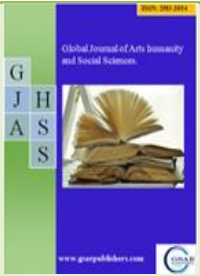
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LEGAL CHALLENGES AND THE ROLE OF THE AFRICAN COURT ON HUMAN RIGHTS IN FACILITATING ACCESS TO JUSTICE IN AFRICA

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Abstract

The African Court on Human and Peoples' Rights was established as a regional body to protect and promote human rights across Africa, focusing on violations that do not involve international crimes. Its primary aim is to complement national and international human rights efforts, addressing gaps in the region's legal framework. Despite its crucial role, the continent faces significant challenges in advancing human rights, including political instability, weak legal systems, and inadequate enforcement of judicial rulings. These challenges hinder the practical realisation of justice, leaving many individuals unable to access fair treatment.

The African Court has a broad mandate, including jurisdiction over human rights violations and providing a forum for individuals, non-governmental organisations, and state parties to address abuses. It interprets and enforces the African Charter on Human and Peoples' Rights and other related instruments, with the authority to issue binding decisions. The court plays a vital role in offering legal remedies to victims of human rights violations.

However, the court faces several challenges that undermine its effectiveness. Non-compliance by state parties is a significant issue, with many African countries failing to implement the court's rulings or acknowledge its jurisdiction. Limited resources and a growing backlog of cases also strain the court's capacity to handle increasing violations. Additionally, some countries are reluctant to allow individuals or NGOs access to the court, limiting its reach.

This paper explores the court's legal functions, challenges, and impact on African human rights. It also examines potential solutions to improve the court's effectiveness, such as strengthening its resources, encouraging political will from member states, and enhancing public awareness. The paper argues that urgent reforms are necessary to help the African Court realise its full potential and ensure that all African individuals can access justice and fairness.

KEYWORDS: *African Court on Human and Peoples' Rights, Role of the Court and Legal challenges facing access to Justice in the Court.*

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1.0 INTRODUCTORY REMARKS

Throughout history, the world has witnessed significant human rights violations, particularly during the First and Second World Wars. These grave atrocities prompted sensitive global awareness

regarding the necessity of protecting human rights. Consequently, various initiatives focused on promoting and safeguarding human rights have emerged, with promotional initiatives appearing in the



Universal Declaration of Human Rights.¹ The international community celebrated and embraced it for its focus on human rights protection and promotion.

Although the Universal Declaration of Human Rights was mere, the instrument garnered the state's commitment to upholding and promoting human rights protections. The recognition of this instrument by the state has positioned human rights protection as a critical agenda within political and socio-economic contexts. This shift underscores the necessity of mitigating human rights abuses, thereby rendering violations of this agenda unacceptable. As a result, most states ratified the document with this consideration in mind. The approach to regional cooperation in protecting and promoting human rights appears to have embraced this rationale.²

Regional cooperation resulted from the complex nature of human rights protection and promotion engagements that would be made in individual states' capacities. The nature of human rights was observed to require human rights protection, whether made in international cooperation among states or in their respective regional setups and structures.

From that Complex historical flow, the discussion of 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.³ The movement towards having a supra-regional body to protect human rights is very much connected to the world's concern for the need to protect human rights. Atrocities that happened across the globe during the world wars taught states in their relative regions and jurisdictions to have some initiatives relating to the protection and promotion of human rights, and this was inclusive of African states.⁴

The Banjul Charter is the principal document safeguarding individuals' rights and welfare across Africa. It underwent thorough consideration, mediation, planning, drafting, and discussion, culminating in its formal adoption by the member states.⁵ Consequently, the African Charter aims to safeguard the rights and freedoms of the African population, reaffirming the Organization of African Unity's (OAU) commitment to advancing human rights. The African Commission on Human and Peoples' Rights was established as a treaty body to promote and protect human rights.⁶ Its function was limited to investigating and engaging with state mechanisms to effectively enforce and comply with human rights obligations in Africa.⁷

¹ Of 1948.

