INTRODUCING THE NEW AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

Convened by

AFRICA LEGAL AID (AFLA)
and
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NARRATIVE REPORT

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NARRATIVE REPORT*

1.0 Introduction

In a milestone step in the process of creating the African Court on Human and Peoples' Rights, the African Union appointed the first eleven judges to the Court. Africa Legal Aid (AFLA) in cooperation with the Ministry of Justice of Ghana held a high-profile, two-day Pan African event on 1 and 2 December, 2006 to introduce the new African Court on Human and Peoples' Rights to Human Rights and Justice Sectors, especially, Civil Society. Dignitaries from different parts of Africa participated in the Conference.

Africa Legal Aid was uniquely positioned to host this important event. AFLA is a Pan-African legal and human rights organization with an extensive track record working with the African Commission on Human and Peoples' Rights. AFLA has Observer Status with the Commission. In addition, AFLA has an extensive network of civil society contacts throughout Africa and a reputation for excellence that brings credibility to the event. AFLA's Headquarters Agreement with the government of Ghana also gives it special status.

DAY 1

2.0 Opening Ceremony

The Seminar opened with impressive interventions by high profile speakers, including Justice Sophia Akuffo, Member of the African Court and Judge of the Supreme Court of Ghana, who also chaired the Opening Ceremony. She emphasized the importance of the Court for the continent and its potential as a powerful tool for ensuring respect of Human and Peoples' Rights. Justice Date Bah of the Supreme Court of Ghana welcomed participants on behalf of the Chief Justice of Ghana. Honourable Julia Joyner, African Union (AU) Commissioner for Political Affairs commended AFLA for its pioneering and courageous work over 10 years, and specifically for its timely and laudable initiative to introduce the new African Court. She informed participants about the efforts of the AU Department of Political Affairs to strengthen the African mechanism for the promotion and protection of human rights, and the launching of the African Court. She emphasized the AU's commitment to facilitate and enhance the work of the court and assist it with the necessary institutional and material support for its efficient functioning. The AU Commissioner commended member states, including Ghana, which have ratified the Protocol to the Charter establishing the African Court and urged the AU member states who have not yet ratified the Protocol, to do as soon as possible in order to give the Court a truly representational and continental character. She further called upon

* The Conveners of the Conference acknowledge with thanks, the various forms of support provided by: The Danish Institute for Human Rights, UNDP, The Raoul Wallenberg Institute, GTZ, Commission of the African Union, and the International Criminal Tribunal for Rwanda (ICTR).

*Papers presented at the Seminar will be published in a special edition of the Africa Legal Aid (AFLA) Quarterly. The African Union elected 11 Judges in January 2006 and they were sworn in on 2 July 2006.

member states to make the optional declaration under Article 34(6) of the Protocol, conferring on non-state actors a right of access to the Court. Honourable Julia Joiner opined that the establishment of the Court is not an end, but rather a means to an end.

Judge Niyungeko, President of the African Court on Human and Peoples' Rights addressed the Opening Ceremony. The President of the Court paid tribute to the African Commission on Human and Peoples' Rights. He informed participants about the current activities of the Court highlighting the priorities the Court has set for itself, including drafting its Rules of Procedure, preparing a budget for 2007, preparing a structure for the Registry and cooperation with external partners. On the substantive provisions of the Protocol establishing the Court, Judge Niyungeko opined that access of individuals to the Court and harmonization of the rules of the Commission and the Court are a prerequisite to the effectiveness of the African human rights system. He called parties and civil society to urge state parties to make the declaration under Article 34(6) of the Protocol, accepting individual access to the Court. The President of the African Court emphasized the importance of separation of powers among the Executive, the Legislature and the Judiciary, to avoid a reproduction at the continental level, of the conflicting roles that often exist at the national level. He stressed that the judges of the new Court are conscientious of their pioneering role and do realize that the future of human rights protection in Africa will depend on their vision, commitment, and quality of their work.

Judge Akua Kuenyehia, First Vice President of the International Criminal Court (ICC), speaking on behalf of the President of the ICC, Judge Philippe Kirsch, congratulated the Judges of the new African Court on their election. She shared experiences of the relatively new ICC and encouraged the new Court to address the inevitable challenges that lay ahead. She commended AFLA for its pioneering work in the African system for the protection of human rights as well as its pioneering work on international criminal justice.

Evelyn A. Ankumah, Executive Director of AFLA introduced the theme of the conference. She said it was an honour for Africa Legal Aid to play a role in introducing the new African Court on Human and Peoples' Rights. She provided the background to the creation of a human rights system for Africa dating back to the Law of Lagos Conference in the 1960s, until the 1980s when the African Charter on Human and Peoples' Rights was adopted and the African Commission was established.

The Executive Director of AFLA informed the participants that after the entry into force of the Charter and the creation of the Commission, NGOs while supporting the work of the Commission, never stopped asking how the African system for the protection of human rights could be strengthened. This is what triggered the drafting of the Protocol establishing the African Court on Human and Peoples' Rights under the leadership of Mr. Adama Dieng, during his tenure as Secretary-General at the International Commission of Jurists (ICJ). Ms. Ankumah also acknowledged the contribution of Prof. Shadrack Gutto, for having participated in the drafting of the Protocol and for contributing intellectually and through activism, to the development of the African Union rights system. Finally, however, the birth of the African Court is credited to the states that signed and ratified the Protocol and committed themselves and their countries to a higher standard of human rights.

Ms. Ankumah cited other successes such as the African Union, the work of the AU's Peace and Security Council, the new Partnership for African Development, the ad hoc tribunals and the International Criminal Court. Though progress has been made, the Executive Director of

AFLA was quick to point out that more work needs to be done. “We have only to think of the situation in the Darfur region to realize that we still have a long way to go.”

She concluded that while the establishment of the Court marks an important victory for human rights protection, it is only the beginning. The Court like the recently established Institutions still has to prove itself: Will the Court be accessible to the victims of the human rights violations? What will be the interface between the Court and the Commission? What role will Civil Society play? These questions must be answered to ensure that the provisions in the Charter are translated into practical reality for Africa’s people.

