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Jurisprudential Analysis of the African Court on Human and Peoples Rights: From 2004 to 2010

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Jurisprudential Analysis of the African Court on Human and Peoples’ Rights: From 2004 to 2010

By Lucky Mgimba¹ and Stephen J. Waters²

1. INTRODUCTION

In an African context, the Charter of the Organisation for African Unity (O.A.U Charter) is the first regional instrument to deal with the protection of human rights in the continent. However, it contains little reference to the concepts of human rights,³ and is vague regarding the modalities for the protection of human rights, as well as with regards to measures for promoting the welfare and well being of Africans.⁴ The O.A.U Charter, more pre-occupied with decolonization and the principle of non-interference in the internal affairs of states, failed to provide African peoples the human rights protection they so desperately needed.⁵

Due to increased domestic and international pressure⁶, in 1981, African leaders met in Banjul, The Gambia, a meeting which later led

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³ The preamble to the O.A.U Charter mentions the Universal Declaration of Human Rights as containing the principles to which states parties reaffirm their adherence, in addition, the purposes assigned to the O.A.U members contain an explicit reference to human rights, other articles stating as such include article 11(1) (b) and (e). see further MANGU A. N., ‘The Changing Human Rights Landscape in Africa: Organization of African Unity, African Union, New partnership for Africa’s Development and the African Court’, Netherlands Quarterly of Human Rights, 2005, pp. 379 - 381
⁴ Loc. Cit.
⁵ See Preamble of the O.A.U Charter
to the adoption of the African Charter on Human and Peoples’ Rights; the most prominent continental human rights instrument (also known as ‘the Banjul Charter’). The Charter came into existence with its independent Commission, known as the ‘African Commission on Human and Peoples Rights’ (herein referred as ‘the Commission’), with the Commission viewed as the principal body for promoting and protecting human rights on the continent. The African Commission is vested with three primary functions: to promote, to protect, and to interpret the provisions of the Banjul Charter.7

However, despite its seemingly broad mandate and powers, the Commission suffered from many structural infirmities. Indeed, while purportedly created to ‘protect’ human rights in the region, the Commission is without enforcement power and remedial authority;8 and further, is handicapped by confidentiality clauses that restrict public access to, and awareness of, the Commission’s work.9 Lack of resources and sustainability, leading to loss of independence, limits the Commission’s ability to function as an effective human rights institution.10

In light of all these facts, the idea of establishing an African court came as a new hope to the African human rights system, a system which previously did not have a mechanism for enforcement of compliance on matters of human rights obligations. The Court came to life with the presumption of being a competent judicial body to address the many human rights instruments existing in Africa without identified judicial mechanisms.11

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9 Article 59 of the ‘Banjul Charter’
As GIORGETTI Chiara\(^{12}\) notes, international courts and tribunals such as the African Court on Human and Peoples Rights (AfCHPR) play an essential role in understanding the developments of international human rights law, especially considering that their primary duty is to adjudicate on matters specifically addressing the interpretation and applicability of human rights instruments, and further, for their role in developing international human rights law in a more general sense. Similarly, the then newly established African Court represented a viable hope for the furtherance of the human rights regime and jurisprudence in Africa;\(^{13}\) jurisprudence that can thus be extracted from the time to time for the effective functioning of the Court. Taking into account the significant amount of human rights violations that have taken place within the continent, and in some cases are ongoing, an analysis of the jurisprudence specifically from the African human rights regime will benefit all.

The paper is divided into four sections: (1) the paper begins with this introduction, consisting of a synopsis of the history and structure of the African human rights system; (2) section two of the paper analyses the establishment of the African Court on Human and Peoples Rights, and other substantial matters regarding the court; (3) the third section provides a critical analysis of the jurisprudential developments from 2004 to 2010, guided by a case study on the Michelot Yogombaye case; (4) the fourth and final section of the paper concludes with a brief summary of the material covered and concluding remarks.

2. The Establishment of The African Court on Human and Peoples Rights

As LYONS Scott\(^{14}\) clarifies, the foundations of the African Court originate at various points in time, one being the Law of Lagos Conference\(^{15}\) on the Rule of Law which took place 3\(^{rd}\) – 7\(^{th}\) January,


\(^{13}\) GIORGETTI Chiara (eds.), *Op. Cit.*, p. 2


1961; at this time, the view of establishing such a court was considered to be part of the once proposed African Convention for Human Rights. The Convention never developed, and the idea of the Court was later dismissed as not being an “African way” to resolve disputes.\footnote{16}

Complex negotiations over how to address human rights abuses took place throughout the 1960s and 1970s, resulting in the creation of the African Charter on Human and Peoples’ Rights in, 1981 (Banjul Charter).\footnote{17} The ‘Banjul charter’ attempted to protect the rights and freedoms of the African population and reaffirm the dedication of the Organisation of African Unity towards this end, however, it strategically omitted the creation of a ‘court’, in order to achieve consensus regarding the human rights document. Instead, an African Commission\footnote{18} was created with diluted supervisory powers incapable of making binding decisions. Unfortunately, this only perpetuated the need for an effective African regional human rights protection and enforcement mechanism.\footnote{19}

From the 1990’s human rights scholars, activists, and victims alike pushed for the establishment of a judicial institution that would be effective in protecting human and peoples’ rights on the continent.\footnote{20} Eventually, in January 1994 experts under the auspices of the International Commission of Jurists prepared the first working draft of the Protocol to the African Charter on the Establishment of an African Court.\footnote{21} The draft was subsequently submitted to the inaugural

\footnote{16} Many African leaders showed a strong a preference for an arbitration mechanism. Other African scholars contented a need for a system that incorporates unique African culture and traditions. The basis of each argument is a rejection of an adversarial process of litigation. \textit{see further} NMEHIELLE Vincent O. O., ‘Towards an African Court on Human Rights: Structuring the Court’, 6 Annual survey of International & Comparative Law, San Francisco, pp. 1-28

\footnote{17} African Charter on Human and Peoples Rights (ACHPR) adopted in 1981, but did not enter into force until October 21, 1986

\footnote{18} ‘Banjul Charter’ in its Part II, Chapter I

\footnote{19} ORLU Nmehielle, Vincent O., ‘Towards an African Court of Human Rights: Structuring and the Court’, Annual Survey of International & Comparative Law, Vol. 6, Issue 1, Article 4, 2000, p. 26


\footnote{21} See Draft prepared by the experts assembled by the O.A.U General Secretariat in collaboration with the African Commission on Human and Peoples’ Rights and the International Commission of Jurists, 26\textsuperscript{th} December 1993 – 8\textsuperscript{th} January 1994
government experts’ meeting in September, 1995, in Cape Town South Africa where it was deliberated further, and eventually approved. The International Commission of Jurists was pivotal in the efforts to bring together judges, practicing lawyers, activists, and academics across the African continent to participate in deliberations on the African Court on Human and Peoples’ Rights.

