

12 An Overview of the African Human Rights System

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1 Introduction

Africa continues to deal with insurmountable human rights violations, which call for a robust system of human rights protection that can adequately respond to these challenges across the continent. Since 1981 when the African Charter on Human and Peoples' Rights (ACHPR) was adopted under the auspices of the Organization of African Unity (OAU), institutions and organs of the now Africa Union remain seized with inundating demands to mainstream and improve the situation of human rights. Conflict are currently raging in countries such as Central Africa Republic and Burundi thereby generating new violations and exerting pressure on existing mechanisms for the protection of human rights. One violation or another of the fundamental rights and freedoms protected by the key human rights treaties in Africa is ever-present in African societies thereby begging the question as to the extent to which African states are committed to promoting and protecting human rights first at the national level and then at the international level when national systems are either unwilling or unable to do so.

This chapter therefore aims at reviewing the African human rights system with a strong focus on demonstrating its legislative and institutional framework for the protection of human rights on this continent. The chapter will begin with the history of the system, and move on to examine the legislative framework of the system – with a focus on the ACHPR, the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol). This is followed by a comprehensive examination of the soft law principles contained in non-binding documents.¹

The final part of this chapter focuses on the institutional frameworks that make it possible to interpret and expand on the binding treaties (frameworks) and principles contained in the non-treaty documents. The African Commission on Human and Peoples' Rights (the African Commission) and the African Court on Human and Peoples' Rights (the African Court) are mandated to oversee the implementation of the African Charter and the Maputo Protocol. Further, the chapter focuses on the role of the African rapporteurs and working groups and the committees.

2 Historical Background

The debate around cultivating a culture of human rights in Africa was conceived at the first congress of African Jurists in Lagos, Nigeria, in 1961.² During that period, African states did not make serious efforts to promote this concept through the Charter of the Organization of African Unity due to the fact that the Charter did not

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¹ See <http://www.achpr.org/files/specialmechanisms/cpta/rig_practical_use_book.pdf> (accessed on 18 December 2017).

² The International Commission of Jurists in 1961 sponsored a conference on the Rule of Law in Lagos, Nigeria, where a resolution entitled the Law of Lagos was accepted. Also reprinted in M. Hamalengwa et al. (eds.), *The International Law of Human Rights in Africa* (1988) p. 37.

impose explicit obligations on member states to ensure the protection of human rights.³ In spite of the absence of a clear human rights mandate, the OAU through the Charter committed to addressing a number of human rights issues such as decolonisation, self-determination and ending apartheid.⁴ The OAU during that time paid little attention to the gross human rights violations perpetrated by dictatorial regimes in Africa against their own citizens. To this end, Gwananas⁵ argues that the institution largely focused on socio-economic issues. This was due largely to the OAU's preference to focus on socio-economic development issues, territorial integrity, cooperation and state sovereignty over human rights protection, as well as firm reliance on the principle of non-interference in the internal affairs of member states as reflected in the OAU Charter.

The idea of the Law of Lagos was revisited at the First Conference of Francophone African Jurists held in Dakar, Senegal, in 1967.⁶ The process of developing the African Charter of Human and Peoples' rights went through a series of seminars and conferences held at different levels in some cases organised by the International Commission of Jurists and in other cases the United Nations Human Rights Commission which set up an *ad hoc* working group that was charged with the duty of assisting in the creation of a regional human rights system for Africa.⁷

3 Legislative Framework

This part focuses on the prevailing human rights legal instruments adopted by the AU that constitute the basis for the normative framework of rights and freedoms in Africa. Only key instruments are briefly discussed here to give guidance on the themes and sectors where African human rights instruments apply. In any event, the legislative framework also pre-empted the institutional framework to be discussed later in this chapter. The instruments do not only provide for rights and freedoms but also establish institutions charged with supervision of implementation of human rights obligations subscribed to by member states upon ratifying these instruments.

3.1 African Charter on Human and Peoples' Rights (Banjul Charter)

Universally ratified by AU member states, the African Charter is the leading

³ Charter of the Organisation of Africa Unity (1963/1963), adopted in Addis Ababa, Ethiopia, on 25 May 1963 and entered into force on the 13 September 1963.

⁴ Article 2(d) of the Charter of the OAU 1963.

⁵ B. Gwananas, *The African Union: Concepts and Implementation Mechanisms Relating to Human Rights*, available at: <http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/6_Gwananas.pdf> (accessed on the 18 December 2017).

⁶ Human and Peoples' Rights in Africa and the African Charter Report of a conference held in Nairobi from 2–4 December 1985 convened by the International Commission of Jurists, <<http://icj.wppengine.netdna-cdn.com/wp-content/uploads/1986/04/Africa-human-and-peoples-rights-conference-report-1986-eng.pdf>>. "On the occasion of the mission to President Senghor of Senegal, he asked to be given a draft resolution for submission to the next meeting of the Heads of State of the OAU. It was this resolution, which led to the appointment of a Committee of Experts to draft what became the African Charter of Human and Peoples' Rights. The Rapporteur of the Committee was Judge Keba Mbaye, who was the President of the ICJ and of the follow-up Committee to the Dakar seminar. This Charter was adopted unanimously at the meeting of the Heads of State under the chairmanship of President arap Moi in Nairobi in 1981."