² <https://www.african-court.org/wpafc/basic-information> Accessed on 8th December, 2023.

³ African Charter, "the "Banjul Charter," this agreement was adopted in 1981, but did not enter into force until October 21, 1986.

⁴ <https://www.african-court.org/wpafc/basic-information> Accessed on 8th December, 2023

⁵ <https://www.african-court.org/wpafc/basic-information> Accessed on 8th December, 2023

⁶ Ibid Article 30.

⁷ Ibid footnote 10.

Following an additional decade of negotiations, a Draft Protocol was formulated and adopted by representatives of the Organization of African Unity (OAU), now known as the African Union, in 1998.⁸ This Protocol established the Court under Article 1,⁹ The document was adopted by the Member States of the former Organization of African Unity (OAU) in June 1998 in Ouagadougou, Burkina Faso. Its purpose is to complement and enhance the functions of the African Commission on Human and Peoples' Rights.¹⁰

It can make legally binding findings about whether the African Charter or any other international instrument ratified by the state concerned has been violated.¹¹ However, it took another six years for the fifteen African countries to ratify the Protocol to the African Charter and for its entry into force, with the Court finally constituted in 2004.

Following the establishment of the Court, negotiations were conducted to determine its base location and the method for electing judges. The Court officially began operations in Addis Ababa, Ethiopia, in November 2006. Ultimately, it was determined that the Court would be situated in Arusha, Tanzania, utilising facilities developed for the International Criminal Tribunal for Rwanda. In August 2007, the Court officially established its seat in Arusha, United Republic of Tanzania. Between 2006 and 2008, the Court primarily concentrated on operational and administrative matters. This period was marked by efforts to establish the organisational framework of the Court's Registry, develop its budgetary provisions, and draft its Interim Rules of Procedure.¹²

In 2008, during the Ninth Ordinary Session of the Court, the Court formally adopted the Interim Rules of Court, following consultations with the African Commission on Human and Peoples' Rights. This process aimed to establish a mutual agreement regarding their procedural rules.¹³ The harmonisation process was completed in April 2010. Subsequently, in June 2010, the Court formally adopted its final regulations of the court.¹⁴ The African Court was established to serve as an organ of the African Union and enhance the protective mandate of the Commission on Human Rights.¹⁵

⁸ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol for Establishment of an African Court), CAB/LEG/665, adopted June 9, 1998, and entered into force January 1, 2004.

⁹ The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

¹⁰ The preamble of the Protocol on the Establishment of an African Court.

¹¹ Ibid Article 7.

¹² <https://www.african-court.org/wpafc/basic-information> Accessed on 8th December, 2023.

¹³ <https://www.african-court.org/wpafc/basic-information> Accessed on 8th December, 2023

¹⁴ <https://www.african-court.org/wpafc/welcome-to-the-african-court/> Accessed on 8th December, 2023.

¹⁵ Article 2 of the Protocol for Establishment of an African Court on Human and Peoples' Rights.



The African Court on Human and Peoples' Rights was established with the mandate to safeguard and promote human rights across the continent of Africa. Accordingly, it possesses jurisdiction over matters that pertain to the interpretation and application of the African Charter, which encompasses contentious, conciliatory, and advisory jurisdictions. Furthermore, the jurisdiction of the Court is not confined solely to the African Charter on Human and Peoples' Rights; it also encompasses any relevant human rights instruments ratified by the states in question.¹⁶

The jurisdictional provisions of the Protocol on the African Court specify who has access to the court, the conditions for access, and the types of violations that the African Court can address. The African Court does not possess the jurisdiction to evaluate the constitutionality of domestic law, nor does it hold the appellate authority to review appeals concerning cases already adjudicated by domestic courts. Moreover, the court cannot consider applications of the evaluation of evidence by domestic laws. Instead, it may analyse such evidence to determine its compliance with the requirements established by the African Charter or any other international instruments ratified by the respondent state.¹⁷ In *Kennedy Owino Onyachi and Another vs. Tanzania*,¹⁸ the court affirmed its jurisdiction to investigate how the evidence pertinent to the alleged violation of human rights was obtained. Furthermore, it will examine whether the collection process incorporated sufficient safeguards to prevent arbitrary actions.