Two years later, in April 1997, another meeting of experts was convened in Nouakchott, Mauritania. The meeting introduced the following amendments: an amicable settlement for the first time; increased number of ratifications required for the Protocol to come into force (from eleven to fifteen); seating the Court in a single chamber, as opposed to multiple chambers; authorizing the assembly of Heads of States and Government to intervene in the process of removing judges; and effectively limiting the access to the court to the commission and state parties to the protocol.

These efforts indeed resulted from the willingness by African states to submit to a regional judicial institution, namely the African Court on Human and Peoples’ Rights. Incidentally, these very same efforts are viewed as subtle by several analysts, reasoning that reports have shown that during the drafting process the issue of access to the African Court ignited the most debate of all the issues discussed.

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After a series of meetings the draft Protocol was adopted by the conference of O.A.U Ministers of Justice Attorneys General in December 1997. In June 1998, the Assembly of Heads of States and Governments unanimously adopted the Protocol establishing the Court in Ouagadougou, Burkina Faso, with the signatures of thirty out of fifty-two member States of the O.A.U, all obtained in one day. The Protocol established the sole basis for the court. However, it unfortunately took another six years to acquire the necessary fifteen African countries to ratify the Protocol to the African Charter and for it to enter into force, with the court constituted in 2004. Subsequent meetings were held to determine where to base the court, and further how to elect judges. It was later resolved that the Court would be based in Arusha, Tanzania, and judges for the Court were finally elected in January 2006, at the Eighth Ordinary Session of the Executive Council of the African Union.

The Court officially started its operations in Addis Ababa, Ethiopia in November 2006. However, in August 2007 it moved to its seat in Arusha, the United Republic of Tanzania, where the Government of the Republic had provided it with a temporary premise pending the construction of a permanent structure. Between 2006 and 2008, the court dealt principally with operational and administrative issues, including the development of the structure of the courts Registry, and preparation of its budget and the drafting of its interim Rules of procedure. In 2008, during the Courts Ninth Ordinary Session, judges of the Court provisionally adopted the Interim Rules of the Court pending consultation with the African Commission on Human and Peoples’ Rights.

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27The reason for African states reaching an agreement is stipulated under the preamble to the Protocol for the establishment of an African Court, which states that the member states were ‘firmly convinced that the attainment of the Objectives of the African Charter on Human and peoples requires the establishment of an African Court on Human and Peoples’ Rights to complement and reinforce the functions of the African Commission on Human and Peoples’ Rights.

28Initially it was decided that the court will utilise facilities developed for the International criminal Tribunal for Rwanda (ICTR), however the extension in time of existence of the ICTR, spear headed a formulation of a host agreement between the government of the United Republic of Tanzania and the African Union on the seat of the African Court on Human and Peoples’ Rights in Arusha, Tanzania.

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Peoples’ Rights. This Harmonization process was completed in April 2010, and in June 2012, the Court adopted its final Rules.\(^{30}\)

### 2.1. Signatures and Ratifications

On June 9\(^{\text{th}}\), 1998, the Protocol was left open for signature and ratification pursuant to Article 34 (3) of the Protocol, requiring fifteen instruments of ratification or accession to be deposited before the instrument could come into force, unlike the 11 instruments required in the former Cape Town draft.\(^{31}\) The Protocol thus came into force on the 25\(^{\text{th}}\) January 2004; a month after Comoros, the fifteenth state to deposit its instruments of ratification.\(^{32}\)

As of June 2010, only twenty one states had signed the Protocol; however as of March 2010, twenty five states had submitted their instruments of ratification. To date, only twenty six states have ratified the Protocol, which include the following: Algeria,\(^{33}\) Burkina Faso,\(^{34}\) Burundi,\(^{35}\) Cote d’Ivoire,\(^{36}\) Comoros,\(^{37}\) Congo,\(^{38}\) Gabon,\(^{39}\) Gambia,\(^{40}\) Ghana,\(^{41}\) Kenya,\(^{42}\) Libya,\(^{43}\) Lesotho,\(^{44}\) Mali,\(^{45}\) Malawi.\(^{46}\)

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\(^{30}\) Internal Rules created during a joint harmonization meeting in July 2009 in Arusha, October 2009 in Dakar and April 2010 in Arusha


\(^{32}\) Deposited instrument on 26/12/2003

\(^{33}\) Signed on 13/07/1999, Ratified on 22/04/2003, deposited instrument on 03/06/2003

\(^{34}\) Signed on 09/06/1998, Ratified on 31/12/1998 deposited instrument on 23/02/1999

\(^{35}\) Signed on 09/06/1998, Ratified on 02/04/2003, deposited instrument on 12/05/2003

\(^{36}\) Signed on 09/06/1998, Ratified on 07/01/2003, deposited instrument on 21/03/2003

\(^{37}\) Signed on 09/06/1998, Ratified on 23/12/2003, deposited instrument on 26/12/2003

\(^{38}\) Signed on 09/06/1998,Ratified on 10/08/2010, deposited instrument on 06/10/2010

\(^{39}\) Signed on 09/06/1998, Ratified on 14/08/2000, deposited instrument on 29/06/2004

\(^{40}\) Signed on 09/061998, Ratified on 30/06/1999, deposited instruments on 15/10/1999

\(^{41}\) Signed on 09/06/1998, Ratified on 25/08/2004, deposited instrument on 16/08/2005

\(^{42}\) Signed on 07/07/2003, ratified on 04/02/2004, deposited instrument on 18/02/2005

\(^{43}\) Signed on 09/06/1998, ratified on 19/11/2003, deposited instrument on 08/12/2003
Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, South Africa, Senegal, Tanzania, Togo, Tunisia, and Uganda.

2.2. Access to the Court and Declarations by states


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44 Signed on 29/10/1999, ratified on 28/10/2003, deposited instrument on 23/12/2003
45 Signed on 09/06/1998, ratified on 10/05/2000, deposited instrument on 10/06/2000
47 Signed on 23/05/2003, ratified on 17/07/2004, deposited instrument on 20/01/2004
48 Signed on 22/03/1999, ratified on 19/05/2005, deposited instrument on 14/12/2005
49 Signed on 09/061998, ratified on 03/03/2003, deposited instrument on 24/03/2003
50 Signed on 09/06/2004, ratified on 20/05/2004, deposited instrument on 09/06/2004
51 Signed on 09/06/1998, ratified on 17/05/2004, deposited instrument on 26/06/2004
52 Signed on 09/06/1998, ratified on 05/05/2003, deposited instruments on 06/05/2003
53 Signed on 09/06/1999, ratified on 03/07/2002, deposited instruments on 03/07/2002
55 Signed on 09/06/1998, ratified on 07/02/2006, deposited instruments on 10/02/2006
56 Signed on 09/06/1998, ratified on 23/06/2003, deposited instruments on 06/07/2003
57 Signed on 09/06/1998, ratified on 21/08/2007, deposited instruments on 05/10/2007
58 Signed on 01/02/2001, ratified on 16/02/2001, deposited instruments on 06/06/2001
59 Article 7 of the Protocol establishing the African Court on Human and Peoples’ Rights
60 Loc. Cit.
61 Article 30 of the Protocol establishing the AfCHPR
62 Article 5 of the Protocol establishing the court states as to who has access to the court
Additionally, the Protocol provides optional access to the Court, pursuant to Article 5(3), for Non-Governmental Organisation (NGOs) possessing observer status with the African Commission and individuals. Furthermore, Article 34 (6), in accordance with Article 5(3), provides that the court shall be competent in considering communications from individuals once the state party concerned has made a declaration accepting such competence. To date, of all the twenty six state parties to the Protocol, only five states have made the declaration allowing such direct access, namely Burkina Faso, Mali, Tanzania, Malawi, and Ghana.