⁷ <<http://www.achpr.org/instruments/achpr/history/>> (accessed 10 October 2017).

instrument in the promotion and protection of human rights in Africa.⁸ To date, 53 African states⁹ have ratified the Charter, which is a revolutionary treaty in that it covers aspects of socio-economic rights in the same breath as civil and political rights. In contrast, the United Nations treaties were unable to combine the different categories of human rights in one treaty and opted for a diffused approach. However, each approach has its own pros and cons, which is not relevant to the current discussion. The Charter contains qualities that distinguish its influence to the regional protection of human rights on the continent. This is due to the fact that it reflects the challenges that the continent grapples with and integrates both civil and political rights and economic, social and cultural rights within one document. This aspect makes the Charter stand out as opposed to other international instruments that preferred the diffused approach to human rights. The inclusion of socio-economic rights is a notable achievement taking into account that national constitutions of various African states have not yet included them as justiciable rights. The African Commission in the *Social and Economic Rights Action Centre and Another v. Nigeria* case¹⁰ underlined that socio-economic rights are a vital part of the Charter. It also underscored the importance of treating human rights as indivisible. Violation of socio-economic rights would inevitably result in violation of some civil and political rights depending on the circumstances of each case. Nonetheless, in terms of Article 27 of the African Charter, both categories of human rights in the Charter are circumvented with claw-back clauses that subject the enjoyment of these rights to domestic laws. In *Media Rights Agenda and Others v. Nigeria*,¹¹ the African Commission made it clear that the term 'law' is not equivalent to domestic law, finding that any limitation of Charter rights must be compatible with standards of international law.¹² In other

⁸ <<http://www.achpr.org/instruments/achpr/achpr/>> (accessed 10 October 2017). Since the adoption of the Banjul Charter, African states have enacted other treaties focusing on protecting human rights. These treaties are the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

⁹ <<http://www.achpr.org/instruments/achpr/ratification/>> (accessed 10 October 2017).

¹⁰ Communication 155/96, *Social and Economic Rights Action Centre and Another v. Nigeria*, 15th Activity Report, (2001) AHRLR 60 (ACHPR 2001), para. 68: "The uniqueness of the African situation and the special qualities of the African Charter imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective. As indicated in the preceding paragraphs, however, the Nigerian Government did not live up to the minimum expectations of the African Charter." The Communication is available at <http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf> (accessed 10 October 2017).

¹¹ (2000) AHRLR 200 (ACHPR 1998).

¹² 105/93-128/94-130/94-152/96: *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project / Nigeria*, para. 66. According to Article 9(2) of the Charter, law may restrict dissemination of opinions. This does not mean that national law can set aside the right to express and disseminate one's opinions; this would make the protection of the right to express one's opinions ineffective. To allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter. Please visit <http://www.achpr.org/files/sessions/24th/comunications/105.93-128.94-130.94-152.96/achpr24_105.93_128.94_130.94_152.96_eng.pdf> (accessed 1 October 2017).

words, limitations to the exercise of human rights often spelt out in domestic law must conform to international standards of imposing reasonable conditionalities to the exercise of human rights.

The Charter contains two different types of rights and freedoms. The first are the rights that apply to each human being as an individual person. Moreover, the second type is 'peoples' rights' or 'collective rights', which apply to a people as a collective. This exemplifies the impression that rights are not only individualistic but are also collective in nature. Not many human rights systems have adopted this approach to human rights architecture. There is a philosophical approach to human rights in Africa centred on community orientation. The individual is a unit in the greater scheme of the environment called a community. The communal approach lies at the heart of African sociology and anthropology, which is reflected in the instruments. The right of 'peoples' to self-determination is one such right that has been contentious, bringing to bare the question as to who qualifies as a 'people'. As the concept of 'people' is not defined in the Charter, it may be interpreted as referring to the inhabitants or nationals of a state or to smaller units – religious, ethnic or linguistic minorities – within a state. The African Commission has refrained from explicitly accepting that this provision entitles minority groups to special status as it would legitimate claims to secession. Kiwanuka argues that a "person is not regarded as an isolated and abstract individual" but an integral member of a group animated by a spirit of solidarity.¹³ He further quotes the rapporteur's report stating "man is a part and parcel of the group, some delegation concluded that individual rights could be explained and justified only by the rights of the community".

The Charter further incorporates 'duties' that individuals owe to each other and to society in general.¹⁴ These provisions are a manifestation of the significance that Africans place on congruent relationships within the family and in the broader society. These duties, however, do not affect the rights and freedoms contained in the Charter, nor are they conditional to the enjoyment of any rights and freedoms in the Charter. It is important to also note that individual and collective rights are often differentiated as either civil and political rights or economic, social and cultural rights. Some of the individual civil and political rights contained within Articles 3–18 of the Charter are the rights to: equality before the law and equal protection of the law (Article 3); the right to the respect of the dignity inherent in a human being and to the recognition of his legal status, liberty and freedom from torture, cruel, inhuman and degrading treatment, slavery and other forms of exploitation (Article 5); a fair trial (Article 7); freedom of conscience and religion (Article 8); freedom of assembly and association with others (Articles 10 and 11); freedom of movement and residence (Article 12); participation in government (Article 13); and non-discrimination against women (Article 18(3)).

Of equal importance to note is that the African Charter does not contain any provisions on derogation by member states from their obligations under the instrument. The African Commission, in the case of *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*,¹⁵ interpreted this silence to mean that derogation from

¹³ R. N. Kiwanuka, 'The Meaning of "People" in the African Charter on Human and Peoples' Rights', 82:1 *The American Journal of International Law* (January 1988) pp. 80–101.

¹⁴ See Articles 27–29 of the African Charter.

¹⁵ Ninth Activity Report, (2000) AHRLR 66 (ACHPR 1995).

the Charter is not allowed under any circumstances.¹⁶ Nevertheless, the absence of a provision on derogation is not necessarily a prohibition of derogation. This issue is clearly covered in international customary law for states to derogate from treaties, and it remains arguable whether or not the African Charter can retract this entitlement.¹⁷

3.2 African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child (hereafter African Children's Charter)¹⁸ represents one of the sectorial instruments focusing exclusively on children. Article 2 thereof defines a child as a human being below the age of 18 years old. The preamble to this Charter sums up the environment in which an African child exists and articulates it as follows:

NOTING WITH CONCERN that the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he or she needs special safeguards and care,

RECOGNIZING that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding ...