2.0 FUNCTIONS AND RESPONSIBILITIES OF THE AFRICAN COURT.

From its relative establishment instruments, meaning the African Charter on Human and People Rights¹⁹ and the Protocol to the Establishment of the African Court,²⁰ This judicial organ is both *adjudicatory* and *advisory* in respect of its function plus the purpose of its establishment. The court is recognised to have three principal responsibilities within the region. These responsibilities include issuing advisory opinions regarding interpreting the Charter and other human rights instruments, implementing "provisional measures" to avert imminent and irreparable harm to individuals or groups, and adjudicating cases about alleged human rights violations by states that are parties to the Protocol.²¹

2.1 AFRICAN COURT AS THE ADVISORY BODY IN AFRICA

One of the essential functions of the court is to provide advisory opinions regarding the interpretation of the African Charter and other human rights instruments. This service is contingent upon the

submission of relevant concerns by competent parties. While inherently non-binding, the advisory opinion serves a vital function in shaping socio-economic and political developments within the nation. This opinion may concentrate on a particular legal issue or the implementation of a specific legal instrument of protecting and enforcing human rights in a defined region. It considers the relevant African context associated with each human rights advocacy and promotion dimension.

The opinion's results are not intended to constitute a binding judgment against any party involved in a specific case. Instead, they highlight the progressive developments in legislative and administrative frameworks concerning the recognition and protection of human rights. This suggests that the court's recommendations may influence future administrative and legislative trends on particular socio-economic or political matters, emphasising the necessity of upholding and safeguarding the fundamental values of human dignity and respect.²²

The African Court has effectively rendered advisory opinions on various administrative and legislative matters about protecting human rights within individual member states and the region. A prominent instance is the court's advisory opinion regarding vagrancy laws across several states, issued on December 4, 2020.²³

The court's advisory opinion was issued in a socio-economic context where numerous states had Numerous laws enacted to criminalise vagrancy, effectively targeting unemployed individuals, impoverished communities, and sex workers as suspected offenders or presumed criminals. These legislative measures are present in various African nations, including Algeria, Burundi, Burkina Faso, Cameroon, Chad, Comoros, the Republic of Congo, Côte d'Ivoire, Gabon, Guinea, Madagascar, Mauritania, Mali, Morocco, Niger, the Sahrawi Arab Democratic Republic, Senegal, Togo, Botswana, Gambia, Malawi, Nigeria, Seychelles, Uganda, Zambia, Mauritius, Namibia, and Sierra Leone.²⁴

The court determined, about the case presented by the Pan-African Lawyers' Association, that:

Vagrancy laws have been shown to criminalise individuals primarily based on their perceived socio-economic status, creating profound implications for social justice. These laws disproportionately target impoverished and marginalised populations, including those experiencing homelessness, individuals with disabilities, gender-nonconforming persons, sex workers, hawkers, and street vendors. As a result, these regulations not only perpetuate but also deepen the existing discrimination faced by these already vulnerable groups. Often, vagrancy laws rely on derogatory terminology that categorises individuals in a negative light. Judges and advocates have criticised this

¹⁶ Article 3(1) and Article 7 of the Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights

¹⁷ *Mohamed Abubakari v. Tanzania*, Application no. 007/2013.

¹⁸ Application no. 003/2015.

¹⁹ *Supra*.

²⁰ *Supra*.

²¹ *Supra*.

