

Engaging Africa-based Human Rights Mechanisms

A Handbook for NGOs and CSOs



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List of Abbreviations

ACDHRS	African Centre for Democracy and Human Rights Studies
ACRWC	African Charter on the Rights and Welfare of the Child
ACtHPR	African Court on Human and Peoples Rights
Art	Article
AU	African Union
CED	Convention for the Protection of All Persons from Enforced Disappearance
CEDAW	Convention on the Elimination of Discrimination Against Women
CERD	Convention on the Elimination of Racial Discrimination
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSO	Civil Society Organisations
EAC	East African Community
EACJ	East African Court of Justice
ECOWAS	Economic Community of West African States
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
ICMW	Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IDPs	Internally Displaced Persons
NGO	Non-Governmental Organisation
OAU	Organisation of African Unity
RECs	Regional Economic Communities
SADC	Southern Africa Development Community
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNCAT	Convention against Torture, Cruel, Inhuman and Degrading Treatment or Punishment

PART ONE

1. Introduction

With the adoption in 1981 of the African Charter on Human and Peoples' Rights (African Charter), the foundation for an African Human Rights System was laid. Coming approximately two decades after the wave of independence from colonial rule swept through the African continent, the African Charter was adopted at a time when nationalist feelings were highest on the continent and African leaders were battling to assert control over often fluid territories. Although, African leaders reluctantly approved the establishment of a quasi—judicial African Commission on Human and Peoples' Rights (African Commission) as the mechanism to supervise implementation of the Charter, neither the leaders nor the vast majority of African citizens expected much in terms of concrete results. Awareness of human rights was low and the idea of challenging the actions of political leaders, especially before an international monitor was alien.

Several decades later, the continental landscape presents a very different story. With the adoption of several human rights instruments and rights-related instruments, the addition of a continental human rights court, the establishment of another quasi-judicial organ to supervise implementation of a regional Children's Charter of rights and the emergence of sub-regional courts with human rights mandate among other things, Africa has one of the richest arrays of regional human rights mechanisms and norms. Yet, the use of the continental normative and institutional framework for human rights protection remains relatively low. Part of the reason for this underutilization of the system is that most of Africa have remained unaware of the workings of the African Human Rights System. This handbook is an attempt to contribute to improvement in the use of system through a simplified presentation of the main features, norms and institutions of the African Human Rights System.

The pages that follow aim to introduce the idea of international protection of human rights by giving a general explanation of the link between human rights and international law, an introduction into the regional protection of human rights and a brief history of the African system. This is followed by an overview of the normative and institutional framework for the protection of human rights in Africa. As much as possible, the handbook avoids technical terms so that it can be useful even to readers without any background in law.

2. Human Rights and International Law: An Overview

As international law was emerging as a distinct body of law with its own sets of legal rules and institutions to regulate relationships among States and the conduct of states towards one another, the powerful European monarchies of the time emphasized a conception of sovereignty that privileged acknowledgement of, and respect for a monarch's exclusive authority over his or her own national space. In that era, international law served primarily to assure a Sovereign that his or her territory would not be invaded by another Sovereign and that the conduct and actions of a Sovereign within his or her national territory (including his or her treatment of 'subjects'¹) did not concern any other Sovereign.

Based on this understanding, an individual could *only* be the subject of international protection where the State of which he or she is a national invoked diplomatic protection in favour of the individual by bringing a claim with regards to that individual before an international forum. The idea of individuals themselves claiming the protection of their own rights on the basis of international law before an international tribunal or other similar institution was largely unknown. In fact, international law as the basis for the protection of human rights did not exist until after the Second World War.

The idea of human rights – the entitlement of an individual to make claims concerning his or her fundamental interests against his or her State – originated as a philosophical concept, and eventually began to be incorporated in national laws, typically in the form of Constitutional rights. In its earliest days, the idea (that people within a State can claim 'rights' against the government of that State) was associated only with the Constitutional documents of a few States.² This meant that the enjoyment of human rights in those early days depended on whether an individual was fortunate enough to be an inhabitant of a State with domestic constitutional recognition and protection of rights. The manner in which inhabitants of other States where no such domestic constitutional protection was available were treated depended largely on the whims and caprices of the rulers of those States. Based on the principle of respect for the sovereignty of States, International law was not concerned with issues or ideas of human rights. In exercise of sovereignty, a given Sovereign or government could choose to treat its 'subjects' as it pleased and this remained purely the domestic affair of that Sovereign or government. It

¹ People we now know and address as citizens of their respective states were seen and treated as the subjects of the monarch who ruled over the territory. The perception of people as subjects instead of citizens still prevails in parts of Africa and affects the relationship between certain governments and their people.

² The United States, in its Constitution, the French Declaration of the Rights of Man and of the Citizen and the Magna Carta in the context of the British Common Law were some of the few examples of States that could be associated with the idea of human rights as a constitutional concept. Generally, see Louis Henkin, *The Age of Rights*.

was not a matter for international law or the business of any other government. If any government chose to interfere in the domestic affairs of another sovereign State, it could not do so by invoking international law. In other words:

- Legal protection of human rights was largely a function of national or domestic Constitutions;
- In general, the only forums at which inhabitants of a State could contest their treatment were the courts and other national institutions within that State, and this depended on the legal framework in that State;
- International law – as a body of law regulating relationships among States and the conduct of States towards one another – was generally not concerned with the manner in which any State treated its inhabitants;
- International law could generally not be invoked as a basis for one State interfering with the manner in which any other State decided to treat its inhabitants;
- As an exception, international law could be invoked by one State to demand reparations for the treatment of its own nationals by another State.

However, since World War II, the promotion and protection of human rights of all persons in all States has become a matter for international law, and international law has developed a wide range of mechanisms for individuals to complain about violations of human rights and to seek redress and remedy.

After surviving two World Wars and witnessing the atrocities perpetuated by national governments in World War II, the attitude of States to the idea of human rights changed dramatically. It was no longer sustainable to hold on to a rigid conception of sovereignty and governments could no longer be allowed to have exclusive preserve over the treatment of people, including the inhabitants of their own territories. It is now accepted that this 'new' attitude of States has resulted in expanding the idea of human rights into a universal concept and transposing it from a strictly domestic affair into a concern for international law. While in Europe and parts of the Americas, the idea of human rights gained universal acceptance even before it transformed into a matter of general concern for international law, in Africa, it was the transformation of the idea into a matter of concern for international law that set the stage for universal acceptance of the idea on the continent.³

³ In the period following World War II, most of what is now known as Africa was still under colonial domination and as such had no constitutions of their own or had no recognition of human rights in the constitutions made and used by the colonial authorities to rule the colonies.

The transposition of the idea of human rights into a matter of international concern essentially took place in the framework of the United Nations, an international inter-governmental organisation created in 1945. As a fallout of World War II, the comity of nations comprising of most of the states that were independent at that time (including Egypt, Ethiopia, Liberia and South Africa)⁴ convened to establish the United Nations Organisations (now known as the 'United Nations' or 'UN'). Having witnessed the global impact of the atrocities of a national government within its own territories, those States agreed to the idea that the protection of human rights should be, and was a legitimate concern of the international community. Affirming '**faith in fundamental human rights, in the dignity and worth of the human person and in the equal right of men and women**', the founders of the UN set out the purposes of the UN to include 'international cooperation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinctions as to race, sex, language or religion'. [art 1(3) of the UN Charter].

In their acceptance of the idea that the promotion of governmental respect for human rights is a principal purpose of the UN, the founding States effectively conceded to the idea that governments could not mistreat the inhabitants of their respective territories with impunity. It was further understood that:

- governments would set standards at the international level to stipulate the acceptable minimum standard that all governments were allowed to treat people;
- other governments should pay attention to the treatment that each State metes out to its inhabitants;
- governments will apply international institutions for the purpose of collectively monitoring how governments treat people; and
- the conduct of governments and the manner they treat people will be a factor in the conduct of international relations.

With this approach to international politics, the idea of human rights became firmly a matter of international law. On the platform of the UN, international norms for the protection of human rights were adopted and became the minimum standards by which governments could be held to account for the treatment of the inhabitants of the territories of their respective States. The earliest of these normative or standard setting instruments include:

- the 1949 Universal Declaration on Human Rights (the UDHR) – a non-treaty declaration by States, which was not originally legally binding in and of itself but

⁴ These were the states that were independent in Africa at that time.

some or all of which has since become customary international law and therefore legally binding;

- The 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- the 1966 International Covenant on Civil and Political Rights (the ICCPR) and International Covenant on Economic, Social and Cultural Rights (the ICESCR)-treaties which are legally binding on the States that choose to ratify or accede to them.

Over time, these initial instruments have been followed by many others including:

- The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
- The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT);
- The 1989 Convention on the Rights of the Child (CRC);
- The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW);
- The 2006 International Convention for the Protection of All Persons from Enforced Disappearance (CED);
- The 2006 Convention on the Rights of Persons with Disabilities (CRPD).

Protocols to some of these treaties sometimes include additional provisions on particular issues.⁵

Each UN Human Rights Treaty also establishes a mechanism for monitoring and guiding the implementation of its provisions by States (referred to as “Treaty Bodies”), in the form of a committee of independent experts (for instance, the Human Rights Committee under the ICCPR) that meets on a regular basis at the United Nations offices in Geneva, Switzerland.⁶ The methods used by the committees vary, but in most cases it includes a periodic review and dialogue with the government, in which civil society is able to participate, resulting in the publications of conclusions and recommendations to the States. Some treaties or protocols also provide a procedure for individuals who claim to be victims of violations of their rights under the treaty, to make an individual complaint to the relevant committee; the State is asked to respond and then the committee

⁵ For all core treaties and protocols, see <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>.

⁶ See <https://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx>.

publishes a decision on whether the violation occurred and, in some cases, how it could be effectively remedied.

African States are party to many of the global human rights treaties, as well as many of the individual complaints procedures, described above. Determining which treaty obligations and procedures apply to any given State depends on which particular treaties the State has ratified or to which it has acceded, and whether any relevant declarations regarding recognition of complaints procedures have been made.

Apart from treaty bodies established under the various treaties mentioned above, other United Nations organs, particularly the Human Rights Council (a body made up of 47 member States elected by the UN General Assembly), also take decisions relevant to human rights, and have produced a considerable body of authoritative statements, additional standards, instruments and guidance on implementation.⁷ The Human Rights Council also creates mandates, appointing independent experts to monitor and report on a range of human rights issues and the human rights situation in affected countries. These mandates commonly known as “Special Procedures” include “Special Rapporteurs”, “Working Groups”, and “Independent Experts”, many of whom also feature individual complaint procedures (known as “communications”).⁸ Unlike the treaties and treaty bodies, standards and complaints procedures associated with the Human Rights Council apply to all States, whether or not they have ratified any particular treaty or recognised any particular procedure; on the other hand, unlike the treaties, the Council’s standards and its processes are not necessarily of a legal character.

Although, the transposition of the idea of human rights protection into a matter of concern for international law also included the introduction of monitoring and supervision by international institutions established by States for that purpose, *it was always understood that such international monitoring and supervision was not a replacement for national protection of human rights*. It was originated to complement national protection.

Wider or universal acceptance of the idea of national protection of human rights was also a consequence of World War II. In the case of Africa, as colonial powers were forced into abandoning their claim to colonial authority in the aftermath of the war, it became common for the departing colonial authorities to demand a commitment to respect for human rights or to ensure that a bill of rights was written into the independence constitutions. Thus, post-independence States in Africa inherited constitutions with bills

⁷ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx>.

⁸ <https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>

of rights which guaranteed most of the basic civil and political rights entrenched in the global human rights instruments.

3. Regional Protection of International Human Rights

With the acceptance of the idea of promoting respect for human rights as a principal purpose of the UN, that organisation became an important focus for early work by the international human rights movement. However, the UN was not the only international institution with a human rights mandate. Two years after the adoption of the UDHR and several years before the adoption of the core human rights instruments of the UN, the first *regional* system for human rights protection emerged in Europe. On the platform of the Council of Europe, the European Convention on Human Rights was adopted in 1950, setting the stage for the growth of the European human rights system. This was followed by the adoption in the Americas, of an American Convention on Human Rights in 1969 as a foundation for the American human rights system.

By 1977, the UN General Assembly clearly endorsed the potential complementary role of regional arrangements for the protection of human rights when it appealed 'to States in areas where regional arrangements in the field of human rights do not yet exist to consider agreements with a view to the establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights'. [GA Res.32/127]. It was four years after Resolution 32/127, in 1981, that the African Charter on Human and Peoples' Rights was adopted by African States on the auspices of the Organisation of African Unity (OAU).

Since its adoption of the 1977 Resolution calling for the establishment of regional arrangements, the UN General Assembly has made several other calls for the regionalisation of human rights protection. In the process, the General Assembly has acknowledged and affirmed that regional arrangements for the protection of human rights may '**make a major contribution** to the effective enjoyment of human rights and fundamental freedoms'. [GA Res 47/125 of 18 December 1992]. In the same Resolution, the UN General Assembly made the point that such regional arrangements and the regional instruments adopted on those platforms 'should **complement** the universally accepted human rights standards'. In an earlier Resolution, the General Assembly had stressed that regional arrangements 'should **reinforce** universal human rights standards'. [GA Res. 49/189].

The complementary roles of the global and regional human rights systems should be mutually reinforcing in relation to providing for effective protection and implementation of universal human rights. Regional systems can also be a particularly important location for progressive development of human rights norms, with many positive regional

innovations eventually becoming incorporated at the global level. At the same time, the international framework of human rights law and standards does not permit regional systems to invoke regional circumstances or values as a ground for providing lesser human rights protections than the global standards. Earlier arguments about “cultural relativism” of human rights protection were soundly rejected by States with the adoption in 1993 of the Vienna Declaration and Programme of Action, frequently reaffirmed since that time, which included the following provisions:⁹

5. All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

...

37. Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection. The World Conference on Human Rights endorses efforts under way to strengthen these arrangements and to increase their effectiveness, while at the same time stressing the importance of cooperation with the United Nations human rights activities.

Thus, while regional contexts may result in certain rights receiving greater attention and emphasis in particular regional systems, the minimum benchmark for human rights remains the same whether they are invoked at regional or the global levels.

4. The Evolution of the African Human Rights System: From the OAU to the African Union and Beyond

What we know today as the African Human Rights System developed out of the adoption of the African Charter by African States on the auspices of the Organisation of African Unity (OAU), the predecessor organisation to the African Union (AU). When African States began to demand for independence and the end of colonialism on the continent, competing ideologies for the integration and unity of an independent Africa began to emerge in the diaspora and on the continent. In May 1963, Ethiopia’s Emperor Haile Selassie brought the 32 then independent African States together at a conference in

⁹ Vienna Declaration and Programme of Action, adopted by consensus at the World Conference on Human Rights in Vienna on 25 June 1993.

Addis Ababa in May 1963 to found the OAU. On 25 May 1963, the Charter of the OAU was adopted to bring into existence Africa's premier intergovernmental organisation.