Inasmuch as these adverse factors may also manifest in communities outside of Africa, AU member states articulated the circumstances of an African child in those words. These words are the premises upon which the rest of the provisions in the Charter are built. The rights and freedoms are couched in such a way that they address the adverse environment in which the child finds itself. In other words, this 'African environment' justifies AU member states in adopting an African instrument notwithstanding being state parties to the UN Convention on the Rights of the Child (UNCRC).

The principles that form the basis of the Charter are non-discrimination, participation,¹⁹ the best interests of the child²⁰ and survival and development.²¹ More specifically on the rights and freedoms covered, the African Children's Charter prohibits child marriage, child labour and child abuse. It also addresses children rights related themes such as juvenile justice, armed conflict, adoption, drug abuse, sexual exploitation and human trafficking, just to name a few. Perhaps fundamental to the survival and development of a child are the rights to a name, birth registration and nationality.²² The practice of child soldiers is one evil that has been documented

¹⁶ Cf. with derogations provisions contained in Article 6 of the ICCPR.

¹⁷ R. Higgins, 'Derogations under Human Rights Treaties', 48 *British Yearbook of International Law* (1976–1977) p. 281.

¹⁸ The Charter was adopted in Addis Ababa, Ethiopia, on 11 July 1990, and entered into force on 29 November 1999. As of 10 October 2017, 41 member states of the AU have signed and ratified the Children Charter and nine have only signed the Charter.

¹⁹ See Article 3 of the Charter.

²⁰ Article 4 of the Charter.

²¹ Article 5 of the Charter.

²² Article 6 of the Charter. See also General Comment No. 1 on this Article. In that General Comment the Committee emphasised that birth registration is one of the most effective methods of reducing statelessness in children.

in Africa. It happens when children are conscripted into armed formations such as belligerent groups and in some cases the national army and the children are directly involved in hostilities. Article 22(2) affirms this position by requiring state parties to take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular from recruiting any child.

The African Children's Charter establishes the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) in Part II thereof. The mandate of the Committee is to promote and protect the rights and welfare of the African child. Article 33(1) states that experts are also expected to be of high morality, integrity, impartiality and competence in matters of children's rights. The Committee comprises 11 members elected by the AU Assembly for a term of five years. The mandate of the Committee is to promote and protect the rights stipulated in the African Children's Charter, monitor its implementation and interpret its provisions. State parties to the African Children's Charter are required by Article 43 to submit periodic state reports setting out measures they have adopted to implement the provisions of the Charter.

The Committee is also competent to receive communications from individuals, groups, non-governmental organisations (NGOs) and state parties complaining of violation of the African Children's Charter against any particular state party. Illustratively, the Committee received its very first individual complaint in the case of *Hansungule & Ors (On behalf of children of Northern Uganda) v. Uganda*.²³ The case alleged massive and systematic violations of rights of children in Northern Uganda as a consequence of an internal armed conflict between the Lord's Resistance Army, a belligerent militia outfit seeking to topple government of the day since 1986. The conflict had resulted in abduction of children into the militia group among violations of socio-economic rights to education, healthcare and development. The case was finalised in 2013 with the Committee finding Uganda in violation of a number of provisions of the African Children's Charter and made specific recommendations including putting in place programmes and policies to reform and rehabilitate affected children. The implementation of these recommendations is underway but moving painstakingly slow.

The case of *The Nubian Community in Kenya v. The Republic of Kenya*²⁴ dealt with right to birth registration and nationality of a supposedly minority community in Kenya. The Committee dealt with the allegations that Kenya had failed to register and provide nationality to children of Nubian descent resident within its territory. The Committee held Kenya to be in violation of the African Children's Charter. It held as follows:

... Although states maintain the sovereign right to regulate nationality, in the African Committee's view, state discretion must be and is indeed limited by international human rights standards, in this particular case the African Children's Charter, as well as customary international law and general principles of law that protect individuals against arbitrary state actions. In particular, states are limited in their discretion to grant nationality by their obligations to guarantee equal protection and to prevent, avoid, and reduce statelessness.

²³ Communication No. 001/2005.

²⁴ Communication No. 317 / 2006 – *The Nubian Community in Kenya v. The Republic of Kenya*.

The individual complaints procedure of the Committee has great potential in terms of developing a jurisprudence that speaks to the circumstances of an African child. As more and more cases are brought before it, the Committee now has to prepare to deal with issue of non-implementation of its recommendations – a problem that confronts almost every international human rights tribunal. Although the problem persists, there is hope that implementation will improve on account of the Committee's innovative engagement strategies with member states by creating a platform where states can update the Committee on progress made in terms of implementation of decisions in which they were parties. One such strategy is the adoption of Guidelines on Compliance Hearings.²⁵ These will assist the Committee to convene formal meetings with relevant state parties to discuss progress and challenges relative to implementation of decisions against a particular state party.

3.3 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the African Women's Protocol) was adopted in Maputo, Mozambique, in July 2003 and entered into force in November 2005. The African Women's Protocol has been ratified by 36²⁶ of the 54 African Union member states, the latest of which are Cameroon, Guinea and Swaziland. Several states are in various stages of its domestication and implementation. The proposal behind the enactment of the Protocol was the recognised and urgent need to ensure that mechanisms are put in place to compensate and protect the rights that are afforded to women by the African Charter on Human and Peoples' Rights. While Article 2 of the African Charter guarantees non-discrimination based on sex, equality before the law and the elimination of discrimination against women, it does not articulate specific violations of women's rights which result from discrimination against women in an African context.

