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**EXECUTIVE COUNCIL**

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**EX.CL/1378(XLI)**

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**PRESENTATION ON THE BENEFITS OF JUDGES OF THE AFRICAN  
COURT ON HUMAN AND PEOPLE'S RIGHTS (AFCHPR)**

**REPORT ON THE BENEFITS OF JUDGES OF THE AFRICAN COURT ON  
HUMAN AND PEOPLES' RIGHTS PRESENTED TO THE PRC SUB-COMMITTEE  
ON GENERAL SUPERVISION AND COORDINATION ON ADMINISTRATIVE,  
BUDGETARY AND FINANCIAL MATTERS**

## **I. BACKGROUND**

1. In 2007, at its 11<sup>th</sup> Ordinary Session held in Accra, Ghana, the Executive Council, in its Decision **EC.CL/Dec. 351 (XI)** of June 2007, *approved "the conditions of service of Members of the AfCHPR...as per the PRC's report Document PRC/RPT (XIV)..."*. On the request of the Court, the Executive Council, during its 13<sup>th</sup> Ordinary Session held in Sharm El-Sheikh, Egypt, in its decision **EC.CL/Dec. 449 (XIII)** of July 2008, *"authorised the Court to submit in 2009 a new structure of the Registry and new proposals concerning the status [benefits] of Judges"*.

2. Between 2008 and 2011, the Court, in consultation with the relevant departments of the African Union Commission (AUC), prepared a new structure of the Registry as well as new proposals on the emoluments for Judges of the Court. These proposals were presented to and considered by the Permanent Representatives Committee (PRC) in 2009, 2010 and 2011.

3. In January 2011, the PRC approved the new benefits of Judges, and this was included in the 2011 budget of the Court. Although the approval for the new benefits was given in January 2011, the Judges insisted that a specific decision of the Executive Council was required. Thus, in June 2011, during its 19<sup>th</sup> Ordinary Session held in Malabo, Equatorial Guinea, the Executive Council in its Decision **EC.CL/Dec. 659 (XIX) of June 2011**, requested *'...the immediate implementation of the 2011 budget of the Court with respect to the new status of Judges'*.

## **II. PROCESS TO HARMONISE BENEFITS OF ELECTED OFFICIALS**

4. In 2012, the AUC initiated a process to harmonise the benefits of elected officials of the Union. A number of meetings were held with representatives of AU Organs. During its submissions at one of the meetings, the Court made it clear that *"... within the framework of the harmonisation exercise, the African Court is not requesting for any additional benefits for its Judges, so the financial implication [of the harmonisation process for the Court] is zero"*.

5. The benefits of Judges at the time which were all adopted by Executive Council Decisions stood as follows:

- i. Inter-sessional Allowance (Thirty per cent (30%) of ninety percent (90%) of the salary of the President of the Court as monthly salary for intersessional work)
- ii. Monthly Judicature Allowance (Ten per cent (10%) of ninety per cent (90%) of the salary of the President of the Court as monthly judicature allowance)
- iii. Administrative Lump sum (US\$ 500 per month)

- iv. Pension as per the AUC Staff Regulations and Rules
- v. Session Honoraria (US\$ 500 per day during the Ordinary sessions of the Court)
- vi. DSA as per the AU Regulations & Rules
- vii. Gratuity
- viii. Medical and Life Insurance;
- ix. Travel in First Class (in practice, business class only).

6. In January 2019, the AUC, at a meeting of the PRC Sub-Committee on Administrative and Financial Matters, presented proposals for the harmonization of benefits for elected officials, which completely altered the benefits mentioned above.

7. The new proposed benefits from the AUC were as follows:
- i. DSA rate for the place of session x number of days for the session;
  - ii. Honorarium to be paid per session at \$1,050.20 per session for five sessions (4 ordinary and 1 extraordinary);
  - iii. Intersession allowance calculated on the basis of DSA Rate of duty station x number of days;
  - iv. Judicature allowance pecked at a lump sum of \$1,181.75 per session; and
  - v. Travel insurance coverage pecked at a lump sum of \$1,000 per year.

8. In the AUC proposal, some acquired benefits, such as pension, gratuity, medical and life insurance were dropped, while other benefits were reduced.

