

# THE ROLE OF THE AFRICAN COURT ON HUMAN AND PEOPLE'S RIGHTS IN THE PROTECTION OF THE RIGHTS OF REFUGEES: BLEND, SLOVENIA: 7 - 9 SEPTEMBER 2011 IARLJ CONFERENCE

## A. GENERAL

### 1. **Mandate and Applicable Law.**

The African Court on Human and Peoples Rights was established by a protocol to the Africa Charter on Human and Peoples Rights. The Court is the sole judicial organ of the African Union, mandated to complement and reinforce the functions of the African Commission on Human and Peoples Rights ("the Commission") in protecting human and people's rights, in African Union Member states. In doing so, the Court applies the provisions of the Charter and any other relevant human rights instruments ratified by the States concerned.

The Charter provides that the sources of law that apply for the monitoring of the implementation of the Charter are international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity (now the Constitutive Act of the African Union), the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the Charter are members.

## **2. Submission of cases: who can make an application to the Court?**

The following are the parties with direct access to the Court:

- The African Commission on Human and Peoples' Rights
- A State party to the Court's Protocol which has lodged a complaint before the Commission
- A State party to the Court's Protocol against which the complaint has been lodged at the Commission
- A State party to the Court's Protocol whose citizen is a victim of a human rights violation
- African Intergovernmental Organizations

State parties to the Court's Protocol with an interest in a case may be permitted by the Court to join the proceedings

Relevant Non Governmental organizations (NGOs) with Observer Status before the Commission, and individuals can institute cases directly before the Court, only if the State party involved has made a declaration allowing such applications.

## **3. Judgment of the Court**

The Court gives its judgment within ninety (90) days of having completed its deliberations. Its judgment is final and not subject to appeal.

However, in light of new evidence, which was not within the knowledge of a party at the time the judgment was delivered, a party may apply for review of the judgment. This application must

be within six months after that party acquired knowledge of the evidence discovered.

The Court also has power to interpret its own decisions.

#### **4. Remedies**

When the Court finds that there has been a violation of human or peoples' rights, it will issue appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court can adopt provisional measures as necessary.

#### **5. Enforcement/Execution of the Court's Judgments**

Article 30 of the Court's Protocol obliges States Parties to undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.

Rule 61(5) and 64(2) of the Rules of Court provide that "The judgment of the Court shall be binding on the parties" and "The Executive Council shall also be notified of the judgment and shall monitor its execution on behalf of the Assembly".

### **B. PROTECTING REFUGEE RIGHTS IN PARTICULAR**

6. There are several African instruments which the Court can possibly utilize for the protection of refugee rights. The most notable are: The African Charter on Human and Peoples' Rights itself, The Convention Governing the Specific Aspects of Refugee Problems in Africa, the Protocol to the African Charter on the Rights of Women in Africa, The African Charter on the Rights and Welfare of the Child and the African Union Convention for the Protection and Assistance of Internally Displaced Persons.

### 6.1 The African Charter

In his book, **International Human Rights Law in Africa**, Frans Viljoen makes the point that in accordance with **Article 2** of the African Charter:

*“every refugee – as part of the category ‘every individual’ – is also entitled to all the rights in the African Charter, such as the rights to dignity, property and health”.*<sup>1</sup>

This is indeed the case, as Article 2 is admirably clear on its absolutely universal application:

*“Every individual shall be entitled to the enjoyment of the rights and freedom recognized and guaranteed in the present Charter without distinction of any kind, such as race, ethnic group, colour, sex, language, religion, political, or other opinion, national and social origin, fortune, birth, or any status”.*

Therefore, it seems that in line with this article, refugees are entitled to all the protections enshrined in the Charter. With

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<sup>1</sup> Frans Viljoen: International Human Rights Law in Africa page 254

this in mind, there are some provisions of the Charter which are more important to the status of refugees than others. They include:

**Article 3 and 7** which entitle one to equal protection before the law and the right to have one's cause heard.

**Article 5** which prescribes the right to respect and dignity for every individual; and

**Article 12:** which provides for the right to freedom of movement and prohibits mass expulsions of non-nationals; this must be taken together with the *jus cogens* international law principle of non-refoulement which ensures that refugees may not be sent back to a territory where they may be subject to persecution again.

## **6.2 Convention governing the specific aspect of Refugee problems in Africa (1951)**

Some scholars have taken the view that the manner in which this Convention is drafted does not provide “explicitly for the ‘rights’ of refugees”, but is clear on “entitlements (or indirect rights)” which are “implied by the imposition of obligation on states, thus rendering the OAU Refugee Convention a “human rights-related” treaty”.<sup>2</sup>

However, it should be noted that the Convention has a far wider definition of the term “refugee” than the African Charter,

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<sup>2</sup> Frans Viljoen: International Human Rights Law in Africa page 254

and more particularly, than the UN Refugee Convention from which it is derived.

Thus, the OAU Convention defines a refugee as: “*every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.*”

This definition is a notable in that it removes the element “fear of persecution” which must otherwise be shown under the UN system.

However, by far the most relevant of the entitlements implied in the OAU Convention member states are *inter alia*:

- **Article 2(1):** “use their best endeavors consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.”
- **Article 2(4):** “Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international

cooperation take appropriate measures to lighten the burden of the Member State granting asylum.”