However, the preamble captures the state of mind of the African heads of state and government at the time of its adoption. They considered that Article 18 of the African Charter on Human and Peoples' Rights calls on all states parties to eliminate every discrimination against women and to ensure the protection of the rights of women as stipulated in international declarations and conventions.²⁷ Member states also recognised the crucial role of women in the preservation of African values based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy,²⁸ but still remained concerned that:

despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices.²⁹

²⁵ These are guidelines in the form of rules adopted by the Committee to regulate the process where the Committee formally meets with a state party to engage it on progress the state would have made in terms of implementing decisions of the Committee. The Guidelines will form part of the Committee Rules of Procedure on Individual Complaints Procedure.

²⁶ <<http://www.achpr.org/instruments/women-protocol/>> (accessed 10 October 2017).

²⁷ See para. 3 of the preamble to the African Women's Protocol.

²⁸ See para. 10 of the preamble to the African Women's Protocol.

²⁹ See para. 12 of the preamble to the African Women's Protocol.

As to content, the African Women's Protocol is comprehensive in that it provides for civil and political rights, economic, social and cultural rights and group rights in a single document. Probably its best asset is to enshrine these rights and freedoms modified to speak to the context of African women and not generalised as a 'one-size-fits-all' document. Commitment to the African context separates this instrument from other sectoral instruments such as the Convention on the Elimination of All Forms of Discrimination against Women.

It is the first international treaty to provide for health and reproductive rights under Article 14 thereof. Furthermore, the Protocol is also a first to, in the same Article, refer to HIV/AIDS in the situation of sexual and reproductive health rights in Article 14(d) and (e). This provision is as articulate as it is accurate in mentioning areas where a typical African woman has little or no control in terms of decision-making in the home or community. These aspects of sexual and reproductive health rights include:

- i. the right to control their fertility;
- ii. the right to decide whether to have children, the number of children and the spacing of children;
- iii. the right to choose any method of contraception;
- iv. the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;
- v. the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices.

With the aid of General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14.2 (a) and (c) of the African Women's Protocol,³⁰ the African Commission went into detail providing the normative content of the right to health and reproductive rights to guide states in terms of fulfilling their respective obligations under the provision. Again looking at the African context of women, a case in point is the legal prohibition of female genital mutilation in Article 5(b); the authorisation of abortion in cases of sexual assault, rape, incest and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus in Article 14.

The African Women's Protocol further addresses protection from harmful traditional practices such as polygamy, inheritance, economic empowerment (Article 5); right to peace (Article 10); women in armed conflict (Article 11); right to education (Article 12); right of widows to inheritance (Article 20); and special protection of women with disability (Article 23). Notably, the Women's Protocol also introduces intersectionality by recognising that certain women suffer multiple forms of discrimination, and accordingly separate provisions for widows and elderly women are included.

The Protocol signs off up by making reference to the duty of state parties to provide effective remedies in the aftermath of a violation of 'any woman' rights. Such remedies must be 'appropriate' and "determined by competent judicial, administrative or

³⁰ See also General Comments on Article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; General Comment No. 3 on The African Charter On Human And Peoples' Rights: The Right To Life (Article 4); General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5).

legislative authorities, or by any other competent authority provided for by law".³¹ As to its implementation, the Protocol recognises the competence of the African Commission to receive and consider state reports from state parties in terms of Article 62 of the African Charter and vests in the African Court on Human and Peoples' Rights the competence to interpret the Protocol.³²

4 Soft Law

The jurisdiction of the African Commission to develop soft law results from Article 45(1)(b) of the African Charter on Human and Peoples' Rights, which entitles it to "formulate and develop rules and principles that address legal problems regarding the enjoyment of human and peoples' rights". As a legal instrument complementary to the African Charter, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa also falls under the Commission's interpretative jurisdiction. Article 1 of the Banjul Charter³³ obliges states parties to recognise the rights, duties and freedoms by undertaking necessary measures to "adopt legislative, or other measures to give effect" to rights duties and freedoms enshrined in the Charter. In order to assist the states in fulfilling this obligation, the African Commission on Human and Peoples' Rights has sought to elaborate on the scope and content of some of the rights contained in the African Charter through the adoption of 'soft law'.

4.1 Resolutions

Resolutions³⁴ address matters of procedure, but often they serve to further define standards set by the African Charter. The Charter empowers the Commission under Article 45 to "formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights". In accordance with this provision, the Commission adopts resolutions to address diverse human rights issues. These resolutions could generally be classified into three categories: thematic, administrative and country specific resolutions.

A thematic resolution is a resolution that expounds in greater detail specific human rights topics or specific substantive rights that are covered in the African Charter. The specific role of this type of resolution is to define a state's obligation in respect of such right. The resolution aims to reiterate the standards that have been clearly set out in the Charter. Since 1988 the African Commission has passed a number of thematic resolutions covering a wide range of themes including death penalty; indigenous peoples; situation of women and children;³⁵ socio-cultural rights; HIV/AIDS;³⁶ electoral process and good governance; prisons; freedom of association; and fair trial.

³¹ See Article 25(2) of the African Women's Protocol.

³² See Articles 26 and 27 of the African Women's Protocol.

³³ African Charter on Human and Peoples' Rights (1981/1986).

³⁴ <http://www.achpr.org/files/pages/resolutions/recomres_codified_1988_2017_eng.pdf> (accessed 10 October 2017).

³⁵ ACHPR /Res.66 (XXXV)04: Resolution on the Situation of Women and Children in Africa.

³⁶ Resolution on the HIV/AIDS Pandemic –Threat against Human Rights and Humanity, ACHPR/ Res.53(XXIX)01.

The second type of resolution is the administrative resolutions that deal with the Commission's procedures, internal mechanisms and relationship between the Commission and other organs of the AU, intergovernmental organisations, national human rights institutions (NHRIs) and NGOs. These include the resolutions on the appointment and mandate³⁷ of special rapporteurs and working groups, resolutions on the criteria for grant of observer status to NGOs and affiliate status to NHRIs, and the resolution on the protection of the name, acronym and logo of the Commission.

