States—namely individuals and NGOs with observer status before the Commission—who may bring cases indirectly through the African Commission under certain conditions (Section I).

The second section examines Africa's ongoing efforts to align with other regional human rights systems by granting individuals and NGOs the right of direct access to the African Court on Human and Peoples' Rights (Section II).

## THE FIRST TOPIC: INDIRECT ACCESS TO THE AFRICAN COURT BY NON-STATE ACTORS

The African Charter on Human and Peoples' Rights stands apart from other regional human rights models in its focus on the individual within the framework of the community. According to the provisions of the Charter, the individual does not exist in isolation but as part of a collective<sup>1</sup> — in contrast to the European Convention on Human Rights, which centers on the individual and has progressively strengthened his rights through additional protocols to the 1950 Convention. Among these, Protocol 11, which unified the European Commission and Court into a single body, the European Court of Human Rights, stipulating that individuals have the right to bring an application before the Court without the consent of the State Party. This illustrates the advanced stage of development of the European human rights model, which began to take shape in 1950. In contrast, the African continent embarked on this path only in 1981, with the adoption of the African Charter on Human and Peoples' Rights.

The Charter links rights and duties by stipulating this in its preamble, which emphasises the continuation of efforts to achieve the complete liberation of Africa and its true independence, and establishing bodies responsible for monitoring the implementation of the Charter, namely the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, which was established by a protocol annexed to the Charter in 1998. The Court allows non-state actors to access it indirectly, through the Commission (1), under two specific circumstances (2).

### **First requirement: Access to the Court through the African Commission on Human and Peoples' Rights**

Individuals and non-governmental organizations may submit petitions to the African Commission, as inferred from the wording “other communications” used in Article 55 of the African Charter. This deliberately broad formulation has been further interpreted in Rule 93(1) of the Commission's Rules of Procedure, which expressly mentions both natural and legal persons<sup>2</sup>.

<sup>1</sup> Mentri, M. (1989). *The African Charter on Human and Peoples' Rights: A Universalist or regionalist vision in the protection of human rights?* *Revue Algérienne des Relations Internationales*, (16), 31. Office des Publications Universitaires, Algiers.

<sup>2</sup> Full text of the Charter and internal regulations available via the website: <http://www.au.int/fr>.

The admissibility of such individual petitions is subject to the seven requirements stipulated in Article 56 of the Charter:

- The communication must bear the author's name;
- Its content must concern rights enshrined in the Charter;
- All available domestic remedies must have been exhausted;
- It must not employ offensive or disrespectful language;
- It cannot rely exclusively on information published in the mass media;
- It must not concern a matter already resolved in accordance with the principles of the United Nations or the African Charter;
- It must be filed within a reasonable period following the exhaustion of local remedies.

With regard to applications before the African Court on Human and Peoples' Rights, the Protocol establishing the Court introduces a dual mechanism:

- Under the general rule, the right of referral belongs to States and to the African Commission, under specific procedural conditions. This is known as the Optional access.
- The exception allows bringing the case directly by individuals and non-governmental organisations recognised as observers before the committee. This is subject to an optional condition imposed on states, which is to ratify the protocol establishing the court and declare the acceptance of jurisdiction issued by the state concerned to act in this regard.<sup>3</sup>

### **Second requirement: Circumstances in Which the Commission May Seize the Court on Behalf of Individuals or NGOs**

Individuals and NGOs enjoying observer status before the Commission may access the Court even if the respondent State has not issued the declaration referred to in Article 34(6) of the Protocol, provided that the State has ratified the Protocol establishing the Court. This can occur in two situations:

- When a communication has been submitted to the Commission by individuals or NGOs, and the content reveals serious or massive violations of human rights committed by a State Party to the Protocol, the Commission may refer the matter to the Court.
- When a complaint has been lodged with the Commission by an individual or NGO with observer status and the respondent State fails to comply with the

<sup>3</sup> Menkour, K. (2010, January 3). *The African Court on Human and Peoples' Rights: A real step toward the effectiveness of human rights protection... or a mere structural reform?* *Revue de Droit*, 1(1), 110–111. Relizane University, Algeria.

Commission's decision, the latter may then submit the matter to the Court against that State Party, provided it has ratified the Protocol<sup>4</sup>.