The African States that signed the OAU Charter jointly expressed awareness of the significance of human rights in the Preamble to the Charter as follows: "Persuaded that the Charter of the United Nations and the Universal Declaration of Human Rights, to the Principles of which we reaffirm our adherence, provide a solid foundation for peaceful and positive cooperation among States". The Charter further expressed their intention to promote international cooperation having '*due regard*' to the Charter of the UN and the UDHR. However, the promotion of respect for human rights was not listed as one of the objectives of the OAU. This is in spite of the fact that aspects of human rights such as self-determination, the rejection of colonialism and apartheid and attention to the refugee question featured prominently in the agenda and conversations of the OAU, and Haile Selassie himself emphasized the centrality of concern with human rights for all, in his famous address to the UN General Assembly a few months later in October 1963. At the same time, some of the operating principles that the OAU chose to guide its functioning included non-interference in the internal affair of Member States and respect for the sovereignty and territorial integrity of Member States.¹⁰ Hence, notwithstanding the bills of rights in some of the national constitutions of the post-independence era and the existing global human rights instruments adopted on the platform of the UN, African States (individually and as members of the OAU) generally ignored allegations of human rights violations that occurred in certain States in Africa. The violations that occurred in one State were not a concern of other African governments.

In contrast to the nonchalant attitude of Africa's post-independence political leaders to the question of human rights, the human rights consciousness of African peoples continued to rise. This was due to a number of factors including the prominence that issues of human rights began to take globally and the advocacy work of (mostly international) NGOs. At a conference – the Law of Lagos Conference – hosted by the ICJ in 1961, a clear call for an African human rights mechanism was made by civil society and NGOs in Africa. Faced with increasing pressure from within and outside Africa, including demands by civil society and NGOs for a regional human rights protection system, some African leaders became sympathetic to the idea. Thus, under the leadership of people like Senegal's former President Leopold Senghor, Gambia's former President Dauda Jawara and then OAU Secretary General Edem Kodjo, in 1979 the OAU Assembly of Heads of State and Governments adopted a resolution to begin the process for the adoption of a regional human rights instrument. The resolution called on the

¹⁰ See Art 3 of the OAU Charter. In these aspects, the OAU Charter in fact approached human rights in a similar manner to the UN Charter, articles 1 and 2.

Secretary General of the OAU to 'organise as soon as possible ... a restricted meeting of highly qualified experts to prepare a preliminary draft of an "African Charter on Human and Peoples' Rights"'.¹¹

Commissioned by the OAU and hosted by Senegal, in the same year 1979 a team of experts (headed by Senegalese Jurist Keba Mbaye) began the process of drafting what became the African Charter. Addressing the experts ahead of their assignment, Senegal's President Senghor emphasized the need for the instrument to be *inspired by African traditions and reflect the values of civilization and the real needs of Africa*. By June 1980, a draft of the Charter was ready for consideration and adoption by Africa's political leaders. At a meeting in Banjul, the Gambia, the African Charter was adopted by African heads of State and Governments 'without debate or a formal vote'.

Some of the main features of the African Charter are that it **protects rights in all three 'generations of human rights',¹¹ contains duties of individuals, provides for a quasi-judicial supervisory body** instead of a regional human rights court and **restricted the functioning of the supervisory body by a requirement of confidentiality**.

Thus, the core of the African Human Rights System was established with the African Charter as its central normative instrument and the African Commission on Human and Peoples' Rights as its main monitoring body.

Despite the structural and operational obstacles that it was confronted with, the African Human Rights System gradually took off and increasingly grew its influence along with its normative and institutional structure. With the support of international partners and civil society, the African Commission has been able to expand the reach of the African Human Rights System, often dragging and pushing an otherwise unwilling political organ to adopt additional regional human rights instruments of huge significance. These include:

- The African Charter on the Rights and Welfare of the Child;
- A Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; and
- A Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights

¹¹ Human rights are generally considered to be of three generations. First generation rights are civil and political rights. Second generation rights are economic, social and cultural rights while third generation rights are collective or group rights.

With the adoption of the Protocol for an African Human Rights Court, African governments conveyed their willingness (at least in theory) to subject themselves to a combination of judicial and quasi-judicial supervision of their human rights conduct (albeit still operating under the original OAU principles of non-interference in the internal affairs of other States and total respect for the sovereignty and territorial integrity of its Member States). In these additional treaties, African States retained the option of accepting or remaining outside the coverage of the additional normative instruments. Thus, while the African Charter enjoyed near universal ratification, most of the other regional human rights instruments have had varying degrees of ratification.

Prompted by a variety of considerations, African leaders in the mid to late 1990s took the decision to dissolve the OAU, which was generally considered to have outlived its usefulness. In its place, a new regional organization with a mixture of intergovernmental¹² and supranational¹³ features was proposed. Based on a so-called Sirte Declaration adopted in September 1999, African leaders adopted the Constitutive Act of the African Union (AU) on July 2000. Entering into force on 26 May 2001, the Constitutive Act of the AU replaced the OAU with the AU, inheriting the assets, liabilities and institutions of the OAU, *including especially institutions such as the African Commission on Human and Peoples' Rights*.¹⁴ Significantly, the Constitutive Act of the AU is a major departure from the OAU regime in terms of the place it gives to the promotion and protection of human rights.

From its preamble to its objectives and on to its principles, the Constitutive Act robustly expressed a commitment to the protection of human rights, especially those guaranteed in the African Charter. Although, principles such as non-interference in the internal affairs of a member State remain in the Constitutive Act, new principles that are human rights friendly were introduced. For instance, Member States of the AU accepted principles such as:

- the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity;
- respect for democratic principles, human rights, the rule of law and good governance; and

¹² An intergovernmental structure retains decision making powers in the States that make up an international organization. This means that the States control the direction and trajectory of the organization.

¹³ A supranational structure cedes some or most decision making powers to organs of the international organization so that States do not necessarily control the direction that the international organization they have formed will take.

¹⁴ Art 33(1) of the Constitutive Act of the AU.

- condemnation and rejection of unconstitutional changes of governments.

In effect, the AU was widely acclaimed as a new page in the human rights annals of Africa. There was an excited expectation that African States will pay more than lip service to issues of human rights and the records of compliance with regional human rights standards would improve.

Another significant feature of the AU was that it subsumed the treaty of the African Economic Community. With the new understanding that regional economic communities (RECs) are pillars on which the economic integration of the African continent should be built and the acknowledgement that economic integration is not possible without an assurance of respect for human rights, the stage was set for the deployment of the RECs as platforms for human rights protection.

Probably, taking the cue presented by the AU, sub-regional groupings of States established or revived RECs across Africa, adopting new treaties or revising existing treaties which now mainstream the promotion and protection of human rights as fundamental principles upon which such sub-regional integration would be founded. Thus, RECs such as the East African Community (EAC), the Economic Community of West African States (ECOWAS) and until recently, the Southern Africa Development Community (SADC) became quasi-extensions of the African human rights system. Directly or indirectly using the African Charter as a central normative instrument, the RECs provide an additional layer of international (or transnational) supervision of the human rights conduct of African States. In the over thirty (30) years of its entry into force, the African Charter has become the normative foundation of an expanded African human rights system. The African Charter, the African Commission and the African Court, together with the UN treaty bodies, Human Rights Council and related mechanisms and procedures, mean that a wide range of possible avenues exist to pursue the protection of their human rights in Africa. For these mechanisms to be effective, they must among other things be accessible to everyone and people must make use of them in practice. The present Handbook focuses on explaining the African human rights system and how it may be used, in the hopes of encouraging greater access by persons throughout Africa to the widest possible means of seeking protection of their human rights.

PART TWO

5. The Normative Structure for Rights Protection in Africa

i) The African Charter on Human Rights

The African Charter on Human and Peoples Rights (African Charter), also known as the Banjul Charter was adopted¹⁵ in Nairobi, Kenya on 27 June 1980. The Charter entered into force on 21 October 1986 when the stipulated minimum number of ratifications was secured. The African Charter is a unique instrument that is generally considered to be the foundational catalogue for human rights in Africa. It is foundational because it has generated a number of other continental human rights instruments and mechanisms. It is unique because of a number of its features are progressive. (This is not to say that the Charter is without certain flaws, though the Commission and other institutions have through their guidance and jurisprudence gone a long way towards redressing these). Some of the striking features of the Charter are as follows:

- The Preamble declares that in agreeing to the Charter, the member States have “tak[en] into consideration the virtues of their historical tradition and the values of African civilisation”, while “reaffirming their adherence to the principles ... contained in the declarations, conventions and other instruments adopted by ... the United Nations” and also “taking into account the importance traditionally attached to these rights and freedoms in Africa”. The Charter therefore recognizes the universality of human rights, while at the same effectively affirming that human rights is firmly rooted in Africa, and that the peoples and States of Africa have as much ownership of the concept of human rights as anyone anywhere else in the world.
- The Charter was the first binding international human rights treaty to combine three generations of human rights (civil and political rights; economic, social and cultural rights; and group rights) in a single instrument.¹⁶
- Economic, social and cultural rights in the Charter are not limited by the ‘subject to availability of resources’ clause found in the ICESCR.

¹⁵ An international treaty is said to be adopted when the states making the treaty vote to accept a draft of the treaty prepared (usually) by experts as reflective of the wishes of the states involved. After adoption, states sign and or ratify the treaty. It is the act of ratification that binds a state to legal obligations under the treaty.

¹⁶ A consequence of the combination of the three generations of rights in the Charter is the acknowledgement that human rights are interdependent and indivisible. It also directly or indirectly proclaims that all rights contained in the Charter are justiciable.

- No express derogation is recognized for rights guaranteed in the Charter, in contrast to the ICCPR which specifically provides for derogations of some rights in certain situations of emergency.
- The African Charter was the first international human rights treaty to give binding effect to emerging rights such as the right to development and the right to a satisfactory environment.
- On the other hand, Chapter II of the Charter, setting out certain “duties” of the individual, risked undermining governments’ implementation and respect for the human rights set out in Chapter I of the Charter and thereby impact negatively on the enjoyment of rights; in practice, however, the impacts of Chapter II have been limited significantly by the African Commission through its interpretation of the Charter.

The application of the African Charter has territorial, temporal and personal limitations. Thus:

- Generally, the legal validity of the African Charter only extends from 21 October 1986 when the Charter entered into force. This means violations that occurred before 21 October 1986 cannot be the subject of a complaint under the Charter unless the violations continue to take place even after the entry into force of the Charter.¹⁷
- With respect to individual States Parties to the Charter, the African Charter becomes applicable with effect from the date the Charter entered into force in respect of the given State. Article 65 of the Charter stipulates that with respect to States that ratify after 21 October 1986, the Charter takes effect three months after the date of deposition of the instrument of ratification or adherence.¹⁸
- The choice of the word ‘every individual’ as used in relation to most of the substantive provisions is an indication that any individual who alleges a violation of his or her rights as guaranteed under the Charter may invoke the right to seek protection and remedy under the Charter. Such an individual may or may not be

¹⁷ Violations that begin before the entry into force of the Charter and continue after the entry into force of the Charter can be captured under the concept of continuing violations.

¹⁸ This may now be merely academic in the sense that most African States have been parties to the African Charter for decades and most violations that are subject matters of complaint would have occurred long after the entry into force of the Charter for these States. However, a fistful of States may still require careful calculation of the applicable date.

a citizen of an African country and may reside in Africa or in the diaspora. Anyone can be an applicant under the African Charter.

- With respect to States, only 'member states' of the *Organisation of African Unity* (now the African Union (AU)) can be State Parties to the African Charter.¹⁹ Thus, only an African State that is also a State Party to the African Charter can be held to account for alleged violation(s) of the Charter.
- States Parties to the African Charter are not only responsible for ensuring state compliance with the Charter (i.e. the State is not only responsible for the conduct of its officials) but also bear responsibility to ensure that third parties within their territories (such as other individuals and legal persons, including multinational companies) do not violate rights guaranteed in the African Charter.²⁰
- Territorially, States Parties to the African Charter can only be held to account for violations that occur within their territories. An exception may be where a State Party to the Charter perpetrates violations of the Charter within the territory of another African State.²¹ In such cases, the violating State may be held to account for the violations that it perpetrates in the territory of the third state.

While rights in the African Charter can roughly be classified in the three generations of human rights, article 1 of the Charter expresses a general duty of State Parties. **Article 1** contains a general undertaking by States Parties to recognize the freedoms, rights and duties in the Charter and to take appropriate steps to give effect to those freedoms, rights and duties. This undertaking has been interpreted to comprise of both positive and negative duties.²² In other words, depending on the circumstances of a case, States Parties may violate the Charter by action, conduct or omissions. The African Commission has expressed this to mean duties to respect, protect, promote and fulfil the rights in the Charter.

Civil and Political Rights in the African Charter

Articles 2 to 14 of the Charter contain rights and freedoms that may generally be termed civil and political rights.

¹⁹ This is implied in the formulation of art 1 of the African Charter.

²⁰ See generally the African Commission's decision in *SERAC & Anor v Nigeria*.

²¹ See for instance, *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (2004) AHRLR

²² See *SERAC v Nigeria*.

- **Article 2** guarantees non-discriminatory enjoyment of Charter rights “without distinction of any kind such as *race, ethnic group, colour, sex, language, religion, political and other opinion, national and social origin, fortune, birth or other status*”. The words “such as” indicate that the listed grounds are not exhaustive. State Parties have a duty to ensure that all persons within their territories or in territories under their control are equally guaranteed enjoyment of Charter rights.
- **Article 3** guarantees equality before the law and equal protection of law. This presupposes that national law and legal processes should be equally available and accessible to all. It also requires that law (national or international) should not be applied to specifically target anyone in ways that it does not target others.
- **Article 4** protects the right to life and integrity of the person. It requires States to ensure that the life and integrity of a person are not arbitrarily interfered with. The right has not yet matured into a prohibition of the death penalty, though any execution without a trial that has strictly met the highest standards of fairness would be arbitrary and in violation of the article.
- **Article 5** protects the dignity of the human person and guarantees recognition of a person’s legal status. The right to dignity under the Charter is not defined precisely and this allows for expansive interpretation of ‘dignity’ ‘to encompass the widest possible array of physical and mental abuses’.²³ The African Commission links the right to adequate food to ‘the inherent dignity of the person’.²⁴ Article 5 also prohibits all ‘forms of exploitation and degradation of the human person, including especially acts of slavery, slave trade, torture, cruel, inhuman and degrading treatment’. Acts such as horsewhipping a detainee,²⁵ or incarceration in congested prisons²⁶ for instance, have been considered as violations of article 5 of the Charter. The State’s duty includes refraining from perpetuating any of the prohibited acts and protecting persons under its jurisdiction from violating acts by third parties.²⁷
- **Article 6** guarantees the right to liberty and security of the person. Arbitrary arrest and or detention are prohibited under this article and deprivation of a person’s freedom may only be based on reasons and conditions previously laid

²³ Communication 323/06: Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt (decision of the African Commission)

²⁴ See the African Commission’s Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights.

