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40TH ANNIVERSARY CELEBRATION OF THE ADOPTION OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ORGANISED BY THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

ON THE APPLICATION OF THE AFRICAN CHARTER BY THE AFRICAN UNION HUMAN RIGHTS ORGANS AND SUB-REGIONAL COURTS:

A FOCUS ON THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

PRESENTATION BY HONOURABLE LADY JUSTICE IMANI D. ABOUD,
PRESIDENT OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

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VIRTUAL

Honourable Commissioner Solomon Dersso, Chairperson of the African Commission on Human and Peoples' Rights

HE The Representative of the Republic of Kenya

The Representative of the Republic of The Gambia

HE Moussa Faki, Chairperson of the African Union Commission

Distinguished participants

Ladies and gentlemen

All protocols observed

I feel greatly honoured to be part of the commemoration of the 40th anniversary of the African Charter on Human and Peoples' Rights (the Charter or the African Charter) and, particularly, to be given the opportunity to address this august panel. My remit today is to speak about the *Application of the African Charter by AU human rights organs and sub regional courts*. Admittedly, the topic that I have been asked to speak on is broad, however, and in order to make a more pointed contribution, I will speak largely from the perspective of the African Court on Human and Peoples' Rights (the African Court or the Court).

A convenient starting point would be to make a few remarks about the Charter. As may very well be recalled, the African Charter has been ratified by fifty-four (54) of the fifty-five (55) Member States of the African Union. This makes it one of the most widely ratified instruments adopted by the African Union. This almost universal ratification of the Charter, it is argued, also signifies a near universal acceptance by African States of the standards contained therein. In terms of standard setting, I should hasten to add, the Charter represents an effort by the then Organisation of African Unity, now the African Union, to set common regional human rights standards in Africa. From this perspective, therefore, the Charter will always be a central plank of the African human rights system and the premier standard setting instrument.

While standard setting may be important, it is not a sufficient prerequisite of an effective protection of human rights. Over and above accepting standards, as states often do by ratifying a treaty, it is even more important that the ratifying states take action, at the domestic level, to ensure that the instrument is implemented. It is this latter process that ends up conferring tangible benefits to citizens. This requires states to take steps through legislation and policy making to recognise and protect all rights contained in the Charter

and further to ensure that all duties incidental to the realisation of the various rights are fulfilled.

The African Court, as may be recalled, was established through a Protocol to the African Charter (Ouagadougou Protocol) which was adopted in 1998. Although the Protocol entered into force in 2004, the Court only began its operations in 2006. A critical provision of the Court's founding instrument is that it was established to complement the protective mandate of the Banjul Commission. I will come back to this matter later in my presentation but for now suffice to point out that in its fifteen (15) years of existence the Court has established a vibrant human rights jurisprudence primarily by interpreting and applying the Charter.

The three key human rights supervisory institutions within the African Human Rights System are the Court, the Banjul Commission and the Committee of Experts on the Rights and Welfare of the Child (the African Children's Committee). By design, from the Ouagadougou Protocol, the mandate of the Court and the one of Commission are intimately intertwined. For example, under article 6 of its Protocol, the Court can, when deciding on the admissibility of a case, request the opinion of the Commission. Furthermore, in respect of advisory opinions, the Court is enjoined not to consider any request for advisory opinion where the subject matter relates to a case being considered by the Commission. The Court and the Commission, therefore, are front line institutions in so far as the interpretation and application of the Charter are concerned. Unfortunately, while the African Children's Committee remains an integral component of the African Human Rights System it does not have direct access to the Court under article 5 of the Protocol. This issue was the subject of an advisory opinion that the Court rendered in 2014. In the said opinion, the Court conceded that the Committee ought to be among those institutions that should have direct access to the Court but it also felt constrained by the explicit terms of article 5 of the Protocol. In the end, while the Court strongly recommended that the Committee of Experts be granted access to the Court, it deferred the process to the policy organs of the African Union so that necessary amendments could be made to the Protocol. A process is currently underway for the amendment to be endorsed by the policy organs.

