



**International Convention on
the Elimination of All Forms
of Racial Discrimination**

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Summary record of the first part (public)* of the 2198th meeting

Held at the Palais Wilson, Geneva, on Wednesday, 29 August 2012, at 10 a.m.

Chairperson: Mr. Avtonomov

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* The summary record of the second part (closed) of the meeting appears as document CERD/C/SR.2198/Add.1.

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The meeting was called to order at 10.05 a.m.

Discussion with a delegation from the African Court on Human and Peoples' Rights

1. **The Chairperson** welcomed the President of the African Court on Human and Peoples' Rights, who was accompanied by a judge of the Court, a special assistant to the President, and a policy adviser to the Court. The Meeting of Chairpersons of human rights treaty bodies held in Addis Ababa in June 2012 had decided to strengthen relations between the treaty bodies and regional human rights judicial bodies and other organizations. The Committee was the first treaty body to act on that decision.
2. He presented the delegation with four copies of the recent publication *Selected Decisions of the Committee on the Elimination of Racial Discrimination*. The publication contained some of the Committee's most important decisions on individual complaints. While the Committee was not a court of law, some aspects of the individual complaints procedure were quite similar to judicial proceedings.
3. **Mr. Niyungeko** (President of the African Court on Human and Peoples' Rights) said that the purpose of his delegation's visit to Geneva was to forge links with United Nations human rights institutions conducive to exchanges of views and collaboration. The Court had been planning a visit for some time and had been further encouraged by the Chairpersons' decision in Addis Ababa.
4. The African Charter on Human and Peoples' Rights, adopted in 1981, had been ratified by all African States. It was supplemented by the African Charter on the Rights and Welfare of the Child, a Protocol to the African Charter on the Rights of Women in Africa, the Convention Governing the Specific Aspects of Refugee Problems in Africa, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, and several other legal instruments.
5. Three key institutions were mandated to address human rights issues: the African Commission on Human and Peoples' Rights; the African Committee of Experts on the Rights and Welfare of the Child; and the African Court on Human and Peoples' Rights.
6. The Court had been established pursuant to the Protocol to the African Charter on Human and Peoples' Rights, which had been adopted in June 1998 and entered into force in January 2004. The first judges had been elected in January 2006 and had assumed their duties in July 2006. The 11 judges from the five major African regions were elected on the basis of equitable geographical representation and equitable representation of the main legal systems, namely common law, civil law, sharia law and customary law. The principle of equitable gender representation had unfortunately not been respected, since only 2 of the 11 judges were women.
7. The Court's primary role consisted in the settlement of disputes concerning the interpretation and implementation of applicable legal instruments. It also played a consultative role, issuing advisory opinions at the request of States or other bodies concerning legal issues pertaining to relevant human rights instruments.
8. Pursuant to article 7 of the Protocol to the Charter, the Court was required to apply the provisions of the African Charter and any other relevant human rights instruments ratified by the States concerned. It followed that the Court also applied United Nations human rights instruments ratified by African States, including the International Convention on the Elimination of All Forms of Racial Discrimination.
9. No judicial proceedings had been conducted until 2008. During the intervening period, the Court had established the administrative structure of its registry and had adopted its rules of procedure. It had also negotiated with political bodies within the African Union concerning budgetary and staff matters. It was based in the United Republic of Tanzania.

10. The Court had finally begun to function in late 2008. However, owing to a lack of awareness of the possibility of instituting proceedings before the Court, only one case had been filed during the first two years. The case, concerning Mr. Hissène Habré, had been brought by an individual against the Republic of Senegal. The Court had found that it lacked jurisdiction, since Senegal had not yet deposited the declaration under article 34, paragraph 6, of the Protocol accepting the competence of the Court to receive cases instituted by individuals and non-governmental organizations (NGOs). Fortunately, since early 2011 an increasing number of cases had been filed: 22 applications concerning contentious matters and 3 requests for advisory opinions.