The last and final type of resolution is the country-specific resolution. This kind of resolution addresses pertinent human rights concerns in member states. This category of resolution has proven very useful whenever there are widespread violations in a member state but no individual has submitted any communications to the Commission in respect of those violations. It is important to highlight that the Commission has passed specific resolutions to address the human rights situation in Sudan, Uganda, Zimbabwe,³⁸ Ethiopia, Eritrea, Somalia,³⁹ Kenya, DRC, Côte d'Ivoire, Comoros, Libya, Tunisia, Guinea Bissau, Liberia, Burundi, Rwanda, and many other countries.

4.2. Declarations, Principles and Guidelines

Declarations are non-binding instruments adopted by the AU heads of state and government on a thematic area prior to the adoption of binding instruments. Declarations are a demonstration of awareness of an issue of concern at the highest level in decision-making but also show resolve to develop common interest in the issue and to adopt a binding instrument at the appropriate time. Human rights institutions within the African human rights system do not make much use of these declarations. The African Commission has since issued the Kigali Declaration,⁴⁰ the Pretoria Declaration on Economic, Social and Cultural Rights in Africa⁴¹ and the Declaration on Gender Equality in Africa.⁴²

However, treaty bodies have often utilised principles and guidelines to develop human rights jurisprudence based on key human rights instruments discussed above. The African Commission has so far issued over 20 principles and guidelines on various issues within the human rights dialogue. The very first document was the Guidelines on National Periodic Reports issued by the body in 1989,⁴³ with the latest adoptions being the State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment adopted on 30 October 2018. Several other principles and guidelines

³⁷ Resolution on the Renewal of the Mandate of the Chairperson and Members of the Working Group on the Death Penalty, Extrajudicial, Summary and Arbitrary Killings in Africa, ACHPR/Res.251 (LIV) 2013.

³⁸ Resolution on the Human Rights and the Humanitarian Situation in Zimbabwe, CHPR/Res.138(XXXXIV)08.

³⁹ Resolution on the Human Rights Situation in Somali, ACHPR/Res.137(XXXXIV)08.

⁴⁰ Adopted on 8 May 2003.

⁴¹ Adopted on 17 September 2004.

⁴² Adopted on 8 July 2004.

⁴³ Adopted by the African Commission on 14 April 1989. These Guidelines were adopted at the Fifth Ordinary Session of the Commission, in April 1989, and were attached to the Commission's Second Annual Activity Report 1988–1989.

were adopted in-between 1989 and 2018 that have changed the way we look at some colonial legacies. For instance, the Principles on the Decriminalisation of Petty Offences in Africa is one such set of principles that seeks to change the way certain offences in national legislation should be viewed vis-à-vis rights protected in key human rights instruments,⁴⁴ so as to ensure interpretation and enforcement by state parties of criminal laws and by-laws in compliance with Articles 2, 3, 5 and 6 of the African Charter. This is an important source of human rights law in Africa although regarded as non-binding.

5 Institutional Framework

The African human rights frameworks that have been set up to breathe life into and monitor the implementation of regional treaties and ensure adherence to the guidelines include the African Court of Human and Peoples' Rights and a quasi-judicial body known as the African Commission on Human Peoples' Rights. These bodies are mandated to oversee the enforcement of the African Charter and the African Women's Protocol.

5.1 African Commission

The African Commission was established to promote, protect and interpret the rights enshrined in the Banjul Charter. The jurisprudence of this Commission has been a great resource for national jurisdictions especially in the expansion of human rights concepts and principles. The state reporting mechanism⁴⁵ has provided an opportunity for constructive dialogue and review between civil society and their governments, and has enabled member states to keep stock of their human rights achievements and challenges. The Commission is the main human rights body that is mandated to hold public sessions twice a year at which states' compliance with the African Charter on Human and Peoples' Rights is reviewed. Preceding these sessions, human rights defenders⁴⁶ gather at the NGO Forum to discuss human rights concerns and urge the Commission to take action. Such engagement is key to strengthening the African human rights system.

The African Charter in Article 30 establishes the Commission and gives it the mandate to promote human and peoples' rights and ensure their protection in Africa. Under Article 31, the African Charter sets the parameters under which individuals should be selected as commissioners. These include: the highest reputation, high morality, integrity, impartiality and competence in matters of human and peoples'

⁴⁴ Adopted by the African Commission at its meeting at its 61st Ordinary Session, held from 1 to 15 November 2017, in Banjul, Gambia.

⁴⁵ The treaty bodies monitor the extent of compliance by states parties with their obligations under the human rights treaties through a system of state reporting by the principal mechanism.

⁴⁶ Human rights defenders are defined foremost by their efforts to stop human rights abuses and make sure that everyone has access to their universal rights. They come from all walks of life. A defender's human rights work might be fulfilled through their job – they could be a community worker, teacher, lawyer, journalist or activist working for human rights change. Equally, they may defend human rights in a voluntary capacity, separate to their profession. The Declaration on Human Rights Defenders refers to individuals, groups and associations contributing to the effective elimination of all violation of human rights and fundamental freedoms of peoples and individuals. Human rights defenders can be any persons or groups of persons working to promote human rights ranging from intergovernmental organisations based in the world's largest cities to individuals working within their local communities.

rights. Preference is given as regards legal experience and that they serve on the Commission in their personal capacity, which means they are not serving as representatives of their governments or countries. The 11 commissioners serve on a part-time basis and the permanent secretariat, based in Banjul, The Gambia, plays an important role. A secretary heads the Commission's secretariat.

The Commission serves a protective mandate in which aggrieved parties may submit complaints alleging the violation of provisions of the Charter. The individuals that can file complaints include state and non-state actors by initiating cases and communications before the Commission. A state party to the African Charter may submit a complaint that another state party is in violation of the African Charter ('inter-state communication'). The African Charter also permits the submission of a complaint by an individual or NGO ('individual communication').