²² See <https://www.amnesty.org/en/latest/campaigns/2023/06/why-the-african-court-should-matter-to-you/>

²³ See <https://www.amnesty.org/en/latest/campaigns/2023/06/advisory-opinion-of-the-court-requesting-the-abrogation-of-vagrancy-laws/>

²⁴ See <https://www.amnesty.org/en/latest/campaigns/2023/06/advisory-opinion-of-the-court-requesting-the-abrogation-of-vagrancy-laws/>



language as symptomatic of an outdated, predominantly colonial mindset that dismisses the rights and dignity of specific populations. This practice of dehumanisation is alarming, as it reflects broader societal attitudes that fail to recognise the humanity and worth of all individuals, regardless of their circumstances. The ramifications of these laws extend beyond legal penalties; they fundamentally violate the right to dignity, a cornerstone of human rights. Additionally, vagrancy laws undermine the principle of equality before the law, as they create a system that disproportionately punishes those who are already marginalised. Ultimately, these laws are inherently discriminatory, creating a cycle of exclusion and hardship for those who are most in need of support and assistance.²⁵

The advisory opinion is one of the fundamental functions for which the court was conceived, meticulously planned, and ultimately established in the region. This key role underscores the court's status as an advisory body that provides legal guidance on interpreting rights enshrined in the charter and other pertinent human rights instruments relevant to the region. Through its advisory opinions, the court aids in clarifying legal ambiguities, ensuring that the rights of individuals and groups are upheld, and fostering a greater understanding of human rights obligations among member states.²⁶ Additionally, these opinions can significantly shape regional legal frameworks and promote adherence to international human rights standards.²⁷

According to Article 27(1) of the Protocol to the Establishment of the Court and Rule 5(1) of the court, the court may, therefore, accord provisional measures where it deems necessary to prevent harm. In the circumstances where it has been so requested, the court accords it regardless of whether it has jurisdiction on the merit case. This is another function the court has in matters relating to human rights violations and protection in the region.²⁸

2.2 AFRICAN COURT AND ISSUANCE OF PROVISIONAL MEASURES

While courts possess the authority to implement legal measures for provisional relief, their ability is considerably constrained. Expressly, a court will refrain from granting provisional measures if there is a risk that such actions could compromise or negatively influence the case's ultimate resolution regarding its merits.²⁹ This principle serves a critical function in maintaining the integrity of the legal process, as it seeks to prevent any potential conflicts or interference between the court's provisional decisions and the final judicial ruling. By adhering to this guideline, the court upholds the fundamental tenet of judicial independence within domestic legal

systems, ensuring that provisional measures do not disturb the judiciary's impartial evaluation of the case.³⁰

This position has been established in various cases, including *Konaté v. Burkina Faso*³¹. The court carefully considered the request for provisional measures but ultimately denied it. The judges highlighted that the applicant's sentence in the primary case would violate his freedom of expression, an essential right protected under applicable laws. They expressed concern that, while the applicant sought temporary relief, granting such an order could potentially undermine the substantive legal issues at stake in the case, complicating the overall judicial review process and possibly affecting the outcome. The court emphasised the importance of balancing the applicant's rights with the integrity of the case's substantive matters.³²

As previously discussed, another critical aspect of the court's legal authority in the region is its power to issue provisional measures when necessary. As mentioned earlier, the court was established to ensure the adequate protection of human rights within the area. It was established to meet these precious human rights protection objectives, and it has three essential functions, adjudication being one of them.³³ From establishing instruments, the court has the legal status of being the judicial organ empowered to interpret the African Charter on Human and Peoples' Rights and other legal instruments of human rights.³⁴

2.3 AFRICAN COURT AS THE ADJUDICATIVE ORGAN IN AFRICA

Access to the court will be granted to relevant parties following the applicable legal framework. This includes state parties that sign the Charter and the African Commission for Human and Peoples' Rights. The Commission can submit complaints directly to the court on behalf of individuals whose rights may have been violated. On the other hand, individuals and non-governmental organisations (NGOs) can only submit complaints directly to the court if their respective states have made a formal declaration allowing such submissions. This requirement is explicitly outlined in Article 34(6) of the Protocol to establish the African Court. In this context, individuals and NGOs must verify their state's position before bringing a case before the court.³⁵

