



PRESS STATEMENT

CENTRE FOR HUMAN RIGHTS EXPRESSES CONCERN ABOUT THE WITHDRAWAL OF DIRECT INDIVIDUAL ACCESS TO THE AFRICAN COURT BY BENIN AND CÔTE D'IVOIRE

5 May 2020

The Centre for Human Rights, University of Pretoria, is deeply concerned about the recent decisions by the Governments of the Republic of Benin and Côte d'Ivoire to no longer allow individuals and NGOs to take cases directly to the African Court on Human and Peoples' Rights. Almost all cases decided by the African Court so far have been submitted by individuals. Reducing this form of access to the African Court, impedes the establishment of the Court as a legitimate continental institution that entrenches the principles of accountability based on the rule of law. Our concern is exacerbated by the fact that these decisions have been taken in a context of increased hostility towards the human rights bodies established under the African Union and decreasing support for their mandates.

Background

The African Court is one of the main organs of the AU responsible for strengthening the human rights protection system in the continent, and for ensuring respect for and compliance with the African Charter on Human and Peoples' Rights and other human rights instruments ratified by AU member states. To date, 30 AU member states have accepted the Court's jurisdiction by ratifying the Protocol of the African Charter on the Establishment of an African Court (Court Protocol). By doing so, these states accepted that cases may be brought against them, but these cases have to be submitted first to the African Commission on Human and Peoples' Rights.

However, in addition to ratifying the African Court Protocol, state parties to the Protocol have the option to make a declaration under article 34(6) of the Protocol allowing individuals and NGOs to take cases *directly* to the African Court after exhausting domestic judicial remedies. To date, only 10 African states (Benin, Burkina Faso, Cote d'Ivoire, Gambia, Ghana, Malawi, Mali, Rwanda, Tanzania, and Tunisian) have *ever made* this declaration since the Protocol had been adopted in 1998. Benin ratified the Court Protocol in 2014 and deposited the article 34(6)-declaration in 2016. Côte d'Ivoire ratified the Court Protocol in 2004 and deposited the article 34(6)-declaration in 2013. Their withdrawals bring to four the number of states revoking their individual access-declarations. The first state to do so was Rwanda, in March 2016; followed by Tanzania, in November 2019.

Benin's withdrawal

According to its notice of withdrawal of 25 March 2020, Benin's withdrawal is motivated by its contention that the Court has interfered in areas beyond its competence ('une habilitation à s'immiscer dans les domians qui n'ont pas été attribués á sa compétence'), resulting in a serious disruption of the national legal order ('une grave perturbation de l'ordre juridique') and legal uncertainty ('véritable insécurité juridique') negatively affecting its economic appeal (attractivité économique). In the notice, specific reference is made to the Court's recent order of provisional measures, in which the Court suspended a domestic court's order. This seems to be the cases of [Ghaby Kodeih v Benin](#) and [Ghaby Kodeih and Nabin Kodeih v Benin](#). In the first case, the African Court ordered that the title to the applicant's property should not be transferred pending the African Court's decision on the merits of the case. In the second case, the African Court ordered that the 8-storey building (a Hotel) constructed by the applicants should not be demolished pending the Court's decision on the merits. Benin contends that these matters have been and should be resolved by the Cotonou Court of Appeal and the Common Court of Justice and Arbitration of the Organization for the Harmonization in Africa of Business Law (OHADA).

It is not clear to what extent another decision by the African Court, [Sebastien Ajavon v Benin](#), played a part in Benin's decision to withdraw its acceptance of direct access. Ajavon is not only a businessman, but also a politician. Running for President in 2016, he showed himself to be a serious contender. However, he was subsequently convicted for drug trafficking, a charge that he denied. This conviction thwarted his ambition to run as presidential candidate in the presidential elections scheduled for February 2021, and caused him to seek political asylum in France. Submitting his case to the Court under article the article 34(6)-declaration, [the Court found](#) that Benin had violated his rights, and in November 2019, ordered the state to pay him compensation to a total of 3 billion CFA (approximately USD 5 million).