The African Charter has therefore granted the African Commission the ability to deliberate on both 'inter-State' and 'individual' communications in respect of all states parties. In the history of the Commission only one inter-state communication has been submitted to the Commission. This is due to the fact that African states have been reluctant to interfere in the 'domestic affairs' of other states. Based on the pushback that human rights continue to face in Africa, evidenced in the continued closure of the space for civil society and the small role human rights plays in foreign policy and international relations, this procedure is not likely to be used by the members of the African Charter.

The African Charter also authorises the Commission to consider complaints from individuals whose rights under the Charter have been violated. The Commission is a quasi-judicial body, and its decisions do not carry binding force and are merely of persuasive authority. Over the years, the Commission in considering individual complaints has developed significant jurisprudence that interprets the provisions of the Charter.

The Commission also has special investigative powers with respect to emergency situations or special cases which reveal the existence of a series of serious and massive human rights violations. Article 59 of the Charter states that if the Commission decides to publish its decisions or annual activity report, it must submit them for consideration by the AU Assembly. It is important to highlight that the Charter does not necessarily require it to do so. In terms of process, the Assembly usually concludes its consideration by authorising or withholding authority for publication of the report or decisions. The decisions are thus included in the Commission's activity reports to the AU Assembly.

Before the AU replaced the OAU, the Assembly did not take much notice of these decisions and approved the Commission's activity reports without much debate. Since 2002, especially with the increased pushback on human rights many more African governments have become intolerant and sensitive to criticism or condemnation by the Commission, leading to more rigorous and politically coloured discussions of the activity reports at the Executive Council, to which the Assembly delegated its authority to consider the Commission's annual reports. A case in point was the decision of the Executive Council that prevented the publication of a decision against Zimbabwe contained in the Commission's 20th Activity Report. This unfortunate decision by the Executive Council tends to undermine the role of the Commission by giving the Zimbabwean government another opportunity to comment on the case, although it

has already participated in the hearing of the matter.

Article 45 of the African Charter clearly states the role of the Commission to include the promotion of human and peoples' rights and in particular:

- i. To collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments;
- ii. To formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations;
- iii. To co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights;
- iv. To ensure the protection of human and peoples' rights under conditions laid down by the Charter;
- v. To interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organisation recognised by the OAU; and
- vi. To perform any other task which may be entrusted to it by the Assembly of Heads of State and Government.

It is clear from the list of competences of the African Commission that the mandate is broadly ambitious. While the Commission has extensively utilised the rest of the aspects of its mandate, very little use has been made of the final two competences. Paragraph (v) appears to imply the Commission's competence to "interpret all the provisions of the present Charter at the request of" to mean that it may issue advisory opinions. By their very nature, advisory opinions constitute authoritative interpretations of the Charter and other instruments.

5.2 Special Mechanisms under the African Human Rights Instruments

In order to supplement its original mandate, the African Commission established other mechanisms which included the positions of the special rapporteurs. These are experts in specific human rights themes appointed to carry out specific terms of reference. So far those appointed include the Special Rapporteur on Extra-Judicial, Summary and Arbitrary Executions in Africa (in 2005), the Special Rapporteur on Prisons and Conditions of Detention in Africa (in 1996), the Special Rapporteur on the Rights of Women in Africa (in 1999), the Special Rapporteur on Freedom of Expression in Africa (in 2004) and the Special Rapporteur on Human Rights Defenders in Africa (in 2004). These experts could be drawn from within the Commission itself or externally sourced on account of unique expertise. They are however required to report on their work to the African Commission for policy reasons.

Part of the role of the African Commission also includes the appointment of working groups that consists of one or more commissioners as well as members of civil society organisations or other sectors joining as experts. Another distinction between special rapporteurships and working groups is that the latter are usually appointed for a specific *ad hoc* purpose. Examples of working groups of the African Commission are those on indigenous peoples/communities in Africa and on the implementation of the Robben Island Guidelines.

5.3 African Court on Human and Peoples' Rights

The Protocol to the African Court on Human and Peoples' Rights was adopted in Ouagadougou, Burkina Faso, on 9 June 1998 and entered into force on 25 January 2004.⁴⁷ The Protocol has been signed and ratified by 24 countries, signed but not ratified by 25 countries and five countries have neither signed nor ratified the instrument.⁴⁸ Article 34(6) of the Protocol states that state parties may also make an optional declaration accepting the competence of individuals and NGOs with observer status before the Commission to submit cases *directly* to the Court. As at July 2017, only eight states parties to the Protocol had made the declaration recognising the competence of the Court to receive cases from NGOs and individuals. The Court was established in order to complement the protective mandate of the Commission. Its decisions are final and binding on state parties to the Protocol.

The Court consists of 11 judges elected by the AU Assembly from a list of candidates nominated by member states of the AU. The judges are elected in their personal capacity but no two serving judges shall be nationals of the same state. Due consideration is also given to gender and geographical representation⁴⁹ when nominations and appointments are made. The judges are elected for a period of six years and are eligible for re-election only once. Only the president of the Court holds office on a full-time basis. The other ten judges work part-time. The first judges of the Court were sworn in on 1 July 2006. The seat of the Court is Arusha, Tanzania.

5.4. Complementarity between the African Commission and the African Court

The purpose for the establishment of the African Court is to complement and reinforce functions of the Commission, particularly its protective mandate. The concept of complementarity in the context of the African human rights system focuses on the relationship between the African Court and the African Commission. The aspect of complementarity is introduced in the preamble to the African Court Protocol in which the Court will complement and reinforce the functions of the African Commission. Article 2 relating to the relationship between the African Court and the African Commission emphasises that the Court shall "complement the protective mandate" of the African Commission. Article 8 of the Protocol relating to the 'Consideration of Cases' requires the Court to bear in mind "the complementarity between the Commission and the Court" in making its rules of procedure. In these three provisions, the concept of complementarity entered into the discourse on the African human rights system. The challenge that complementarity poses for the African human rights system is the determination of what functions should be undertaken by which institution(s). Generally, there appears to be an assumption that whenever there is a two-tier system comprised of a judicial body and a quasi-judicial body, the task of adjudication naturally rests with the judicial body.