There fore, the only way for individuals to have direct access to the African Court is for the respondent Member State to make the necessary declaration under Article 34(6) of the Court Protocol. This declaration is at the discretion of the State, which may withdraw it, as there is no obligation to maintain it<sup>5</sup>. Consequently, individuals' access to the Court is extremely limited, as Article 34(6) of the Court's Protocol hinders the African human rights system.

This indirect mechanism, while essential, remains insufficient to ensure full access to justice, which explains Africa's progressive move toward direct access instruments.

## **THE SECOND TOPIC: DIRECT ACCESS TO THE AFRICAN COURT: ALIGNING THE AFRICAN SYSTEM WITH COMPARATIVE HUMAN RIGHTS MODELS**

The African Union countries have sought to keep pace with other regional human rights systems, mainly by promoting oversight processes. Whereas the Commission was previously the sole mechanism for monitoring the implementation of the provisions of the Charter, which is a political monitoring body, it has become necessary to seek to give greater substance to the provisions of the Charter by establishing a judicial mechanism alongside the Commission, similar to other regional models, notably the American and European human rights models. This court was vested with jurisdiction to entertain complaints from individuals and NGOs under certain conditions.

### **First requirement: The Court's Competence to Receive Complaints from Non-State Actors**

In accordance with Article 5(1) of the Protocol to the African Charter, the right to institute proceedings before the African Court is granted both to the African Commission and any State Party to the Protocol. Paragraph 3 of this provision broadens the scope by allowing individuals and NGOs that enjoy observer status

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<sup>4</sup> Berabah, S. (2021). *The optional jurisdiction of the African Court on Human and Peoples' Rights*. *Revue Sawt Al-Qanoun (Voice of Law)*, 7(3), 386-387. Khemis Miliana University, Algeria.

<sup>5</sup> Bidouzo, T. S. (2023). The withdrawal of the optional declaration recognizing the jurisdiction of the African Court on Human and Peoples' Rights: The case of Benin. *Revue des Droits et Libertés Fondamentaux*, No. 29. Available at: <http://www.revuedlf.com/droit-international/>

before the Commission to submit cases, provided that the concerned State has previously deposited a declaration recognizing the Court's competence. Such a declaration is an essential procedural condition, supplementing the admissibility standards outlined in Article 6 of the Protocol and Article 56 of the African Charter.

The drafting process of the Protocol, particularly during the Nouakchott negotiations, gave rise to considerable controversy regarding the role of non-governmental organizations. Certain State representatives contended that NGOs could display partiality or encroach upon domestic sovereignty, whereas other participants emphasized their indispensable function in supporting the Commission's efforts to uphold its human rights protection mandate<sup>6</sup>.

The Court was conceived as a complementary organ to the Commission's functions. When it comes to communications submitted by individuals, the Court does not directly rule on them. Rather, such communications must first be examined by the Commission, which then issues a decision or prepares a report. The Court may only be seized after a three-month period has elapsed following the Commission's decision<sup>7</sup>.

Under Article 3 of the Protocol, the competence of the African Court covers all disputes involving the interpretation or implementation of the African Charter, the Protocol itself, as well as any other human rights treaties endorsed by Member States. Such an inclusive formulation mirrors the Inter-American system, while differing from the European framework, which restricts the authority of its Court strictly to matters arising under the Convention and its supplementary instruments<sup>8</sup>.

### **Second requirement: Some Obstacles to Judicial Protection for Non-State Actors within the African Human Rights System**

African States have long acknowledged the systemic barriers that prevent individuals from effectively bringing their cases before the African Court—ranging from the considerable costs of proceedings, travel and visa expenses, to the financial burdens that persist during and after litigation. These difficulties are further exacerbated by the general lack of legal literacy, particularly among economically disadvantaged and marginalized populations.

<sup>6</sup> Boukrif, H. (1998). *The African Court on Human and Peoples' Rights: A judicial body serving human rights and peoples in Africa*. *Revue Africaine de Droit International et Comparé*, 10(1), 74. London: Société Africaine de Droit International et Comparé.

<sup>7</sup> Menkour, K. (2010). *Ibid.*, p. 111.

<sup>8</sup> Farsi, Dj. (2016). *The status of the individual in international law* (Doctoral dissertation). Faculty of Law and Political Sciences, Mouloud Mammeri University, Tizi Ouzou, Algeria, p. 94.

