

AFRICAN UNION

الاتحاد الأفريقي



UNION AFRICAINE

UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES
P.O. Box 6274 Arusha, Tanzania - Téléphone: +255 205 0111/+255 782341688

**Conference on the Establishment
of the
Arab Court on Human Rights**

25-26 May 2014

**Manama,
(Bahrein)**

**“The African Court of Human and Peoples’ Rights:
Challenges, Achievements and Prospects
of Cooperation with its future Arab Counterpart”**

by

Dr. Fatsah Ouguergouz
*Judge and Former Vice-President of the African Court
of Human and Peoples’ Rights*

As Salaam Arlikoum,

H.E. Dr. Abdulaziz H. Abul, *Chairman of the National Institution for Human Rights of the Kingdom of Bahrein,*

H.E. Dr. Nabil El-Araby, *Secretary-General of the League of Arab States,*

H.E. Dr. Abdulatif Bin Rachid Al-Zayani, *Secretary-General of the Gulf Cooperation Council,*

H.E. Dr. Ahmed M. Al-Jarwan, *President of the Arab Parliament,*

H.E. Mr. Mohammed Essabbar, *President of the Arab Network of National Institutions for Human Rights,*

Dr. Frej Fenniche, *Representative of the United Nations High Commissioner for Human Rights,*

Excellencies,

Dear Colleagues and Friends,

Ladies and Gentlemen,

It is with a feeling of pleasure and honour that I am joining you today on the occasion of this two-day Conference and that I am sitting on this distinguished panel to share with you my eight-year experience at the African Court of Human and Peoples' Rights and my views concerning the establishment of an Arab Court of Human Rights. I must add, that as an Algerian brother I am also very proud to have been invited to bring my modest contribution to this thematic discussion.

On behalf of the African Court, and in my own name, I therefore wish to express my sincere gratitude to the *National Institution for Human Rights of Bahrein*, the *National Human Rights Committee of Qatar*, as well as the *Arab*

Network for National Human Rights Institutions, for their kind invitation to participate in this Conference which will, beyond any doubt, constitute an historical milestone towards the establishment of the long awaited Arab Court of Human Rights.

Since I have the privilege to sit together with my colleague, the Vice-President Casadevall, and my friend, Professor Christina Cerna, who spoke about, respectively, the European Court and the Inter-American Court of Human Rights, I would like to stress that both the drafters of the Protocol establishing the African Court and the judges of the African Court have much borrowed from the constitutive instruments and practice of these two sister judicial institutions.

I therefore hope that our discussions will help us to build an effective Arab Court, using the rich and diverse institutional and procedural material which already exists in the other regions of the world. The African Court would of course be more than willing to assist the future Arab Court in its establishment and effective functioning and I am sure that the two sister regional Courts will also be willing to join us in this endeavour.

At that stage, I also wish to underscore the fact that Algeria, my home country, is a member State of both the League of Arab States and the African Union, the African continental organization; eight (8) other countries are in the same situation (Comoros, Djibouti, Egypt, Libya, Mauritania, Somalia, Sudan and Tunisia). These nine (9) countries could therefore participate in both the African Human Rights System and the Arab Human Rights System. To date, however, only five (5) out of the said nine (9) abovementioned Arab States have ratified the Protocol establishing the African Court (Algeria, Libya, Mauritania, Tunisia and Comoros) but none of them have accepted the optional jurisdictional of the Court to examine applications from individuals or NGOs.

As an African international judge, I can not really interfere in what is actually the political and sovereign choice of the Member States of the Arab League, that is, the content of the Statute of the future Arab Court. I would simply express the wish that the nine (9) above-mentioned States, that is almost half of the Member States of the Arab League, will make sure that this Organization do not create a Court of a much lower standard than the one they have created sixteen (16) years ago in the framework of the African Union, I mean the African Court of Human and Peoples' Rights on the bench of which I have the pleasure and privilege to sit. It is indeed important to provide the Arab Court with sufficient prerogatives and financial resources that will entitle it to fulfil efficiently its important and unique mission.

After this lengthy introduction, I will turn to the main purpose of my presentation which is to underscore the main challenges faced by the African Court since its establishment in 2006, as well as its main achievements, and to explore ways of assisting the future Arab Court of Human Rights to discharge its functions. For those of you who are not very familiar with the African Court, I will first say a few words about the organization and functioning of this judicial body.