It is important to emphasise that the Court's jurisdiction applies only to states that have ratified the Court's Protocol. The Court may entertain cases and disputes

⁴⁷ <http://www.achpr.org/files/instruments/courtestablishment/achpr_instr_proto_court_eng.pdf> (accessed 10 October 2017).

⁴⁸ <<http://www.achpr.org/instruments/court-establishment/ratification/>> (accessed 10 October 2017).

⁴⁹ Africa is divided into Southern, Northern, Eastern, Western and Central for purposes of regional representation.

concerning the interpretation and application of the African Charter, the Court's Protocol and any other human rights treaty ratified by the state concerned. The Court may also render advisory opinion on any matter within its jurisdiction. The AU, member states, its organ and any other organisation recognised by the AU may from time to time request the advisory opinion of the Court. The Court is also authorised to promote amicable settlement of cases pending before it. The Court can also interpret its own judgment.

This therefore allows the Court to enjoy a two-tier competence, namely, the contentious⁵⁰ and advisory jurisdictions.⁵¹ On ratifying or acceding to the African Court Protocol, a state subjects itself to both facets of the Court's jurisdiction. The African Court is a pure judicial body. Like many other international judicial institutions, access to the Court is restricted. States dominate the right of access in terms of Article 5 of the African Court Protocol. The Commission, and with extension, the African Committee of Experts have access to the Court. Article 5(3) of the African Court Protocol contemplates access to the Court by individuals and NGOs subject to provisions of Article 34(6) of the same Protocol. These provisions directly affect individual access to the African Court. Individuals and NGOs can only lodge complaints with the African Court upon lodging of a declaration by the state of nationality that the state acknowledges the competence of the African Court to preside over complaints filed by individuals or NGOs. Such a declaration could be lodged by a state simultaneously with ratification or accession or at any other time. The absence of this declaration impedes individual access to justice by failing to invoke the jurisdiction of the African Court.

Judgments of the African Court are binding on parties to the dispute, with an orientation effect on the rest of the states in the African human rights system. This means that other states not parties to a dispute that has triggered a judgment are expected to orient their actions in line with the jurisprudence of the Court in that judgment without necessarily having to wait to be sued before the same Court. In terms of Article 28 of the Court Protocol, judgments of the Court are final and not subject to appeal, although the Court could revise or interpret its decision on discovery of new facts. Parties are entitled to reasons for the judgment which is read out in open court. The judgment could be composed of the majority's findings as well as dissenting opinions or judgments if the outcome is not unanimous.

Articles 29, 30 and 31 of the African Court Protocol govern enforcement of judgments. It is important to note that the enforcement of international decisions or judgments is complex and problematic. Implementation is highly political and does not follow the usual procedure taken in respect of judgments of national courts. Judgments of the African Court are implemented by states which were parties to the proceedings. Upon ratifying the African Court Protocol, states undertake to comply with the judgments of the Court whose contentious jurisdiction they voluntarily subscribed to. The Executive Council is responsible for overseeing implementation of judgments on behalf of the AU Assembly. The African Court is empowered by Article 31 of the African Court Protocol to report to the AU Assembly cases of non-compliance of states with its judgments. Notwithstanding all these measures, implementation of court decisions has already become a problem.

⁵⁰ Article 3 of the African Court Protocol.

⁵¹ Article 4 of the African Court Protocol.

Where the Court determines that there has been a violation of human and/or peoples' rights, it may issue appropriate orders to remedy the violation, including the payment of fair compensation or reparations. In cases of extreme gravity and urgency, and when deemed necessary to avoid irreparable harm to persons, the Court may adopt such provisional measures as shall be necessary. Following below is a sample of the jurisprudence of the Court for illustrative purposes only.

5.4.1 *Femi Falana v. African Union*

*Femi Falani v. African Union*⁵² dealt with the issue of jurisdiction of the African Court to preside over a case implicating the African Union as an international organisation. Citing the Reparations case (ICJ, 1949), the Court held that the AU is an international person: a subject of international law capable of possessing international rights and duties. It stated that international obligations arising from a treaty cannot be imposed on an international organisation unless it is a party to such a treaty or it is subject to such obligations by any other means recognised under international law. In line with Article 34 of the Vienna Convention on the Law of Treaties (VCLT), the Court held that as far as an international organisation is not a party to a treaty, it cannot be subject to legal proceedings implicating rights in an instrument. It concluded that the AU cannot be sued before the Court on behalf of its member states, and that an application filed against an entity other than a state having ratified the Protocol and made the declaration falls outside the jurisdiction of the Court. The Court concluded that it was therefore unnecessary to examine the admissibility of the application and the merits of the case.

5.4.2 *African Commission on Human and Peoples' Rights v. Republic of Kenya*

In *African Commission on Human and Peoples' Rights v. Republic of Kenya*⁵³ the African Court held that Kenya violated the Ogiek peoples' rights to land, religion, culture, development and non-discrimination. The African Court further held that the state violated the rights of the Ogiek people because Kenya had expelled them from their ancestral land against their will, without prior consultation or compensation. The Ogiek are forest-dwelling people who live in the Mau Forest, one of Kenya's largest water catchment areas. They argued that eviction would prevent them from using and maintaining ownership of their ancestral land on which they rely for their social, economic and cultural existence.