Hon. Joe Ghartey, Attorney General and Minister of Justice of Ghana, officially opened the Conference.

Thereafter, H.E. Adama Dieng, Initiator of the Protocol Establishing the Court was introduced to a standing ovation. In his Keynote Address, Mr. Dieng stressed the importance of the questions related to the reason of being, the nature, content and diversity of the procedures of the Court and the African Court of Justice (the “ACJ”). He added that the credibility of the Court would depend on its independence from States.

He stressed that with the advent of the Court nothing will ever be the same. After highlighting the background and history of the Court, he said that the Court is going to fill a big legal lacuna. He discussed the merger of the ACJ and the Court that was agreed upon in Khartoum in January 2006.

He enumerated different certainties that are the consequences of the advent of the Court, that is the vital need for jurisdictional protection of human rights, the irreversible process of the strengthening of human rights protection, some shadow zones and questions that will have to be filled in by the Court’s Rules of Procedure - which will have to be drafted with utmost shrewdness - the quality of judges, their independence and impartiality. He also said that the birth of the Court creates uncertainties, like the constitutional powers of the Court that following the merger will give the Judges of the African Court of Justice and Human Rights (“ACJHR”) the mandate of monitoring simultaneously the application of the Charter and the respect of the fundamental rights provided for in the Constitutive Act of the AU. Another uncertainty, linked to the precedent, is the fact of the merger to limit divergent interpretations of the relevant human rights instruments.

He added that in the long term and in the case of success, the number of judges of the Court will have to be increased. He said that an efficient justice system must arise from the Court and that it could be a springboard for the establishment of the rule of law; its case law could be a driving force for many national legal institutions. He opined that with the merger of the two courts, the Court will become a constitutional court, which must watch the respect of the Charter and of its Protocol.

He concluded by stressing that to be successful, the Court will have to be on the same wavelength as the citizens whose views it is made of, which implies that State Parties will have to associate African civil society by providing it with adequate information.

After the opening ceremony, the conference proceeded under the following themes:

- **Personal Jurisdiction: Who Can Address the Court?**
- **Substantive and Advisory Jurisdiction**
- **The Interface between the African Commission and the African Court**
- **Lessons and Warnings from Elsewhere: The Experiences of the Inter-American Commission and Court and the Experiences of the European Court on Human Rights**
- **The Contribution of Civil Society to the African Court**
- **Panel Discussion: Towards an Effective African Human Rights Machinery**

3.0 Personal Jurisdiction: Who Can Address the Court?

This session was chaired by Prof. Shadrack Gutto, Director of the Centre for African Renaissance Studies (CARS), University of South Africa, and Member of the Governing Council of Africa Legal Aid. Prof. Gutto stressed the importance of personal jurisdiction for the Court and for the respect of human rights. He then introduced the speakers and the topics they will address.

The first speaker was Judge Duncan Mlambo, Chairperson of the South Africa Legal Aid Board. His presentation was entitled **"Peoples' Court: Access of Individuals and the Importance of Public Legal Assistance (from a South African Perspective)."**

Judge Mlambo emphasized the importance of the Court for the adjudication of human rights violations. He added that the success of the Court will depend a lot on the good will of States Parties.

He stressed the importance of the access of individuals to the Court since they are the first targets of human rights violations, and opined that Article 34(6) was a limitation that must be changed.

He quoted Article 10(2) of the Protocol as one of the provisions providing for legal assistance. He welcomed that provision and added that the Court will have to provide interpretations that meet the interest of justice. He considered that the access a person has to resources determines the access this has to legal assistance. He denounced the fact that governments all around the world have little tolerance for free legal aid and, in his view, this trend must be reviewed.

He stressed that in South Africa, with regard to criminal matters, the Constitution provides for assistance to those in need. The Government has been supportive of legal aid schemes but the demand is high. He informed the audience that the South African Legal Aid Board covers the whole country and comprises about 500 lawyers; it has a corporation agreement with the NGOs and provides access to justice to those who otherwise would not have had access to it. Its budget is just under 500 Million Rands and the government has committed to continue funding it.

Judge Mlambo compared the situation in his country to that in other African countries, where, he stressed, there is not such a scheme and where legal systems tend to serve a circle of privileged few. He opined that the scheme should exist to serve the poor and it should always be this way.

Judge Mlambo emphasized that governments of developing countries should develop these kinds of schemes because it would nurture trust in legal systems and, in the long term, it would benefit the government and the country, since a functioning legal system is a prerequisite to a democracy. He emphasized that legal aid should not depend on external funding.

He concluded by saying that *pro bono* work is important as it plays an essential part in helping access to justice and as such it complements legal aid.

The next speaker was Feyi Ogunade, Senior Legal Officer for Promotion, African Commission on Human and Peoples' Rights, who spoke on **"A Peoples' Constitutional Court: Access of State Parties and AU Organs"**.

In his presentation, Mr. Ogunade welcomed the establishment of the Court, which he sees as a watershed moment in human rights enforcement in Africa and addressed several issues of interest for the Court.

Looking at the contentious jurisdiction of the Court, he argued that the Protocol will strengthen the African human rights protection mechanism through the jurisdiction it has conferred on the Court. He made reference to the issue of *locus standi* before the Court as spelled out in Article 5 of the Protocol, particularly in Article 5(3) – which he opined has to be read in conjunction with Article 34(6). Individuals and NGOs are allowed to submit cases directly to the Court if the State concerned has made a permissive declaration to this effect. Mr. Ogunade stressed that the criticisms against this provision are unfair in light of Article 5(1). Indeed this article grants to the Commission the Right to bring cases before the Court and one knows that individuals have direct access to the Commission.

Mr. Ogunade also stressed the importance of the advisory jurisdiction of the Court under Article 4 of the Protocol. He emphasized the fact that it would enable the Court to render legal opinions on issues presented before it and would affect the conduct of States with regard to human rights issues although they would not have a binding effect. He stressed that those legal opinions would enrich the case law of the Court. In Mr. Ogunade's view, the advisory Jurisdiction is an effort to secure a culture of the rule of law within the African context and could be enhanced by the participation of NGOs and other relevant entities.