²⁵ Communication 215/98: Rights International v Nigeria (decision of the African Commission)

²⁶ See Communication 54/91-61/91-96/93-98/93-164/97-196/97-210/98: Malawi Africa Association and others v Mauritania.

²⁷ Communication 279/03 – 296/05: Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan (decision of the African Commission).

down by law. This article requires States Parties to protect persons from forced disappearances and detention without trial.²⁸

- **Article 7** protects the right to a fair trial or hearing. It guarantees every person a right to have his matter heard by a competent and impartial court of law. The right includes a right to 'appeal to competent national organs' in appropriate situations including in the face of violations of human rights; the right to be presumed innocent until proved guilty by a competent court or tribunal; a right to defend oneself in court, including the right to be defended by a counsel (lawyer) of one's choice; the right to be tried within a reasonable time; the right not to be subjected to criminal trial for acts or omissions which were not offences at the time of commission; the right not to be subjected to a penalty that was not in existence at the time of a wrong; and the right not to be punished for the acts or omission of another person. The article requires States Parties to guarantee due process in the legal and judicial process.
- **Article 8** guarantees freedom of conscience, the right to choose, profess and practice a religion of one's choice. In the interest of law and order, in appropriate cases, States Parties may be able to impose some limitations to the enjoyment of this right insofar as the core freedom to 'adopt or not adopt, have, hold or maintain or indeed recant or denounce a religion cannot ... be subject to restriction'.²⁹
- **Article 9** protects the right to information. It guarantees the right of everyone to receive information and to express and disseminate opinion within the boundaries of law. The term 'within the law' means the right is not necessarily absolute, but any scope for restrictions arising from the phrase must be interpreted in reference to international norms'.³⁰
- **Article 10** protects the right to freedom of association within the boundaries of law.³¹ The article also prohibits the practice of compelling any person to join an association. States Parties are required to guarantee free association and protect individuals from being forced to join any organisation or association.
- **Article 11** protects the right to freedom of assembly with other people. However, the enjoyment of this right is made subject to restrictions that a State may

²⁸ Communication 275/03: Article 19 v Eritrea (decision of the African Commission).

²⁹ Communication 355/07 :Hossan Ezzat & Rania Enayet v The Arab Republic of Egypt (decision of the African Commission)

³⁰ Communication 313/05: Kenneth Good v Botswana (decision of the African Commission).

³¹ Communication 379/09 – Monim and others v Sudan.

impose through national law in the interest of national security, safety, health, ethics and the rights and freedoms of others.³²

- **Article 12** guarantees the right to freedom of movement and to residence within the borders of a state. This right is also subject to a person (claimant) abiding 'by the law'. This clause may only apply to non-nationals whose right to reside within the borders of a state can be revoked. Article 12 also guarantees right to leave any country (including one's country) and to return to one's country, again subject to national law for the protection of national security, public health, etc. In situations of persecution, the article guarantees the right to seek and obtain asylum in accordance with the laws of the receiving state and international conventions. States Parties are prohibited from undertaking mass expulsion of non-nationals.
- **Article 13**, first, protects the rights of citizens to participate freely in the government of their country. This right is only available to citizens of States Parties and assures the right to vote and be voted for, subject to national law. The second paragraph of the article guarantees citizens' access to the public service. The third paragraph protects the right of all individuals (not only citizens) to access public property and services equally.
- **Article 14**³³ guarantees a right to property. However, the right is subject to the public interest or need of communities under terms laid down in national laws.

Economic, Social and Cultural Rights in the African Charter

One of the pioneering features of the African Charter was the inclusion of some of the so-called 'second generation' economic, social and cultural rights in a single binding treaty with 'first general' civil and political rights (as well as 'third' generation group rights). However, the African Charter only includes a subset of the more comprehensive range of economic and social rights recognized in the ICESCR. Articles 15 to 17 are generally considered to be unambiguous 'second generation' rights while some would loosely include article 18 of the Charter as a 'second generation' right because of its actual or potential impact on the socio-economic wellbeing of people.

- **Article 15** assures of a right to work under equitable and satisfactory conditions and guarantees equal work for equal pay. There is a debate as to whether the

³² Communication 266/03: *Gunme et al v Cameroon*

³³ There are people who contend that the right to property in the African Charter is an economic right rather than a civil right. The right to property was recognized in the UDHR but was not included in either the ICCPR or the ICESCR. In any event, the Charter does not distinguish between civil/political rights and economic/social/cultural rights, so the categorization of the right to property is of little consequence.

right guaranteed is a right to work – thereby creating a State Party obligation to provide or facilitate the provision of jobs – or whether it is a guarantee that those in employment are assured of equitable and satisfactory conditions of work. The second limb of the article is aimed at addressing discrimination in the remuneration of persons in similar employment.³⁴

- **Article 16** guarantees the right to 'enjoy the best attainable state of physical and mental health'. This article requires States Parties to take 'necessary measures' to protect the health of their people and to guarantee that medical attention is available to those who are sick. The formulation of the Charter leaves it open to debate whether the 'best attainable state of health' is a subjective standard (i.e. the best the particular State can do) or an objective standard (i.e. the best that is currently available to medical science).³⁵ The second limb requires States to take actions necessary to protect the health of their people, for instance, the tightening of borders in the event of an epidemic but also the allocation of extra resources to tackle the outbreak of an epidemic.³⁶
- **Article 17** protects a right to education even though it does not specify the level of education guaranteed. The article also affirms the right to participate in 'the cultural life of his community'. A State duty to promote and protect 'morals and traditional values recognized by the community', which could in some circumstances conflict with human rights elsewhere in the Charter, is set out in the third paragraph of the article.³⁷ However, the African Commission interprets this to mean 'positive African values consistent with international human rights standards' and a State duty to eradicate harmful practices that negatively affect human rights.³⁸
- **Article 18** captures a State duty to protect the 'physical and moral health' of the family which is recognized as the 'natural unit and basis of society'.³⁹ Tucked away in this article is a State duty to ensure the 'elimination of every discrimination against women' and to see that the globally guaranteed rights of

³⁴ See the decision of the ECOWAS Court in the case of *Essien v the Gambia*

³⁵ See the African Commission's Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights.

³⁶ See the Principles and Guidelines above.

³⁷ For instance, a community endorsed traditional value may encourage cultural practices that are harmful to certain categories of persons, eg, girls and women.

³⁸ African Commission's Guidelines and Principles.

³⁹ The African Commission sees this article as basically protecting the right of persons to matter with full and free consent. See the Guidelines and Principles.

women and children are protected.⁴⁰ A State duty to take measures to protect the peculiar needs of the aged and disabled is also captured in this article.⁴¹

Peoples' and group rights in the African Charter

Another innovation that the Charter was celebrated for was the inclusion of a series of group or 'third generation' rights. Articles 19 to 24 of the African Charter are dedicated to these so-called 'third generation' rights.

- **Article 19** proclaims the equality of all peoples and guarantees that the same respect and rights for all peoples. It prohibits the domination of a people by another people. While this was apparently targeted at colonizers, the protection is equally applicable to countries with ethnic, religious and other identifiable minorities.
- **Article 20** proclaims a right of all peoples to existence and guarantees the right to self-determination. Echoing and expanding on similar provisions in the ICCPR and ICESCR (article 1(1) in each), this right includes a right of peoples to 'freely determine their political status' and to 'pursue their economic and social development' in accordance with their own policies. The second and third limbs of the article give an indication that this article was targeted at the colonizers. However, it has been determined that the rights in this article can still be enjoyed by 'peoples' within independent African States insofar as it is not used as a basis to seek secession.⁴²
- **Article 21** proclaims that all peoples shall freely dispose of their wealth and natural resources and this must be done in the exclusive interest of the people. The terms of article 21 expand considerably on the similar provisions in the ICCPR and ICESCR (article 1(2)). Peoples whose wealth and natural resources have been plundered are entitled to the payment of adequate compensation. This article is one of those apparently targeted at colonizers but which have remained useful for communities in the extractive zones of African states.

⁴⁰ While on the one hand including provisions on women and children's rights in the Charter is positive in so far as it recognizes that women and children typically face particularly pervasive and deep discrimination and lack of access to justice, on the other hand placing those rights in association with the "protection of the family" in the article risks downplaying or even subsuming the rights and role of women and children as being primarily defined by family relationships, particularly when compared to the UN Convention on the Elimination of Discrimination against Women, the text of which had already been adopted in 1979, as well as the later 1989 Convention on the Rights of the Child. Since adoption of the Charter, additional separate African instruments to protect the rights of women and children respectively have better reflected the status and importance of the rights of women and the rights of children, as far beyond the context of the family.

⁴¹ A distinct treaty for the protection of this group of vulnerable persons has also been adopted in Africa. See *infra*.

⁴² *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995)

- **Article 22** assures peoples of a right to economic, social and cultural development and creates an obligation on States to 'ensure the exercise of the right to development.
- **Article 23** proclaims a right of all peoples to 'national and international peace and security'. The article obligates States Parties to ensure that persons enjoying the right to asylum under article 12 do not 'engage in subversive activities' against another state and that their territories are not used as bases for "subversive or terrorist activities" against the peoples of other states parties. These vaguely framed provisions must be applied in a careful and constrained manner if conflicts with international refugee law and global human rights norms are to be avoided.
- **Article 24** guarantees a right of all peoples to enjoy a general satisfactory environment that is favourable to their development. The formulation of this article raises the question whether the right to a satisfactory environment can only be enjoyed as a group right and only in terms of 'development'.

Other important State Duties

Directly following the articles that guarantee or proclaim rights, the drafters of the African Charter have included state duties and duties of the individual. Considering that both state duties are critical to the enjoyment of Charter rights such that States Parties need to be held to account for their performance of this 'enabling duties', it is necessary to highlight those state duties.

- **Article 25** proclaims a state duty to ensure the African Charter and its contents are publicized within their territories through 'teaching, education and publication'.
- **Article 26** requires States Parties to guarantee the independence of the courts and to ensure that appropriate national institutions are established for the promotion and protection of Charter rights. Independence of the courts is crucial for enjoyment of the right to fair trial under the Charter.

As the central human rights instrument adopted by the OAU/AU, the African Charter has received more attention in terms of interpretation and usage than other human rights catalogues in the continent.

It has to be recalled that the African Commission on Human and Peoples Rights is established within the African Charter as the treaty body responsible for supervising the implementation of the Charter. While the African Commission continues to perform its supervisory role within the limits of its quasi-judicial character, the African Court of

Human and Peoples Rights has since been established to complement the protective mandate of the African Commission. As such, subject to the conditions set out in the relevant treaties and rules of procedure, allegations of violations of the African Charter can be brought before either the African Commission or the African Court. In general, complaints procedures before the African Commission and Africa Court may, for a variety of reasons such as geographic proximity and cultural familiarity, be perceived and experienced by victims of violations and their advocates in Africa to be more accessible than the Geneva-based United Nations mechanisms. Sub-regional courts and some national courts also have jurisdiction to entertain complaints alleging violation of the Charter.

The African Charter on Human and Peoples Rights was signed by 45 out of the 55 Member States of the AU. As at 31 July 2018, the Charter has been ratified by 54 AU Member States. States that have ratified the African Charter are: Algeria; Angola; Benin; Botswana; Burkina Faso; Burundi; Cameroon; Central African Republic; Cape Verde; Chad; Côte d'Ivoire; Comoros; Congo; Djibouti; Democratic Republic of Congo; Egypt; Equatorial Guinea; Eritrea; Ethiopia; Gabon; Gambia; Ghana; Guinea Bissau; Guinea; Kenya; Libya; Lesotho; Liberia; Madagascar; Mali; Malawi; Mozambique; Mauritania; Mauritius; Namibia; Nigeria; Niger, Rwanda; South Africa; Sahrawi Arab Republic; Senegal; Seychelles; Sierra Leone; Somalia; South Sudan; Sao Tome & Principe; Sudan; Swaziland; Tanzania; Togo; Tunisia; Uganda; Zambia; and Zimbabwe. Morocco re-joined the African Union in 2017 after a 33-year absence following its withdrawal in 1984 over a dispute concerning the Sahrawi Arab Republic. As at 31 July 2018, Morocco was the only African State that had not signed or ratified the Charter.

ii) The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)

Article 66 of the African Charter contemplates the adoption of 'special protocols and agreements' to supplement the Charter where necessary. Thus, when civil society organisations and African and international NGOs, especially women's organisations began to challenge what was considered to be the un-dignifying place given to women in the African Charter, the response was the advocacy for a regional treaty dedicated to the protection of the rights of women in Africa.

The African Commission also gave impetus to the campaign by establishing in 1998, the position of a Special Rapporteur on the Rights of Women in Africa. With the Special

Rapporteur taking position as the focal point for the advocacy, the process for the drafting of an African catalogue of rights for women gathered momentum in the late 1990s. Taking advantage of article 66 of the African Charter, African leaders finally adopted a Protocol on the rights of women in Africa to make up for the scant specific attention given to the rights of women in the African Charter. The Protocol was also intended to address the specific challenges faced by women in Africa, including especially the challenge of implementation of rights in favour of women.

Adopted on 11 July 2003 in Maputo, Mozambique, the Protocol to the African Charter on Human and Peoples' Rights (the African Women's Protocol or Maputo Protocol) entered into force on 25 November 2005. As at July 2018, 49 African States had signed the Maputo Protocol while 39 of those States had ratified the Protocol and deposited their respective instruments of ratification. This means that the Maputo Protocol is binding (internationally) on the 39 States that have ratified it while the remaining ten States that have signed but not ratified are under a legal obligation "to refrain from acts which would defeat the object and purpose" of the Protocol.⁴³

While the Maputo Protocol is not necessarily the first international instrument dedicated to the protection of the rights of women, the Protocol stands out for the following reasons (among others):

- ✓ The Protocol addresses issues culturally contextual to women in Africa.
- ✓ The Protocol restates but expands the scope of rights contained in existing human rights instrument, giving such rights a gender perspective.
- ✓ The Protocol creates new rights, giving statutory expression to rights introduced to the African Charter by the jurisprudence of the African Commission.
- ✓ The interdependence and indivisibility of human rights is maintained in the Maputo Protocol.

Although, the Maputo Protocol is not organized in a manner that neatly arranges the rights guaranteed in clear compartments, the Protocol contains clusters of rights in the following categories – equality and non-discrimination rights; dignity and personal security rights; marriage and family-related rights; political and civil rights; economic, social and cultural rights; peace, development and environmental rights; and rights for

⁴³ See article 18 of the 1969 Vienna Convention on the Law of Treaties, which is widely considered also to reflect a rule of customary international law binding on all States, even those not party to the Vienna Convention.

the protection of vulnerable women. These rights are spelt out in articles 2 to 24 of the Maputo Protocol. Article 1 of the Protocol is dedicated to the definition of terms.

