



Promising Practices

On the human rights-based approach in German development cooperation

Human rights protection mechanisms – Strengthening the African human rights system

Background

The African Charter on Human and Peoples' Rights (the Charter) from 1981 has been ratified by 53 out of 54 member states of the African Union (AU). Most African states have enshrined human rights in their respective constitutions. However, national justice systems often lack the capacities to deal with human rights violations or the political situation in some countries does not allow for an independent, strong judiciary. This leaves many African citizens with a long list of rights but often no reliable mechanisms that could enforce them, protect individuals against human rights violations and remind states of their role as primary bearer of the duty to respect, protect, and fulfil human rights.

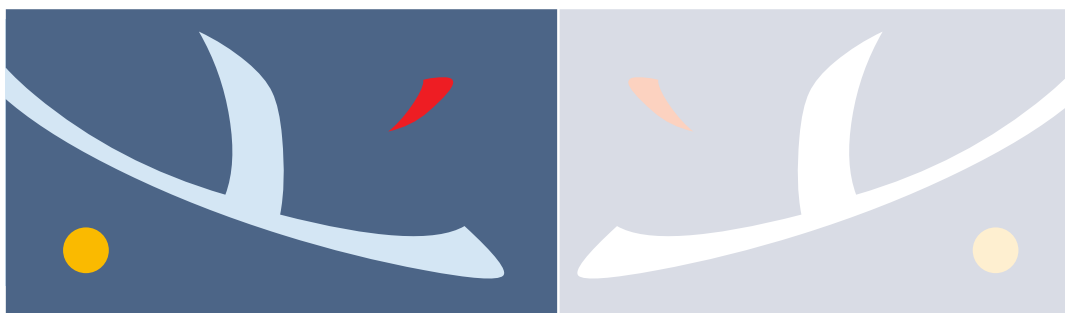
In 1998, the Heads of State and Government of the AU adopted the Protocol establishing the African Court on Human and Peoples' Rights (the Court). With the entry into force of the Protocol after 15 ratifications in January 2004, the AU established a human rights court with the mandate to ensure the protection of human and peoples' rights on the continent. The Court has its permanent seat in Arusha, Tanzania.

The mandate of the Court is also to complement and reinforce the functions of the African Commission on Human and Peoples' Rights (the Commission – often referred to as the Banjul Commission), which is a quasi-judicial body established in 1987 and mandated to monitor the implementation of the Charter. Whereas the Commission is easily accessible for individuals and non-governmental organisations (NGOs) to file complaints about human rights violations, access to the Court is restricted. Individuals and NGOs can only bring cases to the Court if the respective state has ratified the Protocol and made a special declaration allowing individual complaints. To date, 29 African states

have ratified the Protocol and only seven have made the special declaration. However, the Commission can refer cases to the Court that had previously been filed with the Commission under conditions set out in the Rules of Procedure of both institutions. The Commission then acts as litigant on behalf of the victim. The Court's decisions are legally binding and final. The Commission considers complaints and makes recommendations to the state.

Both institutions hold a great potential for the protection of human rights in Africa. However, African citizens yet need to fully make use of them, and African governments need to wholly support them and engage with them more actively. The Court – being a fairly new institution – is not well known and few states have accepted its jurisdiction, even fewer allow for direct access by individuals and NGOs. The Commission, on the other hand, struggles with a backlog of cases.

German development cooperation took up the challenge to support a completely new continental judicial institution in a politically sensitive environment. A project called 'Strengthening the African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights' was established in 2007 to contribute to the improvement of the African human rights protection system. In particular, it aimed at increasing the number of cases reaching the Court, including through more referrals of cases from the Commission, and at raising awareness among African citizens about the existing protection mechanisms. Between its launch in 2007 and 2013, it was a stand-alone programme. Since January 2014, the cooperation with the Court and the Commission has been a component of the BMZ-commissioned AU programme 'Support to the African Governance Architecture'.



The African human rights framework

Beside the African Charter on Human and Peoples' Rights (Banjul Charter), important regional human rights instruments include:

- The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) (2003)
- The African Charter on the Rights and Welfare of the Child (1990)
- The African Charter on Democracy, Elections and Governance (2007)

The current programme is operational until December 2016. The programme is carried out by GIZ in cooperation with the Court, the Commission and NGOs. It is financed by the German Federal Ministry for Economic Cooperation and Development (BMZ).