Withdrawal by Côte d'Ivoire

A few days after Benin's withdrawal, Côte d'Ivoire followed in Benin's footsteps.

The African Court has thus far decided only [one case](#) against Côte d'Ivoire, finding it in violation in respect of the legal regime regulating the composition of its Independent Electoral Commission. While the government did not explicitly oppose this finding, it has been slow in giving effect to it. It seems Côte d'Ivoire was also propelled into action by a [provisional measures order](#), handed down just a few days before it issued its withdrawal notice. This order was brought in the context of a case submitted by Guillaume Soro, who had been a rebel leader and a previous Prime Minister. The Court decided to suspend the arrest warrant against Soro pending the finalisation of the case on the merits. Instead of abiding by the African Court's order, Soro – who had fled the country – was convicted in absentia, after a one-day trial, and sentenced to 20 years' imprisonment. It certainly seems relevant that Soro has declared his intention to contest the presidential elections scheduled for 31 October 2020.

An additional factor that seems to be of relevance is the avalanche of cases submitted against Côte d'Ivoire. In 2019, 24 cases were submitted against Côte d'Ivoire before the African Court. However, none of these cases have yet been decided on the merits; and almost all request for provisional measures orders emanating from these cases have been denied.

Consequences of withdrawal

In line with previous rulings of the African Court, these withdrawals only becomes effective after 12 months and do not affect cases that are already pending before the Court or may still be filed during the 12 months transitional period. Under international law, Benin and Côte d'Ivoire have the obligation to cooperate with the Court in good faith until all the cases pending before the Court have been dealt with, since the withdrawal has no retrospective effect.

Centre for Human Rights' position

The Centre for Human Rights would like to reiterate that disagreements with decisions of the Courts are expected in any system that values divergent views but such disagreements should not warrant withdrawal by states, given that a withdrawal does not in itself absolve the state party of its obligation to comply with the decisions of the Court.

The Centre for Human Rights further reiterates that while it is the sole prerogative of states to make the declaration allowing direct access to individuals and NGOs, states should always keep in mind the primary motivation for making the declaration, which is to ensure access to remedy at the regional level for human rights violations when local remedies prove unavailable, insufficient, or ineffective. While there still remain avenue to seek remedy from the African Court through the African Commission, practice has shown that this route is extremely underutilised leaving access to remedy from the African Court almost impossible without the article 34(6)-declaration. States should therefore be very cautious about exercising the option of withdrawing their article 34(6)-declarations, as such an action diminishes the established right to access justice of its nationals.

The African Court is the central institution in creating an effective regional accountability mechanism that plays a part in providing 'African solutions to African problems'. This observed trend of withdrawals contributes to the polarization of states and a further restriction of access to remedy, an outcome that must be avoided at all cost.

Centre for Human Rights' call

The Centre for Human Rights therefore urges the governments of Benin and Côte d'Ivoire to reconsider their decisions to withdraw the article 34(6)-declaration. We also urge the African Union and other stakeholders to use all diplomatic and other means to engage these government to reverse these decisions. In so far as the decision to withdraw these declarations is based on orders for provisional measures, the withdrawing states are urged to take into account that these orders have no bearing on the eventual finding on the merits of the case.

Should these states notwithstanding maintain their withdrawals, we urge that they fully cooperate with the Court on all pending cases and comply with decisions that emanate from those and previous cases.

We further urge state parties to the Court Protocol that have not yet made an article 34(6)-declaration, to do so. According to Frans Viljoen, Director of the Centre for Human Rights: "We in particular urge South Africa, during this year of its AU Presidency, to take a lead in stemming the tide that risks undermining the effectiveness of the African Court as a landmark of justice and human rights, accountability and the rule of law on our continent. Now is the time for South Africa to take bold actions to bolster this crucial AU institution."

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