Referring to Article 3(1), Mr. Ogunade stressed the importance of the general jurisdiction of the Court, which includes its capacity and competence to decide what falls within its jurisdiction. He addressed the importance of Article 7, which, in his view, if construed and applied progressively, would have the capacity to ensure the establishment of high human rights standards in Africa.

He emphasized the importance of the complementarity between the Court and the Commission, which means that they will coexist as independent bodies within a mutually reinforcing relationship. He stressed that the Court will stay the final arbiter and interpreter of the Charter.

Prof. Gutto applauded the presentations and thanked the discussants before opening the floor for discussion. During the discussions, questions raised revolved around the exhaustion of internal remedies and complementary between Court and Commission.

4.0 Substantive and Advisory Jurisdiction

Mr. Lovemore Munlo, U.N. Assistant Secretary-General, Registrar of the Special Court for Sierra Leone in replacement of Judge Modibo Guindo, who was unable to attend the seminar, introduced the speakers and opened the session.

Prof. Kofi Quashigah, Faculty of Law, University of Ghana spoke on **"Substantive Jurisdiction: the African Charter and other sources of interpretation**". He touched upon the issues relating to the substantive jurisdiction of the Court, of the relationship between the Court and the Commission and also with sub-regional courts, the relationship between the Court and domestic courts and the African Court of Justice (ACJ).

He opined that the Court has been given an expansive jurisdiction that is not easy to define. He discussed the scope of the substantive jurisdiction of the Court described in Article 3(1) of the Protocol as extending to *"[…] all cases and disputes submitted to it concerning the interpretation and application of the Charter, this protocol and any other relevant human rights instruments ratified by the States concerned."* He stated that this generous scope is supplemented by Article 3(2), which reads *"[i] n the event of a dispute as to whether the Court has jurisdiction, the Court shall decide."*

He said that the Court has therefore a green light to determine the scope of its substantive jurisdiction. He added that the magnitude of the scope of this jurisdiction is further complemented by articles 60 and 61 of the Charter, which was drafted with the Commission in mind. He argued that it is fair to extend resort to these principles to the Court. He stressed that with this expansive jurisdiction it is difficult to imagine any area of human rights that would escape the mandate of the Court.

Prof. Quashigah pointed out that the Court is intended to complement the Commission and not to undermine it. To illustrate the relationship between the Court and other sub regional courts, like the ECOWAS Court of Justice, he took the hypothesis of an individual wanting to appeal against one of its decisions before the Court. He noted that Article 6(2) of the Protocol and Article 56 of the Charter – which seem not to have included sub-regional mechanisms – and of the fact that the Court will determine admissibility, one could foresee a trend to exclude cases already handled by sub-regional courts.

With regard to the relationship between the Court and domestic courts, Prof. Quashigah stated that ratification of the Charter and the Protocol is an indication of the states' preparedness to subject their sovereignty to the relevant international systems. As a consequence, the Court could possibly develop a common content for the various human rights issues brought before it and affecting Africa and it could develop common legal standards like the Commission did.

Prof. Quashigah emphasized that the decision to merge the ACJ and the Court introduces a new dimension into the substantive jurisdiction of the hybrid Court that will emerge.

He concluded by saying that the general nature of the jurisdiction of the Court is very expansive and that its Judges should adopt a constructive interpretation of the scope of their jurisdiction.

The second speaker of the Afternoon Session, Dr. Frans Viljoen, Centre for Human Rights, University of Pretoria, South Africa spoke about "**The Institutional Dimension of Substantive Jurisdiction: The African Court vis-à-vis Other International Tribunals"**.

Dr. Viljoen noted that the Court came into existence in a post-modern judicial landscape where there is an apparent institutional proliferation and duplication of institutions. He stressed that the drafters of the Protocol seemed to have celebrated the complexities of this era by formulating Article 3(1) of the Protocol in such expansive terms.

Dr. Viljoen tried to unravel some of the complexities by examining two main institutional consequences of the Court's wide jurisdictional mandate: 1) the choice of forum and 2) the multiple proceedings ensuing from the multiplicity of forum.

Concerning the choice of forum, Dr. Viljoen developed arguments on the appropriate forum to which a litigant should go. He dismissed suggestions of an overlap with the International Criminal Court (ICC) and other international criminal tribunals because the Court will deal with the States, not individuals.

He, however, saw an overlap with the International Criminal Court of Justice because the wide scope of the ICJ comprises the specific human rights scope of the Court. Dr. Viljoen gave the example of the Democratic Republic of the Congo (DRC) case. The Commission in Communication 277/1999 decided, in 2003, that rights embodied in the Charter had been violated and so did the ICJ in 2005. He added that this is allowed by the non-exclusivity of the legal jurisdiction of Article 95 of the UN Charter, which allows States to settle their disputes before tribunals other that the ICJ.

Dr. Viljoen made note of the danger of an overlap with sub-regional courts, which have a specialized scope of application.

Concerning the multiple proceedings, Dr. Viljoen, developed arguments in case more than one body or tribunal is approached. According to him, there are several possibilities. The body that is approached may refuse to consider any matter pending before another international dispute resolution mechanism (only the Human Rights Committee in the framework of the Optional Protocol to the CCPR adopts this position); the body approached may refuse, in application of the principle of *res judicata*, to entertain matters that have been finalized elsewhere (he quoted Article 56(7) of the Charter and its application to the Commission). In his view, it will also be applied to the Court given the universality and logic of the principle; the body approached will combine the two possibilities mentioned above by selecting only one route by sticking to it from the start (example of the Committee against Torture).

Dr. Viljoen concluded that the problems of duplication are more apparent than real and when problems arise they should be resolved in a spirit of collaboration, the final goal being the human rights protection of all Africans.

The next speaker Dr. A.P. van der Mei, Faculty of Law, University of Maastricht, the Netherlands, spoke on **"The Forgotten Power: The Court's Advisory Jurisdiction"**.

Dr. van der Mei at the outset contended that thanks to this power, enshrined in Article 4 of the Protocol, the Court's advisory jurisdiction is broader than that of any other international

supervisory organ. He considered the scope and potential significance of this jurisdiction and the extent to which it could strengthen the Africa human rights protection mechanism.