About the state declaration previously discussed, it is essential to note that only a small subset of states has completed this process. Of the thirty-four (34) states that have formally ratified the charter, only eight (8) have made the necessary declaration. These eight states are Burkina Faso, Gambia, Ghana, Guinea-Bissau, Mali, Malawi, Niger, and Tunisia. Each nation has taken the significant

²⁵ *Ibid*

²⁶ See <https://www.amnesty.org/en/latest/campaigns/2023/06/advisory-opinion-of-the-court-requesting-the-abrogation-of-vagrancy-laws/>.

²⁷ *Ibid*.

²⁸ *Ibid*.

²⁹ See the decision in the African Commission on Human and Peoples' Rights vs The Republic of Kenya (2012).

³⁰ *Ibid*

³¹ Application 004/2013.

³² *Ibid*.

³³ <https://afchpr-commentary.uwazi.io/api/files/1494488401502t65e5dg1ppm134wk9dxd5nrk9.pdf>.

³⁴ See Article 2 of the Protocol to the Establishment of the African Court, *Supra*

³⁵ *Supra*



step to affirm its commitment to the principles outlined in the charter, demonstrating its willingness to uphold international standards and contribute to collaborative governance in its respective regions.³⁶

The three images of the African Court on Human and Peoples' Rights provide a detailed representation of its legal framework and operational mechanisms within the African context. Established to uphold and promote human rights across member states, the court is expected to play a pivotal role in ensuring these rights are protected and advanced in the region. Despite its intended purpose, the court has faced various complex legal challenges that hinder its effectiveness. These challenges stem from theoretical perspectives, such as the scope of its authority, the legal obligations of member states, and practical issues related to its operations and implementation of judgments.

3.0 LEGAL OBSTACLES IMPEDING THE AFRICAN COURT'S EFFECTIVE ACHIEVEMENT OF ITS OBJECTIVES IN ENSURING INDIVIDUAL ACCESS TO JUSTICE IN AFRICA

Article 34(6) of the Protocol for the Establishment of the African Court³⁷ This provision imposes significant restrictions on the ability of individuals and non-governmental organisations (NGOs) to access the Court directly. Individuals are permitted to file cases with the Court only if the state has made a formal declaration that grants such access to individuals and NGOs within the region.

This limitation creates a substantial barrier to justice and accountability, hindering the capacity of individuals and organisations to seek remedies for human rights violations. Moreover, this restriction has profoundly impacted the broader mission and vision of the regional framework, undermining efforts to safeguard and promote human rights across member states effectively. For example, only a few states have managed to do that. Out of thirty-four (34) states which have ratified the charter, it is only eight (8) states which have made the declaration, and these are *Burkina Faso, Gambia, Ghana, Guinea-Bissau, Mali, Malawi, Niger, and Tunisia*.³⁸

In various instances, certain states initially made formal declarations affirming their commitment to upholding human rights standards before international courts later chose to retract those declarations. A significant example of this trend is the Republic of Tanzania formally withdrawing its human rights declaration in 2019. This decision occurred after the Republic of Rwanda had previously rescinded its declaration in 2016, reflecting a broader pattern among some nations to reevaluate their pledges to

adhere to international human rights norms and obligations.³⁹

These withdrawals are concerning as they signal a shift in how these states view their responsibilities to protect the rights of individuals within their jurisdictions. Such actions can undermine the framework that supports the enforcement of human rights, potentially leaving many marginalised and vulnerable populations without access to avenues for justice and protection.⁴⁰ Without the backing of these formal commitments, individuals facing injustices such as discrimination, violence, or repression may find themselves with limited recourse to challenge abuses, further exacerbating their plight and eroding the overall effectiveness of international human rights protections.