### III. COURT REACTION TO THE PROPOSAL

9. When the above AUC proposal was made, the Court objected to the same. The Court reminded the meeting that Judges had binding contracts in which all their emoluments approved by Executive Council Decisions **EC.CL/Dec. 351 (XI)** of June 2007, **EC.CL/Dec. 449 (XIII)** of July 2008 and **EC.CL/Dec. 659 (XIX)** of June 2011 had been clearly set out, and it would be a breach of contract if those benefits were altered midstream the contracts. A copy of one of the contracts was tendered to the Sub-Committee. The Court also brought to the attention of the Sub-Committee the international law principle by virtue of which the emoluments of Judges may not be reduced during their tenure.

10. On the basis of the above arguments proffered by the Court, the PRC agreed that since Judges had contracts, the *status quo* for Judges be maintained until the expiry of their contracts.

11. However, during the 35<sup>th</sup> Ordinary Session of the Executive Council held from 4 to 5 July 2019 in Niamey, Niger, the Council adopted Decision **EX.CL/Dec.1057 (XXXV)**, paragraph 14 of which provides as follows: “**ENDORSES** payment of allowances and benefits according to the below matrix to be applied by all AU organs. **ALSO ENDORSES** maintaining the *status quo* of the honorarium of US\$500 for existing contracts of the judges at the African Court on Human and People’s Rights (AfCHPR) until their expiry”.

12. The Court was surprised to note that the *status quo* for Judges of the Court had been maintained only with respect to the honorarium of \$500 per day. It was the understanding of the Court that having submitted the contract to the PRC which set out all the benefits of Judges, the *status quo* would be maintained for the entirety of the benefits in the contract.

#### IV. ACTION TAKEN BY THE COURT AFTER NIAMEY

13. When the Court received the final version of the decision in July 2019, it instructed its Registrar to seek audience with the AUC to discuss the same. In August 2019, the Registrar wrote to the Secretary General of the AUC requesting guidance on when the implementation of the decision could be discussed. In October 2019, the Secretary General informed the Registrar that *“since the matter is a legal aspect, it should be submitted to the Office of the Legal Counsel for legal advice”*. During the 33<sup>rd</sup> Assembly of Heads of State and Government in February 2020, the Court sought audience with the Legal Counsel to discuss the matter. Unfortunately, on 11 February 2020, the Court delegation was informed by the Office of the Legal Counsel that *“due to unforeseen circumstances, the Legal Counsel will not be able to hold the meeting as planned”*.

14. Having tried unsuccessfully to resolve this matter since August 2019, at its 56<sup>th</sup> Ordinary Session held in March 2020, the Court resolved that it should seize the Bureau of the Chairperson of the African Union Commission.

#### V. JUDICIAL DIPLOMACY

15. In the meantime, the Court decided to engage other relevant stakeholders, in particular, members of the PRC, to explain the situation to them. Between September 2021 and February 2022, therefore, the Court undertook a number of consultations with Member States on a number of issues relating to the effective functioning of the Court, including the conditions of service of Judges. These consultations included meetings with 18 members of the PRC in Addis Ababa, and visits to senior government officials in Benin, Niger and Tanzania, as well as bilateral meetings during the Summit of the African Union.

16. During these consultations it was agreed that there was need for a proper forum where Member States and the Court could have a frank and constructive discussion on the work of the Court, including the conditions of service of Judges. A Retreat between the Court and the PRC was thus organised from 10 to 11 March 2022 in Arusha, Tanzania in which this matter was also discussed.

#### VI. OUTCOME OF THE RETREAT

17. During the Retreat, it was the general view of the participants that the running contracts of the Judges should not have been altered as was done in the Niamey Decision of 2019. The Retreat further noted that the downward revision of the benefits of Judges was not appropriate, and concluded that there was need to relook at the Decision.

18. The Retreat thus “Requested the Court, in consultation with the AUC, and following due process, to submit a proposal through the relevant sub-committees of the PRC, for the review of Decision **EX.CL/Dec.1057 (XXXV)** adopted during the Thirty-Fifth Ordinary Session of the Executive Council, held in Niamey, Republic of Niger, from 4 to 5 July 2019, relating to the entitlements of the Judges of the Court, for consideration at the 41<sup>st</sup> Ordinary Session of the Executive Council. further requested the Court to liaise with the office of the DCP to ensure that the proposal is submitted early enough before the next session of the Executive Council in June/July 2022”.