He stressed that advisory jurisdictions are less confrontational than contentious proceedings in so far as States are not placed in a position of "accused". Dr. van der Mei considered that it is a strategic method of promoting respect for human rights.

Dr. van der Mei examined who can request an advisory opinion from the Court. He emphasized the broad concept, which allows not only African organizations to approach the Court with a request for an advisory opinion. Dr. van der Mei opined that NGOs should be allowed to request advisory opinions given the significant role they play in the promotion of human rights. He, however, cautioned that to avoid a situation where the Advisory Jurisdiction of the Court may be used as a disguised contentious referral, a case by case approach according to which the Court could decline requests for advisory opinions when it deems that it constitutes in fact a contentious case, should be adopted.

As to possible advisory opinions on the compatibility of domestic laws with international human rights law, Dr. van der Mei noted that the Protocol does not expressly confer this power upon the Court. However, he is of the view that Article 4 could be interpreted to allow the Court to deliver such opinions, which may cause States to withdraw legislation which are at odds with international human rights norms. This power gives rise to many questions, one of which is whether national judges might also request advisory opinion on the compatibility of domestic laws with international human rights law.

Dr. van der Mei concluded that the advisory power of the Court will remain dormant if no or few requests are submitted to it. He took the example of the European Court for Human Rights (ECHR), which never rendered an Advisory Opinion probably because of the broad accessibility of its procedures for dispute settlement. He also referred to the Inter-American Court, which can only exercise jurisdiction over States that have accepted its jurisdiction. In the first years most of the cases before this Court involved Advisory Opinions, because only a handful of States had accepted its contentious jurisdiction. When more States accepted its contentious jurisdiction, the Court's Advisory Jurisdiction declined in favour of its contentious jurisdiction.

Dr. van der Mei said the practical significance of Advisory Jurisdiction depends on the accessibility and effectiveness of contentious procedures. He suggested that the African Court could strengthen its position by interpreting Article 4(1) broadly so as to notably allow NGOs and national courts to submit requests for opinions and even to publish on its own motion a document indicating how it intends to use its Advisory competence and invite parties to make use of it by initiating advisory proceedings.

In the subsequent and lively floor discussions; various issues were raised by participants including the issue of *res judicata* between the Court and the Commission, indeed can a question placed before the Court be considered *res judicata* if it has been brought and dealt with by the Commission? Dr. Viljoen answered that this point will be answered by the Rules of Procedure of the Court and added that he did not mean that *res judicata* applied between the Commission and the Court. Other issues discussed were the interplay between the Economic Community of West African States (ECOWAS) and the Court, since one could not exclude the problem of forum shopping. Prof. Quashigah said that since not all States Parties to the AU belong to Ecowas, no duality is possible and a lot of cases will go to either one of

them but not to the two. Another issue discussed was to what extent the Court will draw on the case law of sub-regional courts.

5.0 Presidential Address

The first day of the conference concluded with a Presidential address chaired by Justice Modiba Ocran of the Supreme Court of Ghana. The Presidential session was addressed by Hon. Papa Owusu-Ankomah, Minister for Education and Sports representing H. E. President Kufuor, Judge Gerard Niyungeko, President of the African Court on Human and Peoples' Rights, H. E. Adama Dieng, U.N. Assistant Secretary General, and Registrar of the International Criminal Tribunal for Rwanda (ICTR), and Prof. Shadrack Gutto, Director of the Centre for African Renaissance Studies (CARS), University of South Africa, and Member of the Governing Council of Africa Legal Aid. Justice Ocran noted that the establishment of a court was a defining moment for the creation of a stable society. He regretted that the President of Ghana H.E. John Agyekum Kufuor could not participate in person due to unforeseen circumstances. He said the President's participation would have been appropriate because he is a lawyer. He then introduced the President's representative, Hon. Papa Owusu – Ankomah to present the President's address.

Before presenting the address of the President, Hon. Papa Owusu – Ankomah informed the participants that he had himself been associated with AFLA during his tenures as Minister of Justice and Minister of the Interior. He had had the opportunity to contribute to the creation of the Court, and it was towards the end of his tenure as Minister of Justice that Justice Sophia Akuffo was nominated to be a Judge at the African Court. Hon. Papa Owusu – Ankomah then proceeded to present the President's address.

Firstly, the President[2] welcomed all participants on behalf of the people of Ghana. He said the creation of the Court provides hope for an Africa where Peace and Justice can be enjoyed by all. Peace and Justice in that context, promotion of human rights for Africa and Ghana constitute core objectives of his government. It is for this reason, said the President, that his government whole heartedly supports this seminar. He then presented a background and overview of the Court, the creation of which, is part of a broader process of democratization and internalization of Justice that commenced in the late 1980s and 1990s.

President Kufuor pointed out that human rights are at the heart of the new African Union and that virtually all of the AU organs have a human rights mandate. He also noted that the Constitutive Act of the AU provides for a right of humanitarian intervention. Furthermore, fundamental rights and democratic principles are embodied in the NEPAD, (The New Partnership for Africa's Development.) The President said his government has subscribed to the objectives and values of NEPAD, and to demonstrate this, Ghana subjected itself as the first country ever, to NEPAD's African Peer Review Mechanism.

The President referred to the emergence of international criminal justice with the establishment of the International Criminal Tribunal for Rwanda (ICTR), the Special Court of Sierra- Leone (SCSL) and the International Criminal Court (ICC) to which so many African States have actively contributed. President Kufuor said each of these Tribunals express a common African and International commitment to achieve cross-border justice.

[2] H.E. John Agyekum Kufuor was elected Chairman of the Assembly of the African Union on Monday, 29th January 2007.

The President described the conference as a unique one bringing together three actors that have played and will play a central role in the creation and functioning of the Court. The first group comprises, NGOs and civil society, which have pushed for a strong and effective human rights machinery for Africa. He noted that NGOs contributed to the functioning of the African Commission on Human and Peoples' Rights. The President observed that it was NGOs that put the establishment of a human rights court for Africa on the political agenda. In this connection, President Kufuor said a special word of thanks to Mr. Adama Dieng, who led the NGO movement for many years and was a driving force in the process that ultimately resulted in the creation of the African Court.

