



Coalition for an Effective African Court on Human and Peoples' Rights
Coalition pour la Cour Africaine des Droits de l'Homme et des Peuples

التحالف من أجل المحكمة الأفريقية لحقوق الإنسان والشعوب
Coligação para o Tribunal Africano dos Direitos Humanos e dos Povos
Mkutano wa Korti la Afrika la Haki za Kibinadamu

To the Assembly of Heads of State and Government, the Executive Council and the Permanent Representatives Committee of the African Union
Mid-term Summit in Khartoum, the Sudan from 16 – 25 January 2006.

THE ELECTION OF JUDGES TO THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

The Coalition for an African Court on Human and Peoples' Rights (hereinafter referred to as the Coalition) is a network of non-governmental organisations that was formed in Niamey, Niger in May 2003 for the rapid establishment of an effective and independent African Court on Human and Peoples' Rights (hereinafter referred to as the Court) in order to provide redress for victims of human rights violations and strengthen the human rights protection system in Africa. Below is the Coalition's submission on the nominations and elections of judges to the Court.

1. Summary

The Coalition welcomes the African Union's (AU) commitment to the protection of human and peoples' rights in Africa. Through the creation of the Court and the process of making it functional, the AU has shown determination to establish a new human rights system based on international principles on human rights protection and to conform to its aims and objectives as provided in the Constitutive Act of the AU.

The protocol establishing the Court came into force on 25 January 2004 paving the way for the election of judges. The AU is scheduled to elect 11 judges out of a pool of candidates of 21 that were nominated by States that have ratified the protocol. At the close of nominations, 16 States had nominated 21 candidates.

The nominations and elections process marks a significant and commendable development in the short history of the AU and its predecessor the Organisation for African Unity. This is the first time that the AU has adopted criteria for the nomination and election of candidates to a human rights body. This shows a desire to ensure the creation of a credible and effective human rights Court. Civil society, with the encouragement of the AU, has played a pivotal role in the elaboration of these criteria and broadly in the establishment of the Court.

Out of the 21 candidates, a third have the required experience in human and peoples' rights, and five of the candidates are women. While all regions have nominees, both candidates from Central

Secretariat

Human Rights Institute of South Africa (HURISA)
15th Floor, Sable Centre, 41 De Korte Street, Braamfontein, Johannesburg, South Africa
P.O. Box 31267, Braamfontein 2017, South Africa
Tel: +27 11 403 0850
Fax: +27 11 403 0855
Email: askus@africancourtcoalition.org

Website and Newsletter

Alliances for Africa
Plot 12, House B, Hannat Balogun Street
Dolphin Estate Extension
P.O. Box 60024, Alagbon Close, Ikoyi, Lagos, Nigeria
Tel/Fax: +234 1 269 0043
Website: www.africancourtcoalition.org

Africa are from Burundi. The nominations process within countries has not been open and transparent in all cases.

The AU's adoption of principles that ensure the election of qualified and impartial judges, taking into account gender and regional balance should be applauded. The April 2004 guidelines set standards for the AU that require adherence. The Coalition believes that in its deliberations, the AU will select a bench that fulfils the guidelines it set and the mandatory provisions in the protocol. Africa needs a functional human rights protection mechanism with integrity that will protect the rights of victims of human rights violations.

2. Introduction

In light of the elections that are scheduled to take place at the January 2006 AU mid-term Summit in the Sudan, the Coalition believes that this submission will contribute to the establishment of a credible and effective Court by ensuring that the member States observe their own guidelines and the provisions in the protocol.

The adoption of these guidelines is a significant development in the AU's procedures and its predecessor the Organisation for African Unity. This is the first time that the AU has elaborated guidelines for nominations to human rights institutions. Furthermore, the AU's appreciation of the valuable role of civil society in the processes of the AU broadly and the establishment of the Court, in particular is encouraging. These developments at the AU are in recognition of the importance of an effective and credible human rights protection system for Africa.

Following the coming into force of the protocol establishing the Court on 25 January 2004, the AU called on States Parties to submit names of suitable candidates to serve on the Court. The initial date of June 2004 for the election of judges was postponed to January 2006. This was in part due to too few candidates nominated by States Parties. In addition, the list of candidates failed to comply with the AU guidelines.