The absence of a clear and comprehensive legal framework for recognising and enforcing decisions rendered by the African Court on Human Rights presents a significant concern. The lack of enforcement mechanisms significantly undermines the court's ability to function effectively, leading to a situation where its judicial decisions may go unobserved or unimplemented. In Tanzania, for example, no single, comprehensive legal framework currently addresses the recognition and enforcement of court decisions about the violation of rights held by citizens and individuals. This gap in legislation means that individuals may face challenges in seeking justice or recourse when their rights are infringed upon. Without a cohesive statute, the processes for recognizing and enforcing court rulings can be inconsistent, leading to potential disparities in how rights violations are addressed across different cases. This lack of a unified approach may hinder the effective protection of human rights within the country. Consequently, the court's judicial functions have been less impactful within the member states and throughout the region, raising concerns about its overall efficacy in promoting human rights in Africa.

As presented above, decisions of African courts have always been missing a *single, definite, and comprehensive* law on recognition and enforcement of the African court's decisions. This legal weakness on its merit has resulted in a situation where most states do not administratively and positively respond or react to what has been directed by the court in due process of its adjudicatory business in the cases brought before it. The opposing end result of this position is that there has been a slow pace in adopting the court's observation against different legislative and administrative measures to *recognize, protect, and promote* human rights and values in the region.

In Tanzania, for example, it was once observed that;

In June 2011, the Tanganyika Law Society, the Legal and Human Rights Centre, and Rev. Christopher Mtikila filed in the African Court on Human and Peoples' Rights applications instituting proceedings against the government

³⁶ See <https://www.amnesty.org/en/latest/campaigns/2023/06/why-the-african-court-should-matter-to-you/>

³⁷ *Ibid*

³⁸ See <https://www.amnesty.org/en/latest/campaigns/2023/06/why-the-african-court-should-matter-to-you/>

³⁹ See <https://ohrh.law.ox.ac.uk/tanzanias-withdrawal-of-access-to-the-african-court-further-retrogression-in-human-rights-protection-in-east-africa/>

⁴⁰ *Ibid*.



of the United Republic of Tanzania claiming that the government had, through certain amendments to its Constitution, violated its citizens' right of freedom of association, the right to participate in public affairs and the right against discrimination by prohibiting independent candidates to contest Presidential, Parliamentary and Local Government elections. In its judgment of 14 June 2013, the Court found that the government violated Articles 2, 3, 10, and 13 (1) of the African Charter on Human and Peoples' Rights. The Court directed the government to take constitutional, legislative, and all other necessary measures within a reasonable time to remedy the observed violations. This article revisits this case to understand the government's reluctance toward independent candidates.⁴¹

Despite the condemnation against the prevention of private candidates under the electoral laws of Tanzania by the court, the case was initiated and lodged by Christopher Mtikila before the African Court of Justice⁴², but nothing has been made in the Tanzanian law to reflect private candidature in the country. This indicates that most of the African court's decisions remain in the judgment documents with no practical reflection under the laws and their related practices on election. This is the same position in the court's implementation of other decisions in the country and region.

4.0 CONCLUDING REMARKS

From the presentation above, it is evident that the adjudicative aspect and function of the court is crippled by unnecessary limitation of individuals access to the court freely. It is the position that affects the efficiency of the court in protecting human rights in the region. Some recommendations on what should be done to address the legal challenges on the influence of the African Court to promote and develop human rights protection among member states are inevitable.

Thus, it is recommended that the legal instruments on the establishment of the court undergo reforms, mainly in the area involving limiting direct individual and NGO access to the court. This will be effectively done where legal frontiers limiting individuals and NGO's direct access to the court are avoided under the relevant legal instruments, especially Article 34(6) of the Protocol on Establishment of the Court. This, in its reform-ending results, will enable the practical meeting goal of protecting against human rights violations that may, in some circumstances, be made by state agencies in individual member states instead of maintaining state sovereignty to decide or not decide whether individual or otherwise NGO's can directly lodge their cases regarding human rights violations in each given member state in the region.

⁴² *Mtikila v United Republic of Tanzania (Application No. 009/2011; Application No. 011/2011)*