11. The Court faced three major challenges. The first stemmed from the relatively small number of ratifications of the Protocol. Only 26 of the 54 member States of the African Union had ratified it to date. He and his colleagues therefore took every opportunity, especially at African Union summit conferences, to draw States' attention to the problem and to urge them to ratify the Protocol.

12. The second, even more worrying challenge stemmed from the fact that only five States had deposited the declaration required by article 34, paragraph 6, of the Protocol. He commended the States concerned, namely Burkina Faso, Ghana, Malawi, Mali and the United Republic of Tanzania. The territorial jurisdiction of the Court with respect to complaints by individuals and NGOs and its ability to exert an effective impact on human rights was therefore very limited. In view of the seriousness of the situation, the Court had decided in 2011, departing from the traditional reluctance of judicial bodies to actively encourage lawsuits, to launch an awareness-raising campaign. It had approached heads of State and other high-level authorities in member States in order to draw their attention to the Court's paradoxical inability to play the role it had been assigned by the African Union. It was hoped that the campaign would lead to the deposit of a larger number of declarations within the next few years.

13. With a view to meeting the third challenge, which stemmed from the lack of awareness of the Court's existence among the general public, the Court had organized two continent-wide conferences in 2011 to publicize the Court among human rights institutions and organizations. Some 10 awareness-raising seminars had also been held.

14. Two major developments would affect the institutional future of the Court. The first involved the merger of the Court with the Court of Justice of the African Union pursuant to a Protocol adopted by the Assembly of Heads of State of the African Union in July 2008. The minimum number of ratifications required for the entry into force of the Protocol was 15. As only three States had ratified it to date, the unified Court was unlikely to be established in the near future. When it eventually materialized it would consist of two sections, one dealing with disputes concerning various legal instruments between African Union member States, and the other dealing exclusively with the interpretation and implementation of African human rights instruments.

15. The second institutional development stemmed from a decision by the Assembly of Heads of State in January 2009 to extend the jurisdiction of the Court to cover criminal cases, a form of jurisdiction modelled on the International Criminal Court (ICC). The Court could then hear cases concerning persons charged, *inter alia*, with genocide, crimes against humanity and war crimes. The member States of the African Union had received a draft Protocol to that effect which should have been considered at the Assembly of Heads of State held in July 2012, but had been postponed for discussion until the next Assembly in January 2013.

16. If the institutional developments materialized within the next few years, the existing Court would be replaced by a court with very extensive powers to deal with general disputes between States, human rights issues and criminal cases. The difficulties that could

arise from that development would need to be discussed jointly by the African Union, United Nations human rights bodies and States parties to the Rome Statute of the ICC.

17. **The Chairperson** said that the Committee could urge African States parties to the Convention to ratify the various African instruments mentioned by the President of the African Court.

18. **Mr. Saidou** said that 140 States had ratified the International Convention on the Elimination of All Forms of Racial Discrimination but only 54 had made the declaration under article 14 recognizing the Committee's competence to consider communications from individuals or groups. The situation was therefore similar to that of the African Court.

19. Awareness-raising was clearly essential. He wondered whether genuine political will existed among the African political leaders who had established the Court through the African Union. Prior to that development, the African Commission on Human and Peoples' Rights had also received complaints of violations of human rights, but unfortunately its views had for the most part been ignored.

20. Another challenge for the Court was the existence of the Community Court of Justice run by the Economic Community of West African States (ECOWAS), which could be seized by parties that had not exhausted domestic remedies. It was now overwhelmed with communications and found it difficult to address them all.

21. He hoped that the African Court on Human and Peoples' Rights would acquire the same status as the European Court of Human Rights. The African Charter on Human and Peoples' Rights was just as well known in Africa as the Universal Declaration of Human Rights. Disputes among politicians should not affect the implementation of norms designed to guarantee the enjoyment of human rights by the peoples of Africa.

22. With regard to the proposed merger of two existing courts, the fact that only three States had ratified the relevant Protocol to date raised serious doubts about the project. Even if the unified Court was eventually established, it seemed unlikely to prove effective.