- **Article 2** aims at the elimination of discrimination against women and is couched as a duty of States. Accordingly, States Parties undertake to combat all forms of discrimination against women by adopting constitutional, legislative, institutional and other means to curb all forms of discrimination. Article 2 also requires states to employ corrective and positive (affirmative) action to address structural and other forms of discrimination against women. States Parties also commit to address discriminative socio-cultural patterns of behaviour through public education, information and communication strategies. Discrimination in public and private spaces must be addressed by States in compliance with this provision.
- **Article 3** of the Maputo Protocol relates to the right to dignity of women. It guarantees the right to dignity as well as recognition, respect for and protection of the legal personality of women. States Parties take on obligation to prohibit the exploitation and degradation of women and to protect women from all forms of violence, especially including sexual and verbal violence. Domestic violence against women and trafficking in girls and women are examples of issues that would be in violation of this provision.
- **Article 4** of the Maputo Protocol protects the rights to Life, Integrity and Security of the Person. First, article 4 guarantees every woman respect of her life and the integrity and security of person. Then, it goes on to once again register states commitment to apply national law to prohibit all forms of violence against women, to identify the cause and consequences of such violence, to punish perpetrators and to implement programmes for the rehabilitation of women victims. Article 4 also records the commitment of States Parties to address trafficking in women, prohibit medical or scientific experiments on women without their informed consent and to refrain from carrying out the death sentence on pregnant or nursing women. The article is formulated in a manner that mixes statements of rights and a proclamation of state duty. The rights protected under this provision reinforce and in some cases expand the guarantee(s) already given in the African Charter.

- **Article 5** focuses on the elimination of harmful practices against women, especially in the traditional-cultural context. States Parties undertake to prohibit and condemn all forms of harmful practices, including by legislative and other means and by creating public awareness. States Parties also agree to provide support structures for women victims in the form of health service, emotional and psychological counselling, vocational training and legal/judicial support. The duties of the States therefore, goes beyond legislative action to include the provision of potentially cost-intensive service in a manner not expressly spelt out in the African Charter.
- **Article 6** shifts the focus of the Maputo Protocol to the protection of marriage-related rights. It proclaims a State duty to ensure equality of men and women within the institution of marriage. To realize this aim, State Parties commit to apply legislation to guarantee that marriage takes place only with the free and full consent of both parties to the marriage (not just their parents or families); that a woman cannot marry until she attains the age of 18 years; that all marriages are registered and legally recognized under national law; that men and women are capacitated to freely agree on the terms and conditions of their marriage; men and women jointly contribute to the sustenance and development of the family and that a woman's right to acquire her own property even in the subsistence of her marriage is assured.
- **Article 7** relates to the rights of women in the event of a breakdown of marriage. It obligates States Parties to ensure equality of rights of men and women in separation, divorce and annulment of marriage. States Parties are to guarantee the enjoyment of reciprocal rights and responsibilities towards the children of the marriage (taking into account the best interest of the child or children) and the right to equitable sharing of joint property deriving from the marriage.
- **Article 8** guarantees access to justice for women and equal protection before law. States Parties are required to facilitate effective access to justice for women including through the provision of legal aid (in appropriate situations); provide adequate educational and other structures to enhance access to law for women and to improve gender consciousness within national law enforcement agencies. Article 8 also requires States Parties to enhance the presence of women in the judiciary and in the law enforcement agencies. Women must be protected from

structural discrimination in a male-dominated law enforcement, legal and judicial space.

- **Article 9** of the Maputo Protocol guarantees the right of women to participate in the political and decision-making processes in their respective countries. In article 9, States Parties undertake to take positive action (including though affirmative action) to promote participative governance and to ensure that women participate equally in the national political spaces.
- **Article 10** guarantees a right to peace. It assures that women have a right to a peaceful existence and to participate in the promotion and maintenance of peace. States Parties accordingly commit to ensuring that women participate actively in national and regional peace processes and conflict prevention initiatives. Women are also assured of roles in the settlement of internally displaced persons (IDPs) and refugees especially in the post-conflict context.
- **Article 11** relates to the protection of women caught in armed conflicts. States Parties commit to respect and to ensure respect for the rules of international humanitarian law for the protection of the civilian population, particularly women. States Parties also commit to prohibit and to refrain from the involvement of persons under 18 years, especially the girl-child, in direct armed conflict. State Parties further commit to ensure the protection of women refugees, IDPs and returnees especially from violence, rape and other forms of sexual exploitation.
- **Article 12** shifts the focus to the right of women to education and training. The article obligates States Parties to eliminate discrimination between males and females, sexual harassment and all forms of abuse and violence against women and girls in the field of education and training. Stereotypes in the syllabuses and textbooks perpetuating discrimination are to be addressed and eliminated while State Parties are required to provide access to counselling and rehabilitation for female victims of abuse of any kind within the school environment. States Parties also commit to take positive (including affirmative action) to promote the education of women, improve literacy among women and promote the enrolment and retention of girls in schools and other training institutions.

- **Article 13** deals relates to economic (employment and workplace opportunities) and social welfare rights. It obligates State Parties to apply legislative and other measures to guarantee economic and career opportunities for women. States Parties are to assure women equality of access to employment; equality of remuneration between men and women for equal work; transparency in recruitment, promotion and discipline of men and women; prohibition of exploitation of women in the workplace; provide support including social insurance for the occupations and economic activities of women especially in the informal sector; and introduce a minimum age for work with a view to addressing child employment and exploitation of the girl-child. States Parties are also required to create conducive environment for the recognition of the work of women even in the home; guarantee adequate pre and post-natal benefits, ensure equal and equitable application of tax laws and fair payment of allowances to eligible salaried women.
- **Article 14** deals with the health and reproductive rights of women. The article commits States Parties to ensure that the right to health of women, including the sexual and reproductive aspects of the right are assured. States Parties are to respect and promote the right of women to control their fertility; make child bearing decisions; make and or contribute to decisions on contraceptives and protection against HIV/AIDS and other sexually transmitted diseases to enhance the right to health, State Parties are required to provide affordable and accessible health services; improve pre and post-natal health services and create a conducive legal environment for the provision of health services to victims of all forms of sexual violence.
- **Article 15** guarantees the right of women to nutritious and adequate food. States Parties are required to ensure food security and provide access to clean drinking water and means of producing food. This right is not expressly included in the African Charter but has been 'read in' to the Charter by the African Commission. In this Protocol, the right is express.
- **Article 16** protects the right of women to equal access to housing and acceptable living conditions. States Parties are to provide access to adequate housing for both single and married women. This is another right 'read in' to the African Charter but expressly provided for in the Maputo Protocol.

- **Article 17** focuses on the right of women to live in a positive cultural context. States Parties commit themselves to take measures to ensure that women participate and have a say in the formulation of cultural practices. In the context of male dominance in traditional societies, the implementation of this right is critical for some of the other rights guaranteed in the Protocol.
- **Article 18** of the Maputo Protocol guarantees the right to a healthy and sustainable environment for women. The equivalent provision in the African Charter formulates the right as a group right. Under this Protocol, States Parties commit to take appropriate measures to enhance the participation of women in the management of the environment; to promote research and invest in new technologies to improve the environment; to facilitate the development of the indigenous knowledge systems of women and promote proper waste management.
- **Article 19** guarantees the right to sustainable development for women, distinct from the general right to development captured in the African Charter. The right in this article invites States Parties to introduce gender perspectives to development planning; improve the participation of women in decision making and in the implementation of development programmes; enhance access to land, property, credit and skills development for women and to tackle the negative effects of globalization on women.
- **Article 20** shifts the focus to the rights of widows in Africa. States Parties commit to take measures to protect the human rights of women. Specifically, States Parties commit to protect widows from inhuman, humiliating and degrading treatment; ensure that widows legally and automatically claim custody of the children upon the demise of the husband insofar as this is in the best interest of the children. States Parties are also required to remove legal, cultural and structural obstacles that prevent a widow from remarrying a person of her own choice.
- **Article 21** protects the right to inheritance and assures that a widow shall have the right to an equitable share in the inheritance of the property of her late husband. This article also protects the right of a widow to remain in her

matrimonial home before remarriage and if she owns or inherited the house, to retain it even after she remarries. The right of women to share equitably in inheriting the property of their parents is also protected.

- **Article 22** assures special protection for elderly women, committing States Parties to take specific measures to meet the needs of elderly women including access to suitable employment. States Parties also undertake to protect elderly women from all forms of violence and discrimination.
- **Article 23** relates to the right of women with disabilities to special protection. States Parties undertake to ensure that the specific needs of women with disabilities including suitable employment and training needs are met. States Parties also assure the right of disabled women to participate in making decisions affecting them and to protect such women from all forms of violence and discrimination.
- **Article 24** guarantees special protection for women in distress. States Parties are required to enhance the protection of poor women, women who head households, women from marginalized groups and other women in distress. States Parties also undertake to specifically protect pregnant and nursing women in ways suitable to their conditions.

The Maputo Protocol also spells out the duty of States Parties to provide appropriate remedies to any woman who is a victim of violation of the rights or freedoms guaranteed in the Protocol. In **article 25**, States Parties commit to ensuring that remedies are institutionalized through judicial or other administrative involvement.

The Protocol gives States Parties the task of reporting on the implementation once every two years. Although, the African Court is the judicial organ authorized to interpret the Protocol, the African Commission also has a supervising role and violations of the Maputo Protocol can be raised in Communications before the African Commission.

As at July 2018, 49 African States had signed up to the Maputo Protocol while 39 of them have ratified the Protocol. The States that have ratified the Protocol are: Algeria; Angola; Benin; Burkina Faso; Cameroon; Cape Verde; Cote d' Ivoire; Comoros; Congo; Djibouti; Democratic Republic of Congo; Equatorial Guinea, Gabon, Gambia; Ghana; Guinea Bissau; Guinea; Kenya; Lesotho; Libya; Liberia; Mali; Malawi; Mozambique; Mauritania; Mauritius; Namibia; Nigeria; Rwanda; South Africa; Senegal; Seychelles; Sierra Leone; Swaziland; Tanzania; Togo; Uganda; Zambia and Zimbabwe.

iii) Other Regional Human Rights Instruments:

a) The African Charter on the Rights and Welfare of the Child

Although, regional focus on the rights of children in Africa had begun since the OAU adopted a Declaration on the Rights and Welfare of the Child in 1979, it was only in the late 1980s that enough momentum was generated to arrive at the adoption of a continental treaty aimed specifically at the protection of the rights of children in Africa.

The African Charter on the Rights and Welfare of the Child ('the African Children Charter' or 'the ACRWC') is a free standing regional treaty adopted by African political leaders on the auspices of the OAU. Following a period of intensive advocacy and drafting work spanning several years, the African Children Charter was adopted by the OAU at its 26th Ordinary Session held in Addis Ababa, Ethiopia on 11 July 1990. The African Children Charter entered into force on 29 November 1999 when the required minimum number of ratifications (15) was secured.

- The African Children Charter is the first regional human rights treaty dedicated specifically to the protection of the rights of children.
- The African Children Charter complements the 1989 global Convention on the Rights of Children (CRC) in the sense that it addresses Africa-specific issues, and tackles rights and welfare needs peculiar to children in Africa and not captured in the CRC.⁴⁴
- The African Children Charter guarantees rights that cut across the three generations of human rights.

⁴⁴ For instance, the African Children Charter expressly prohibits the use of child soldiers as well as child marriages both of negative realities that child in Africa face which the CRC did not expressly address.

- States recognize and proclaim the superiority of the African Children Charter over custom, tradition, cultural or religious practice.
- States agree that African children are entitled to enjoy more favourable rights contained in instruments other than the African Children Charter.
- The guiding principles of the African Children Charter are: non-discrimination; best interest of the child; survival and development of the child; and participation.
- The African Children Charter also contains a list of duties or responsibilities of the child.
- The African Children Charter is endowed with its own supervisory mechanism.

The rights in the African Children Charter are elaborated in articles 3 to 30, while article 1 sets out the general duties of States Parties and article 2 defines a child to be every human being below the age of 18 years.

Rights and Freedoms in the African Children Charter (ACRWC)

- **Article 3** guarantees the right of every child to enjoy ACRWC rights and freedoms without any form of discrimination based on the child's or the parents' or guardian's socio-political or legal position.
- **Article 4** stipulates that the best interest of the child shall drive all private, public, judicial or administrative action in respect of the child. For a child capable of communicating, opportunity has to be given for the child to air his or her views in judicial or administrative proceedings affecting that child.
- **Article 5** recognizes the child's right to survival and development and asserts that the right to life of every child must be protected by law. States Parties undertake not only to ensure the survival and development of the child (through positive action) but also to prohibit the imposition of death sentence on a child.
- **Article 6** guarantees the child a right to a name and a nationality. This article obligates States Parties to ensure the registration of every child born within its territory, even where the nationality of the child is not known.

- **Article 7** protects the right of the child to freedom of expression insofar as the child is capable of expressing his opinion.
- **Article 8** protects the child's right to associate and freely assemble with others in accordance and conformity to national law.
- **Article 9** protects the child's right to freedom of thought, conscience and religion but recognizes the right of parents and legal guardians to provide necessary guidance to the child in his exercise of this freedom.
- **Article 10** guarantees protection of the child's right to privacy. This article prohibits arbitrary or unlawful interference with the privacy of the child, his home or correspondence and protects the child from attacks on his honour and reputation. However, the reasonable supervisory rights of parents and legal guardians are recognized. (Note that neither the African Charter nor the Maputo Protocol explicitly guarantees a right to privacy).
- **Article 11** guarantees every child a right to education. It provides for such education to be targeted at promoting and developing the personality, talents and overall abilities of the child. This article stresses that education of the child should aim at fostering respect for human rights as well as the preservation and strengthening of positive African morals, traditional values and cultures as well as other global values for the preservation of the natural environment. Accordingly, States Parties are obligated to provide free and compulsory basic education; progressively make secondary education free and accessible and to make tertiary education accessible to all on the basis of capacity and ability. States Parties also commit to respect the rights and duties of parents and legal guardians regarding the choice of schools; ensure that the discipline of children (by school authorities) is done humanely and with respect to the dignity of the child; and to assure that the girl child has opportunities to complete her education even if she gets pregnant in the course of her schooling.
- **Article 12** guarantees the right of the child to leisure, recreation and cultural activities. States Parties acknowledge that a child has the right to rest, play and engage in recreational activities appropriate to his age. States Parties further commit to respect the right of the child to fully take part in cultural and artistic activities.
- **Article 13** shifts focus to the protection of mentally and physically challenged children. Challenged children are assured of the right to special measures of protection appropriate to their specific needs in conditions that respect their

dignity and promote their self-reliance and active participation in society. Subject to available resources, States Parties commit to ensure that a challenged child (and anyone responsible for his or her care) receives effective access to training, preparation for employment and recreational activities conducive to the realization of the child's fullest possible social integration, individual, cultural and moral development. States Parties further undertake, subject to available resources, to progressively provide fully convenient access to public buildings and similar places for challenged children.