Towards a human rights-based approach: Making a new judicial human rights institution work

With support from the programme the Court developed an outreach and sensitisation strategy. The aim has been to inform African citizens, NGOs, governments, National Human Rights Institutions, legal professionals and other stakeholders about the existence of the Court, its mandate and procedures. This is done through regional seminars, sensitisation visits and seminars custom-tailored to particular target groups. The strategy covers all African regions starting with the countries that have ratified the Protocol and therefore allow for individuals and NGOs to access the Court. Information material, a film documentary and practical user guides for potential litigants were produced and widely distributed. The Court's website was developed and launched parallel to the implementation of the outreach activities. Often, the President of the Court, the judges and Court staff were personally involved, travelled the continent and spread the word about the institution. This is an unusual approach for judges and a Court, but the Court took up the challenge.

While initially focussing on disseminating information, the strategy now takes a narrower and more technical focus and combines awareness-raising with training for potential litigants, i.e. human rights NGOs including bar associations as potential representatives of individuals. These organisations often lack the knowledge and experience to lodge complaints before the court. The training is carried out by 'friendly agents' of the Court, namely NGOs with a network throughout the continent such as the African Coalition for an Effective African Court (Court Coalition), or the International Federation for Human Rights (FIDH). In close consultation with the Court, those organisations work directly with the

programme and train domestic NGOs and human rights lawyers to bring suitable cases before the Court, in particular in countries that allow them to access it. This will provide access to an effective remedy and contribute to the development of the Court's jurisprudence over human rights violations in Africa. The training also aims at providing litigants with the technical tools necessary for effective litigation before national courts.

In addition, a capacity building programme has been set up at the Court. The judges of the Court are all well-respected legal professionals in their home countries. However, when taking up their mandate, they expressed interest in learning more about dealing with human rights violations at an international court. Part of the capacity building programme has been the establishment of a network with other international courts, such as the European Court for Human Rights, the Inter-American Court of Human Rights, the UN International Criminal Tribunal for Rwanda, the Caribbean Court of Justice, the International Criminal Court and courts of the African Regional Economic Communities (REC). The programme has supported regular exchanges between the institutions to share experiences and to learn from each other.

The programme also supports multi-level cooperation between the African Court on Human and Peoples' Rights, the courts of the African Regional Economic Communities and the national judiciaries. In order to implement this multi-level-approach, a biennial Judicial Dialogue has been initiated involving the

Lohé Konaté v. Burkina Faso – a groundbreaking ruling for freedom of the press in Africa

Lohé Konaté is a journalist based in Ouagadougou, Burkina Faso, and publisher of the weekly newspaper L'Ouragan. After having published two articles about an allegedly corrupt magistrate, he was sentenced to twelve months imprisonment, 3,000 USD fine and 9,000 USD in damages for defamation and insult. Lohé Konaté claimed a violation of his right to freedom of expression and freedom of the press and appealed. His appeal to the highest court of Burkina Faso failed and he turned to the African Court for Human and Peoples' Rights.

The Court, in its judgment of 5 December 2014, found that Konaté's conviction violated the right to freedom of expression and freedom of the press as laid down in Articles 9 of the Banjul Charter and 19 of the International Covenant on Civil and Political Rights (ICCPR) respectively. It ruled that Burkina Faso had to amend its media laws and pay reparation to Mr. Konaté.

The ruling is a milestone for the protection of human rights in Africa and comes at a time of increasingly restrictive media laws in some African states and ensuing self-censorship by journalists. The Court has sent a strong signal to African states to uphold freedom of the press according to human rights standards.

African Court, the REC courts as well as Chief Justices and judges from African countries. This format is the first of its kind in Africa. Through this dialogue, ways and means of cooperation and coordination are being explored, including the sharing of jurisprudence, information and best practices, e.g. regarding the use of case management systems in the various courts.

In 2013, the programme was expanded to include the African Commission on Human and Peoples' Rights as another partner organisation. The programme now supports and facilitates regular working meetings between the Court and the Commission. In addition, three African legal experts – supported by the programme – have worked at the Secretariat of the Commission to help clear the backlog of cases. In order to enable the Commission to act as a litigant before the Court, the programme facilitated litigation training for the Commission. Joint capacity development of legal units from the Court and Commission has been set up for staff to simulate and practice litigation in front of the Court.

Impact

With the support of the programme, great interest in the work of the Court has been generated in Africa and beyond and its visibility has significantly increased at the regional and international level. Most importantly, the Court is developing the existing human rights standards on the continent through its emerging jurisprudence.

The Court started its outreach campaign in 2011 when it had no cases. Since the launch of the outreach strategy with a regional seminar in Malawi more than 50 applications in contentious matters and eight requests for an advisory opinion have reached the Court. The Court held various public hearings, issued preliminary rulings and decisions on the merits. So far, the Commission has referred three cases to the Court involving massive human rights violations and non-compliance by African states with recommendations of the Commission. The referral mechanism closes a gap in the human rights protection on the continent, which results from the fact that the Commission's decisions are non-binding while access to the Court by individuals is restricted. The programme has been facilitating the on-going dialogue between the two institutions regarding the referral of cases.