1) The African Court in a nutshell

The decision to create an African Court was taken in Tunis in 1994 and the drafting process involved the civil society through, *inter alia*, the participation of the *International Commission of Jurists*, a prominent and well-respected NGO based in Geneva. The Protocol establishing the Court was adopted on 9 June 1998 and it entered into force on 25 January 2004, that is, almost six (6) years later, after its ratification by fifteen (15) African States. It is a protocol to the African Charter on Human and Peoples' Rights which was

adopted in 1981 and which created the African Commission on Human and Peoples' Rights; the Court was established to complement the protective mandate of this commission which is a quasi-judicial body.

The Court is composed of eleven (11) judges working on a part-time basis; only the President is working full-time. The first members of the bench have been elected in January 2006 and were sworn-in on 2 July 2006. The seat of the Court was not specified in the Protocol; Article 25 of this Protocol provides that the seat of the Court shall be determined by the Assembly of Heads of State and Government of the African Union. The Heads of State and Government later decided that the seat of the Court will be in Arusha (Tanzania).

The Court is assisted by a Registry headed by a Registrar and composed of 46 staff members to be raised to 90 in the next couple of years; its annual budget is now about eight (8) millions US dollars. The Court has so far held thirty-two (32) ordinary sessions and six (6) extraordinary ones.

The Court has been provided with a broad material jurisdiction in both contentious and advisory matters. This jurisdiction indeed extends far beyond the African Charter on Human and Peoples' Rights, to embrace other relevant human rights instruments. The Court has also a broad personal jurisdiction since it can be seized by various different entities, including the African Commission on Human and Peoples' Rights, individuals and non-governmental organizations.

As of today, that is 16 years after the adoption of the Protocol establishing the Court, twenty-seven (27) Member States of the African Union, out of fifty-four (54), that is half, are parties to this Protocol and seven (7) of them (no Arab States however) have filed the optional declaration allowing individuals and non-governmental organizations to lodge applications before the Court. I will

now turn to the challenges faced by the Court right after its establishment in 2006.

2) Main challenges faced by the Court upon its establishment

Immediately after the eleven (11) judges were sworn-in, the Court had to face many challenges relating to its launching or operationalization. It is expected that the future Arab Court of Human Rights will be facing the same challenges. I will mention ten (10) of these challenges:

- 1) The first challenge faced by the Court was to prepare its budget for the first biennium (2007 and 2008);
- 2) the second one was to draw up the administrative structure of its Registry;
- 3) the third challenge, which was also a critical test for the sustainability and independence of the Court, was to *convince* the political organs of the African Union to *accept* its budget and the structure of its Registry;
- 4) fourth, the Court had to start the recruitment of the forty-six (46) staff of its Registry;
- 5) fifth, the Court had to draft the conditions of service/terms of appointment of the judges;
- 6) the sixth challenge was for the Court to get these conditions of service *approved* by the African Union;
- 7) the seventh one was to negotiate a headquarter agreement with the Government of Tanzania, the host country;
- 9) the ninth challenge was for the Court to draft its Rules; and
- 10) *last but not least*, the Court had to design the robes of the judges and of the Registrar. This was not really a challenge but the exercise took a couple of years...

I would confess that the drafting of the Rules of Court was the most time consuming and painstaking activity conducted by the Court during its first four years of existence. It indeed took two (2) years to draft and adopt a set of preliminary Rules (20 June 2008) and two more years to harmonize these interim Rules with the Rules of the African Commission. The Court and the Commission held three (3) joint meetings for the purpose of this harmonization (July 2009 in Arusha, October 2009 in Dakar and April 2010 in Arusha); the present Rules of Court were finally adopted on 2 June 2010. The drafting process therefore lasted almost four (4) years. It is to be hoped that the Members of the future Arab Court will learn from our experience in this matter.

I would underline that the drafting of the Rules was the most crucial challenge faced by the Court because it was absolutely necessary for the Court and the Commission to work together in a coordinated and efficient way. Once it was established, the African Court indeed needed to be fasten to the one-tier system as it existed before its establishment, that is the African Commission. This was a technical but also a diplomatic operation which had to be carried with lots of care. I would compare this sensitive operation to the docking of a space-craft to the international space station.