The African Court held that Kenya was in violation of Article 14 of the African Charter (right to property, including communal ownership of land) because the eviction notices issued to the Ogiek were not proportionate to the state's justification that eviction is necessary to protect the natural ecosystem in the region. The Court found that the state failed to present evidence showing that if the Ogiek were to continue to reside on the land it would harm the natural ecosystem, and other evidence showed that environmental harm in the area has been linked to other factors and the activities of other groups and entities, including the government. Next, the African Court held that the state violated Article 2 (right to be free from discrimination), concluding that the state discriminated against the Ogiek based on their ethnicity or 'other status' when it refused to recognise and grant them the same rights as similar groups due to their way of life as hunters and gatherers.

⁵² Application No. 001/2011.

⁵³ Application No. 006/2012.

The African Court also found a violation to the right to freedom to practice religion, which includes the right to worship and to engage in rituals and ceremonies, and further that their religious practices were inextricably linked with the land and the environment and that an interference with their connection to the land placed severe constraints on their ability to practice religious rituals in violation of Article 8 of the African Charter. The African Court explained that the right to culture under Article 17(2) and (3) is of an individual and collective nature and that it requires protection of the cultural heritage that is essential to preserve traditions. It found that Kenya interfered with the Ogiek's cultural rights and that the state's justification that the interference with their cultural rights was necessary to preserve the natural ecosystem was not proportionate as the evidence did not show a connection between the Ogiek's presence in the area and environmental degradation. The African Court also found a violation to the right to economic, social and cultural development protected under Article 22 of the African Charter given Kenya's practice of evicting the Ogiek without engaging in effective consultation and without involving them in the development of health, housing, and social programmes affecting them. Finally, the African Court concluded that the state violated Article 1 of the African Charter by not implementing legislation or other measures to give effect to the rights enshrined in the articles that the African Court found the state was in violation of: Article 2, 8, 14, 17(2) and (3), 21 and 22.

The African Court did not find a violation of the right to life because it did not find a causal connection between the evictions and the deaths alleged to have occurred as a result. In doing so, the Court distinguished between the physical and existential understanding of the right to life or, put differently, the "classical meaning of the right to life and the right to decent existence of a group". The African Court later ruled on forms of reparations and on costs in a separate ruling.

These few cases go far in terms of showing the difficult cases the African Court has already dealt with, and probably the reasons behind lack of appetite by states to ratify the African Court Protocol and lodge the Article 34(6) declaration. Nonetheless, the Court has huge potential in terms of defining the parameters of rights and freedoms protected in the key human rights instruments under its interpretative mandate. Yet this potential is undermined by low ratification and lodgement of declaration, and non-implementation where decisions have been issued on the merits.

5.5 African Children's Committee

Article 32 of the African Children's Charter establishes the Committee of Experts on the Rights and Welfare of the Child (hereinafter Committee). The Committee was established in order to promote and protect the rights and welfare of the child. The Committee consists of 11 independent and impartial members serving in their individual capacity.

Article 42 of the African Children's Charter sets out the mandate of the Committee. The functions of the Committee include the need to promote and protect the rights enshrined in this Charter and in particular to collect and document information, organise meetings, encourage national and local institutions concerned with the rights and welfare of the child and where necessary give its views and make recommendations to governments; formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa; cooperate with other African, international and regional institutions and organisations concerned with the

promotion and protection of the rights and welfare of the child; and to monitor the implementation and ensure protection of the rights enshrined in the Charter.

The African Children's Charter provides for the following two procedures: the *reporting procedure*: every state party undertakes to submit reports on the measures it has adopted to give effect to the provisions of the Charter within two years of the entry into force of the Charter, and thereafter every three years (Article 43(1)). The second procedure is the *complaints procedure*: the Committee may receive communications from any person, group or NGO recognised either by the OAU, a member state or the United Nations relating to any matter covered by the African Children's Charter (Article 44). Lastly, the Committee may resort to any 'appropriate method' of investigating any matter falling within the ambit of the Charter. It shall further submit regular reports on its activities to the Ordinary Session of the Assembly of Heads of State and Government every two years; a report shall be published after having been considered by the Assembly as stated in Article 45 of the African Children's Charter.

The Committee has issued only a few decisions on individual communication procedure as well as general comments. This is explained by the fact that it is a relatively new institution but with great potential for the protection of human rights in Africa. Children's rights are least contested among human rights and often draw immediate response from stakeholders in order to quickly remedy the violation. They are unique in that delayed implementation of children's rights may retard the development agenda of a child with such devastating consequences in that once deprived of a right a child may not be able to recover the loss as he or she quickly matures into an adult. The Committee stands in the gap to ensure that the rights and welfare of African children are jealously promoted and protected.

6 Conclusion

The importance of strengthening institutions that further the African human rights agenda cannot be overstated. It has been demonstrated that Africa already has key human rights instruments that are designed to confront and deal with situations specific to African people. The key instruments have also established robust institutions to oversee implementation by states with their obligations under the key instruments. These institutions, namely, the African Court, the African Commission and the African Children's Committee have wide mandates that are complimentary but wide enough to enable effective promotion and protection of human rights in Africa. However, the promotion and protection of human rights in Africa should be regarded as a multi-stakeholder affair. It is important to have a stronger civil society that continues to utilise the African human rights system. The fact that state and non-state actors continue to disregard human rights and governments undermine decisions of national courts provides an opportunity to strength the regional mechanism. This chapter therefore has taken an overview journey into the history of the of the African human rights system, the legislative framework with a focus on the African Charter, the African Children's Charter and the African Women's Protocol followed by a brief examination of the soft law principles contained in non-treaty documents.

The final part of this chapter focused on the institutional frameworks that make it possible to interpret and expand on the legally binding treaties and principles contained in the non-treaty documents. The African Commission and the African

Court are mandated to oversee the enforcement of the African Charter and the African Women's Protocol. It is therefore hoped that this overview has provided readers with an opportunity to have an understanding of the African system and engage the system to strengthen the continent's ability to advance a strong human rights agenda in a time when there is a pushback on democratic principles and human rights throughout Africa.