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African Union: Entry-into force of the Protocol Establishing an African Court on Human and Peoples' Rights - a significant development

Amnesty International welcomes the entry into force of the Protocol to the African Charter on Human and Peoples' Rights Establishing an African Court on Human and Peoples' Rights (the Protocol) after the Union of Comoros became the 15th state to ratify the Protocol on 26th December 2003.

According to the provision of Article 34(3), "the Protocol shall come into force thirty days after fifteen instruments of ratification or accession have been deposited." The ratification by Comoros has thus paved the way for the entry into force of the Protocol on 25 January 2004 and for the establishment of the Court. Other states that have ratified the Protocol are: Algeria; Burkina-Faso; Burundi; Côte d'Ivoire; Gambia; Lesotho; Libya; Mali; Mauritius; Rwanda; Senegal; South Africa; Togo; and Uganda.

Once it has been established, the Court will consider cases of human rights violations referred to it by the African Commission on Human and Peoples' Rights (African Commission) established pursuant to the African Charter on Human and Peoples' Rights (African Charter) and states parties to the Protocol and, where a state party accepts such a jurisdiction, by individuals and non-governmental organizations (NGOs). Unlike the African Commission, the African Court possesses the authority to issue a binding and enforceable decision on cases brought before it.

The entry into force of the Protocol is an extremely positive step towards demonstrating African governments' commitment to realise the spirit and letter of the African Charter and ensure the protection of human rights in Africa. The establishment of an independent, effective, and efficient African Court would make a vital contribution to the efforts to strengthen the African regional human rights system, and could stimulate positive change throughout Africa. Furthermore, the Court would provide the platform for the articulation of international legal principles at the regional level, as well as direction and precedents for domestic courts. It would allow victims of human rights violations or their representatives access to a robust institution that is capable of holding states parties accountable to their obligations both under the African Charter and the Protocol as well.

Now that the Protocol has entered into force, the next critical stage is the nomination and

election of judges and the establishment of a fully functional Court. Amnesty International calls on states nominating a candidate for judge to take measures to ensure the nomination of the highest qualified candidates by fulfilling the criteria set out in the Protocol, including that of individual competence, independence, and impartiality and “adequate gender representation.” States parties should conduct transparent processes, including consultation with civil society. Similarly, the drafting of the Court’s rules of procedure by the judges should be transparent and open to participation of civil society. Consultations with competent NGOs should be held on these issues as well as any other operational aspects regarding the establishment of the Court. Amnesty International further calls on:

- African governments that have not yet done so to ratify the Protocol without further delay. In addition, states - including those that have already ratified - should make declarations allowing individuals and NGOs direct access to the Court.
- African governments to review their legislation and practice, to ensure that these are in full conformity with the Protocol and the African Charter.
- African governments to ensure that the Court is allowed to function independently, impartially and effectively, and to develop its own case law. African governments should cooperate fully with the Court, including by according high priority to the prompt compliance with the judgments and decisions of the Court.
- African governments to ensure that interested people are given the opportunity to be heard and to be represented by legal counsel of their choice. Also, parties and witnesses who appear before the Court should be protected and not face retribution.
- African governments to provide the essential resources, including funding to the Court once established. African governments should also provide adequate resources to the African Commission and ensure that a practical framework be instituted that effectively enable the Court and the African Commission to establish a constructive and complementary relationship.
- African governments to take into account other practical requirements to achieve an effective and efficient Court, including by ensuring that the Court is located in a place that will meet its operational and infrastructural needs.

Background

The Protocol to the African Charter on Human and Peoples’ Rights Establishing an African Court on Human and Peoples’ Rights was adopted by the Assembly of Heads of State and Government of the Organization of African Unity (OAU), now the African Union, at its 34th Ordinary Session, June 1998, in Ouagadougou, Burkina-Faso. The African Court’s principal function is to consider allegations of violations of the human rights, including civil and political rights and economic, social and cultural rights guaranteed under the African Charter, the Protocol and relevant human rights instruments. Only the following entities have the right of direct access to the Court: the African Commission; the state party which has lodged a complaint to the Commission; the state party against which a complaint has been lodged at the Commission; the state whose citizen is a victim of human rights violations; and African Intergovernmental Organizations. Individuals and NGOs can only have direct access to the Court if a state party to the Protocol also makes a declaration accepting the competence of the Court to receive such cases.

The African Court will operate side by side with the African Commission, and not replace the Commission. Indeed, as the Preamble to the Protocol makes clear, “the attainment of the objectives of the African Charter on Human and Peoples’ Rights 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.”

The African Charter which came into force on 21 October 1986 has been ratified by all the OAU (AU) member states. The only mechanism created under the Charter to supervise state parties' compliance is the African Commission. While the African Commission has an elaborate promotional mandate under the African Charter, it does not possess sufficient protective powers. In fact, neither the Charter nor the Commission provides for enforceable remedies, or a mechanism for encouraging and tracking state compliance with decisions that the Commission makes. Despite some positive development in the Commission's individual complaint mechanism, the decisions it renders are non-binding, and still attract little, if any, attention from governments of member states. For several years Amnesty International has campaigned for ratification of the Protocol and believes its entry into force is a significant development in the protection of human rights in the continent. Amnesty International will continue to push for a regional wide ratification of the Protocol and for the establishment of a fully effective and efficient Court. Since the success of the African Court will to a large extent depend upon the operational efficiency of the African Commission, Amnesty International will continue to seek for the strengthening of the Commission as well.