Mr. Konaté from Burkina Faso consulting with his lawyer.

Alex Thomas v. United Republic of Tanzania – a landmark judgment for the right to a fair trial

Alex Thomas was sentenced in absentia in Tanzania to 30 years in prison in the late 1990s for armed robbery. He has been in prison in Moshi since then, having tried everything to get an appeal in the domestic judiciary.

In its decision from 20 November 2015, the Court decided that Tanzania violated Mr. Thomas' right to a fair trial by not providing him legal aid, by not hearing him properly and sentencing him while he was in hospital and by committing manifest procedural errors (the property of the alleged robbed object was unclear).

There was no order to release him, but the Court ordered Tanzania to take appropriate measures within 6 months, excluding reopening the trial.

The content of this decision has an extraordinary impact. Especially in relation to the 'reasonable time' requirement between the last domestic remedy and the application to the Court: other international courts use a 6 months (or 3 months) ceiling. The Court had determined in previous decisions that it would decide on the 'reasonable time' requirement on a case by case basis. In the case of the applicant Alex Thomas, it allowed a time span of more than 3 years to be sufficient to be considered as 'reasonable time'. This will open many chances for fair trial cases of indigent prisoners all around Africa.

The Court incorporated in its interpretation of the right to a fair trial (Articles 1, 7 of the Banjul Charter) the standards of Article 14 of the ICCPR. Further groundbreaking aspects were the following: in absentia trials are forbidden, legal aid has to be provided in cases of serious crimes and manifest errors during the trial amount to a violation of the right for a fair trial. Regarding legal aid the Court said that the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2004) and The African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), instruments of soft law, constitute the standards to be applied. This decision sets high standards for the right to a fair trial for all African judiciaries.



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The current President of the African Court on Human and Peoples' Rights, Justice Augustine S.L. Ramadhani, emphasises the advantages for African countries to allow individuals to access the Court during the sensitisation visit to Zambia (October 2014). To the left: Justice Duncan Tambala and the Registrar of the Court, Robert Eno.

'The voice of the Court is increasingly being heard' – This statement of the former President of the Court, Lady Justice Sophia Akuffo, summarises one of the main achievements of the Court: It not only started its jurisprudence, but also managed to establish itself as a credible continental judicial institution. It has now been mandated by the AU to develop a framework to ensure compliance with judgments by AU member states. Besides its judicial work, the Court is actively involved in the operationalisation of the African Governance Architecture (AGA) together with other AU organs with a mandate in human rights and governance.

The more cases the Court is dealing with, the more specifically it addresses its needs. It is revisiting its case management system and the judgement drafting, has started to monitor the implementation of its decisions and is redrafting aspects of its rules and procedures.

Challenges

The number of ratifications and special declarations allowing access to the Court remains low, which undermines the effectiveness of the continental human rights institutions. Only 29 out of 54 African states have ratified the protocol and only seven states so far allow individuals and NGOs to access the Court directly. Awareness of human rights as laid down in the Banjul Charter and knowledge about the African human rights institutions continues to be low including in countries that allow individual access to the Court. Furthermore, compliance by member states with the recommendations of the Commission is still low.

Both the Commission and the Court face constraints due to a lack of financial and human resources.

The African judicial institutions landscape is going to undergo substantial changes in the future, and there is currently a rather complex coexistence of pertaining legal documents. Beside the Protocol establishing the Court, a second Protocol (Protocol on the Statute of the African Court of Justice and Human Rights (2008)), not yet in force, provides for the merger of the African Court of Justice with the African Court on Human and Peoples' Rights. In June 2014, the AU Summit adopted a further protocol, envisaging amendments to the 2008 Protocol, in particular the introduction of the Court's competence for international crimes. The latter is now also open for ratifications.

Lessons learnt

The project office is located within the premises of the Court which contributed immensely to its success. GIZ supported the Court almost since its inception and moved with the Court to its current premises in 2008.

Project experience shows that advocacy for ratifications in AU member states requires a more diversified approach considering the specific context of each country and follow-up on the ground by national actors such as National Human Rights Institutions.

In the project, this led to a shift in strategy including the cooperation with suitable civil society actors at national level, with National Human Rights Institutions and with other AU organs such as the Pan African Parliament. The new strategy envisages advocacy for ratification at various levels (national, regional) as well as continued efforts on the ground by national actors.

At the same time, with the number of cases submitted rising sharply, especially in 2015, the Court has recognised in its strategic documents that it will now focus on enhancing what is the core business of the court – the judicial procedure.

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