19. The Retreat further “requested the Court to liaise with the office of the DCP to ensure that the proposal is submitted early enough before the next session of the Executive Council in June/July 2022”.

## VII. ACTION UNDERTAKEN SINCE THE RETREAT

20. On 17 April 2022, the Court submitted a Briefing Note on the Benefits of Judges, as well as a Request for review of the Niamey Decision to the Cabinet of the DCP as per Retreat recommendation cited above. On 28 April 2022, the Court addressed the Bureau of the Sub-Committee on Supervision and Coordination of Administrative, Budgetary and Financial Matters on the benefits of Judges. The Bureau of the said Sub-Committee requested the CDCP, Office of the Legal Counsel (OLC) and the Court, to prepare a report on the implementation of the Niamey Decision, including the contracts given to re-elected and newly elected Judges, and make recommendations as necessary. On 11 May 2022, the Court submitted a draft of the said report to the CDCP and the OLC for consideration and advice.

## VIII. WHAT IS THE COURT SEEKING FROM THE SUB-COMMITTEE

21. It is important to state from the onset that the Court has fully complied with the Niamey Decision on the harmonisation of benefits of elected officials, even if it is still challenging the same. The Court decided that while engaging AUC authorities to reverse the decision, it should implement the decision until such time that it is reviewed. From January 2020 therefore, the Niamey decision, relating to the benefits of Judges, has been fully complied with.

22. What the Court is seeking from the Sub-Committee is a recognition that there was a breach of contract as a result of the Niamey decision, and that the contracts of Judges should be restored in its entirety until the expiry of the last contract, and then the Niamey decision can come into force.

23. So that’s the only request the Judges are making. Restoration of the contract before Niamey and implementation of Niamey after expiry of the last contract.

## IX. COURT’S INTERPRETATION AND APPLICATION OF THE DECISION

24. The Court notes that its interpretation and application of Paragraph 14 of decision **EX.CL/Dec.1057 (XXXV)** is not shared by some stakeholders. Paragraph 14 provides as follows: “**ENDORSES** payment of allowances and benefits according to the below matrix to be applied by all AU organs. **ALSO ENDORSES** *maintaining the*

*status quo of the honorarium of US\$500 for existing contracts of the judges at the African Court on Human and People's Rights (AfCHPR) until their expiry.*

25. In the Court's opinion, the most rational interpretation and application of paragraph 14 of the decision would be to ensure that all Judges, (who perform substantially the same kind of work in the same establishment, the work requires substantially the same skill, effort and responsibility and is performed under similar working conditions), operate under the same conditions of service and are remunerated equally, to ensure compliance with the basic principle of equal pay for equal work.

26. According to the Court, the question of differentiating between Judges with contracts before the Niamey decision and Judges re-elected or elected should not arise, because the Judges perform similar duties and responsibilities. Such differentiation would result in differentials in the payment of honorarium, and would be contrary to the labour law practice of equal pay for equal work.

27. In the light of the above, the Court ensured that in the implementation of the Niamey decision, the contracts for all the Judges were the same, including on the question of honorarium, that is, DSA of \$500 per day until September 2024 when the last 'existing contract' will expire, and \$150 thereafter, and all other emoluments as per the matrix under paragraph 14 remain the same for all the Judges.

28. The Court believes this interpretation and application is important in at least two respects:

- i. First, it puts all the Judges at the same level of remuneration as they are performing the same tasks, and*
- ii. Second, it does not open the Union to any possible litigation, for alleged discrimination.*

29. The argument has been advanced that those who were either re-elected or elected after the Niamey decision knew or should have known of the conditions before their election and had the option to either reject or accept the offer. This is not the case because the conditions of service for Judges of the Court are not attached to the call for nominations issued by the AUC, so Judges get to know of the conditions only after they have been elected.