Why was it a sensitive operation ? In reply, let me remind you that in the two other regional two-tiered systems, that is the Inter-American System and the European System as originally conceived, the relationships between the respective Commissions and Courts are or were articulated in a very precise and detailed way by the American Convention and the European Convention. There is no such precise and detailed articulation in the African system *which has not been designed by a single instrument but by two different ones*, that is the African Charter and its 1998 Protocol.

Indeed, the Protocol establishing the African Court does not specify in detail the relationships between the Court and the Commission and it is to be hoped that the drafters of the Statute of the Arab Court will give a careful attention to the question of relationship between the Arab Court and the Arab Committee.

Article 2 of the Protocol (entitled “*Relationship between the Court and the Commission*”) only provides that the Court shall “*complement the protective mandate of the African Commission*”. Articles 5 and 6 of the Protocol, relating to the access to the Court and the admissibility of cases, respectively, are shedding more light on the nature of this relationship but they are actually raising more questions than they provide answers.

The potential relationships between the Court and the Commission are indeed rich and complex. These relationships are not one-way ones like in the two other regional human systems, where the stream goes from the respective Commissions to the Courts. Articles 5 and 6 of the Protocol strongly suggest that the relationships between the African Court and the African Commission can be two-way relationships: from the African Commission to the African Court and from the latter to the African Commission. Time does not allow me to dwell on these relationships but I may come back to them later during the discussion. I will now deal with the achievements of the Court since its establishment in 2006.

4) Main achievements of the Court since its establishment

As I mentioned previously the Court faced several challenges after it was established and I would say that most of these challenges have been faced successfully by the Court. These are to be considered as significant achievements of the Court during the past eight (8) years but there is no need to

dwell on them here. I would instead focus on the judicial achievements of the Court so far.

As of today, the Court received twenty-nine (29) applications from individuals and Non-Governmental Organizations, and six (6) requests for advisory opinion. Eight (8) of these cases are still pending: two (2) against Burkina Faso, one (1) against Kenya, one (1) against Libya and four (4) against Tanzania. Two (2) requests for advisory opinion are still pending, one (1) filed by a Nigerian NGO, SERAP (Socio-Economic Rights and Accountability Project) and one (1) filed by the African Committee on the Rights and Welfare of the Child.

It is still too early to make a real assessment on the impact of the rulings of the Court on the situation of human rights on the continent. I would simply mention a positive development. On 14 June 2013, the Court has delivered an important judgment which might have some consequences as far as the free participation of individuals to the political life of their countries is concerned. The Court has indeed ruled that obliging a candidate to a presidential election to be member of, or to be backed by a political party was contrary to the international obligations of the State concerned. The Government of Tanzania is now in the process of amending the Constitution in order to allow the independent candidatures to presidential and parliamentary elections.

Another important development is of institutional nature. Indeed, in January 2014, that is a few months ago, the Executive Council of the African Union requested the Court to propose a concrete reporting mechanism that will enable it to bring to the attention of relevant policy organs, situations of non-compliance and/or any other issues within its mandate, at any time, when the interest of justice so requires. This proposal was made after the Court drew the

attention of the Executive Council on two (2) cases of non-compliance by States parties to the Protocol with provisional measures ordered by the Court.

Concerning the relationships between the African Court and the African Commission, I would also mention that since 2012, the two institutions are holding an annual meeting to discuss issues of common concern; our next meeting will take place this coming July in Kigali (Rwanda).

I am now turning to the important issue of institutional cooperation between the regional Courts.

5) Institutional cooperation between the three existing regional Courts and the future Arab Court of Human Rights

In this regard, given the universality of human rights, it would be useful that similar systems and institutions collaborate in order to share experiences, information, jurisprudence, lessons learnt and best practices, with a view to continuously improving the promotion and protection of human rights.

The four regional Courts could collaborate in many ways in order to improve their working methods and strengthen their efficiency. I will focus here on how the Arab Court could benefit from this cooperation, since it is an institution with a similar mandate as the European, Inter-American and African Courts.

i) Exchange visits for Judges

It is important that Judges from the four Courts pay visits to the other Courts to see and exchange views on how they are run, and see physically their structures and set up. This is the reason why, one year after its establishment, the African Court deemed it necessary to visit its two regional sisters. Indeed, in June 2007, Members of the African Court undertook a study visit to the

European Court in Strasbourg (France) and to the Inter-American Court in Costa Rica (Costa Rica); they have also visited the seat Inter-American Commission of Human Rights in Washington D.C. (USA) and met with some Commissioners. Members of the future Arab Court would also learn a great deal from such exchange visits. The African Court is therefore launching a standing invitation to Members of the future Arab Court to attend its sessions and visit its facilities.