As WUNDEH Robert Eno and HIGGINS Gillian point out, this is one of the main limitations of the African system in respect to the protection of human rights, even though the experience of the European Court has shown that evolution could be possible. The wording of article 34 (6), as noted by judge Ouguergouz in one of his

63 Article 5 (3) and 34 (6) of the Protocol establishing the Court
64 Declaration made on 5th February 2010
65 Declaration made on 9th February 2011
68 The solution adopted by the African system limits access to the court. However, one can note that it also reproduces the model of the European court at the time of its creation, when individual petitions had to go before the Commission before being brought to the attention of the Court if, and only if, the state concerned had made a prior declaration of acceptance. When the European Convention was adopted in 1950, the provision opening the way for individual’s petition constituted an innovation in international law, and several European countries were reluctant to accept the change. At the time of the Conventions entry into force in 1953, only 3 out of 10 countries to have ratified had made a declaration accepting individual petition. By 1960, this number had risen to 10 out of 15 countries bound by the convention. Thereafter, reluctant states became increasingly marginalized, as new members of the council of Europe rapidly accepted all commitments of the convention. Faced with this reversed trend, the Council of Europe rapidly accepted all the commitments of the Convention. Faced with this reversed trend, the council of Europe finally adopted Protocol no. 11, which entered into force in November 1998 allowing individual petition. See further MILLER Vaughne, ‘Protocol 11 and the New European Court of Human Rights’, House of Commons Library, Research Paper 98/109, 4th December 1998, p. 12.
separate opinions, \(^{69}\) raises a question as to its correct interpretation as the word ‘shall’ in the first sentence, may suggest that the filing of a declaration by the state party is an ‘obligation’ and not merely ‘facultative’. By interpreting it in this fashion, article 34 (6) makes it mandatory for state parties to lodge such a declaration after depositing their instruments of ratification. It is noteworthy however that the Protocol does not set any guidelines or time limit for the declaration. Upon reflection, this interpretation does not withstand scrutiny when read in the context of Article 5 (3) and the second sentence of Article 34 (6), which provides that ‘The Court shall not receive any petition under article 5 (3) involving a state party which has not made such a declaration’. The filing of the declaration is clearly optional. If state parties to the Protocol do not make the Article 34 (6) declaration, the activity of the court will be largely be limited as it currently is.

However, unlike other regional courts such as the European Court of Human Rights and the Inter-American Court of Human Rights, individuals and NGOs do not have to demonstrate that they are direct victims of human rights violations. \(^{70}\) Once a state has made an Article 34 (6) declaration, any individual or NGOs with observer status, may refer a case to the court in order to challenge human rights violations perpetrated by that state. The ability of the Court to receive individual communication is therefore fundamental in ensuring that the institution is able to play a credible role in the fight against impunity and the protection of human rights on the continent. \(^{71}\)

Writers \(^{72}\) have further suggested that the limitations imposed by Article 34 (6) could be interpreted as an effective and necessary method of controlling floodgates. However, if that were the true reasoning behind its incorporation, it has indeed never been necessary. Alternatively, the requirement of an article 34 (6) declaration can be

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\(^{69}\) Separate opinion by Judge Fatsah Ouguergouz, in decision 001 – 2008 of the African Court on Human and Peoples’ Rights, Michelot Yogogombaye Versus The Republic of Senegal

\(^{70}\) Article 35 of the European Convention of Human Rights, however, article 47 of the same convention provides conditions for individuals petitions before the American Commission of Human Rights

\(^{71}\) List of states who have made declaration under article 34 (6) of the Protocol Op. Cit.

interpreted as a violation of an individual’s right to justice and a contravention of the purpose of the Court, namely the protection of individuals and groups of individuals from human rights abuses by states.

Seemingly, although the AfCHPR has been established to complement the protective mandate of the African Commission, the paradox is that individuals and NGOs, the primary intended users of the protective function, are not automatically entitled to petition before the Court.

2.3. Relations with other Entities

**Court’s Relation with the African Commission**

Pursuant to Article 2 of the Protocol establishing the court, the court is established to complement the protective mandate of the Commission. However, Rule 29 of the Rules of the African Court on Human and Peoples’ Rights and the Protocol establishing the Court, provides for the guiding provisions in regard to the relationship between these two organs. These rules set out the basic interactive framework between the commission and the court, including provisions on: (a) Complementarities\(^\text{73}\) (b) Consultations between the Commission, the Court, and their respective Bureaus\(^\text{74}\) (c) consultations on any amendment of any issue, or procedure governing the relations between the two institutions\(^\text{75}\) (d) Requirements in situation where a case is submitted by the Commission under Article 5(1)(a) of the Protocol\(^\text{76}\) (e) the Courts ability under Rule 45 to hear individuals or NGOs with cases originating from the Commission of the Rules, pursuant to Article 55 of the Charter\(^\text{77}\) (f) opinions on admissibility under Article 6 of the Protocol\(^\text{78}\) (g) procedures to transfer a case to the commission pursuant to Article 6 (3)\(^\text{79}\) (h) situations of examining

\(^{73}\) Article 2 of the Protocol establishing the AfCHPR

\(^{74}\) Rule 29 (1) Para (a) and (b) of the Rules of the court

\(^{75}\) Rule 29 (2) of the Rules of the court

\(^{76}\) Rule 29 (3) (a) of the Rules of the court

\(^{77}\) Rule 29 (3) c) of the Rules of the Court

\(^{78}\) Rule 29 (4) of the Rules of the Court

\(^{79}\) Rule 29 (5) (a) of the Rules of the Court
an application before it on issues in a communication before the commission.\textsuperscript{80}

As a result of the harmonisation of the Interim rules of the Court and the Commission carried out during joint meetings in July 2009, conducted in Arusha; October 2009, in Dakar; and April 2010, in Arusha, the Court and the Commission have an understanding to meet at least once a year. Their primary objective is to discuss questions relating to their relationship.\textsuperscript{81}

Although critics and supporters alike have argued that it makes little sense to create an institution that duplicates the weakness of the African Commission.\textsuperscript{82} In the context of the African Union, an organisation with scarce financial resources and limited moral clarity, the establishment of a new body would have been approached sombrely.\textsuperscript{83} A human rights court would have been more useful if it genuinely sought out to correct the shortcomings of the African system, and provide the victims of human rights violations with a real and accessible forum to vindicate their basic rights.