President Kufuor thanked Africa Legal Aid, its Executive Director, Evelyn A. Ankumah and its board members, not only for convening the conference but for all its efforts to make human rights a reality. He said Ghana is proud that Africa Legal Aid has chosen Accra as the seat of its Headquarters.

The President said the second group that has been essential for the creation of the Court are the AU member states that have ratified the Protocol establishing the Court and those that are in the process of doing so. He said by signing and ratifying the Protocol, the AU member States have set an example that should be followed by others and thus bring nearer the day that all Africans can enjoy human rights as part of a free democratic society.

President Kufuor then welcomed the new members of the Court and expressed confidence in their ability to make a success of the Court. While that it was not his place as President of Ghana to say anything about how a court and its judges should carry out their mandate, he called on the new court to work on a good working relationship with the African Commission and national courts. He expressed the hope that the present conference in Accra will lay the foundations for such cooperation. The President noted with satisfaction the presence of members of national courts at the conference, and their important role in human rights protection because human rights violations will first be addressed at the national level.

President Kufuor concluded that there is a common responsibility to ensure enjoyment of human rights in Africa. He said the conference provides a common African table to explore how best to shape our future system, and make progress on the road to a fair and just Africa. The President said his government will do everything within its power to work on such an Africa. He expressed the hope that this conference will bring nearer the day that human rights are a practical reality for every African.

After thanking the Minister, Justice Ocran introduced the next speaker, Mr. Adama Dieng.

Mr. Dieng, after thanking the President for his brilliant statement, emphasised how he was proud to be in Ghana, which has been the torch for the fight against all external forces that tried to silence the people of Africa. He stressed that Ghana has produced major intellectuals who contributed to the success and radiance of Africa. He commended the government for promoting women like it did with the nomination of Judges Kuenyehia and Akuffo respectively to the ICC and the African Court, and expressed the hope that Ghana would nominate the Executive Director of AFLA, Evelyn A. Ankumah, to a comparable body. He also thanked the Government of Ghana for the efforts made to facilitate this important gathering.

Mr. Dieng also called on Hon. Papa Owusu-Ankomah to be President Kufuor's ambassador to the conference and invite the President to accept the direct access of individuals to the Court. He stressed the importance for Ghana to do so, given the significant role it played in the pan African movement.

He congratulated the Judges of the Court whose task is not easy since a lot of critical rights will be brought before them (such as the right to self determination, the right to freely dispose of ones wealth)[3] and in adjudicating those rights they will face powerful lobby groups.

Mr. Dieng concluded that it was important that power returns to the people and he was sure that, in this regard, Ghana will continue to play a pioneering role. He also hoped that Ghana will play a role in the complementarity with the ICC, as well as in the matter of enforcement of sentences issued by the ICTR.

The floor was thereafter given to Judge Niyungeko who also thanked the President and his Government for having been one of the first States to ratify the Protocol establishing the Court and to propose the candidacy of a judge. He also thanked the President for accepting to be associated to the organisation of this conference whose role towards NGOs is important and for renewing his commitment to contributing towards the protection of human rights.

Judge Niyungeko stressed that the Court has started its activities and has already held three sessions and is planning to hold another one next week in Addis Ababa.

He emphasised the commitment of the members of the Court to apply all means at their disposal for the Court to play the role that it is expected to play. He highlighted that they are conscious of their pioneering work and are committed to make the Court a strong, independent and credible institution.

Judge Niyungeko concluded his address by requesting the President of Ghana to continue to support the Court through the interstate organs of the AU because the Court will probably submit files to its political organs and this support is needed for the Court to be able to function properly and efficiently. He also called upon Ghana to set an example by accepting access of individuals to the Court, particularly since Ghana has accepted to host this conference, and to incite other African States to do the same.

The last speaker of the Presidential Address Session was Professor Gutto who thanked the encouraging input of the President. He added that AFLA is grateful to his Government and particularly to the Ministry of Justice and Attorney General, Hon. Mr. Joe Ghartey who has provided significant material contribution and political support to AFLA. He also stressed that Africans are tired of all the fights and that it is important to make their life better and to promote freedom.

Justice Ocran called the day off after thanking this eminent panel and invited the audience and the participants to a reception.

[3] In Articles 20 (1-3) and 21 (1-5) of the African (Banjul) Charter on Human and Peoples' Rights. See also, Basic African Human Rights Treaties , Africa Legal Aid 2005, p.13 - 14

DAY 2

6.0 The interface between the African Commission and the African Court

This session was chaired by Dr. Lennart Wohlgemuth, Immediate Past Director, Nordic African Institute, Uppsala, Sweden, and Member of the Governing Council of AFLA. After introducing the theme and Speakers he invited the first Speaker, Judge El Hadji Guisse to present his Paper.

On the above referenced theme, Judge El Hadji Guisse, Member of the African Court on Human and Peoples' Rights spoke from the perspective of the African Court.

He opined at the outset that the establishment of the Court is an important step in the development of human rights Protection in Africa and that it came to reinforce an already existing important system for Africa.

After giving a historical overview of the Court, he praised the roles played by the International Commission of Jurists and particularly by Adama Dieng, its former Secretary-General.

Judge Guisse stressed that the Court has not been created to replace the Commission and addressed issues concerning possible overlap between the Court and an African Court of Justice. He said that conflicts of jurisdiction might be possible but that fortunately the merger of the two will erase any differences that may arise.

Judge Guisse pointed out that international jurisdictions are not created to replace national jurisdictions but to complete them to better fight impunity. He said the Court is first and foremost a jurisdiction, then an organ, with a consultative function. After explaining these two essential functions, he said that it is in this framework that the Court will have to participate, through its jurisprudence, to the building of a corpus of legal norms. He added that it will have a critical pedagogical role for States.

He concluded that the judgements of the Court will have value only if they are applied by States and he therefore called upon them to comply with their obligations.