In the future, Members of the four Courts could also be invited to participate in events (Conferences, Workshops, etc...) organized by one these Courts. This would help raising the awareness of the four Courts on matters of particular or common concern.

ii) Joint meetings for Judges and other stakeholders

The three existing Courts laid the groundwork for their collaboration during the First Colloquium of the African, European and Inter-American Human Rights Courts which was held from 1 to 8 August 2009, in Berlin (Germany). The theme of the Colloquium was “*Current and emerging issues relating to the protection of human rights*”; the Colloquium brought together not only judges of the three Courts but also, academicians, professors, researchers and advocates. The discussions focused on the comparison of the functioning of the three Courts, the problems that may arise for the African Court as a young jurisdiction and the search for solutions by means of the practices of the older Courts. The Colloquium ended with a roundtable meeting in which many non-governmental organisations participated. During that roundtable meeting, the NGO’s were particularly interested in the issue of access to the African Court and its promotion; issues relating to possible partnerships with the Court were also discussed.

Following that colloquium, there has been a more structured collaboration between the African Court and the other two Courts, including staff exchanges, information sharing and exchange visits. The African Court and the Inter-American Court of Human Rights have for example signed a Memorandum of understanding to strengthen this collaboration.

The future Arab Court would be more that welcomed to participate in such joint meetings.

iii) Joint retreats by Judges

The Judges of the four regional Courts could also organise joint retreats on a regular basis in order to exchange views, experiences and other developments in the area of human rights protection. A Colloquium has for example been organized by the European Court in Strasbourg, from 2 to 4 December 2009, on the issue of “Remedies for Gross and Systematic Human Rights Violations”; the Inter-American and African Courts were both invited at this Colloquium, together with the Inter-American and African Commissions of Human Rights.

This kind of meeting is very important as it would allows the four regional Courts to learn more about their respective jurisprudence on particular issues so as to seek coherence and avoid the fragmentation of international human rights law. Issues of common concern could also be discussed such as the effective compliance of judgment by the States concerned.

In the Inter-American system for example, the American Convention does not provide for the monitoring of the compliance with the Court’s decisions by a political organ, unlike the European Convention and the African Charter which give such a power to the Council of Ministers of the Council of Europe and the

Executive Council of the African Union, respectively. The Inter-American Court has therefore devised a special procedure for monitoring compliance with its Judgments and other decisions (Article 69 of its Rules); the procedure for monitoring compliance with the decisions of the Court is carried out through, *inter alia*, the submission of reports by the State concerned and observations to those reports by the victims or their legal representatives.

The European Court, for its part, has developed the concept of «pilot judgments». Under this procedure if complaints emanate from structural flaws in the national legislation and policies of a State Party to the European Convention, then the Court will monitor the implementation of reform of those laws and policies so as to avoid repetitive cases or repetition of claims arising from those laws and policies.

Each regional Court could thus learn from the experience of the others and from these cross-fertilization discussions.

iv) Staff exchange

One of the key resources in ensuring the effectiveness of any institution is the human resource. It is thus important for the four institutions to enhance their human resource capacity, including enhancing their knowledge and skills in human rights, through staff exchanges. This could be through a formalized exchange framework which will enable staff members of the Arab Court to visit the Registries of the European, Inter-American and African Courts, for a period of not less than one month, to understudy the operations of these Courts, with a view to help setting of the Registry of the Arab Court and to improve its functioning. Regular contacts between the Registries of the four Courts would allow exchange information on issues of procedure, methods of work and case-law.