- **Article 2(5):** “Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph.”
- **Article 2(6):** “For reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin.”

While scholars are not agreed as to whether this provision is obligatory or merely recommendatory, it is possible for the Court, in its jurisprudence, to settle the question one way or the other, and therefore possibly promote the protection of refugee rights.

In addition, unlike the UN convention, this Convention also places an express obligation on states to ensure that “Refugees who voluntarily return to their country shall in no way be penalized for having left it for any of the reasons giving rise to refugee situations.” – **Article 5**

It is clear therefore, that this convention potentially opens a wide door for a possible role by the Court in the protection of refugee rights.

### **6.3 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa**

Like the Charter before it, apart from the specific article prescribing rights for refugees, asylum seekers and displaced persons, the general provisions of the Protocol regarding human rights protection apply equally to refugees and non-refugees alike; viz: elimination of discrimination, right to dignity, life, integrity, security of persons, justice and protection before the law, protection from harmful practices etc. And in terms of Article 27 of this Protocol, the Court is squarely responsible for its interpretation and application.

In particular, **Article 11(3)** provides that *“States Parties undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.”*

This provision is important in that it creates a positive obligation on the member states. As a result, it empowers the Court to ensure that once refugees are taken in by a state, measures are taken to ensure that they are adequately protected. Thus, not only must the State, or the agents of the



state ensure that they do not engage in the prohibited activities (the negative element), they are also required to ensure protection from civilian perpetrators. This is important in that it could potentially allow the Court to find the State liable for an omission on its part, namely, protection, and the bringing of perpetrators to justice.

While its title seems to imply that the Protocol applies only to the protection of women, scholars have noted that the provisions dealing with the protection of refugees, asylum seekers and internally displaced persons can actually be read as including both men and women. This arises from the various inconsistencies found elsewhere in this protocol in that it is sometimes unclear as to whether it applies only to Women. The result is that this makes for a fertile ground for the Court to build its jurisprudence on the protection of refugee rights.

#### **6.4 The African Charter on the rights and welfare of the child**

Like the African Charter which is administered by the Human Rights Commission, the Children's Charter shall be administered by a Committee which shall produce reports and make recommendations on the status of the protection of children's rights. However, like the Commission, the Committee cannot make binding decisions. In terms of Article 7 of its Protocol therefore, the Court shall also have

jurisdiction on matters arising out of the provisions of the Children's Charter.

The Charter enshrines children's rights generally, and nothing in its provisions prevents those rights being extended to children of refugees or children who are refugees. In fact Article 3 prohibits discrimination against any child on many grounds including status. And among other provisions, Articles 4 and 5 ensures a child's right to its best interest and its survival and development, while Articles 11, 12 and 14 assures every child of the right to education, leisure, recreation cultural activities, health and health services. A child shall be protected from child labour, abuse, torture and shall be entitled to the protection of its family. These provisions expand considerably, the possible role of the Court in the protection of refugee children or children of refugees.

In particular, Article 23 prescribes specific obligations for states with regard to the protection of refugee children, which provisions shall apply mutatis mutandis to internally displaced children.

#### **6.5 African Union Convention for the protection and assistance of internally displaced persons in Africa (Kampala Convention)**

This convention is a natural extension of the rights and protection accorded by the Convention Governing the Specific Aspects of Refugee Problems in Africa, and as

stated by Bahame Tom Nyanduga<sup>3</sup> in his article “The African Union IDP Convention, The Kampala Declaration And Recommendations; The Challenges Faced And Strategies Needed To Ensure A Speedy Signature, Ratification And Implementation”, *“The Heads of State and Government therefore decided that mere statements of normative principles, which are non-binding, were not good enough for them. It is therefore safe to state that their decision to adopt the Kampala Convention was a conscious and deliberate effort to enhance the protection and assistance to IDPs, through a legally **binding instrument**, rather than the UN inspired, non-binding Guiding Principles.”*

The convention therefore establishes a legal framework; within a legally binding convention which potentially gives the Court limitless possibilities for the protection of refugee rights considering that an IDP is essentially a refugee but within state borders, particularly in so far as it creates a positive obligation to ensure that internal displacement is avoided, and when it does occur, that the affected individuals are protected. Unfortunately, the convention has not yet come into force.

## **6.6 Other International Law sources**

In accordance with Article 3 of its Protocol, the Court’s jurisdiction *“shall extend to all cases and disputes submitted*

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<sup>3</sup> Former Commissioner at the African Court on Human and Peoples’ Rights

*to it concerning the interpretation and application of the Charter and any other human rights instrument ratified by the States concerned*". Effectively, this means that the Court shall have jurisdiction over all possible refugee issues governed by other international instruments which the states concerned have ratified. In this regard, the possible role of the Court in the protection of refugee rights would appear to be limitless.

### **C. CONCLUSION**

While the African Union has put in place a truly comprehensive framework for the protection of human rights and refugee rights, the necessary implementation has lagged behind. For instance the Convention on the Protection and Assistance of Internally Displaced Persons in Africa requires to be translated into reality regionally and nationally, by encouraging its full ratification. In addition, further ratification of the Court Protocol and the deposit of the Declaration permitting individual refugees direct access to the Court are essential for the possible protection of refugee rights. This will have the cascading effect of an increase in the submission of cases to the court. For its part, the Court is ready to exercise its jurisdiction in the protection of the rights of refugees.

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