The Chair of the session, Dr. Wohlgemuth thanked Judge Guisse and stressed that the future of the Court looked very promising given the content of its Judges. He then called upon Evelyn Ankumah to present **Commissioner Nyanduga's** paper on the above referenced theme, from the Commission's perspective.

The paper began by making reference to the 40th session of the African Commission that had just concluded in Banjul, during which the relationship between the Commission and the Court had been discussed extensively. The Commission had identified certain issues which are key to its relationship with the Court. These include the binding effect of the Court's decisions and the need for the Commission and Court to establish good and fruitful working relations.

Mr. Nyanduga noted in his paper that the binding effect of the Court's decisions as opposed to the non-binding effect of the Commission's decisions that have been largely ignored will enhance the protection of human and people's rights in Africa. He stressed the importance of

the working relationship between the two bodies and informed the audience, of the creation, at the 38th Ordinary Session of the Commission, of a Working Group, on Specific Issues, to among other things revise the Rules of Procedure of the Commission, to cater for the issues relating to the working relationship between the Commission and the Court. The Working Group *inter alia* recommended that the *bureaux* of the two institutions meet every year to discuss their relationship. The draft Rules are yet to be adopted. However, Mr. Nyanduga observed that by virtue of Article 33 of the Protocol the Court[4] is bound to meet with the Commission.

He pointed out that it was important that the two institutions work together to develop and articulate rules on the roles of the two institutions under a complementary regime and to harmonize their Rules of Procedure.

Commissioner Nyanduga concluded that the establishment of the Court is one of the major developments of the 21st century on the human rights landscape in Africa. He called on African States to make the declarations to give the Court the necessary powers to be an effective organ in the protection of human rights on the continent.

The subsequent floor discussion focussed on the binding or non binding nature of decisions, the enforceability or non enforceability of the decisions of the Commission and Court. It was generally agreed that unlike the decisions of the Commission, the decisions of the Court are final and binding, and a state that ignores the decisions of the Court would have violated international law.

The question arose as to why there were no references to the East African Court or to the ECOWAS Court, which are performing, at the sub-regional levels, some of the functions of the African Court.

On the Interface between the Commission and the Court and the need for cooperation, the President of the Court assured participants that the Court is committed to work with the Commission to give effect and recognition to human rights protection in Africa.

7.0 Lessons and Warnings from Elsewhere:The Experiences of the Inter-American Commission and Court and the Experiences of the European Court on Human Rights

This session was chaired by Ms Anna Bossman, Acting Commissioner, Commission for Human Rights and Administrative Justice, Ghana. Ms Bossman introduced the two speakers and then invited the first Speaker, Ms. Christina Cerna to make her presentation.

Ms. Christina M. Cerna**,** Principal Specialist of the Inter-American Commission on Human Rights spoke on **"Lessons and Warnings from the Americas: the experiences of the Inter-American Commission and Court"** after providing the background to the inter – American human rights System, including the Organization of American States, she discussed the

[4] Article 33 of the Protocol Establishing the African Court on Human and Peoples' Rights reads:
"The Court shall draw up its Rules and determine its own procedures".
"The Court shall consult the Commission as appropriate".
See also, Basic African Human Rights Treaties, Africa Legal Aid 2005, p.41.

evolution of the Inter – American system which she set out in three phases: 1960-1990; 1991-2001; 2001 to present.

Between 1960 and 1990, the Inter-American Commission above all tried to delegitimise the militias and to therefore contribute to the protection of human rights in the region. The Commission went on historic on-sight visits to inter alia Nicaragua and Argentina. The Commission, however, did not refer contentious cases to the Human Right Court.

The second phase, 1991 – 2001, was the period of guaranteeing democratization within the OAS which coincided with an Europeanization of the inter-American system. During this period the Inter-American system evolved as a contentious judicial trial procedure before the Court with the Commission prosecuting the state for Human Rights violations with the assistance of the victim and the victim's representative.

The third phase, 2001 to present, is characterised by a strengthening of the position of the victim, which were granted autonomy from the Commission before the Court, and the decision of the Commission to submit all cases in which the state did not comply with the Commission's recommendations to the Court.

Many applications that come before the Court involve issues relating to previous governments. Ms. Cerna said that the Court has the power to issue provisional measures in the form of injunctions, and has compulsory jurisdiction over States. She said 80% of States comply with the decisions. Ms. Cerna concluded by listing a number of lessons that Africa could learn from Latin America.

After summarizing Ms Cerna's presentation, Ms Bossman introduced the next speaker, Mr. Atilla Teplan of the European Court on Human Rights whose presentation was on **"Lessons and Warnings from Europe: the experiences of the European Court on Human Rights."**

After providing a background to the European system, Mr. Teplan discussed the two types of applications under the European Convention, Inter-State (which is very rare) and Individual.

He stated that the right of individual complaint was originally optional and contracting States could recognise it at their discretion. With the entry into force of Protocol No. 11, on 1 November 1998, the recognition of the right of individual petition became compulsory.

He stressed that the procedure has changed. At the beginning there was a preliminary admissibility examination by the Commission, which, after the case had been deemed admissible, issued a report establishing the facts and expressing an opinion on the merits of the case. The report was transmitted to the Committee of Ministers and where the State had accepted the compulsory jurisdiction of the Court, the Commission and/or any Contracting State concerned could bring the case before the Court for a final and binding adjudication.

Mr. Teplan emphasised that Protocol No. 11 radically transformed the supervisory system by creating a single, full-time Court, to which individuals can have direct recourse. Furthermore, since this Protocol, the Court is composed of a number of judges equal to that of the Contracting States (46) and are elected by the Parliamentary Assembly of the Council of Europe. The majority of judgements are given by a seven member Chamber. The Grand Chamber of the Court is composed of seventeen judges.

He said that the procedure before the ECHR is adversarial and public but largely written. There are very few hearings, but when there are, they are held in public. He explained the way applications are assigned.

He emphasised the upcoming changes in the organisation and procedure of the ECHR thanks to protocol 14, which has the aim to devote more attention to meritorious applications by increasing the filtering capacity and improving the implementation of the Convention at the national level with a view to making it more efficient. He noted that when the Protocol takes effect, judges will be elected for a single term of nine years.