Out of 53 member States, only 21 have ratified the protocol creating the Court.¹ Of the States Parties, only 16 have submitted nominees. The Gambia and Mauritius declined to nominate candidates. If States Parties had each submitted a minimum of two candidates as recommended, there would be a pool of 42 candidates which would in all likelihood provide the required diversity in relation to gender, regions, legal traditions and qualifications. The protocol entitled States to nominate up to three candidates each.

Under the protocol establishing the Court, member States are required to elect 11 judges to the Court. There should be gender and regional balance within the Court. The prevalent legal traditions in Africa and competence in human and peoples' rights should be reflected in the composition of the bench. Below is an evaluation of the extent to which States Parties and member States are in compliance with the AU guidelines and the protocol aimed at ensuring an independent and credible Court.

3. The list of candidates

There are 21 candidates on the composite list. This list comprises the initial pool of candidates that were submitted to the AU for election in June 2004. Following the re-opening of the list for nominations and additional States ratifying the protocol, the list was extended from an initial 15 candidates to the current number. Some of the candidates on the original list withdrew and one is

¹ These States are: Algeria, Burkina Faso, Burundi, Côte d'Ivoire, the Comoros, Gabon, the Gambia, Ghana, Kenya, Lesotho, Libya, Mali, Mauritius, Mozambique, Niger, Nigeria, Rwanda, Senegal, South Africa, Togo, and Uganda.

deceased (Ms R Kiyingi [Uganda] died after nomination; it appears that Libya withdrew the names of Mr Anwar Salem Al-Mared and Mr Guma Abdallah Abu-Zaid Al-Roaie).²

4. Qualifications and compatibility

4.1. Candidates to the Court shall be elected among jurists of high moral character and of recognised practical, judicial, or academic competence and experience in the field of human and peoples' rights

Out of the list of 21 nominees, eight candidates have verifiable experience in the field of human rights. Their qualifications are as follows – one candidate is the President of a constitutional court (Burundi), one is a supreme court judge with human rights focus (Ghana), one is the Secretary of the International Court of Justice (Algeria), two are law professors in international law (Burundi, Côte d'Ivoire), one is a high court judge who was previously the Chairperson of the Committee of Experts of the Rights and Welfare of the African Child (Kenya), one is a barrister and United Nations Special Rapporteur on the right to water (Senegal), one is the former secretary of the African Commission on Human and Peoples' Rights and current president of the Commission on the Review of the Constitution (Rwanda); and one is a Justice of the Supreme Court and Professor of Law specialising in Constitutional Law (Uganda)

4.2. Principal legal systems of Africa, that includes common, civil and Islamic law, should be reflected in the composition of the Court

Out of the 21 candidates nominated, six have common law experience (Kenya, Lesotho, South Africa, Nigeria, Uganda, Ghana); nine have civil law experience (Algeria, Burkina Faso, Burundi, Côte d'Ivoire, Mali, Senegal, Rwanda, Comoros, Niger), and two have Islamic law experience (Comoros, Libya). It should be noted that there is a need for knowledge of the peculiarities of the legal systems in Lusophone countries in the Court. Mozambique is the only State out of the five Lusophone countries that has ratified the protocol establishing the Court; yet it has not nominated a candidate.

4.3. The position of judge is incompatible with any activity that might interfere with the independence or impartiality of such a judge or the demands of the office, as determined by the rules of procedure of the Court. The candidates should not be a member of government, a minister or under-secretary of a state, a diplomatic representative, a director of a ministry or one of its subordinates, or a legal advisor to a foreign office.

Only one candidate (Burkina Faso) holds the position of legal adviser to the Minister of Justice.

5. Process

5.1. The procedure for nomination of candidates should be at the minimum that of the appointment to the highest judicial office in the State Party. States Parties should encourage the participation of civil society, including judicial and other bodies in the process of the selection of nominees. Lastly, States Parties should employ a process that is open and transparent in order to create public trust in the integrity of the nominations process.