\textit{Courts’ Merger with the African Court of Justice}

The Constitutive Act of the African Union, under Articles 5 and 17, provides for the establishment of an additional judicial body to function as the primary judicial organ of the African Union, to be called the ‘African Court of Justice’. The Protocol of the Court of Justice was thus adopted on the 11\textsuperscript{th} of July, 2003 in Maputo Mozambique, but has yet to enter into force.

However, following a proposal by the then chairperson of the assembly of the African Union and head of the Federal Republic of Nigeria, President Olusegun Obasanjo, the AU Assembly under its decision ‘Assembly/AU/Dec. 45 (III)’ and ‘Assembly/AU/Dec. 83

\textsuperscript{80} Rule 29 (6) of the Rules of the Court
\textsuperscript{81} HIGGINS Gillian, ‘The African Commission and the African Court on Human and Peoples Rights: Case Progression from the Commission to the Court’, ARC Project Paper, 2012, p. 1
(V)’ adopted respectively at its third\textsuperscript{84} and fifth\textsuperscript{85} ordinary sessions, decided to merge the African Court on Human and Peoples Rights and the Court of Justice of the African Union into a single court. The merger was mainly instituted for part implementation of the decision of the Assembly of heads of states and Governments to rationalize institutions in order to avoid duplication of mandates and to ensure cost effectiveness within the African Union.\textsuperscript{86}

The draft on ‘The Protocol and the Statute of the African Court of Justice and Human and Rights’ was adopted at the AU Summit in Sharm El-Sheikh, Egypt, on the 1\textsuperscript{st} of July, 2008. The Protocol and the Statute annexed to it shall enter into force thirty days after the deposit of the instruments of ratification by fifteen (15) Member States. Only three (3) States, namely Libya,\textsuperscript{87} Mali\textsuperscript{88} and Burkina Faso,\textsuperscript{89} have ratified the Protocol by August 2010.\textsuperscript{90}

\textbf{2.4 Composition of the Court}

The Court is composed of eleven (11) judges,\textsuperscript{91} all of whom are nationals of member states of the African Union. The judges are elected by the Assembly of Heads of State and Government of the African Union for a period of six years,\textsuperscript{92} and may be re-elected once. The judges are elected in their individual capacities from amongst African jurists of proven integrity and of recognised practical, judicial

\textsuperscript{84} 6\textsuperscript{th} – 8\textsuperscript{th} July 2004 in Addis Ababa, Ethiopia
\textsuperscript{85} 4\textsuperscript{th} – 5\textsuperscript{th} July 2005 in Sirte, Libya
\textsuperscript{86} SUTHERLAND Kirsty & SANDER Barrie, ‘Endowing the African Court of Justice and Human Rights with Jurisdiction over International Crimes – A More Legitimate Form of Justice for Africa or a Recipe for Disaster?’ Paper proposal for conference on International Law in Africa, International Criminal Law Bureau, p. 2
\textsuperscript{87} Signed on 14/05/2009, ratified on 06/05/2009, deposited instruments on 17/06/2009
\textsuperscript{88} Signed on 24/12/2008, ratified on 13/08/2009, deposited instruments on 27/08/2009
\textsuperscript{89} Signed on 21/01/2009, ratified on 23/06/2010, deposited instruments on 04/08/2010
\textsuperscript{90} Article 60 of the Protocol on the Statute of the African Court of Justice and Human Rights
\textsuperscript{91} Article 11 (1) of the Protocol establishing the Court
\textsuperscript{92} Article 15 (1) of the Protocol to the Court
or academic competence and experience in the field of human and peoples’ rights after being nominated by their respective states.\(^93\)

Nationals of the 53 member states of the African Union can be judges of the Court. The AU guidelines on nominations and elections of the judges state, that the court should have the following number of judges for each region of Africa: Eastern two, Northern two, Central two, Western three and Southern region two. No two judges can be from the same country.

The judges then elect a president and a Vice-president from among themselves who serve a two years term\(^94\) eligible for one re-election. The president of the Court resides and works on a full time basis at the seat of the Court,\(^95\) while the other ten judges work on a part time basis. When performing his or her duties, the President is assisted by a registry, which performs the managerial and administrative functions of the court.

As of the 24\(^{th}\) of September, 2012 membership of the Court is as follows:

<table>
<thead>
<tr>
<th>NAME</th>
<th>STATE</th>
<th>POSITION</th>
<th>ELECTED</th>
<th>TERM ENDS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Justice Sophia A. B. Akuffo</td>
<td>Ghana</td>
<td>President</td>
<td>2006</td>
<td>2014</td>
</tr>
<tr>
<td>Justice Fatsah Ouguergouz</td>
<td>Algeria</td>
<td>Vice – President</td>
<td>2006</td>
<td>2016</td>
</tr>
<tr>
<td>Judge Benard Makgabo Ngoepe</td>
<td>South Africa</td>
<td>Member</td>
<td>2006</td>
<td>2014</td>
</tr>
<tr>
<td>Justice Gerard Niyungeko</td>
<td>Burundi</td>
<td>Member</td>
<td>2006</td>
<td>2012</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(President 2006 – 2008/ 2010-2012)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Justice Augustino S.L. Ramadhani</td>
<td>Tanzania</td>
<td>Member</td>
<td>2010</td>
<td>2016</td>
</tr>
<tr>
<td>Justice Duncan Tambala</td>
<td>Malawi</td>
<td>Member</td>
<td>2010</td>
<td>2016</td>
</tr>
<tr>
<td>Justice Elsie Nwanwuri Thompson</td>
<td>Nigeria</td>
<td>Member</td>
<td>2010</td>
<td>2016</td>
</tr>
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\(^93\) Article 11 of the Protocol  
\(^94\) Article 21 (1) of the Protocol  
\(^95\) Article 21 (2) of the Protocol
Former Judges of the Court include the following:

<table>
<thead>
<tr>
<th>NAME</th>
<th>STATE</th>
<th>POSITION</th>
<th>ELECTED</th>
<th>TERM ENDS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Justice jean Mutsinzi</td>
<td>Rwanda</td>
<td>Member (President 2008 to 2010)</td>
<td>2006</td>
<td>2012</td>
</tr>
<tr>
<td>Late Justice Joseph Nyamihana Mulenga</td>
<td>Uganda</td>
<td>Member</td>
<td>2008</td>
<td>2012</td>
</tr>
<tr>
<td>Justice Modibo Tounty Guindo</td>
<td>Mali</td>
<td>Member (first Vice-President 2006 to 2008)</td>
<td>2006</td>
<td>2012</td>
</tr>
<tr>
<td>Justice Kelello Justina Mafoso-Guni</td>
<td>Lesotho</td>
<td>Member</td>
<td>2006</td>
<td>2010</td>
</tr>
<tr>
<td>Justice Hamdi Faraj Fanoush</td>
<td>Libya</td>
<td>Member</td>
<td>2006</td>
<td>2010</td>
</tr>
<tr>
<td>Justice Githu Muigai</td>
<td>Kenya</td>
<td>Member</td>
<td>2008</td>
<td>2009</td>
</tr>
<tr>
<td>Justice George W. Kanyeihamba</td>
<td>Uganda</td>
<td>Member</td>
<td>2006</td>
<td>2008</td>
</tr>
<tr>
<td>Justice Jean Emile Somda</td>
<td>Burkina Faso</td>
<td>Member</td>
<td>2006</td>
<td>2008</td>
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</tbody>
</table>