23. Given that, during its several years of operation, the African Court had received so few declarations from States parties under article 34, paragraph 6, of the Protocol establishing it, immediate steps needed to be taken to raise awareness among governments, heads of State and members of the Bar across Africa. Human rights institutions and civil society could be called upon to support those efforts. Political leaders needed to be made aware of the fact that depositing such a declaration was in the interests of their people and consistent with their obligations under the African Charter on Human and Peoples' Rights.

24. With reference to the potential extension of the Court's jurisdiction to cover criminal affairs, he asked whether the Court already had a prosecutor's office and what the powers of that office might be, for example in cases of extremely serious human rights violations.

25. **Mr. Diaconu** said that the Court needed to prove its effectiveness over the coming years in order to gain the support of a greater number of States and fulfil its mission. Cooperation between the Court and the Committee on the Elimination of Racial Discrimination would be necessary. The jurisprudence of the Court was broad, based not only on African instruments of law but also international treaties to which African States were party. Therefore, the Court could accept individual complaints against States invoking the International Convention on the Elimination of All Forms of Racial Discrimination; in turn, the Committee could use the Court's judgements as a reference in its dialogue with African States parties. Such a supportive relationship would prove mutually beneficial.

26. He asked how the Court would address jurisdictional conflicts with other courts or the treaty bodies. Would the Court accept individual complaints that had already been

submitted to those courts or bodies? How would any conflicts in case law or rulings be resolved?

27. **Mr. de Gouttes** and **Ms. Dah** associated themselves with Mr. Diaconu's questions.

28. **Mr. Murillo Martínez** asked what the position of the Court was on customary law and any other special jurisdictions in the African States.

29. He also requested clarification on the nature of the Court's relationship with ICC, in the light of the possible extension of its jurisdiction to cover criminal affairs. Had the Court come to an agreement with ICC on their respective jurisdictions? Was the Court considered one of the regional remedies to be exhausted before a case could be admitted to ICC? Would ICC have to defer jurisdiction to the Court in any particular case, for example, if it involved an African leader?

30. **Mr. de Gouttes** and **Mr. Vázquez** said that they, too, would welcome such clarifications.

31. **Mr. Kemal**, indicating the importance of financial stability, asked what resources the Court had, how it was financed and whether any contributors were in arrears in their payments. He also requested clarification on the nature of its agreement with the United Republic of Tanzania.

32. **Mr. de Gouttes** drew attention to a potential jurisdictional conflict between the Court and the Committee in cases of racial discrimination, while noting that only four African States had made the declaration necessary under article 14 of the Convention, namely Algeria, Morocco, Senegal and South Africa.

33. He asked whether the Court had established, or planned to establish, contact with the other regional human rights courts, in particular the Inter-American Court of Human Rights and the European Court of Human Rights. What would be the nature of its relationship with those regional courts?

34. **Ms. Dah** associated herself with Mr. de Gouttes' questions and said that the obligation on States parties to make a declaration recognizing the competence of the various treaty bodies to receive and consider communications represented an obstacle in the United Nations system. It was regrettable that the same formula had been reproduced in the Protocol establishing the African Court. Automatic recognition of the Court's competence upon ratification of the Protocol would have simplified matters considerably.

35. **Mr. Vázquez** enquired about the nature of the Court's relationship with other human rights bodies. Did the Court consider interpretations of human rights instruments to be authoritative if issued by bodies responsible for their enforcement or had it contested such interpretations in the past? How would differences in interpretation be addressed? He also asked whether the Court had jurisdiction to enforce rules of customary international law in the African context.

36. **Mr. Niyungeko** (African Court on Human and Peoples' Rights) thanked the members of the Committee for their comments and suggestions, which he said marked the start of a fruitful and cooperative relationship.

37. Referring to a comment about the need for awareness-raising, he said that the Court was already taking steps in that regard. Court representatives had met with five or six heads of State in 2011, encouraging them to make the special declaration on the competence of the Court, and would be travelling to Senegal for the same purpose the following week. Awareness-raising seminars were being held for barristers in each country, in cooperation with the government and national Bar. Human rights institutions were important partners of the Court; they were in a better position to encourage ratification and the special declaration than civil society organizations, which were sometimes perceived by governments as

having underlying political motives. In November 2011, a conference had been held for all human rights institutions across Africa to draw up a plan for cooperation.