The nominations process at country level appears to have failed to comply with this requirement. In South Africa and Uganda, the Judicial Services Commission was used in the nomination process and there was formal notification in a government gazette indicating the name of the nominee. In

² African Union, *Progress Report of the Chairperson on the Operationalisation of the African Union on Human and Peoples' Rights (Updated as at 15 June 2004)*, EX.CL/98 (V) Rev.1., Executive Council 25 June – 3 July 2004, Addis Ababa, Ethiopia.

most countries, the recommendation and appointment was confined to government agencies. The nominations process was not publicised for public participation.

5.2. The State party should ensure that at least one of the candidates nominated is a woman in order to ensure gender balance. States parties should therefore nominate at least two candidates.

Out of the 21 candidates, only five are women. Only two countries, namely Burundi and the Comoros nominated a female and male candidate. In the case of Mali and Libya, three and two male candidates were nominated respectively.

5.3. Upon election, the Court shall reflect a regional balance. In the five regions, the guidelines propose the following representation: North (2), East (2), West (3) South (2), and Central (2). The protocol establishing the Court provides that no two judges shall be nationals of the same country.

The candidates per region are divided as follows:

North- 4 male candidates; East – 3 male and 2 female candidates; Central- 1 female; 1 male (both from Burundi); South – 1 male, 1 female; West – 7 male; 1 female.

This means that the Central African region will have only one representative in order to comply with the protocol and the guidelines since both candidates from the region are from the same country.

Conclusion

The protocol creating the Court and the AU guidelines on the nomination and election of judges provide a basis in guaranteeing that there is a wide pool for selection; diversity regarding gender, regions and legal systems and a high calibre bench that accords credibility to the Court. The Coalition calls on the member States to be mindful of the standards to which they have subscribed to in electing the inaugural bench of the Court.

The list of candidates

Name	Current position	Human and peoples' rights experience	Gender	Country
1.Fatsah Ouguergouz	Secretary, International Court of Justice	Academic in human rights and international law, Professor of Law	Male	Algeria
2.Domitille Barancira	President, Constitutional Court	Judicial and human rights experience	Female	Burundi
3.Gerard Niyungeko	Professor, International law, consultant, political affairs commission at the AU	Academic in human rights and international law, written training manuals on human rights	Male	Burundi
4.Jean Emile Somda	Legal adviser to the Minister of Justice	Former judge, Constitutional Court, judicial	Male	Burkina Faso

		experience		
5.Noura Oussane	Magistrate	No human rights experience	Female	Comoros
6.Riziki Djabir	Head of Tribunal	No human rights experience	Male	Comoros
7.Meledje Djedjro	Professor, International Law	Academic in human rights and international law	Male	Côte d'Ivoire
8.Sophia A B Akuffo	Supreme Court judge	Judicial and human rights experience	Female	Ghana
9.Joyce Alouch	High Court judge	Former chairperson of the Committee of Experts of the Rights and Welfare of the African Child, former member of the United Nations Committee on the Rights of the Child	Female	Kenya
10.Kellelo Justina Mafaso Guni	High Court judge	Judicial experience	Female	Lesotho
11.Abdurhman Mohamed Aboutouta	Senior judge	No human rights experience	Male	Libya
12.Hamdi Faraj Fanoush	Senior judge	No human rights experience	Male	Libya
13.M'Pere Diarra	Judge	No human rights experience	Male	Mali
14.Modibo Tounty Guindo	Judge	No human rights experience	Male	Mali
15.Dr Mamadou Diakite	Judge	No human rights experience	Male	Mali
16.Timothy Oyeyipo	Retired State Chief judge	Judicial experience	Male	Nigeria
17. Amadou Hama Alginy	High Court judge	No human rights experience	Male	Niger
18.Jean Mutsinzi	Chair, Commission on the Review of the Constitution	Former secretary of the African Commission on Human and Peoples' Rights and president of the Supreme Court	Male	Rwanda

19.El Hadji Guisse	Barrister	United Nations special rapporteur on the right to water, former United Nations special rapporteur on impunity for social, economic and cultural rights	Male	Senegal
20.Bernard Makgabo Ngoepe	Senior judge, High Court	Judicial experience	Male	South Africa
21.G W Kanyiehamba	Supreme Court judge	Academic on human rights and international law, Professor of Law	Male	Uganda