30. It is important that in interpreting a law for the purpose of implementation, regard should be had not only to the letter of the law, but also to the object and spirit of the law. The object/purpose of this law was to harmonise the benefits of Judges, to ensure that all those doing similar duties receive similar emoluments. It was not and could not have been the intention of the drafters of this law that in the spirit of harmonisation (spirit of the law), elected officials within the same organ, performing the same tasks would be remunerated differently. If we limit our interpretation to the letter of the law only, we may not get the full picture.

31. So the Court is of the view that its interpretation and application of the Decision is the only way to proceed under the circumstances.

**X. CONCLUSION**

32. The Court is requesting a review of the Niamey Decision relating to the benefits of Judges to take into account the running contracts of Judges prior to the said decision.

**DRAFT DECISION ON THE REVIEW OF EXECUTIVE COUNCIL DECISION  
EX.CL/DEC.1057 (XXXV), RELATING TO THE BENEFITS OF JUDGES OF THE  
AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS**

**The Executive Council,**

1. **Takes Note** of the Report of the Permanent Representatives' Committee (PRC) adopted during its 44<sup>th</sup> Ordinary Session, held from 20 June to 8 July 2022, and the recommendations thereto relating to the Status of Judges of the African Court on Human and Peoples' Rights (the Court or AfCHPR);
2. **Congratulates** the PRC and the AFCHPR for the successful Joint Retreat organized from 10-11 March 2022 in Arusha, the United Republic of Tanzania, and **Takes Note** of the recommendations of the said Retreat;
3. **Recalling the Retreat recommendation requesting** "...the Court, in consultation with the AUC, and following due process, to submit a proposal through the relevant sub-committees of the PRC, for the review of Decision EX.CL/Dec.1057 (XXXV) adopted during the Thirty-Fifth Ordinary Session of the Executive Council, held in Niamey, Republic of Niger, from 4 to 5 July 2019, relating to the entitlements of the Judges of the Court, for consideration at the 41<sup>st</sup> Ordinary Session of the Executive Council.
4. **Further Recalling** Executive Council Decision EX.CL/Dec.1057 (XXXV), adopted during its 35<sup>th</sup> Ordinary Session held from 4 to 5 July 2019 in Niamey, Niger; and in particular **Section C** of the said decision, "**ON THE HARMONIZATION OF ALLOWANCES AND BENEFITS FOR ORGANS OF THE UNION**";
5. **Notes** that in the said Decision, the emoluments (allowances and benefits) of Judges of the African Court were reviewed downwards as per the matrix in paragraph 14 of the Decision;
6. **Notes further** that the review was done in spite of the fact that Judges had running contracts which reflected their allowances and benefits as approved by Executive Council Decisions EX.CL/ 351 (XI) of June 2007 and EX.CL/Dec.659(XIX), of June 2011, relating to the Status of Judges of the African Court;
7. **Mindful** of the fact that the implementation of Decision EX.CL/Dec.1057 (XXXV) of July 2019, relating to the benefits of Judges of the African Court has adversely affected Judges and not any other group of AU officials or staff members.
8. **Further Mindful** of the principles enunciated in legal instruments adopted by the African Union relating to the remuneration of Judges, including the Protocol on the Court of Justice of the African Union (Article 17(4)) and the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, (Article Article 23(3), to the effect that the benefits of Judges



cannot be decreased during their term of office, as well as International labour law and International human rights law, relating to the principle of equal pay for equal work.

9. **Decides** to amend paragraph 14 of Decision EX.CL/Dec.1057 (XXXV) to read as follows: "... **Also decides** to maintain the status quo for Judges of the African Court based on the existing terms and conditions of service of Judges of the Court.
10. **Requests** the Commission and the African Court, within the framework of the ongoing institutional reform, to propose new benefits for Judges of the African Court, to be applicable after the expiry of the current conditions of service, taking into account the nature and specificity of the mandate of the Court as a judicial organ.
11. **Calls on** the Commission to identify savings by December 2022, and if necessary, through supplementary budget, to pay the arrears due to the Judges as of January 1 2020.
12. **Requests** the Commission and the AfCHPR to report to the 42<sup>nd</sup> Ordinary Session of the Executive Council in February 2023 on the implementation of this Decision.

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