Notably, the Protocol includes some important guarantees to ensure that the judges’ independence and impartiality are secured. The safeguards rely extensively on International Law.\(^\text{96}\)

However, in some instances what happens on paper does not always translate into practice. Certain situations such as the July 2008 nomination process of judges to replace those, whose terms had

\(^{96}\) Article 17 of the Protocol to the Charter
lapsed, raised a suspicion of possible threats to the independence of the judges. Although it is the prerogative of member states to nominate judges for election to the African Court on Human and Peoples Rights, the decision by Uganda to replace George Kanyeihamba with Joseph Mulenga was fraught with controversy.\(^{97}\) Uganda was allegedly reported to have blocked the nomination of Justice Kanyeihamba for fear that he would ‘embarrass’ the state at the African Court.\(^{98}\) While there were no reasons given by Uganda for not nominating Justice Kanyeihamba to serve a second term, several concerns were raised that the actions of Uganda could spell disaster for the independence of judges of the African Court.

As the 2008 Ugandan nomination case has shown, there is need to revisit the issue of security of tenure of the judges. That could be, for instance, providing that judges serve a specific non-renewable term of about six years, seems to be a reasonable time period for the judges to have at least made some contribution to the jurisprudence of the African Court.


As Professor MUTUA Makau\(^{99}\) argues, ‘there are three basic purposes which are associated with national and international adjudicatory bodies. These are: vindicating the rule of law by providing justice in an individual case; protecting rights through deterrence and behaviour modification; and finally, expounding legal instruments and making law through elucidation and interpretation.’\(^{100}\)


\(^{98}\) Loc. Cit.


The African Court on Human and Peoples Rights, as one such body, has been since its creation embodied with the paramount duty to vindicate the rule of law by providing justice, protecting human rights through deterrence, and by expounding on legal instruments through elucidation and interpretation.

However, since its creation in 2004 the African Court has indeed been slow, and some may argue even reluctant, in carrying out its main activity of adjudication. It was only in 2006, two years after its establishment, that the judges of the court were appointed. Paragraph 3 of the Court’s Annual Activity Report for 2006\textsuperscript{101} states as follows:

“.........The process for designating judges as laid down by these provisions\textsuperscript{102} started on 4\textsuperscript{th} May 2004, but was interrupted following the decision taken by the Assembly of Heads of State and Government meeting at Addis Ababa, Ethiopia from 6\textsuperscript{th} to 8\textsuperscript{th} July 2004 (Assembly/Au/Dec.45(III). They decided to merge the AfCHPR with the African Court of Justice.....later following the decision adopted by the Heads of states........ The process resumed in July 2005.....”

Notably, it’s from this so called ‘interruption’ following the decision by the Assembly, to merge the two courts, that saw the appointment of judges which would have steered the functioning of the court being adjourned or rather postponed to July 2005\textsuperscript{103} and completed in January 2006.\textsuperscript{104}

A critical analysis of the decision to postpone the election of judges, places the decision in an unfavourable light, and on its face is seemingly unreasonable. In order to understand this further it’s imperative to take reference to the African Court itself, where after

\textsuperscript{101}Submitted to the Assembly of the African Union, Eighth Ordinary Session, held on 29\textsuperscript{th} -30\textsuperscript{th} January 2007 in Addis Ababa, Ethiopia

\textsuperscript{102}Article 11 to 14 of the Protocol which defines the profile of candidates for membership of the court and the process for designating candidates and electing judges

\textsuperscript{103}Decision by the Assembly from 4\textsuperscript{th} to 5\textsuperscript{th} July 2005 (Assembly/Au/Dec.83(V)) at Sirte, Libya

\textsuperscript{104}Election of the first judges of the court by the Executive Council, and their appointment by the Assembly meeting held in Khartoum, Sudan in January 2006
nearly four years of negotiations the Assembly of Heads of states of the O.A.U adopted the final text of the Protocol establishing the Court in June 1998. Furthermore, it took another six years to acquire 15 instruments of ratification so as to bring the court to life, in accordance to Article 34 (3) of the Protocol establishing African the court.

What then is a justifiable reason to postpone the appointment and election of judges, if it is evident that a merger of the two courts would take years before coming into effect?

Admittedly, the court has, since that first appointment of judges in January 2006, spent more time dealing with logistics and administrative issues than dealing with actual issues of providing justice. A good example of this is the June 2006, swearing in of judges that surprisingly took place six months after their election. However, the initial sessions of the Court, were mainly on budgetary and administrative issues including the development of and structuring of the Court’s Registry. It was not until June 2008, that the Court completed drafting its interim rules, which were adopted in its Ninth Ordinary Session in June 2008. This of course was pending the process of consultation with the African Commission, which officially opened the court’s doors to receiving cases.

By application 001/2008 dated August 18th, 2008, delivered to the African Union Commission (AUC) by e-mail on August 19th, 2008, and addressed to the African Court both directly and indirectly (through the AUC); however, only effectively delivered to the African Court on December 29th, 2008 (with a cover letter dated November 2008 from the AUC Legal Counsel) through the African Union Commission, Michelot Yogogombaye v. Republic of Senegal historically marked first application that the court has ever received since its establishment. Additionally, it is the only application and

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106 First session being held on 3rd to 5th July 2006, Second session being held from 18th to 21st September 2006, and the third session being held from 11th to 20th December 2006 all in Addis Ababa, Ethiopia
decision available in the court’s books from its establishment to the year two thousand and ten (2004 – 2010), a period upon which this article has focused.

3.1 Michelot Yogogombaye v. the Republic of Senegal, Appl. 001/2008 AfCHPR

Summary of the case

On December 15th, 2009, the AfCHPR rendered its historic first judgement on application 001/2008 submitted by Mr. Michelot Yogogombaye. In a short ruling, accompanied by the separate opinion of Judge Fatsah Ouguergouz, the court unanimously dismissed the case for lack of jurisdiction. The ruling inter alia highlights an immense obstacle that lies in the way of the Court’s Jurisdiction over complaints filed by individuals or NGOs against an African State.

The applicant, Mr. Michelot Yogogombaye is a Chadian national born on October 1st, 1959, who lived in Switzerland by the time this application was filed. His petition sought the dismissal of charges that were pending in Senegal against former Chadian president Hissain Habre.