To mitigate such obstacles, Article 9 of the Protocol establishing the Court introduced the principle of free legal assistance for applicants. This provision, inspired by the practice of the European Court of Human Rights, reflects a growing recognition that access to justice requires not only judicial structures but also the material means to approach them. Similar guarantees are codified in Articles 91 to 96 of the Rules of Court of the European Court of Human Rights, which served as a model for the African framework<sup>9</sup>.

On 15 December 2009, the African Court rendered its first judgment in a case brought by a Chadian citizen against the Republic of Senegal. The Court declared itself lacking jurisdiction to consider the matter, as the respondent State had not made the declaration required under Article 34(6) of the Protocol accepting the Court's jurisdiction over individual petitions.

The Court's judgments are final and binding, yet their enforcement ultimately depends on the will of the concerned State. The Protocol does not establish any enforcement body to ensure compliance with the Court's decisions. In practice, many African States have shown a preference for conciliatory rather than judicial solutions, emphasizing state sovereignty and non-interference in domestic affairs<sup>10</sup>. Regional human rights instruments have generally allowed States a margin of discretion in determining how to fulfill their obligations, depending on circumstances. Consequently, the implementation of the Court's rulings remains largely contingent upon States' political commitment<sup>11</sup>, even though the transmission of judgments to the African Union may exert a form of diplomatic pressure. It is noteworthy that, during the Sharm El-Sheikh Summit in Egypt, the African Union proposed the merger of the African Court on Human and Peoples' Rights with the African Court of Justice through the Protocol on the Statute of the African Court of Justice and Human Rights (2008) — thereby creating a unified institution known as the African Court of Justice and Human Rights, which has not yet entered into force due to the lack of a quorum of ratifications by states. What distinguishes it is its broad jurisdiction,

<sup>9</sup> Masmoudi, M. B. (2010, March 17). *The African Court on Human and Peoples' Rights: Ambitions and limitations*. *Al-Moufakir Journal*, 5(1), p. 50. Faculty of Law and Political Science, Biskra University, Algeria.

<sup>10</sup> As of December 2021, the Court has been authorized to receive complaints from individuals and NGOs against eight African States out of the 32 States Parties to the Protocol: Burkina Faso, Ghana, Guinea-Bissau, The Gambia, Mali, Malawi, Niger, and Tunisia. Four States have meanwhile withdrawn their acceptance of the Court's jurisdiction regarding individual complaints. See Mervat Abdel Rahman, "The Jurisdiction of the African Court on Human and Peoples' Rights: Between Theory and Practice," *Journal of African and Nile Basin Research and Studies*, Aswan University, Egypt, vol. 1, no. 1, July 2022, p. 18.

<sup>11</sup> Boulkameh, Y., & Boughazi, M. (2014). *The issue of implementing judgments of regional human rights courts: The case of the African Court on Human and Peoples' Rights*. *Journal of Human Sciences*, 42(A), 540–551. Retrieved from <http://Imhkm-Ifriky-ihkok>

combining the jurisdiction of the International Criminal Court to consider international crimes with that of the International Court of Justice, which is primarily to resolve disputes between states in accordance with the rules of international responsibility<sup>12</sup>.

## Conclusion:

The pursuit of establishing a judicial mechanism for the protection of human and peoples' rights has now materialized within the African legal system, even though the introduction of such a mechanism into the African system has faced — and continues to face — numerous challenges and shortcomings. The provisions contained in the Protocol establishing the African Court regarding the enforcement of its judgments remain insufficient, as no institutional framework compels states to comply with the Court's decisions. Indeed, going even further, and on the basis of the principle of sovereignty, a State that has issued a declaration accepting the jurisdiction of the Court to receive complaints from non-State actors may withdraw it at any time. This constitutes a shortcoming in the mechanisms for monitoring the protection of human rights in the African system.

There fore, several proposals have been advanced to strengthen this aspect, including enhancing cooperation between the Court and the African Commission in the field of monitoring and protecting human and peoples' rights, as well as encouraging a greater number of states to ratify the Protocol establishing the Court — as the current rate of ratification remains relatively low compared to other regional systems. For instance, within the European model of human rights protection, membership in the Council of Europe is contingent upon respect and adherence to the European Convention on Human Rights, a requirement that does not exist within the African Union framework.

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<sup>12</sup> Bentegri, Moussa. *African Court of Justice and Human Rights: The Necessity of Existence and the Limits of Practice*. Dirassat & Abhath: *The Arabic Journal of Human and Social Sciences*, vol. 12, no. 3, July 2020, p. 522.

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