- **Article 14** guarantees the child's right to health and health services and asserts the right of every child to enjoy the best attainable state of physical, mental and spiritual health. Accordingly, States Parties commit to take measures to reduce infant and child mortality; provide necessary medical assistance and health care to children especially in the area of primary health care; provide adequate nutrition and safe drinking water; and to combat disease and malnutrition through the application of appropriate technology. States Parties further commit to ensure appropriate health care for expectant and nursing mother; develop preventive health care and family life education; enhance societal and community education in child health and related matters; assure full and meaningful participation of NGOs and local communities in the planning and management of basic health services for children; and to support the mobilization of resources in the development of primary health care for children.
- **Article 15** guarantees the child's right to be protected from all forms of economic exploitation and from potentially hazardous work likely to interfere with the child's physical, mental, spiritual, moral or social development. States Parties commit to take legislative and administrative measures to ensure full realization of this right in both the formal and informal sectors of employment. In this regard States Parties undertake to regulate minimum ages for employment; appropriate work hours and conditions of employment; disseminate information on the effects of child labour; and provide appropriate penalties and other sanctions for violations in order to enhance enforcement of this article.
- **Article 16** protects the child against abuse and torture. States Parties commit to take appropriate legislative and other measures to assure the protection of the child from all forms of torture, inhuman or degrading treatment especially physical or mental abuse, neglect or maltreatment and sexual abuse at home, school or community. Thus, States Parties undertake to set up effective procedures for the establishment of special monitoring units to provide necessary support for the child and caregivers. States Parties further undertake to establish

mechanisms for prevention, identification, investigation, treatment and follow-up of cases of child abuse and neglect.

- **Article 17** addresses the administration of juvenile justice. It assures that every child accused or found guilty of infringing penal laws shall have a right to special treatment in a manner consistent with the child's sense of dignity and self-worth in a manner that reinforces the child's respect for human rights and fundamental freedom. States Parties undertake to ensure that a detained or imprisoned child is not subjected to torture, inhuman or degrading treatment or punishment and is separated from adults in their place of detention or imprisonment. States Parties also commit to ensure that a child in conflict with the law is presumed innocent until proven guilty; is informed promptly in language that he understands of the charge against him and is entitled to the assistance of an interpreter if he cannot understand the language of the legal system. A child in conflict with the law shall also be afforded legal and other appropriate assistance to prepare for his defence; have his matter speedily determined by an impartial tribunal; be entitled to appeal to a higher tribunal in the event of conviction; be protected from being compelled to confess to guilt or to give testimony; and be entitled to have the public and the press exempted from his trial. States Parties assure that the trial of a child shall aim at reformation, social rehabilitation and re-integration into his family and that a minimum age for criminal capacity shall be stipulated in each State.
- **Article 18** protects the family for the benefit of the child. States Parties commit to take appropriate measures to ensure equality of rights and responsibilities of spouses with regard to children during and after marriage. In the event of the dissolution of marriage, States Parties commit to provide for the necessary protection of the children of the marriage. States Parties further commit that a child shall not be deprived of maintenance by reference to the marital status of his parents.
- **Article 19** assures the right of a child to parental care and protection. Where possible, the child is required to reside with his parents and no child ought to be separated from his parents against his will except by judicial determination. States Parties guarantee that a child separated from one or both parents shall have a right to maintain personal relations and direct contact with both parents regularly. In situation of separation resulting from State action, the child or a family member shall be entitled to information concerning the whereabouts of the absent member(s) of the family.

- **Article 20** provides for parental responsibilities and stipulates that a child's parent or guardian shall have primary responsibility for the upbringing and development of the child. Parents and guardians shall be responsible for ensuring respect for the best interest of the child; securing living conditions appropriate for the development of the child; and for ensuring that domestic discipline is administered humanely. It shall be the duty of States Parties to assist parents and guardians in the fulfilment of their responsibilities to the child.
- **Article 21** guarantees protection for the child against harmful social and cultural practices. States Parties commit to take all appropriate measures to eliminate harmful social and cultural practices that negatively affect the welfare, dignity and growth of the child. Customs and practices prejudicial to health or discriminatory to the child on grounds of sex or other status are to be addressed specially. States Parties also undertake to prohibit child marriages and the betrothal of children and to use legislation to specify eighteen years as the minimum age for marriage.
- **Article 22** relates to the rights of children during armed conflicts. States Parties pledge to respect and enforce the rules of international humanitarian law applicable in armed conflicts as it relates to children. States Parties undertake to ensure that no child is recruited or takes direct part in hostilities. In accordance with international humanitarian law, States Parties undertake to ensure the protection of children affected by armed conflict.
- **Article 23** assures protection for children who are refugees or internally displaced. States Parties pledge to take appropriate measures to ensure that a child who is a refugee or is seeking refugee status or is internally displaced receives appropriate protection and humanitarian assistance in accordance with international human rights and humanitarian law. To this end, States Parties undertake to work with international organisations to protect and assist the child who is a refugee or seeks refugee status or is internally displaced to trace his or her parents or other relatives with a view to reunification. Upon failure to trace the child's family, the child shall be entitled to the same protection accorded to other children temporarily or permanently deprived of their family.
- **Article 24** focuses on the adoption of children. States Parties are required to ensure that the best interest of the child is the paramount consideration in national adoption processes. States Parties must ensure that inter-country adoption is only allowed as a last resort where a child cannot be placed in a foster or adoptive family within the home State. State Parties undertake to closely monitor adoption processes to prevent abuse detrimental to the child and to

ensure that placement does not result in trafficking or improper financial gain for anyone.

- **Article 25** assures special protection and assistance for the right of a child temporarily or permanently separated from his parents. States Parties undertake to ensure that a child who is temporarily or permanently deprived of its parents is provided alternative family care while effort shall be made to trace and re-unite temporarily displaced children with their parents. In the consideration of alternative family care, attention shall be paid to the child's ethnic, religious and linguistic background with a view to continuity.
- **Article 26** guarantees the right of a child against apartheid and discrimination. States Parties undertake to give the highest priority to the special needs of children who had lived under any form of discrimination.
- **Article 27** guarantees the child protection from sexual exploitation. States Parties commit to protect the child from all forms of sexual exploitation and abuse. Accordingly, States Parties commit to take measures to prevent any form of inducement or encouragement of a child to engage in sexual activities; and to prohibit the use of children in prostitution or other forms of pornographic activities, performance or materials.
- **Article 28** obligates States Parties to take all appropriate measures to protect the child from the use of narcotics and other illicit substances and to prevent the use of children in the production and trafficking of such substances.
- **Article 29** addresses issues of abduction, sale and trafficking of children. It commits States Parties to take appropriate measures to prevent the abduction, sale and trafficking of children by anyone including by parents and guardians and to prohibit the use of children in all forms of begging.
- **Article 30** focuses on the rights of children whose mothers are imprisoned. States Parties undertake to provide special treatment to expectant mothers and mothers with infants and young child where such mothers are in conflict with the law. States Parties commit to consider non-custodial sentences in matters involving such mothers; to establish and promote alternatives to institutional confinements and to establish alternative institutions for holding such mothers. States Parties further undertake to ensure that a mother is not imprisoned with her child; the death sentence is not imposed on mothers; and that the essential aim of the penitentiary shall be reformation, social rehabilitation and reintegration of such mothers into the family. These rights are instrumental in the sense that

they are for the benefit of the child even though they are enjoyed by the expectant or nursing mother.

WHAT IS THE FRAMEWORK FOR THE IMPLEMENTATION OF THE RIGHTS AND FREEDOMS IN THE AFRICAN CHILDREN'S CHARTER?

☐ State Parties are the primary duty bearers and are primarily responsible for the implementation of the rights and freedoms in the African Children's Charter.

☐ To ensure coordinated central supervision of the Children's Charter, the African Committee of Experts on the Rights of the Child is created in Chapter III of African Children's Charter with a mandate to promote and protect the rights in the Charter.

☐ The main tools of the Committee of Experts include the Reporting Procedure; the Communications Procedure and the Conduct of Investigations.

The African Charter on the Rights and Welfare of the Child was signed by 44 out of the 55 Member States of the AU. As at 31 July 2018, 48 States have ratified the treaty and can be held to account for violation of the treaty. The States that have ratified the African Children's Charter are: Algeria; Angola; Benin; Botswana; Burkina Faso; Burundi; Cameroon; Central African Republic; Cape Verde; Chad; Côte d'Ivoire; Comoros; Congo; Djibouti; Egypt; Equatorial Guinea; Eritrea; Ethiopia; Gabon; Gambia; Ghana; Guinea Bissau; Guinea; Kenya; Libya; Lesotho; Liberia; Madagascar; Mali; Malawi; Mozambique; Mauritania; Mauritius; Namibia; Nigeria; Niger; Rwanda; South Africa; Senegal; Seychelles; Sierra Leone; Sudan; Swaziland; Tanzania; Togo; Uganda; Zambia; and Zimbabwe

b) The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)

Africa's engagement with displacement of persons goes back to the pre-independence era so that one of the earliest treaties adopted on the platform of the OAU focused on the refugees, i.e. persons in need of protection either from persecution, war or violence in a *different* State. However, the situation of internally displaced persons

(IDPs), i.e. who have been forced to move *within* a single State, did not attract coordinated institutional attention on the continent until much later. By 1992, the groundwork for a binding regional treaty to address the challenge of IDPs began with the commissioning of a study on the question. This culminated in a formal decision by the African Union Executive Council in June 2008 to approve the drafting of a binding treaty. On 23 October 2009, what is now known as the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa was adopted in Kampala, Uganda.

- The Kampala Convention is the first international treaty dedicated exclusively to addressing the situation of IDPs.
- The Convention builds on a variety of international human rights and humanitarian law instruments so that it is founded on a fairly well-established normative framework including the authoritative UN Guiding Principles on Internal Displacement.
- Despite its link to the existing (generally non-binding) normative framework, the Kampala Convention advances the normative boundaries on the protection of IDPs in important areas.
- The Kampala Convention further expands the range of actors with responsibility to promote and protect the rights protected in the Convention.

The guarantees in the Kampala Convention are couched in the form of State Party obligations. While article 1 provides definitions for critical concepts, article 2 of the Convention states that its objectives are to promote and strengthen regional and national measures to tackle the root causes of internal displacement; establish a legal framework to prevent internal displacement, protect and assist IDPs in Africa, and to mobilize solidarity and cooperation to combat displacement and address its consequences.

Other objectives of the Convention are to provide for the obligations and responsibilities of States Parties, armed groups, non-state actors and other relevant actors with respect to the prevention of displacement and for assuring protection of and assistance to IDPs.

- **Article 3** of the Kampala Convention spells out the general obligations of States Parties such as the obligation to refrain from and to prohibit and prevent arbitrary displacement of populations; prevent all forms of exclusion and marginalization likely to cause displacement of populations; respect and protect the rights of IDPs as guaranteed in international humanitarian law and international human rights law; and to ensure appropriate accountability for those responsible for arbitrary displacement of populations including non-state actors, multinational companies and private militia and security groups. States Parties are also obliged to provide

and to facilitate the provision of protection and assistance for IDPs and to promote self-reliance and sustainable livelihoods amongst IDPs.

- Article 3 further requires States Parties to incorporate Convention obligations into domestic law and to designate national authorities or bodies to ensure the implementation of such obligations. States Parties must also adopt other measures and strategies to advance the protection of IDPs including the mobilization of funds, including through international support for the realization of the obligations in the Convention. It is significant that the focus is not merely to react to but also to prevent the occurrence of displacement.
- **Article 4** sets out the obligations of State Parties specific to the provision of protection from internal displacement. States Parties undertake to respect their obligations under international law, international humanitarian law and international human rights law to prevent and avoid conditions that may trigger arbitrary displacement; to devise early warning mechanisms to avert or reduce risk in areas of potential displacement. Article 4 further proclaims the right of all persons to be protected against arbitrary displacement whether caused by deliberate or unintended state and or non-state actor action or by natural disasters. States Parties are thus obligated to protect everyone from displacement induced by exclusion and discrimination; armed conflicts or as a method of warfare; generalized violence, harmful practices or other violations of human rights; natural or man-made disasters; and caused by the use of displacement as a form of collective punishment.
- **Article 5** lays out the obligations of States Parties to protect and to provide assistance to IDPs. The article affirms that States Parties are the primary duty bearers with responsibility for providing protection and humanitarian assistance to IDPs. Accordingly, States Parties are to seek cooperation with other States Parties or the Conference of State Parties collectively; the UN, AU and other global and regional bodies including non-governmental organizations to assure protection and assistance to IDPs. The obligation to mobilize resources through international cooperation and support reduces the potential for denying responsibility on grounds of lack of resources. States Parties undertake to respect the right of IDPs to request or seek protection and assistance without fear of or actual backlash, persecution, prosecution or punishment. States Parties also commit to refrain from interfering with the provision of humanitarian support for IDPs and to prevent other actors including armed groups from interfering with the provisions of such support to IDPs.

- **Article 6** creates obligations for international organizations and humanitarian agencies in relation to the provision of protection and assistance to IDPs. The article asserts the duty of such organizations to respect the rights of IDPs and to operate based on the principles of humanity, neutrality, impartiality and independence.
- **Article 7** provides guidance for protecting and giving assistance to IDPs during armed conflict. It denies recognition and legitimacy to armed groups and individuals with criminal responsibilities under the guise of protection. This article further spells out the prohibited 'offences' that armed groups could fall foul of, including the interference with the protection of IDPs, recruitment of children in hostilities, kidnapping and similar actions. Although, addressed to third parties such as non-state actors, these provisions commit the States Parties for the prevention of these crimes against IDPs.
- **Article 8** sets out the obligations of the AU, restating the right of the AU to intervene within Member States in accordance with the AU Constitutive Act in cases of war crimes, genocide, crimes against humanity and in order to restore peace and security. Not only does this provision recognize the potential stabilizing role of the AU but also commits the AU to action including for the purpose of mobilizing resources for the benefit of IDPs.
- **Article 9** provides for the obligations of States Parties to protect and assist during internal displacement, notwithstanding the cause of the displacement. States Parties undertake to prevent all forms of discrimination against genuine IDPs of any background; prohibit and prevent international crimes, abduction, arbitrary killings, torture etc. Further, the article commits States Parties to a pledge to protect the rights (civil, political, economic and social) of IDPs within their territories.
- **Article 10** requires States Parties to prevent displacement caused by economic activities and projects whether by public or private actors. The State's duty to regulate the extractive and similar industries falls squarely in this category.
- **Article 11** addresses the duty of States Parties to tackle displacement by creating conditions for IDPs to voluntarily return and be reintegrated to the society or to be relocated. This article emphasizes the right of IDPs to make free and informed choices on the question of return. The right to property of IDPs is equally captured in this article, with the obligation of States Parties to establish mechanisms to resolve property disputes and to restore landed property upon return and reintegration.

