

# Successes of African Human Rights Court undermined by resistance from states

By Lilian Chenwi - The Conversation



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The African Court on Human and Peoples' Rights ( African Human Rights Court ) holds great promise in protecting human rights and ensuring justice on the continent. But it operates amid resistance by states and this threatens its effectiveness and very existence.

The idea of a regional human rights court surfaced at the 1961 African Conference on the Rule of Law held in Lagos, Nigeria. African jurists at the conference called on African governments to create “a court of appropriate jurisdiction” that would be “available for all persons under the jurisdiction of the signatory states”. Four and a half decades later, an operational regional court became reality.

The court is the African Union's judicial arm, and sits in Arusha, Tanzania. It is one of three regional human rights courts in the world. The others are the European Court of Human Rights and the Inter-American Court of Human Rights . They play an important role in protecting human rights within their respective regions.

The African court was established in terms of a protocol adopted in 1998. It began operating 15 years ago in 2006. In this way, African states have created an avenue for judicial scrutiny of their

domestic laws and executive actions that have an impact on human rights.

The court entertains cases of alleged violations of human rights stated in the African Charter on Human and Peoples' Rights , and any other relevant human rights instruments that have been ratified by the state concerned. Its remedies include payment of fair compensation or reparations. Its judgments are binding on the concerned state.

The court can also give opinions which are “advisory” in nature but carry significant legal authority because it is an apex regional court.

Cases can only be brought against states that are party to the court's protocol. States that are party to the protocol, the African Commission on Human and Peoples' Rights and African intergovernmental organisations can bring cases to the court directly. NGOs with observer status at the commission and individuals can only access the court directly if the relevant state party permits them to do so. Otherwise, individuals and NGOs can only access the court if the African Commission takes their case to the court.

Requests for advisory opinions can be submitted by the African Union or its members or organs, or African organisations that it recognises.

But, sadly, the African Human Rights Court's success in protecting human rights and upholding the rule of law is undermined by state resistance. This has been evident as far back as the early years of the court's establishment.

## **Striking a blow for human rights**

Despite current restrictions on direct access to the court, it has lived up to its promise in most cases. It has issued some progressive and ground-breaking decisions and remedies, including substantial reparations.

For example, it found, in response to a request brought by the Pan African Lawyers Union that vagrancy laws, which many African Union member states retain on their statute books, were incompatible with African human rights standards . That's because the laws criminalise poverty, homelessness or unemployment. The court has called on states to review and amend or repeal such laws.

The court has also required states to uphold rights and principles of fairness, transparency and inclusiveness in elections during the COVID-19 pandemic . States should not use the postponement of elections to “unduly” prolong elected officials' term of office.

In contentious cases, the court has enforced various rights such as fair trial rights, the right to property as well as the right to participate freely in government, freedom of association, freedom

of expression and non-discrimination.

It has made it clear in a case against Kenya, for example, that environmental conservation and development policies cannot be at the expense of the rights of indigenous communities . It has also shown, in a case involving a Tanzanian individual, that it will not defer to states on difficult issues such as nationality .

The court has enforced marriage and inheritance rights in a case against Mali, highlighting the rights of women and girls.

In a case involving Tanzanians who had been sentenced to death, it affirmed states' obligation to remove mandatory death penalty from their laws.

It has also set a precedent for non-criminalisation of defamation , in a case involving a journalist in Burkina Faso.

## Constraints

Only 31 of 55 African Union member states (including Western Sahara) have ratified the court's protocol . Only six states – Burkina Faso, Gambia, Ghana, Malawi, Mali, and Tunisia – permit individuals and NGOs direct access to the court.

As stated by the African Commission :

*Non-ratification of the Court Protocol and reluctance of States to make the Declaration impede the protection of human rights in Africa.*

In addition, some countries have withdrawn their permission for individuals and NGOs to access the court, following adverse decisions against them – Rwanda, Tanzania, Benin and Côte d'Ivoire .

By so doing, the states are not only challenging the court's authority, but preventing it from considering future claims from individuals and NGOs against them.

The court is concerned that, should the withdrawals trend continue, millions of citizens will be deprived of the right to justice.

Also, the nomination of judges in the early years was met with resistance .

States have further failed to ensure that the court has enough human and financial resources to

function effectively.

These patterns of resistance “might be seen as hindering development of the Court's authority”.

## **Compliance crisis**

The court has a serious non-compliance crisis. About 75% of states do not comply with its decisions, and there are no built-in consequences in its protocol. The court's orders indicate that states that fail to pay reparation amounts within a stipulated timeframe will pay interest on arrears. Only one country – Burkina Faso – has fully complied with the court's judgments.

Some states, such as Tanzania, have complied with only some aspects of decisions, and ignored other aspects .

The court is concerned that resistance to its decisions threatens not just “the effective discharge of its mandate, but its very existence”.

## **Future sustainability**

The very poor level of compliance has limited the potential impact of the court's decisions at the domestic level. It is crucial that African countries translate their commitment to human rights on paper into practice.

It is important for the court to stay the course. Retrogression, for fear of risking further exits, is not an option when it comes to protecting human rights.

*This article is based on the author's inaugural lecture at the University of the Witwatersrand recently.*

*Lilian Chenwi does not work for, consult, own shares in or receive funding from any company or organisation that would benefit from this article, and has disclosed no relevant affiliations beyond their academic appointment.*

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