Habre, who ruled Chad for eight years, sought asylum in Senegal, a neighbouring West African country, after he was deposed in December 1990. He is allegedly responsible for ordering nearly two

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108 The Judgement; It should also be noted that the Court calls rulings on preliminary matters concerning jurisdiction ‘judgments’, rather than ‘decisions’, the term used by most international courts

109 The Following judges signed the opinion: Jean Mutsinzi, Sophia A. B. Akuffo, Justina K. Mafoso-Guni, Benard M. Ngoepe, Hamidi Faraj Fannoush, Modibo Tounty Guindo, Gerard Niyungeko, Fatsah ouguergouz and Joseph N. Mulenga. As Required by Courts rules, the Senegalese judge El Hadj Guisse recused himself (see para 2 of the judgement)

110 Paras 37 and 46 of the ‘Judgment’

111 Para 1of the Judgment

112 The first name of the former Chadian president is variously spelled Hissen, Hissane, Hissene and hissene.

113 Para 18 of the judgment
hundred thousand cases of torture and up to forty thousand politically motivated deaths of Chadians during his eight years in office.\textsuperscript{114}

Yogogombaye sought to establish the Court’s jurisdiction over the case. He claimed that Senegal, as a member of the African Union\textsuperscript{115} and as a party to the Protocol on the establishment of an AfCHPR\textsuperscript{116} had \textit{de facto} filed a declaration pursuant to Article 34(6) of the Protocol allowing the Court to hear human rights petitions initiated by individuals.\textsuperscript{117}

In his application, Yogogombaye made two substantive allegations. First, he asserted that Chadian victims had filed complaints with Senegalese authorities in 2000, alleging Habre’s complicity in crimes against humanity, war crimes, and torture during his presidency.\textsuperscript{118} Six years later the AU mandated that Senegal either take steps to resolve the matter or find an ‘African option’ to the ‘problem’ posed by the prosecution of Habre.\textsuperscript{119} Thereafter, on July 23\textsuperscript{rd}, 2008, the Senegalese parliament adopted a constitutional amendment authorising the retroactive application of its relevant law, solely to enable this trial.\textsuperscript{120} In Yogogombaye’s view, Senegal’s action violated the ‘sacrosanct’ rule against retroactive application of criminal law, and was therefore inconsistent with both its Constitution and Article 7(2) of the African Charter on Human and Peoples’ Rights.\textsuperscript{121}

\textsuperscript{115}Constitutive Act of the African Union, July 11\textsuperscript{th}, 2000, 2158 UNTS 3
\textsuperscript{117}Para 17 of the Judgment
\textsuperscript{118}Para 18 of the Judgment
\textsuperscript{119}Para 19 of the Judgment; Decision on the Hissene Habre case and the African Union, adopted on July 1\textsuperscript{st} – 2\textsuperscript{nd} July 2006, Doc. Assembly/AU/3 (VII) Para 5
\textsuperscript{120}Para 20 of the Judgment
\textsuperscript{121}Para 21 of the Judgment; Article 7 (2) of the African Charter provides “no one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.” (O.A.U Doc. CAB/LEG.67/3rev 5, 21 ILM 58 (1982))
Secondly, he alleged that Senegal wrongly opted for a ‘judicial’ instead of an ‘African’ solution inspired by African tradition, such as the use of the ‘Ubuntu’ institution (reconciliation through dialogue, truth and reparations). Furthermore, according to the applicant in opting for a judicial solution Senegal sought to use its services as legal agent of the African Union for financial gain.

Yogogombaye advanced a series of other subsidiary legal and political arguments. He claimed, inter alia, that Senegal had violated other African human rights instruments and abused the universal jurisdiction principle, which could have a ‘destabilising effect’ on the political, economic, social and cultural development of Chad and other countries in the continent. Similarly he asked not only for orders directing Chadian and Senegalese authorities to jointly establish a South African Style truth commission to address, in an ‘African manner’, the crimes committed in Chad between 1962 and 2008, but also for a declaration that the charges against Habre had been ‘abusively used’ by Senegal, France, and Human Rights Watch, as evidenced by the ‘media hype into which they turned the said allegations’. Ultimately, among his various requests for relief, he asked that the Court suspend or terminate the AU’s July 2006 mandate that Senegal prosecute Habre.

In response, Senegal moved to have Yogogombaye’s Complaint dismissed for lack of jurisdiction, after initially requesting an extension of time to the one Complaint that the Court granted. Senegal argued that for individuals to be able to file complaints before the court, ‘the respondent state must first have recognised the jurisdiction of the court to receive such applications in accordance

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122 Para 22 of the Judgment
123 Yogogombaye claimed that by choosing to prosecute Habre and by asking for the AU’s financial support to do so, Senegal’s ‘pecuniary motivation’ would be lucrative at 40 billion CFA francs (approximately $ 38 million) (Para 23 (6)). This incentive would, in his view, set a bad precedent for other African states where former heads of states may seek refuge.
124 Para 23 (3), (4) and (8) of the Judgment
125 Para 23 (7), (10), and (11) of the Judgment
126 Para 23 (2) and (9) of the Judgment
127 Para 9 – 12 of the Judgment
with article 34 (6) of the Protocol establishing the Court. Alternatively on the merits, Senegal averred that the Habre case concerned only itself and Habre’s alleged victims, in light of obligations owed under the Convention against torture. Yogogombaye therefore lacked a ‘legitimate interest’ to initiate proceedings.

Furthermore, Senegal denied the purported violations of the non-retroactive principle and the AU mandate to prosecute Habre. Accordingly it requested that the Court declare the case in admissible because the applicant lacked standing to institute a complaint, and on the substance to dismiss the complaint because the evidence he had adduced was ‘baseless and incompetent’.

In view of the facts, the court did not deem it necessary to hold a public hearing, and consequently decided to close the case for deliberation. In this case, the simple but contentious question was whether Senegal, as a party to the Protocol, had entered such a declaration. To resolve the issue the court requested the chair of the AU Commission, the depository of the treaty, to provide the list of African state parties that had accepted the Court’s competence over direct individual complaints. That list confirmed Senegal’s stance that it had not submitted an Article 34(6) declaration.

In finding for Senegal, the Court explained that Article 34 (6) dictates access to the Court is contingent on a prior ‘special declaration’ by the respondent state authorising cases to be brought against it by individuals. Because Senegal has made no such declaration, the court dismissed Yogogombaye’s complaint for lack of jurisdiction, making no assessment of its central allegations.

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128 Para 25 of the Judgment  
129 Para 26 of the Judgment; See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10th 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 UNTS 85 (hereinafter Convention Against Torture)  
130 Para 27 of the Judgment  
131 Para 28 of the Judgment  
132 Para 16 of the Judgment  
133 Para 35 of the Judgment  
134 Para 36 of the Judgment  
135 Para 31 of the Judgment; Article 5 (3) and 34 (6) of the Protocol
Finally the court addressed costs. Yogogombaye, who represented himself, requested the benefit of free proceedings, while on the other hand Senegal represented by five lawyers asked the applicant to bear its expenses. The Judges noted their default rule requiring each party to absorb its costs.