- **Article 12** relates to the IDPs' right to appropriate remedies. Although, labelled compensation, this article opens with a commitment by States Parties to provide persons affected by displacement (not just IDPs) with effective remedies. In addition to just and fair compensation, other forms of reparation such as restitutions are contemplated. State Party liability to make reparation is not restricted to cases where state action triggers displacement but also when a State Party had refrained from protecting and assisting IDPs even in displacement caused by natural disasters.
- **Article 13** shifts focus to the duty of States Parties to ensure proper documentation of IDPs. Disaggregated data capturing is also essential here as the article obligates States Parties to attend to the specific needs of men, women and unaccompanied children, and to guarantee equal rights of each group to secure necessary identity documents in their own names.

The monitoring and supervision of implementation of the Kampala Convention is assigned to a Conference of States Parties established in article 14 of the Convention. This could be seen as self-regulation by States Parties.

The Conference of States Parties is also established as a platform for the mobilization of resources and for cooperation to address State obligations.

The African Commission on Human and Peoples' Rights also has a role to play in monitoring supervision as article 14 requires States Parties to speak to the measures taken to implement the Kampala Convention in their State Reports submitted in compliance with the reporting duties under the African Charter. It will be recalled that the State Reporting procedure under the African Charter is meant to be a forum for constructive dialogue and not an adversarial or confrontational fault-finding process.

Disputes or differences between States Parties touching on the interpretation or application of the Kampala Convention are expected to be settled amicably or referred to the yet-to-be established African Court of Justice and Human Rights. Until the Court is established (through a merger of the African Court on Human and Peoples' Rights and the African Court of Justice foreseen by a not-yet-to-be-in-force Protocol), such disputes shall be heard and resolved by the Conference of State Parties.

In the absence of provision for individual enforcement through a litigation or communications process, the use of shadow or alternative reporting as a tool for holding States Parties to the Kampala Convention to account remains the most viable option for CSOs and NGOs to contribute to the monitoring of implementation.

The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa has been signed by 40 out of the 55 Member States of the AU. As at July 31 2018, this Convention has been ratified by 27 AU Member States. The States that have ratified the Convention and can be held account for violating its provisions are: Angola; Benin; Burkina Faso; Cameroon; Central African Republic; Chad; Côte d'Ivoire; Congo; Djibouti; Gabon; Gambia; Guinea Bissau; Lesotho; Liberia; Mali; Malawi; Mauritania; Nigeria; Niger; Rwanda; Sahrawi Arab Democratic Republic; Sierra Leone; Swaziland; Togo; Uganda; Zambia and Zimbabwe.

iv) Other Regional Instruments with Implications for Human Rights

Apart from the human rights focused regional instruments discussed above, there are a number of other treaties adopted on the auspices of the OAU/AU which protect human rights or touch on the protection of human rights. Such instruments can either be invoked directly or used to support claims before regional human rights bodies. This section introduces the most important of those instruments.

c) The Convention Governing Specific Aspects of Refugee Problems in Africa (Refugee Convention)

This is the first regional treaty relating to human rights issues adopted by the defunct OAU. The Refugee Convention was adopted on 10 September 1969 and entered into force on 20 June 1974 when a third of the Member States of the OAU (at the time) ratified the Convention and deposited their instruments of ratification. The African Refugee Convention takes after the 1951 UN Refugee Convention and its 1967 Protocol in a number of ways but has the distinction of a broader definition of who a refugee is. Six out of the 15 articles of the Convention lay out rights of refugees or duties that States Parties owe to refugees.

- **Article 1** of the African Refugee Convention in paragraph (1) *inter alia* defines a refugee to mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality owing to such fear and is unable or unwilling to avail himself of the protection of that country. This tracks closely the definition under the UN Convention and Protocol. The African Convention however goes on in paragraph (2) to expand this

definition to include every person who is compelled to leave his usual country residence as a result of external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality.

In addition to setting out the conditions on which the African Refugee Convention ceases to apply to a person who was considered a refugee, article 1 of the Convention emphasizes that the Convention shall not apply to any person that the receiving State has serious reasons to consider to have committed a crime against humanity, a war crime or a crime against humanity as defined in international law; or to have committed a serious non-political crime elsewhere prior to acquiring refugee status or is guilty of acts contrary to the purposes and principles of the AU or the UN.

- **Article 2** commits OAU Member States to receive refugees and to aid the settlement of refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality. The article equally prohibits the rejection, return or expulsion of a potential refugee or a refugee where a such person is likely to face threats to life, physical integrity or liberty. OAU Member States are required by the Convention to seek the assistance of other Member States in situations where the asking State is genuinely unable to accommodate an asylum seeker.
- **Article 3** imposes a duty on every refugee to respect the laws and regulations of the State that accommodates him and obligates States Parties to prohibit subversive activities by refugees.
- **Article 4** expresses an undertaking by States to apply the Convention without discrimination.
- **Article 5** sets out conditions for voluntary repatriation of refugees. It emphasizes that repatriation of refugees must be voluntary and returning refugees shall not be penalized but shall be entitled to receive support from the State of which he is a national.
- **Article 6 requires AU Member States to provide relevant travel documents to aid the movement of asylum seekers and refugees.**

The African Refugee Convention has no specific provisions relating to the monitoring or supervision of its implementation. Instead, article 9 stipulates that disputes between States Parties relating to the interpretation or application of the Convention which cannot otherwise be settled shall be referred to a Commission for Mediation, Conciliation and Arbitration of the OAU.

Under the AU regime, as a result of its broad mandate the African Court on Human and Peoples Rights can be approached to determine if a State has violated the African Refugee Convention. The Convention may also be used to buttress violations of the African Charter in communications before the African Commission.

42 African States signed the Refugee Convention. As at 31 July 2018, a total 46 States had ratified the Convention. States that have ratified the Convention are: Algeria; Angola; Benin; Botswana; Burkina Faso; Burundi; Cameroon; Central African Republic; Cape Verde; Chad; Côte d'Ivoire; Comoros; Congo; Democratic Republic of Congo; Egypt; Equatorial Guinea; Ethiopia; Gabon; Gambia; Ghana; Guinea Bissau; Guinea; Kenya; Libya; Lesotho; Liberia; Mali; Malawi; Mozambique; Mauritania; Nigeria; Niger; Rwanda; South Africa; Senegal; Seychelles; Sierra Leone; South Sudan; Sudan; Swaziland; Tanzania; Togo; Tunisia; Uganda; Zambia; and Zimbabwe

PART THREE

6. Mechanisms for Human Rights Protection in Africa

States adopt, sign and ratify international human rights instruments. Therefore, States also bear primary obligation for the implementation and actualization of the rights guaranteed in those instruments. However, the responsibility for ensuring that human rights promises and guarantees translate into actual practical benefits is often shared. As the parties to human rights instruments, States are expected to give domestic effect to those instruments through the adoption of *legislative* (laws) and *other measures* (adoption of policies, creating and empowering national rights supervisory institutions including courts). However, States generally also establish and authorize certain international bodies or institutions to facilitate collective supervision of the implementation of human rights instruments.

In Africa, there are currently two kinds of such bodies and institutions: i) Regional Human Rights Supervisory Mechanisms established by treaty to supervise States' implementation of one or more human rights instruments; and ii) Inter-national judicial bodies established by small groupings of States for other general purposes but authorized or allowed to receive and determine complaints of human rights violations against State members of the group. In either case, the task of the supervisory or monitoring body is to track, identify and ascertain whether and when a given State has failed or neglected to fulfil its obligations under the relevant instrument in question, and if so to make findings and conclusions, usually public, and (for the treaty bodies) make recommendations for responding to the violations or (for judicial bodies) provide accountability and effective remedy and redress through judgments, orders and other legal measures.

A. Continental Mechanisms

a) The African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights (**African Commission or the Commission**) is a quasi-judicial body⁴⁵ established in article 30 of the African Charter to promote and ensure the protection of human rights in Africa. Although, it operates as a single unified institution, the African Commission has a political arm (consisting of eleven (11) mandate holders and a Secretariat (made up of the Secretary of the Commission and professional, technical and administrative staff). In order to successfully engage

⁴⁵ A quasi-judicial body is a body that is not a court but carries out functions that are similar to the functions carried out by courts or operates in ways similar to the way courts operate.

with the African Commission, individuals and organisations interact with both the mandate holders (individually or collectively as the case may be) and the Secretariat (as a unit).

The Commission (political – mandate holders)

The political arm of the African Commission comprises eleven African personalities⁴⁶ who, as the political mandate holders, are addressed as Members of the Commission or Commissioners. Each Commissioner is affirmed to be a personality 'of the highest reputation' known for 'high morality, integrity, impartiality and competence in matters of human and peoples' rights'. Although, preference is given to persons with a legal background, this is not an absolute requirement for nomination. Commissioners are nominated by State Parties⁴⁷ to the African Charter and elected in secret ballot by the AU Assembly, usually to serve for renewable terms of six years.⁴⁸ Once elected, a Commissioner is expected to serve in his or her personal capacity so that his or her allegiance is owed to the peoples of Africa and the continental bodies rather than to individual States. As such, the Commission insists that in order to avoid interference with the independence and impartiality of Commissioners, persons holding politically binding national offices such as Ministers, Under-Secretaries of State, Diplomats or similar positions cannot be suitable nominees for Membership.

For purpose of leadership, the Commissioners elect a Chairperson and a Vice Chairperson from among themselves to serve for a renewable term of two years. The Chairperson and the Vice Chairperson make up the Bureau of the Commission and provide political leadership for the Commission during their tenure. Members of the Commission (including the Bureau) serve part time in their role as Commissioner, retain their regular jobs and are generally based in their normal places of residence.

⁴⁶ The African Charter requires that African personalities may be nominated and elected to the Commission. States can only have one national at a time as a member of the Commission but a state party to the Charter can nominate an African from another state.

⁴⁷ A state is a party to the Charter if that state has ratified the Charter and accepted to be bound by the provisions of the Charter.

⁴⁸ See also ICJ and OSJI, *Strengthening from Within: Law and Practice in the Selection of Human Rights Judges and Commissioners* (2018), <https://www.icj.org/wp-content/uploads/2017/11/Universal-Strengthening-from-Within-Publications-Reports-2017-ENG.pdf>.

Although, CSOs and NGOs have no formal part in the nomination and election of members of the African Commission, African CSOs and NGOs closely monitor the process to ensure that government apologists and persons with anti-human rights views are not nominated or elected to the Commission. CSOs and NGOs track the process to know who is being nominated from their country of operation and where deemed necessary, some may inform other organisations in their networks to campaign against an undesirable candidate. Where unqualified and or undesirable candidates are nominated, some CSOs and NGOs may lobby governments to ensure that such candidates are not elected to the Commission. By doing so, CSOs and NGOs contribute to maintaining the integrity of the Commission and the legacy that has been established over the years of its existence.

The Secretariat of the Commission⁴⁹

The Secretariat which is the engine room of the Commission is headed by the Secretary who is appointed by the President of the AU (formerly, the Secretary-General of the OAU). The Secretariat also comprises professional, technical and administrative staff employed by the AU to assist the Commission in carrying out its mandate. Under the leadership of the Secretary, the Commission's Secretariat keeps the records of the Commission, conducts communications on behalf of the Commission and (in consultation with the Chairperson of the Commission) prepares the draft agenda of each session of the Commission, prepares the budget, strategic plan and annual work plan of the Commission, prepares guidelines for missions, maintains the website of the Commission and works with the Commissioners to prepare the reports of the Commission and of individual Commissioners. The Secretariat also plays a major role in the organisation of statutory meetings of the Commission and is responsible for the accreditation of delegates or participants to sessions of the Commission.

Legal officers who form part of the professional staff in the secretariat of the Commission act as assistants to the Commissioners in their execution of the Commission's legal mandate. The Secretariat of the Commission is based in Banjul, the Gambia and functions full time.

The Secretariat is the link between the Commission and its users, including CSOs and NGOs. Generally, staff of the Secretariat communicate with users under strict conditions

⁴⁹ See art 41 of the African Charter.

since staff members are bound by the confidentiality rule that binds aspects of the work of the Commission. However, the Secretariat is available to supply information, guidance and relevant public documents to individuals and organisations engaging with the Commission. Requests and applications (as the case may be) should normally be sent to the Secretary of the Commission by email or post. The Secretary usually assigns a legal officer (normally the legal officer assisting the Commissioner responsible for the theme or country in question) to treat relevant requests. The Commission insists that individuals and organisations must show professionalism and respect in communicating with the Secretariat.

The African Commission in Summary

- Quasi-judicial body established in article 30 of the African Charter
- Composed of eleven (11) African personalities of high moral standing
- Has a Secretariat comprising of the Secretary and other professional and administrative staff.

Mandate and functions of the African Commission:

The African Commission's mandate to promote and ensure the protection of human rights in Africa is captured in the following functions as spelt out in the African Charter:⁵⁰

- i) Promote human rights through the collection of relevant documents; undertaking and commissioning studies and research on Africa-specific rights issues; organisation of seminars; symposia and conferences on human rights; dissemination of information; encouraging and facilitating the work of national institutions and advising governments on human rights issues; expansion of the scope of the Charter through the adoption of principles and model laws to guide national legislations and cooperation with African and international human rights bodies;
- ii) Protect human rights under conditions laid out in the Charter including through the consideration of state reports, the determination of communications and engagement with states;

⁵⁰ Art 45 of the African Charter.

- iii) Interpretation of the African Charter at the request of a state party or relevant institutions.

Functioning and activities of the African Commission:

Since the political arm of the Commission only operates part time, the business of the Commission is usually conducted in statutory meetings (known as Sessions). The Commission meets in two Ordinary Sessions per year – (around April/May and October/November) for a period of two weeks each and (if need be) in Extraordinary Sessions – generally convened at the request of the Chairperson or a majority of Members of the Commission. The Chairperson of the African Union Commission may also request the African Commission to convene an Extraordinary Session.

Sessions of the Commission are usually held in Banjul, the Gambia (where the Secretariat of the Commission is located) or in the territory of another State Party that extends an invitation to the Commission to that effect. States Parties under suspension of the AU are usually not allowed to host the Commission until the suspension is lifted. One of the advantages of rotating the hosting of the Sessions is that small NGOs, CSOs and other community-based organisations that are unable to travel to far-away sessions, are afforded the opportunity of participating at Sessions hosted in their country of operation. Massive participation by organisations in this category often allows local human rights issues to be mainstreamed and brought to the attention of the regional and global human rights communities even if such issues have previously been missed by or discountenanced.

The agenda for each Session is drawn up by the Secretary of the Commission in consultation with the Bureau of the Commission. Where the need arises, the Commission may also hold joint sessions with other African human rights mechanisms such as the African Court on Human and Peoples Rights and the African Committee of Experts on the Rights and Welfare of the Child. Ordinary Sessions of the African Commission are divided into public sessions (which are open to the public at which CSOs and NGOs are invited to participate) and private sessions at which only Commissioners and the Secretariat participate. Since Extraordinary Sessions are private sessions, governments and organisations are generally not invited to attend and have no opportunity of proposing issues to be included in the agenda.