He stressed that Protocol No. 14 will institute two new procedures regarding the execution phase. Indeed, the Committee of Ministers will be able to request interpretation of a judgment of the Court and to take proceedings in cases where, the respondent State refuses to comply with a judgement of the ECHR.

He also noted that the Council of Europe has established a legal aid scheme to help indigent applicants.

Mr. Teplan spoke about the increasing workload before the ECHR, which affects its efficiency. He opined that the court needs to double its staff to reduce the backlog.

During the floor discussion, participants asked a number of questions including how to minimise the delay in proceedings before the Inter-American and European systems; the relationship between the Council of Europe and the European Union; the practical implications, for the Inter - American system of the participation of the U.S. in the process; and whether, the Inter-American system could be a model for Africa.

Other questions related to the possible inclusion, in the Rules of Procedure of the African Court, a mechanism that protects the independence of the Court from interference or influence by powerful governments.

8.0 The Contribution of Civil Society to the African Court

This session was chaired by Judge Bernard M. Ngoepe, Member of the African Court. After introducing the theme and Speakers, Judge Ngoepe, invited the first Speaker, Advocate Solly Sithole, of the Human Rights Institute of Southern Africa (HURISA) and Member of the Coalition for an Effective African Court to make his presentation on **"the contribution of NGOs"** on the above referenced theme. Mr. Sithole first introduced HURISA. He said that the Coalition was established to monitor the creation of the Court, and to monitor an efficient system of protection. It played a significant role in the creation of the Court by participating in the drafting of guidelines for the election of the Judges and for the Protocol. It has made critical interventions at the AU on decisions affecting the creation of the Court. Its objectives were to have full ratification, to ensure transparency in the election of the judges, to provide a platform for NGOS and to provide support to the AU and the Court.

He welcomed the establishment of the Court, which comes into being at a time when Africa is besieged with human rights violations. He stressed that the AU confirmed at the Banjul summit that the seat of the Court will be Tanzania.

He observed that the power of the Court will be to interpret the provisions of the Charter and of the Protocol. He stressed that to this date, only Mali and Burkina Faso have accepted the jurisdiction of the Court for individuals and NGOs.

He spoke briefly about the functioning of the Court and opined that the Court is a challenge for human rights advocates. He said that it is likely that the Court will see its first cases towards the end of 2007. Mr. Sithole called for human rights advocates to identify good cases for the Commission. The Commission should prepare a framework of its cooperation with the Court, which necessarily implies an amendment of its Rules of Procedure.

He concluded by saying that the newly created Court should be recognised and supported by civil society to help it function effectively to achieve the purpose for which it was set up: the protection of human rights in Africa.

The next speaker, Mr Desmond Davies, Editor of Africa Week Magazine, London, United Kingdom**,** spoke on **"The Role of the African Media in Propagating the Activities of the new African Court on Human and Peoples' Rights."**

At the outset, he commended AFLA for recognizing the role of the African media in maximising the impact of the Court and to ensure that the Court works for Africa and Africans. He denounced the lack of communication between the Power and the People, and said that authorities have failed to fully grasp the fact that access to information is critical for a healthy democracy.

Mr. Davis contended that the media plays the role of a watchdog in the democratic process by notably forcing governments to keep their promises and by keeping the people informed. He referred to Article 19 of the Universal Declaration on Human Rights, guaranteeing the freedom of opinion and expression; this right includes freedom to hold opinions without interference, and to seek, receive and impart information and ideas through the media, a fundamental right not applied in the days of one-party rules. He opined that what is needed in Africa today is a democratic control.

He spoke about the widening of the public sphere and stressed that with the coming of the second wave of democracy in Africa, politicians have had to learn how to use the media to get their messages across. In his view, a true public sphere promotes the dissemination of information necessary to allow the people to make the right decisions. He emphasised the importance of the journalists who are mediators between politicians and the public and who play a major role in enhancing the public sphere.

Mr. Davis stressed the importance of communication for democracy to be viable. He suggested that the Court should organise workshops and seminars for African media practitioners to provide them with basic information on the Court to allow them to constructively report on it and on its work.

He concluded that the media in Africa are beginning to provide a platform for enhancing civil and political rights. He observed that the situation has improved with the advent of multi-partism in many African countries, and that this new climate will provide meaning and significance to communication on human rights protection.

Mr Kwame Tetteh, President of the Ghana Bar Association**,** spoke on **"The Contribution of Bar Associations."**

Mr. Tetteh noted that Article 10 (2) of the Protocol provides for legal representatives. He hoped that these persons will be learned practitioners. He stressed the importance for lawyers to ensure that human rights are respected.

He welcomed the fact that the Court will be the working place of African lawyers. He expected that all African bars will be committed to make the Court a success for the protection of the people. The bar associations must join hands to make it work and to have strong ethics for lawyers so as to avoid misconducts, such as contempt, too many motions for adjournments. He stressed that the Court is of last resort and should not be flooded with too many motions.

He called on the Ghana Government to make the declaration of acceptance of individual jurisdiction and congratulated the Judges on their election.

Judge Bernard Ngoepe, stressing that he was speaking as the chair of the session and not as a Judge of the Court, stated that the Court intends to succeed and will count on the cooperation of civil society. He said that the Court will need proper funding, which is not yet the case. He also said that the media are very precious as watchdogs.

The subsequent floor discussion addressed the following issues: Ways in which NGOS will assist in promoting the objectives of the Court; Lack of responsibility of the media and their role in fuelling hatred in the Rwandan genocide; The need for the Court to have a public relations office, pro-bono services that will be provided to individuals who will want to approach the Court.

9.0 Towards an Effective African Human Rights Machinery

The final session of the conference was chaired by H. E. Mr. Adama Dieng, U.N. Assistant Secretary General, Registrar of the International Criminal Tribunal for Rwanda (ICTR) and Initiator of the Protocol Establishing the African Court on Human and Peoples' Rights. After introducing the Panelists, representing various actors and stakeholders, Mr. Dieng invited the first Speaker Judge Niyungeko, President of the African Court on Human and Peoples' Rights to make his intervention. Judge Niyungeko set out the conditions that he believes would make an efficient Court. Indeed, since the Court has just started, there is no possibility of using its experience.