Distinguished colleagues and participants,

The African Court's jurisprudence has dealt with many aspects of the Charter while at the same time utilising the latitude offered by articles 3(1) and 7 of the Protocol to apply provisions of other relevant human rights instruments ratified by the States concerned. I am sure that many of you here have become quite conversant with the case-law of the Court so, I will only highlight some of its leading aspects. For example, in the case of

Norbert Zongo and others v Burkina Faso (reparations) the Court confirmed that under international law, victims entitled to reparations are not limited to first line heirs but may encompass other relatives of the victim who can reasonably be expected to have suffered prejudice because of the human rights violation. This aspect of the Court's case-law may be important as it strengthens the case-law of the Commission and the African human rights system as a whole by addressing the lack of express provision for the right to reparation in the African Charter. On another question, in the case of *Tanganyika Law Society and the Legal and Human Rights Centre and Rev. Christopher R. Mtikila v. United Republic of Tanzania*, the Court found a violation of the right to participate freely in government by reason of the fact that Tanzania required all presidential candidates to belong to a political party. Importantly, while conceding that rights under the Charter can be limited, the Court emphasised the fact that the only permissible limitations are those provided in article 27(2) of the Charter and can be accepted only when they are proportionate to the aim being pursued. Another topical case is that of *Ally Rajabu v. Tanzania* where the Court held that the imposition of the mandatory death penalty as provided for in the Penal Code of Tanzania constitutes an arbitrary deprivation of the right to life and is contrary to article 4 of the Charter as it breaches fair trial and takes away the discretion of the trial judge.

As earlier alluded to, the Court has, whenever necessary also taken advantage of the quasi-universal human rights jurisdiction provided under articles 3(1) and 7 of the Protocol to apply international instruments other than the Charter where the circumstances so required, namely when the said treaty is a human rights instruments and ratified by the said involved. One area in which this has happened regularly is in relation to the interpretation of article 7 of the Charter dealing with fair trial rights. In this respect, the Court was not shy to make use of the International Covenant on Civil and Political Rights (ICCPR) whose provisions it found are more detailed than those of article 7 of the Charter, even though both provisions deal with the right to a fair trial. The result is that the Court has interpreted article 7 of the Charter to extend to the applicants the more specific and greater protection offered under article 14 of the ICCPR. By doing so, it is evident that the Court has broadened the protection offered by article 7 of the Charter through its recourse to the ICCPR. In the matter of *Wilfred Onyango Nganyi and Others v. Tanzania*, for instance, the Court read into the Charter's fair trial rights provision, the explicit right to free legal assistance guaranteed the ICCPR.

In terms of access to justice, which a key component of human rights protection, I find it relevant to speak of article 5 of the Protocol as read together with article 34(6). What requires specific mention here is the question of direct access to the Court for individuals. While article 5(3) of the Protocol allows individuals and non-governmental organisations having observer with the Commission to file cases directly before the Court, this is all subject to article 34(6) of the Protocol. By virtue of article 34(6), individuals and non-

governmental organisations can only do so if the States involved have made a Declaration to that effect. To date, although 31 States have ratified the Protocol, only ten of them have ever made the Declaration. Critically, out of the ten States, four have since withdrawn their Declarations. What this means, practically, is that although the Court has a key role in interpreting and applying the Charter, its actual umbrella of protection is limited to only six countries in the continent. State's failure to make the Declaration, therefore, considerably truncates the ability of the Court to achieve its main purpose of offering judicial protection to those whose rights have been violated.

Since its establishment, the Court has rendered 106 judgments and rulings, 90 orders and 12 advisory opinions. The judgments and advisory opinions have canvassed several aspects of the Charter. However, one of the main challenges that the Court has faced, in relation to its decisions, is the low rate of compliance. Under the scheme established by the Protocol, all State parties undertake to comply with the decisions of the Court and to guarantee their execution. The Court is also enjoined to report to each regular session of the Assembly of Heads of State and Government cases in which the states concerned have not complied with its decisions. While the Court has consistently filed reports inclusive of information about non-compliance with its judgments, little progress, if any, has been made in terms of securing compliance from States. This represents a significant challenge in the operations of the Court. For, if truth must be told, litigation is useful for the litigants only in so far as the victors are able to access the fruits of the litigation. Where the eventual fruits of litigation are kept perpetually out of a litigant's reach, the whole process is emptied of meaning.