CSOs and NGOs with observer status at the African Commission may propose items to be considered for inclusion in the provisional agenda of Ordinary Sessions of the Commission. This is an important opportunity for such organisations to bring thematic, country-specific or even administrative matters to the attention of regional and global human rights communities. In this way, matters that have fallen through the cracks of the attention of the regional and global human rights communities can be given additional impetus by inclusion in the agenda of the Commission.

In the periods between Sessions (the inter-session period), the Secretariat carries on the day to day business of the Commission not requiring specific action by the political mandate holders. Where a matter requiring the attention of the Commissioners arises in the inter-session, the Chairperson of the Commission is usually authorized to act on behalf of the Commission especially in situations of emergency. While the Commission meets as a unit during Sessions, Commissioners (either individually or in groups) engage in various activities and undertake visits/missions in the inter-session period.

In the inter-session period, CSOs and NGOs may participate in activities of the Commission or in activities involving Members of the Commission. Activities of the Commission during the inter-session may include protective, promotional and fact-finding missions. Activities involving Members of the Commissions include conferences, seminars and workshops hosted by the Commission, similar activities hosted by the CSO or NGO in question (at which the Commissioner(s) is invited) or hosted by another CSO or NGO. Urgent human rights matters can be sent to the Secretariat of the Commission at any time including during the inter-session. This includes requests for provisional measure(s) or urgent appeals to the government(s) of State Parties to avert action likely to result in or bring about irreparable human rights harm or damage.

Special Mechanisms and Country Rapporteurs

In order to increase its effectiveness in spite of the relatively small number of political mandate holders, the African Commission works in plenary, in groups and individually. Commissioners work in plenary mostly during Ordinary and Extraordinary Sessions. In the inter-session, Commissioners operate individually either as **Country Rapporteurs**,

holders of specific mandates commonly known as **Special Mechanisms** or as part of a team of Commissioners that hold a specific mandate as a Special Mechanism.

The African Commission has three kinds of Special Mechanisms. There is the **Special Rapporteur**, who is an individual Commissioner holding a specific mandate in a thematic area. The Special Rapporteur has the task of advancing the relevant thematic area by (among other things) working closely with organizations with interest in the area. A Special Rapporteur also seeks and receives information relevant to the thematic area from stakeholders including governments and their agencies as well as CSOs and NGOs. The Commission currently has a Special Rapporteur on **Freedom of Expression and Access to Information**; a Special Rapporteur on **Prisons, Conditions of Detention and Policing in Africa**; a Special Rapporteur on **Human Rights Defenders**; a Special Rapporteur on **Refugees, Asylum Seekers, Migrants and Internally Displaced Persons** and a Special Rapporteur on **the Rights of Women**.

Another type of special mechanism by which the African Commission carries on its work is the **Working Group** – which is a group of Commissioners (usually with some external independent members) assigned responsibility for deeper work in a thematic area. A Working Group of the Commission undertakes studies and research on behalf of the Commission, gathers and collates information, formulates appropriate recommendations to the Commission for improving the protection of rights in the thematic area and collaborates with donors and civil society.

The Commission currently has Working Groups in the following areas: *Economic, Social and Cultural Rights*; *Death Penalty and Extra-judicial, Summary or Arbitrary Killings*; *Indigenous and Communities on Africa*; *Older Persons and People with Disabilities*; and on *Extractive Industries, Environment and Human Rights Violations*.⁵¹ **Committees** are not very different from Working Groups of the Commission: each comprises more than one Commissioner (and occasionally with independent expert members) broadly mandated within a specific thematic area to undertake studies and research, gather and collate information and function in the manner the Working Groups function. Existing Committees include the Committee on the Prevention of Torture; and the Committee on the Protection of the Rights of People living with HIV and those at Risk, Vulnerable to and Affected by HIV. Working Groups and Committees commonly also undertake fact finding missions.

⁵¹ There are also two administrative working groups. Those are the Working Group on Specific Issues Related to the work of the African Commission and the Working Group on Communications.

Commission Activities during Sessions:

The African Commission performs some of its treaty functions during its Sessions. They include: consideration of communications; consideration of state reports; adoption of resolutions, declarations, guidelines, general comments and model laws; consideration of reports.

Communications:

The African Commission is mandated to receive and consider complaints alleging human rights violation(s) by State Parties to the African Charter. Such complaints are known as communications (instead of case(s) even though like cases in a court of law, communications are determined in adversarial format by the Commission).⁵² Communications may either be **inter-state communications** (submitted by one or more States against another one or more States) or “other” communications (also known as **individual communications**) submitted by an individual, group of individuals or an organisation (CSO or NGO) against a State or group of States. Submitted communications pass through a process that culminates in a decision by the Commission. Final decisions of the Commission are known as **Recommendations**. The recommendations resemble judgments in many respects. They are made after consideration of the facts and law submitted by both parties. If the Commission finds (agrees) that the Respondent (State) violated the right(s) as alleged, the Recommendation will include action(s) required to be taken by the State Party to remedy the violation and this may include payment of compensation. However, unlike court judgments and orders, decisions of the Commission culminate in public recommendations, which are generally not considered as legally binding in themselves.

Nevertheless, State Parties are expected to implement the decisions of the Commission as part of the State’s overall obligation to give effects to the rights in the African Charter. In any case, Recommendations of the African Commission become formally and legally binding after they are included in the Commission’s Annual Activity Reports submitted to the AU Assembly, are adopted by the Assembly and published.⁵³

⁵² Adversarial format means the Commission sits like a court with both parties – the party alleging the violation (the Applicant) and the accused state (the Respondent) presenting their facts and law for consideration by the Members of the Commission. The presentation of fact and law is usually in the form of a written memorandum but may also involve oral presentation.

⁵³ See for instance, F Viljoen, *International Human Rights Law in Africa* (Oxford University Press) 339.

The communications process (Individual or Other Communication)

Complaints alleging human rights violations by a state party to the African Charter (a **communication**) can be sent to the Secretariat of the African Commission by email or by post. A communication can be sent either by the victim(s) of the alleged violation(s) or by an CSO or NGO acting on behalf of such victim(s). Communications sent by email have become more common and are easier to trace and track. When a communication gets to the Secretariat of the Commission, such a communication is **registered** in the Register of Communications before a letter acknowledging receipt of the communication is sent to the Applicant. In order to be formally considered by the Commission, a summary of the communication has to be presented to the Commission by the Secretariat and majority of the Members of the Commission need to be satisfied that the complaint is brought against a State Party to the African Charter and that it relates to matters of human rights guaranteed under the Charter. This is called the **Seizure** stage. Once the Commission decides to be seized of the matter, notification is sent to both the Applicant (individual or CSO/NGO) and the Respondent (State) to request the parties to prepare their arguments on admissibility within a time frame. **Admissibility** is based on criteria set out in art 56 of the African Charter that the i) the author of the communication must state his name even if he/she requests anonymity; ii) the communication must be compatible with the AU Constitutive Act and the African Charter; iii) must not be written in disparaging language; iv) must not be based exclusively on news from the mass media; v) must have been sent after local remedies at the national level have been exhausted unless such remedies are unavailable or unduly prolonged; vi) must have been submitted within a reasonable time from when local remedies were exhausted or the violations occurred (if no local remedies are available); and vii) must not deal with cases that have already been settled in accordance with principles of the Charter of the UN or the AU or the African Charter. The Applicant must address all these requirements in his/her arguments to the Commission on admissibility as the Respondent will also try to show that one or more of these conditions have not been met. If the Commission rules that the communication has satisfied the conditions, it will rule that the communication is admissible and will notify the parties and invite them to submit their arguments on the merits of the complaint. At this **Merit** stage, the Applicant must satisfy the Commission with credible documentary or oral evidence (where needed) that the facts alleged are true and those facts amount to a violation of the Respondent (state)'s obligations under the African Charter. At any stage after seizure of a communication, the African Commission makes its 'Good Offices' available to parties who are interested in pursuing amicable resolution or **friendly settlement** of the matter. This

is where the Respondent is willing to admit that a violation occurred and is willing to remedy the wrong without passing through all the remaining stages of the complaints procedure. Where the option of amicable settlement is not taken, the Commission proceeds to consider the merits of the substantive issues and claims in the communication in order to come to a final decision or **recommendation**. At any stage after seizure, the Commission may make an order for **interim or provisional measures** requiring the Respondent (state) to do or refrain from doing something for the purpose of preventing irreparable loss or damage.

State reporting:

Article 62 of the African Charter obligates each state party to the Charter to submit once in every two years, a report detailing the legislative and other measures taken by that State to give effect to the Charter. These reports are now known as **state reports** and have crystalized into reports which the African Commission claims authority to receive and consider during Sessions in the course of a dialogue with the reporting State. State reporting obligations also exist in instruments such as the *Protocol to the African Charter on the Rights of Women in Africa*. The Commission sees the state reporting process as a 'forum for constructive dialogue' with State Parties by which the implementation of the Charter is monitored using the State's own documentation of its Charter-related achievements, challenges and failures within the reporting period.

State reports are of two kinds: a) **initial reports** (due two years after the Charter enters into force in respect of the reporting State) and b) **periodic reports** (due every two years after the submission of the reporting State's initial report).

Following a format prescribed in the Commission's Guidelines for State Reporting, States prepare and submit reports to the Commission ahead of the Session in which the report is to be considered. Reports received by the Commission are uploaded on the Commission's website along with an indication of the date or session at which the report will be examined. This allows organisations and institutions interested in the report and in making contributions to access the report. Interested CSOs and NGOs submit

contributions to fill in gaps in the state's report⁵⁴ or to give the Commission materials with which to engage the reporting State during the examination of that State's report. Contributions can be in the form of a **shadow report**⁵⁵ which must reach the Secretariat of the Commission at least 60 days before the date the State report is to be examined.

During the examination of a State's report, officials of the State are usually present to respond to questions from Members of the Commission seeking to clarify issues in and aspects of the report. The Commission explores all 'pertinent information relating to the human rights situation in the State concerned' and applies statements and shadow reports from National Human Rights Institutions and CSOs/NGOs to formulate the questions that it poses to the State. At the end of the consideration of a State's report, the Commission formulates **Concluding Observations** detailing issues that require urgent attention as well as the Commission's recommendations for improved implementation which the reporting State is expected to implement. Members of the Commission follow-up in the course of their promotional and other visits to the State to encourage implementation of the Concluding Recommendations.

The African Commission encourages State Parties to involve National Human Rights Institutions and human rights CSOs/NGOs operating in the State in the compilation of the State report to be submitted to the Commission. In States where the authorities are willing to do so in good faith, the compilation of the State report can present an opportunity for CSOs and NGOs to collaborate positively with government to identify issues and areas of urgency in the implementation of the African Charter.

Whether or not the State is not willing in good faith to involve civil society in the compilation of the State report, the window of **shadow reporting** provides another opportunity for civil society, especially CSOs and NGOs to gather, collate and present credible information on the implementation of the Charter in the State in question. Although, individual cases of human rights violation may feature in such shadow reports, the main focus is on ensuring that the Commission has a full picture of the overall situation of implementation in the country, and/or in-depth information about patterns or systemic issues on certain themes. Highly detailed descriptions of individual cases with

⁵⁴ In their anxiety to preserve reputation as rights-friendly states, it is common to find that states under-report shortcomings they have had in implementation of the Charter while exaggerating achievements. This defeats the purpose of state reporting as it would ordinarily leave the Commission with an incorrect picture of the state of implementation of the Charter in that state. The alternative reports presented by CSOs and NGOs provide the Commission with information to have a complete and more accurate picture of the state of implementation.

⁵⁵ A shadow report is a report on the situation of human rights in a given state over a specific period, compiled and submitted by a body other than the government. Usually, shadow reports are submitted by CSOs and NGOs.

the aim of producing quasi-judicial findings and case-specific recommendations will in most cases be more effectively pursued through the communications process. In order to ensure a comprehensive shadow report, CSOs and NGOs stand a better chance when they work in networks. Some NGOs find that producing targeted materials that will allow the Commission to engage in constructive dialogue with the affected State can be an effective strategy. An approach that aims at constructive engagement can allow the Commission to offer positive support to the State to improve implementation of the Charter, and in the long run, may also steer State Parties away from adopting a defensive posture in the state reporting process. On the other hand, some CSOs and NGOs may feel they get the most leverage by seeking to have the outcome of the state reporting process be a rare moment in which the government is formally confronted by official findings that contradict otherwise distorted official narratives. NGO and CSO engagement at the Commission represent a diversity of approaches and themes depending on the circumstances of different States (or, sometimes even a diversity of approaches or themes in relation to the same State).

In situations where a State persistently refuses to submit the statutory report, an emerging advocacy strategy to pressurize the State into action is for civil society to compile and submit an **alternative report** which is a CSO/NGO account of the state of implementation of the Charter in the State in question. An alternative report is not dependent on the State's own report and is therefore, not reactive. Ideally, it contains civil society's account of the state of implementation of the African Charter, highlighting the achievements and challenges of the affected State Party as recorded by the CSO/NGO through its own methods of data collection. Although, there is no guarantee that the submission of an alternative report will trigger a response from the State Party, it provides the Commission with a basis to press the State Party to live up to its reporting obligations.

Resolutions (including Declarations, General Comments and Guidelines)

During its Sessions, the African Commission also adopts Resolutions in line with its mandate to 'formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights'. Resolutions of the Commission may be **administrative** (dealing with procedural issues, the Commission's internal mechanisms and its relationship with other bodies and organisations including especially CSOs and NGOs); **country-specific** (dealing with human rights issues affecting or connected to a particular State including the general situation of human rights in a State); or **thematic**

(relating to specific human rights themes or substantive human rights content(s) in the African Charter).

Although, Resolutions of the African Commission did not initially attract the required respect from State Parties based on the argument that they did not constitute part of the African Charter, the Commission has applied Resolutions over the years to expatiate on the substantive provisions of the Charter, clarify its understanding of the obligations of States under the Charter, create and establish its special mechanisms and appoint member(s) to such mechanisms, and address specific issues or the general human rights situation in given States. Principles and rules set out by the Commission may also take the form of **Declarations, General Comments** and **Guidelines**. In some cases, the Commission has also adopted **model laws** to encourage national legislative action at a level closer to victims of human rights. States are required to take legislative initiative inspired by such model laws.

With General Comments and Guidelines, the Commission is able to make progressive but necessary improvement in the scope of Charter rights. Increasingly governments of State Parties are paying attention to the Resolutions and other authoritative statements of the Commission as civil society applies these principles and rules in national and regional advocacy and in holding States to account.