The conditions are:

1) The existence of appropriate legal tools, Although the Court has currently a good legal basis to work with there is a need to elaborate good and comprehensive Rules of Procedure and Evidence;

2) The Court must have adequate financial, human and material resources. In this connection the President of the Court informed participants that the Court is starting to recruit the staff of

the Registry. It also needs documentation and resource materials. The Court has already identified its needs and has prepared a draft budget that will be submitted to the AU;

3) The place of the Court within the African Union. The Court must be placed on the same level as the Executive and Legislative organs of the AU.

4) Independence in its administrative and financial management and capacity of the Judges to maintain and protect their independence;

5) The quality of the members of the Court and their commitment to fulfil their mission. If the part-time work of certain members has a negative impact on the efficiency of the Court, there would be a need to amend the rules to introduce a full membership for all the Judges;

6) The nature and quality of the relations between the Court and other continental organs, such as the Commission;

7) The legitimacy of the Court, which cannot only rely on its institutional legitimacy, but will have to build a popular legitimacy by meeting Africans expectations. It is there that the crucial role of the civil society will come into play, and its relation with the Court will be essential.

Ms Betty Mwenesi, chairperson of FIDA Kenya stressed that the adoption of the Protocol on Women's rights is a landmark success for women and it provides a platform for them to exercise their rights.

She referred to Article 18 (3) of the African Charter: "the States shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions."

She noted with satisfaction important developments within NEPAD, and its implications for the advancement of women's rights.

She expressed the view that low literacy level of women impacts negatively on their ability to enforce their rights.

Mr. Femi Falana, President of the West African Bar Association, congratulated all Africans for the emergence of the Court. He said that for the Court to be efficient and to enable a new approach to human rights enforcement in Africa, there will be a need to take into account in the Rules of Procedure, the peculiarity of the continent.

He stressed that Africans should use the Court to challenge institutions like the International Monetary Fund to compel African leaders to provide proper funding. He emphasised that African States must take ownership of the Court and therefore define it, involving the Ministers of Justice and Attorneys General.

He stressed that there is a need to assemble Judgements that have been delivered and which have endorsed the Charter, such as the landmark Decision of the Dow case.

Dr Runger, GTZ Programme Manager, Good Governance Programme, Ghana, suggested that there should be a triangle to make the Court work. This triangle should

encompass the executive, the judiciary and civil society. She said that there should be adequate funding for the judiciary and civil society.

She developed arguments on budgetary issues and support relating to bilateral development cooperation, co-funding and project funding.

Prof. Gutto stressed that the Court and the Commission will first work within the parameters of the Protocol and that they therefore do not have free hands. He however said that there will be need for creativity within the boundaries of the Protocol.

He hoped that directions will not be left to the President of the two Institutions but also to the AU. He said that these two bodies must be mindful of the fact that they have a horizontal relationship. He called for a strengthening of the role of the Special Rapporteurs, as well as of the State Reporting Mechanism.

He observed that a human rights Court is neither a criminal nor a civil court, it is between and beyond those two and he hoped that it will not act as a criminal court or a civil court.

Prof. Gutto contended that free legal representation is important and that it represents a double challenge. He called on African people to invest in the Court. He stressed that Africa needs proper legal representation to obtain the best. The Court will have to define, in its Rules of Procedure, what Constitutes legal representation and whether it includes paralegals.
He concluded that in the near future, the AU will have to start thinking about a review of all AU organs with a view to strengthening the approach to human rights and to rationalising its means, which includes competent staff, in which women will be equally represented.

After the interventions of the Panelists, **Mr. Dieng** observed that the merger of the European Commission and the European Court was a positive development. He called on the Court to place the emphasis on promotional activities. He called on the AU to look into the rationalisation of the organs.

He noted that as a result of the work of various actors, we were able to make the Commission work. He expressed the hope that there will be the same support for the Court.

Mr. Dieng then proceeded to highlight the salient points of the presentations of the Panelists.
He said that President Niyungeko has highlighted seven crucial conditions for having an effective Court.

He also said that the Court will have no legitimacy if ownership is not claimed and he was glad that Judge Niyungeko was conscious of that. He thanked Betty Mwenesi for giving the perspective of women organisations.

He said that Prof. Gutto and himself have launched the Arusha Foundation to support the AU in the field of human rights and said that there exist a Trust Fund to help litigants. He reminded Prof. Gutto that the lack of proper funding made it impossible for the Commission to function properly. He recalled that motions were lodged before the Commission regarding the situation in Rwanda and that its members said they couldn't do anything and refused funding from NGOs. He stressed the importance for the Court to start with proper funding.

He also agreed that separation between the powers was crucial for the work of the Court.

He thanked the panelists for their presentations and asked those who have specific proposals to submit them to AFLA. He then opened the floor for discussion.

During the lively floor discussions, several issues were raised regarding economic rights, which too often are forgotten and not raised enough before national and international bodies; the issue of third-world debt, the plague of corruption that will have to be addressed by the Judges; the actions of the Inter-American Court in the case of Guantanamo, its expansive jurisprudence on material and moral reparations (which also takes into account indirect victims), pro-bono work before the Court and the rich jurisprudence of the Commission that will enhance the work of the Court. Mr. Dieng then gave the floor to the President of the Court.

Judge Niyungeko stated that he took note of all the positive suggestions made and will examine them. He thanked all the participants and commended their contributions, which shows that the process of ownership of the Court has started.
He ensured the participants that the Judges were going to develop a communication strategy and will open shortly a website for the Court and will envisage possibilities for individuals to send recommendations and suggestions in order to stay close to the people.

Mr. Dieng closed the meeting by thanking AFLA, its Executive Director and its staff for their excellent work. He recommended putting in practice what had been discussed during the two-day conference. He thanked Judge Niyungeko for his commitment to justice in Africa. He committed himself to follow closely the work of the Court in Arusha and concluded that as the owners of the Court, we, as Africans, have to make sure it will be efficient. He thanked H.E. President Kufuor, the Government of Ghana and the Minister of Justice for supporting the Conference.