In the Court's execution of its mandate, the question of its complementarity with the Banjul Commission also deserves mention. As earlier alluded to, the Court was established to complement the protective mandate of the Commission. The Protocol, the Rules of Procedure of the Commission and Rules of Court all attempt to craft a framework through which complementarity must be realised. Quite besides the normative framework for complementarity, it must be conceded that in practice the Commission and the Court have not registered much success on complementarity. Although complementarity should be understood broadly to encompass various levels and forms of cooperation, taking the example of referral of cases as between the two institutions, it is clear that there haven't been many cases that have been referred from the Commission to the Court and vice versa. In so far as both the Court and the Commission have a primary mandate of overseeing the implementation and application of the Charter, a failure to have a workable understanding on complementarity undermines the output of the two institutions. In other words, it behoves both the Court and the Commission to build on the statutory foundations and ensure that complementarity practically manifests itself in their operations. And I can ensure you that, under my leadership as President of the Court, I will endeavour to find effective ways and means by which to capitalised on efforts already made for a working

complementarity that bears in mind the need of the rights-holders, the victims, the citizens of Africa.

Allow me to conclude my presentation by making a few remarks about the application of the Charter in subregional courts. I will only briefly allude to the ECOWAS Community Court of Justice and the East African Court of Justice, which I believe are the most active such courts sharing similar mandates with our institutions. To start with the ECOWAS Court, which is established under Article 15 of the Revised Treaty of ECOWAS as the sole judicial organ of the community. It is notable that under article 4(g) of the Revised Treaty "the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples Rights" is explicitly recognised. This basis created room for the ECOWAS Court to contribute in the interpretation and application of the Charter. The end result is that at the continental level the ECOWAS Court now shares jurisdiction with the African Commission and the African Court, over the same instrument (the African Charter) although territorially its jurisdiction is limited to only one part of the African continent. The contribution of the ECOWAS Court of Justice to the development of the African Charter cannot be overemphasised; from political freedoms to socio-economic rights, this sister Court has adjudicated leading cases and awarded reparations on issues involving political participation for example in the case of Ameganvi and Others v. Togo concerning the reinstatement of members of parliament; slavery as in the case of Koraou v. Niger where the Court awarded USD 20,000 to the victim; education as in the case of SERAP v. Nigeria where the Court ordered that the State replaced the emblezled funds devoted to basic education and freedom of expression where in the case of Saidykhan v. Gambia where the Court awarded USD 200,000 to the Applicant.

As for the East African Court of Justice (EACJ), this is a sub-regional court that is mandated to resolve disputes involving the East African Community and its Member States. The EACJ was established by article 9 of the Treaty for the Establishment of the East African Community (EAC Treaty) and is tasked with interpreting and enforcing the treaty. It is important to note that the EACJ does not explicitly have jurisdiction over human rights matters. However, the fundamental and operational principles of the East African Community, set out in Articles 6 to 8 of the Treaty, include "good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights". Despite the EACJ's lack of explicit jurisdiction to hear human rights cases, it has addressed cases involving individual rights. In the case of *Katabazi v. Secretary General of the East African Community*, the EACJ while conceding the statutory limitations with respect to its human rights jurisdiction

nevertheless went ahead to confirm its mandate to deal with cases involving human rights violations.

Overall, it is notable that while the African Court and the Commission are the pre-eminent institutions concerned with the application and interpretation of the Charter, they are not alone in this endeavour. Subregional courts also have a key role to play in enforcing and applying the standards in the Charter. Given the common interest in the Charter it is advisable that the Court and the Commission should be paying attention to developments in the subregional sphere with the converse also being true.

I thank you for your attention.