Indeed this first judgement is a case where the poacher is turned a gamekeeper. In light of the horrific crimes carried out under Habre’s regime, the Court’s dismissal of Yogogombaye’s complaint may seem comforting. However, the court could reach the same outcome in a case in which the complainant is a victim of State abuses. What then will convince African States to offer their own victims the possibility of filling direct complaints before the court?

This decision seems quite straightforward as well as in line with the pleadings of Senegal. Such a simple response did not warrant twelve months of deliberation, in fact, in his separate opinion judge Ouguergouz, producing a reason very much enriched by his prior experience at the International Court of Justice, stated that the Applicant ought to know why it took so long for the Court to come to a decision.

Judge Ouguergouz went on to detail his own thorough analysis of the complexity of the case as far as jurisdiction is concerned. In that framework, he developed the concept of ‘forum propogatum’, which would have led the judges to think that the Republic of Senegal, through its attitude, seems to have consented to the proceedings. He consequently questioned whether the Registry should never just dismiss an application when it cannot be excluded that a state may consent to such an application.

As he explained, the majority reached the inevitable conclusion that the Court lacked jurisdiction to hear Yogogombaye’s application.

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136 Para 23 (12) and 42 of the Judgment
137 Para 28 and 32 of the Judgment
138 Para 44 of the Judgment
139 Para 2 of the Separate Opinion of Judge Fatsha Ouguergouz in the Case of Michelot Yogogombaye v. Republic of Senegal (hereinafter ‘the separate opinion’)
against Senegal. However, he noted that the majority reasoning is over simplified because it referred, without detailed analysis, to article 5 (3) and 34 (6) of the Protocol. Though fundamentally important to personal jurisdiction, those two provisions must be read in their context. Doing so requires that a distinction be drawn between concerns about access to the Court (Article 5), and its overall jurisdiction (Article 3).\textsuperscript{140} Ultimately that distinction explains:

1) Why the court did not reject the application through a simple letter given its ‘manifest lack of jurisdiction’.
2) Why, instead, it ruled on the application by way of a very solemn judgement.\textsuperscript{141}

Indeed as Judge Ouguergouz clarified, the majority’s discussion of jurisdiction did not ‘faithfully reflect the Court’s liberal approach to the treatment of the application’.\textsuperscript{142} Senegalese officials had corresponded twice with the Court registry.\textsuperscript{143} Instead of unequivocally challenging jurisdiction, Senegal through notification of the names of its lawyers and subsequent request for extension of time to reply, ‘left open the possibility, however slim, that it might accept the jurisdiction of the Court to deal with the application’.\textsuperscript{144} This prospect raised doubts as for the judges as to whether the country would appear to contest jurisdiction, challenge the admissibility of the application, or make a defence based on the merits.\textsuperscript{145}

Thus Article 34 (6) raises an important ambiguity that should have been clarified by the judges’ majority opinion; as to whether filing the optional declaration is the only way for a state to recognise the Court’s jurisdiction over complaints brought by individuals.\textsuperscript{146} Here the textual meaning of the provision shows that a declaration may be made ‘at the time of ratification or any time thereafter’. Furthermore, nothing in the Protocol prevents a state from granting such consent ‘in

\textsuperscript{140} Para 10 – 11 of the Separate Opinion
\textsuperscript{141} Para 12 of the Separate Opinion
\textsuperscript{142} Para 9 of the Separate Opinion
\textsuperscript{143} Para 18 – 19 of the Separate Opinion and Para 5, 8 – 9 of the Judgment
\textsuperscript{144} Para 20 of the Separate Opinion
\textsuperscript{145} Para 18 of the judgement
\textsuperscript{146} Para 27 of the Separate Opinion
manner other than through the optional declaration.\footnote{Para 29 of the Judgment} As Senegal had not entered such a declaration upon ratification, it could consent afterwards, upon receipt of Yogombaye’s application for example, and in whatever form it chose, including by letter to the court.\footnote{Para 28 of the Judgment}

The Judgement ought to have comprehensively developed this reasoning.\footnote{Para 37 of the Separate Opinion and the Judgment} This is particularly so considering the possibility that, besides filing an Article 34 (6) declaration and other formal ways of indicating consent, Senegal’s acceptance of jurisdiction might have reflected ‘\textit{forum propagatum}’; the acceptance of the jurisdiction of an international court by a state after the seizure of this court by another state or individual, and this either, expressly or tacitly, through decisive acts or an unequivocal behaviour.\footnote{Para 32 of the Separate Opinion} Judge Ouguergouz explained that, under this doctrine, effective participation in proceedings by addressing the merits of a case, for example, could be considered as a tacit endorsement of jurisdiction.\footnote{Para 31 of the Judgment}

Until April 9th, 2009, when Senegal finally filed its statement of defence, the possibility remained that it would accept jurisdiction.\footnote{Para 32 – 34, 37 -38 of the Separate Opinion} Senegal’s correspondence, failure to immediately and unequivocally contest jurisdiction, and general attitude were suggestive of this outcome.\footnote{Para 18-20, 38 of the Separate Opinion} However, once it filled preliminary objections to Yogogombaye’s application and showed that jurisdictional consent was not forthcoming, the judges had to comply with Rule 52 (7), which requires the Court to give reasons for ruling on preliminary objections.\footnote{Para 36 of the Judgment} But for Senegal’s filing a simple order or letter issued by the Court registry would have sufficed to dispose of the application.\footnote{Para 38 of the Judgment}

According to Judge Ouguergouz even where a particular African Country had not filed a prior declaration accepting the Court’s competence to automatically hear human rights applications, an
individual or presumably an NGO may still initiate a case against a state party. Thus, such a case would be rendered admissible if the respondent state submits to the court’s jurisdiction whether explicitly or implicitly by, for example, appearing to contest the merits.

Drawing on the practices of the International Court of Justice before July 1978, Judge Ouguerougouz suggested a new administrative procedure. If an initial review reveals that the court has jurisdiction, a complaint would be placed on the general list, however if it appears that the respondent state has not entered the article 34 (6) declaration, the application would be rejected through a simple letter issued by the Court registry. In his view, the application could eventually be communicated to the state party concerned. It is only if, and when such a state party accepts the Court’s jurisdiction that the case would then be listed and notified to all other states parties and relevant AU organs, as required by the Protocol and pertinent rules.\textsuperscript{156}

Judge Ouguerougouz followed a line of reasoning with more detail and hypothesis than is probably tied to the conclusion of the judgement. He rationalized that the limitation would ‘avoid giving untimely or undue publicity’ to individual applications over which the Court manifestly lacks jurisdiction.\textsuperscript{157}

As JALLOH Charles Chernor\textsuperscript{158} writes, this approach appears problematic for at least two reasons. First, as far as human rights cases are concerned, unlike state-to state disputes, such as those before the ICJ, it is precisely such timely publicity that could shame a state into accepting judicial competence to hear a complaint. Second, the very essence of \textit{forum prorogatum} is to afford the applicant a chance which is unavailable to confront the respondent state. Thus, for this jurisdiction trigger to even be remotely plausible in the context of a human rights court, the complaint must necessarily be transmitted to the concerned state.