38. If the Court's jurisdiction were extended to cover criminal affairs, a prosecutor's office would indeed be established. He hastened to add that both that extension, which was currently only a proposal, and the Court's merger with the African Court of Justice had been decided by political actors rather than by the Court itself.

39. The question remained as to whether States would provide the resources necessary for the Court to become fully operational and exercise its jurisdiction.

40. He agreed that the Court would gain greater credibility if it could prove its effectiveness. The Court judges had taken a proactive rather than reactive approach to cases, in an attempt to raise the profile of the Court and to start making a positive contribution to the protection of human rights.

41. Regarding cooperation between the Court and the treaty bodies, he took note of the Committee's willingness to use the Court's judgements in its discussions with African States parties. With regard to possible jurisdictional conflicts, he drew attention to the Court's conditions for admissibility of applications in rule 40 of its internal rules of procedure, which echoed article 56, paragraph 7, of the African Charter on Human and Peoples' Rights: "Communications ... shall be considered if they: ... 7. Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter". Though the text referred only to "cases which have been settled", the Court would also bear that principle in mind when faced with communications already submitted to other bodies or courts.

42. To date, the Court had addressed only one case relating to customary law and, as such, had not yet developed jurisprudence on its application. In accordance with article 61 of the African Charter, the Court was required to take into consideration "African practices consistent with international norms on human and peoples' rights" and "customs generally accepted as law". In addition, the composition of the Court was based on equitable representation of the principal legal systems of Africa, which included customary law institutions.

43. Regarding the potential relationship between the Court and ICC, he said that no legal agreement had yet been drawn up, since the protocol to extend the jurisdiction of the Court was only at the draft stage. If the protocol were accepted, there would be a certain degree of jurisdictional overlap. However, as indicated by the Office of the Legal Counsel of the African Union, the resolution of conflicts could not be provided for in the protocol itself, since that would only be binding on the African Union. Instead, conflicts would have to be resolved jointly by the two courts, or by the Member States of the African Union and the States parties to the Rome Statute, in a spirit of complementarity.

44. Some 90 per cent of the funding for the Court came from the budget of the African Union, which was adopted each year by the Conference of Heads of State and Government. The Court had chosen to keep the number of partnerships into which it entered to a strict minimum in order to maintain full independence. It currently had two cooperation partners, the German Agency for International Cooperation and the European Union, which contributed some 10 per cent of the funding. The Court's host country, the United Republic of Tanzania, took financial responsibility for the Court infrastructure.

45. While the Court had not yet had the opportunity to examine any individual complaints, when the time came to interpret the article of the African Charter on Human and Peoples' Rights that prohibited all forms of discrimination, it would consult the jurisprudence of all the other international and regional legal or quasi-legal bodies,

including the Committee. That would enable it to ascertain how other courts and committees had interpreted similar provisions. Even if the African Court ultimately reached different interpretations, that research into existing jurisprudence was a necessary part of the process. While it could not be guaranteed, it was hoped that an exchange of views and documentation between the Committee and the Court would prevent any contradictory jurisprudence.

46. The staff of the African Court on Human and Peoples' Rights had already established contact with the European Court of Human Rights and the Inter-American Court of Human Rights and had concluded a formal cooperation agreement with the latter. Staff of the African Court had undertaken internships at both courts and judges from the African Court had visited the European and Inter-American courts in order to gain experience of their work. Contacts had also been set up with several subregional courts including the ECOWAS Community Court of Justice, the East African Court of Justice and the Southern African Development Community Tribunal.

47. The effectiveness of the African Court would depend on States' political will to ratify the various African human rights charters and make the necessary resources available to the Court. To the best of his knowledge, there was nothing to prevent the Court from considering cases that concerned customary international law.

The public part of the meeting rose at 11.40 a.m.