Staff exchange has several mutual benefits for the organizations involved. Such exchanges could for instance, facilitate accelerated learning by staff members and enhance their knowledge of the practices of the other Courts; equipping staff members with added skills, ideas and perspectives which they can incorporate into the practices of their institutions, as well as with increased motivation for the discharge of their respective functions; and broaden staff members' knowledge and experience of the overall human rights architecture, thereby equipping them to contribute to the enhancement of human rights generally.

v) Joint staff training

As part of staff exchange and capacity building, the four institutions can institute staff training (short courses) on human rights in general and the jurisprudence of the four Courts in particular. This will encourage cross-references in jurisprudence and to some extent harmonization of human rights jurisprudence across the regions, since human rights are universal.

vi) Exchange of information

Another possible way of collaboration is through the exchange of information, including challenges that the European Court, the Inter-American Court and the African Court faced at their inception. This information could provide the Arab Court with valuable information to enable it develop concrete strategies to ensure the effective implementation of the decisions of the Court, ensure universal ratification of its Statute. Information on the relationship between the Inter-American Commission and the Court and between the African Court and the African Commission, and how they work to ensure a smooth working relationship would be of immense value to the Arab Court which will

have to shape an effective working relationship with the Arab Committee on Human Rights.

Appointment of focal points within each of the four Courts would create a permanent channel of communication and help maintaining regular interaction and cooperation with the other bodies.

vii) Exchange of research and dissemination of other information material

Research in public international law in general and in human rights research in particular is another possible way for the four human rights Courts to collaborate. It could be joint research or simply research on a thematic human rights issue that should be shared with others. Other information material to be exchanged could include publications, new jurisprudence, etc. The Inter-American Court's library and the European Court's library could for example provide technical support to the African Court's library and the Arab Court in establishing a digitalized library.

viii) Joint publications

In addition to research and exchange of information and publications, the four institutions can engage in a joint publication or publications, such an International Human Rights Review, which will among other things, publish information about the human rights developments in the four regions and in particular the judgments of the different Courts.

ix) Joint public lectures

As part of publicity, especially for the African Court that is less known and the future Arab Court, public lectures organised by universities and other human rights and academic institutions, targeting key human rights stakeholders

such as Diplomats, human rights NGOs, etc, could be another way of collaboration. These lectures could be organized on a rotational basis, preferably on a yearly basis as well, and could be named after a prominent human rights defender from one of the regions.

x) Joint statements

The four Courts could issue joint statements on issues of common concern, including on the occasion of international and regional human rights Days with regards to particular human rights issues.

xi) Human rights award

In order to recognize the contribution of individuals and institutions in the protection of human rights in their respective regions, the four Courts could establish a joint human rights award which will be awarded on a yearly basis to, among others, authors, activists and human rights defenders.

xii) International moot court competitions

Along the same line as the human rights award, the four Courts could organize international moot court competitions to give young lawyers and potential litigants before these Courts the opportunity to understand the processes, procedures and jurisprudence of these Courts. The Center of Human Rights of Pretoria (South Africa) is organizing its *6th World Human Rights Moot Court Competition* in Geneva at the end of this year, the jury of which will consist of human rights practitioners including judges from regional courts.

Conclusion

I sincerely hope that the future Arab Court will be given the “critical mass” or the “teeth” of a genuine international judicial body, and that there is still room for discussion and modification of its draft Statute. Needless to say that this regional Court will be a very important actor when it comes to the protection of human rights in the Arab region, complementing the mandate of the Arab Committee on Human Rights. Its role should therefore not be *underestimated*. The future Arab Court, like the other regional Courts, is however not the only major stakeholder in the domain of human rights protection and its role should not be *overestimated*. I would indeed like to underscore here the paramount importance of the role of the national judiciaries, bar associations, national human rights institutions but also of the civil society in the promotion and protection of human rights. Regional Courts can not do much without the existence of independent and efficient national judicial systems and active civil societies. Regional Courts may be compared to promising seeds that will grow and become robust trees only if the soil is carefully fertilized by the patient work of all the other stakeholders. The rain would consist in the financial resources provided by the States parties and the sunlight by international gatherings such as the present one organized in Manama. Regular meetings and exchanges of good practices between regional Courts are indeed of particular importance in this regard and should be encouraged. The African Court has for example signed a Memorandum of Understanding with the Inter-American Court which describes collaboration in a number of areas, including representation at each other’s ordinary sessions, staff exchange and exchange and dissemination of information and publications. This opens possible avenues of cooperation between the African Court and the future Arab Court of Human Rights. General Conferences like the one organized during these two days in

Manama are also, beyond any doubt, very precious tools to strengthen the cooperation between regional human rights bodies and systems.

Thank you very much for you kind and patient attention.

*

* *