Additionally, there have been doubts with the transparency of the proceedings in regard to this case; for instance, the judgement reveals that some interim orders were made during the course of the proceedings.

\textsuperscript{156}Para 40 of the Separate opinion

\textsuperscript{157}\textit{Loc. Cit.}

proceedings.\textsuperscript{159} However, none of those orders were made public even though nowhere in the judgement is it stated that they were confidential, and one cannot trace them for a comprehensive understanding of the case and procedure.\textsuperscript{160} The same can be said for the case file: the documents of the proceedings such as the application and the pleadings are currently not accessible. Further yet, those same documents are summarised in the judgement without any further explanation, or mention of confidentiality.

Notably one might wonder whether the parties were fully informed of the issuance of the judgement, as neither of the two parties was present. It seems unlikely that such absence should be analysed as a lack of interest from each of them, especially from the Applicant’s side. In light of the aforementioned shortcomings of the judicial process regarding Mr. Yogombaye’s application, it is no surprise that the case concluded in such an ambiguous fashion.

4. Conclusion

This paper has thoroughly examined the history and structure of the African human rights system, along with the pivotal moments during the establishment of the African Court on Human and Peoples Rights. Further, the paper discussed the complexities involved with Court’s relationship towards external entities, such as those of the African Commission et al. The paper has also explained the composition of the Court along with the Court’s admissibility requirements. Moreover, the paper highlighted the case of Michelot Yogombaye, the only case to be heard in the Court, between the years of 2004-2010, to analyse the jurisprudence of the Court within that time period. Lastly, this paper challenges the authenticity and integrity of the judicial processes of the African Court on Human and Peoples Rights.

As previously mentioned, the judges in the Yogombaye case abstained from engaging in any substantive human rights issue, rather, they chose to address the technicalities of internal procedures, such as those of \textit{locus standi}. All of this, in spite of the simplicity of the Court’s questions of admissibility, questions that took nearly a year to

\textsuperscript{159}Para 10 of the Judgement
\textsuperscript{160}JALLOH Charles Chernor, ‘International Decision: Mechelot Yogogombaye V Republic of Senegal’ \textit{Op. Cit.}
answer. Even more can be inferred from the thirteen page judgment. A mere three pages are devoted to the elucidation of the Court’s actual reasoning behind their decision, while the other ten are dedicated to facts and procedural details. What type of message does the management of the Court’s first case send to African constituents? A better question may be: Is the Court concerned with the message that it sends to African citizens, and to the world for that matter?

The 2004 to 2010 period was a major disappointment for the people of Africa, especially in light of their long wait to have a glimpse into the added value that the African Court on Human and Peoples Rights would bring to the continent. It can also be argued that the disappointments involving the Court began prior to 2004; possibly with Article 34(6) of the Protocol of the Establishment of the Court. This provision, requiring states to make a declaration accepting the competence of the Court to receive cases under Article 5(3), completely undermines an individual’s access to justice. If the African human rights system is serious about the promotion and protection of human rights, it will amend this portion of the Protocol to the Establishment of the Court, and no longer allow its justice system to be held hostage to the lack of political will. While the current status of the African human rights system is grim, there is still hope that may be the coming cases involving states such as Tanzania, Malawi, Ghana, Mali and Burkina Faso, states who have all made an article 34 (6) declaration, will present the court an opportunity to adjudicate on substantive allegations of human rights violations. This will assist the Court in rehabilitating its credibility, and help to move the African human rights system into the developed and effective category of human rights jurisprudence.
Appendix - A

**Chronological development of the AfCHPR**

Indeed there are numerous significant steps to date, which geared towards the establishment and development of the African Court on Human and Peoples’ Rights. These steps include the following:

- **January 1961**: The Idea of an African Court is mooted at the meeting of African Jurists in Lagos, Nigeria on 7th January 1961 (see The Law of Lagos, *id*).
- **September 1995**: A meeting of experts in Cape Town, South Africa produces a Draft document on an African Human Rights Court.
- **April 1997**: Second meeting of governmental legal experts to discuss the draft Protocol to the African Charter is held in Nouakchott, Mauritania.
- **December 1997**: Third and final meeting of governmental legal experts to discuss the draft Protocol to the African Charter, bolstered by the presence of diplomats, is held in Addis Ababa, Ethiopia.
- **December 1997**: Draft Protocol is adopted by the conference of O.A.U Ministers of Justice/ Attorneys general.
- **9th June 1998**: Adoption of the Protocol to the African Charter Establishing the African Court on Humana and Peoples’ Rights in Ouagadougou, Burkina Faso.
- **11th July 2003**: Adoption of Protocol to the African Union Court of Justice, in Maputo, Mozambique.
- **July 2004**: The African Union (AU) Assembly decides to merge the African Court on Human and Peoples Rights with the African Court of Justice.
- **13th -14th January 2005**: A panel of legal experts meets in Addis Ababa, Ethiopia, to draft a Protocol on the Integration of the African Court on Human and Peoples Rights and the Court of Justice of the AU.
January 2005: The draft merger instrument is presented to the Executive Council of the AU at the Summit in Abuja, Nigeria. The executive Council decides that the operationalization of the African Court should continue without prejudice.

July 2005: The Assembly of Heads of States and Government in Sirte, Libya, decide that the African Human Rights Court should be set up and the processes towards putting it into operation should begin.

21st – 25th November 2005: A working group on the draft single legal instrument relating to the merger of the African Court on Human and Peoples Rights and the Court of Justice of the AU meets to examine the draft document.

22nd January 2006: The AU Summit in Khartoum, Sudan elects the first 11 Judges of the African Court on Human and Peoples’ Rights.

2nd June 2006: The inaugural members (judges) of the African Court are sworn in in Banjul, The Gambia

31st August 2007: The Host Agreement to situate the Court in Arusha, Tanzania, is signed between the United Republic of Tanzania and the AU.

18 April 2008: AU ministers of Justice and Attorney General resolve that NGOs and individuals only have direct access to the African Court if a state party makes an explicit declaration to the effect. They also agree that the composition of the court be increased from 11 to 16 members.

July 2008: Both of the resolutions on access to the AfCHPR by NGOs and that of increasing composition of the court from 11 to 16 members are subsequently adopted by the AU heads of states and Governments

2nd June 2008: the terms of two judges of the African Court expire before any cases are considered

15th December 2009: Court issues its first judgement in the case Michelot Yogogombaye V. Republic of Senegal Appl. No. 001/2008
April 2010: The harmonization process of the Rules of the Court and the Rules of Procedure of the Commission was completed.

June 2010: The Court adopts its final Rules.