Civil society plays a critical role in triggering the Commission's adoption of resolutions, declarations, general comments and guidelines. In addition to raising issues for the Commission to consider in greater depth that can lead to any of these outcomes, CSOs and NGOs are able to undertake preliminary research upon which the Commission's work may be based. With respect to country-specific resolutions, the submission of complaints of general and widespread violations of rights in a given State (supported by credible and verifiable facts/evidence) is one of the more common bases on which the African Commission is able to kick-start further investigation that leads to the adoption of such resolutions.

Organisations working on thematic issues are also able to push for the adoption of thematic resolutions, general comments on specific Charter provisions, guidelines and model laws focusing on themes in their areas of work. Such organisations are able to draw the Commission's attention to areas of difficulty or areas requiring clarifications or improved definition of state obligation.

Commission activities during the inter-session period

Missions

Inspired by article 46 of the African Charter which authorizes the Commission to 'use any appropriate method of investigation' in the execution of its mandate, the African Commission embarks on missions to State Parties as another means to promote and ensure the protection of human rights in Africa. Missions may either be protective or promotional and generally creates opportunity for the Commission to meet at a more personal level with officials and other stakeholders in a State.

A **Protective mission** which can either an on-site mission or a fact-finding mission, is undertaken in furtherance of the Commission's protective mandate. Where a number of communications have been submitted against a State Party, the African Commission may decide to embark on an **on-site mission** to 'explore avenues for amicable settlement' or 'to investigate specific facts relating to the communications'. In contradistinction, where allegations of a general pattern of serious and widespread violations of rights exist against a State Party, the Commission may undertake a **fact-finding mission** to investigate such allegations in greater depth. The Commission emphasizes that no prior formal communications need to have been brought against a State to trigger a fact-finding mission to that State.

Promotional missions on the other hand, are visits to State Parties undertaken by the Commission or sections of the Commission (e.g. its special mechanisms) to create or improve awareness on the African Charter and the workings of the African regional human rights system. During such promotional visits, the Commission also encourages States which have not already done so, to ratify the Charter or other relevant human rights instruments. Promotional visits are also applied to persuade States to comply with their reporting and other obligations under the African Charter. The African Commission generally secures the permission of the State concerned before it embarks on a mission.

CSOs and NGOs have significant roles to play in this area of the work of the Commission. In relation to on-site missions, the CSO/NGO that has brought a communication on the basis of which a mission is scheduled has to mobilize victims and other stakeholders necessary to give the Commission a clear picture of the entire issues at stake. Even where an organisation has not been directly responsible for bringing the communication, it can assist in facilitating the attendance of similarly situated victims who were not or have not been able to bring a complaint before the Commission.

CSOs and NGOs before the African Commission

One of the ways in which the African Commission has multiplied its influence and effectiveness in national spaces despite its relatively small size is that it collaborates with governmental and non-governmental institutions that share its objectives and work within States. CSOs and NGOs represent a critical constituency in this regard. They are simultaneously partners with the Commission and a major constituency to which the Commission is accountable. Civil society engagement with the African Commission may be formal or informal and takes place during sessions and in the inter-session period.

Generally, no special qualification is required for CSOs and NGOs to engage with the Commission in a number of areas. For instance, any organisation can submit communications to the Commission on behalf of victims of human rights violations. However, in order to be entitled to formal invitation to activities of the Commission such as Sessions or be eligible to propose items for inclusion in the agenda of a Session, make statements at public sessions, take a case directly to the African Court of Human and Peoples Rights (African Court or ACTHPR),⁵⁶ contribute materials for the formulation of questions for engagement with reporting states or make other formal contributions to the work of the Commission a CSO or an NGO requires official recognition as an organisation with **observer status** before the African Commission. Observer status is granted by the Commission upon application by an interested organisation which meets the criteria set by the Commission.

While any CSO or NGO working in the field of human rights in Africa may engage directly with the Commission, experience has shown that periodic collective engagement with the Commission gives civil society a stronger and more legitimate voice that neither the African Commission nor State Parties can ignore. Thus, over the years, CSOs and NGOs have established a forum – the NGO Forum – hosted by the African Centre for Democracy and Human Rights Studies (ACDHRS) for the purpose of networking and collective engagement with the Commission. Usually convened a few days before the official commencement of Ordinary Sessions of the Commission, the NGO Forum provides opportunity for organisations to discuss pressing human rights issues across thematic lines, receive and consider reports on the human situations from countries and regions in Africa and present a joint statement to the African Commission on the state of human rights in Africa and implementation of the African Charter. The Forum also gives smaller and new organisations, especially organisations without observer status with the Commission, a voice to air pressing matters of human rights concern. Some of the

⁵⁶ There are other conditions that have to be met before a case can be brought before the African Court. These are discussed in this handbook under the African Court.

resolutions eventually adopted by the Commission originate from the Forum as matters of concern raised and exhaustively discussed by civil society. The Forum also provides opportunity for interaction with direct contact with the Commission as it is common for some Members of the Commission to attend sessions of the NGO Forum.

In 2016, reacting to the African Commission's grant of observer status to an NGO that works in the area of sexual minority rights in Africa, the AU Assembly of Heads of State and Government took the unprecedented step of directing the African Commission to withdraw the status granted to the NGO and to review the criteria for the grant of observer status. Following the Assembly's directive, the African Commission released new criteria for the grant of observer status. At the very least, the directives of the AU Assembly amount to unacceptable interference of a political organ in the work of the African Commission - a quasi-judicial human rights body which is supposed to be independent. With the new criteria, the AU is not only seeking to control and complicate the process for the grant of observer status to new applicants, but may well be targeting human rights defenders for reprisals for their work. This posture of the AU and its political organs fall short of global human rights standards and seeks to undermine the gains that have been made in the African human rights system under the leadership of the African Commission.

New criteria for the grant of observer status were released by the African Commission in 2016, taking into account the 'advice' by the AU's Executive Council in Decisions Ex.CL/887(XXVII) and EX.CL/Dec.902(XXVIII)Rev.1

In demanding for a review of the criteria for grant of observer status, the Executive Council of the African Union placed emphasis on 'fundamental African values, identity and good traditions' and the need to review criteria for 'representation ... by non-African individuals and groups'.

Applicants for observer status are required to submit 'documented application' (application in writing) to the Secretariat of the Commission and must show willingness and capability to work realization of the objectives of the Charter. Applications must be sent at least three months before the session

To qualify for consideration, an organisation must be a player in the field of human rights with objectives and activities in consonance with the principles and objectives in the AU Constitutive Act; African Charter and the Protocol to the African Charter on the Rights of Women in Africa. An applicant must submit a signed and authenticated copy of its Constitutive Document; a Certificate of Legal Status issued by government in the relevant state; and a List of its Board Members and other members.

Other required docu

ments include a declaration of financial resources; a statement of the sources of funding of the NGO; the latest independently audited financial statement of the applicant-organisation; a two-year comprehensive Plan of Action or Strategic Plan of the NGO and the latest Annual Activity Report of the applicant. Applications are considered during the public session of the Ordinary Session

a) The African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights (the African Human Rights Court) is another continental institution established and empowered by African States to supervise the implementation of the African Charter and other relevant human rights instruments. The original idea of creating an African Court to supervise the protection of human rights on the African continent first emerged in 1961 at a conference organized in Lagos by the International Commission of Jurists (ICJ).

However, at the time the African Charter was drafted, African governments were not ready to establish a regional judicial mechanism for enforcement of human rights. Accordingly, the Charter established the African Commission⁵⁷ to supervise implementation of the Charter. Decades afterwards, building on the positive contributions that the African Commission has made to the promotion and protection of human rights in Africa, advocacy for the establishment of a regional human rights court gathered pace.⁵⁸

Spurred by a desire to improve the effectiveness of the African human rights system, the African Commission with the collaboration of civil society convinced African governments to consider the establishment of an African human rights court to reinforce the protection mandate of the Commission.⁵⁹ At a 1994 meeting of the OAU Assembly of Heads of State and Governments, the decision was made to commission a study to 'ponder ... over the means to enhance the efficiency of the African Commission and to consider ... the establishment of an African Court of Human and Peoples' Rights'.

In June 1998, the Protocol to the African Charter on Human and Peoples' Rights Establishing the African Court on Human and Peoples' Rights (the African Court Protocol or the Protocol) was adopted. Unlike the African Commission which acquires jurisdiction over a State automatically once the State ratifies the African Charter, the African Human Rights Court acquires jurisdiction over a State only when a State Party to the African Charter separately ratifies the African Court Protocol. In January 2004, the African Court Protocol entered into force when the required minimum number of ratifications was attained.⁶⁰ In 2006, the African Human Rights Court was inaugurated with the swearing in of its first set of judges.

The Court is established to complement the protection mandate of the African Commission and is supposed to be an expression of the determination of Africa's leaders to address the challenges associated with quasi-judicial supervision of the implementation of the African Charter. Accordingly, the African Court on Human and Peoples' Rights is mandated to undertake judicial supervision of States Parties' implementation of the African Charter.

⁵⁷ Discussed in the pages above.

⁵⁸ Regional human rights courts existed in the Americas and Europe at the time the African Charter was adopted and this served as models by which the African human rights system was measured.

⁵⁹ Detailed accounts of the history of the African Court can be found elsewhere.

⁶⁰ As at June 2018, thirty (30) AU Member States had ratified the African Court Protocol. The current States Parties to the Protocol are Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Cote d'Ivoire, Comoros, Congo, Gabon, the Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Niger, Nigeria, Rwanda, South Africa, Sahrawi Arab Republic, Senegal, Tanzania, Togo, Tunisia and Uganda.

The Court

Established in article 1 of the African Court Protocol, the African Human Rights Court is composed of eleven (11) judges each of whom is a national of a Member State of the African Union. Judges of the Court are jurists of high moral character recognized for 'practical, judicial or academic competence and experience in the field of human and peoples' rights'.⁶¹ The judges are elected in secret ballot, by the AU Assembly from a list of candidates nominated by States Parties to the Court's Protocol.⁶² No two nationals of any State may be elected to the Court at the same time and attention is given to gender and geopolitical spread. Judges hold office for a six-year term renewable only once. Other than the President of the Court who is full time and resides in Arusha, Tanzania where the Court is located, judges of the African Court hold office on a part-time basis. Accordingly, the Court conducts its business in ordinary sessions which take place four times a year, lasting 15 days at a time. Extraordinary sessions may also be called by the President of the Court. The African Human Rights Court is administered by a bureau comprising of the President and Vice President, both of whom are elected by their fellow judges to serve for a once-renewable term of two years.

Although they are nominated by the States Parties, the judges serve in their personal capacities and are required to be independent and impartial in the performance of their judicial functions. For instance, a judge of the Court may not hear a case in which he has previously acted in some role and a judge may not participate in the hearing of a case involving the State of which he is a national.

CSOs and NGOs currently do not play a formal role in the nomination and election of judges to serve at the African Court. However, civil society actively monitors the process of nomination and election to try to ensure that only qualified, competent, independent and impartial persons are nominated and elected.

The Registry

The African Court Protocol establishes a Registry for the Court to serve as its secretariat. The Registry is headed by a Registrar and also comprises of a Deputy Registrar and

⁶¹ Art 11 of the African Court Protocol.

⁶² See also ICJ and OSJI, *Strengthening from Within: Law and Practice in the Selection of Human Rights Judges and Commissioners* (2018), <https://www.icj.org/wp-content/uploads/2017/11/Universal-Strengthening-from-Within-Publications-Reports-2017-ENG.pdf>

other professional, technical and administrative staff all of whom are appointed by the Court.⁶³ The Registry operates full time and the Registrar, Deputy Registrar and staff of the Registry are based at the seat of the Court. This ensures that the Registry is available to receive and deal with applications and other communications from court users.

Under supervision of the President of the Court, the Registrar performs a major part of the administrative, managerial and registry functions of the Court. The Registry receives and processes all documents sent to the Court including initial complaints (new cases), keeps the records of the Court including a General List of all cases, conducts communications and transmission of documents on behalf of the Court, assists at sittings and other meetings of the Court, prints and publishes judgments, orders and opinions of the Court, prepares the budget, strategic plan and annual work plan of the Court, maintains the website of the Court and performs all other functions assigned to it by the Court. Like the Secretariat of the Commission, the Registry of the Court also plays a major role in the organisation of sessions of the Court and is responsible for the accreditation of delegates or participants to such sessions.

Court users can access the Registry of the African Court from 8 am to 1 pm and 2 pm to 5 pm on Mondays to Fridays (except on public holidays). However, public hearings generally take place from 10 am to 4 pm on Mondays to Fridays.

Ordinary sessions of the Court take place in March, June, September and December while Extraordinary sessions may be held at any other time that the Court may decide.

The official languages of the African Union are also the official languages of the African Court although, where he or she does not speak any of the five official languages, the Court may hear a representative in any language subject to terms.

Mandate and jurisdiction of the African Human Rights Court

In justifying the decision to establish the African Human Rights Court, AU Member States expressed the need for a court to 'complement and reinforce the functions of the African

⁶³ Unlike the African Commission where the Secretary of the Commission and staff of the Secretariat are appointed by the AU, the Court is empowered to appoint its own staff in order to guarantee independence. Staff of the Court are for administrative purposes staff of the AU, but their work is directed by the Court and not the political organs of the AU.

Commission on Human and Peoples' Rights'. Article 2 of the Protocol establishing the African Court proclaims that the Court shall 'complement the protective mandate' of the African Commission. The main responsibility of the Court is therefore to apply its judicial character to strengthen the protection of human rights in Africa. Although, the primary source of law it applies is the African Charter on Human and Peoples' Rights, the scope of the Court's mandate extends beyond the African Charter to 'any other relevant human rights instrument ratified by the States concerned'.⁶⁴

Overall, the additional values that the establishment of the Court brings or ought to bring to the African Human Rights System include:

- A more effective human rights litigation process
- Transparent and accessible public sittings
- Decisions that include judicial findings of fact to legal standards, detailed legal reasoning, and legally binding judgments and orders, rather than being limited to making recommendations.
- Clearer and more certain remedies
- Better prospects for enforcement of orders and judgments
- More effective and efficient handling of urgent cases
- Assurance of better cooperation from States and the AU

The jurisdiction of the Court is set out in article 3 of its Protocol. By that provision, the African Human Rights Court is endowed with a **contentious jurisdiction** and an **advisory jurisdiction**.

The contentious jurisdiction of the Court covers all cases and disputes concerning the interpretation and application of the African Charter, the Protocol of the African Court and other relevant human rights instruments. Adjudication of cases under the contentious jurisdiction of the Court is adversarial in nature and judgments from contentious proceedings are binding on parties to the case⁶⁵ and may serve as 'precedent' in future cases.

Where the Court finds at the end of a case that there has been a violation of rights, the Protocol empowers the Court to 'make appropriate orders ... including the payment of fair compensation or reparations' to remedy violations found. In situations of 'extreme

⁶⁴ Art 3 of the African Court Protocol.

⁶⁵ Art 30 obligates States to comply with judgement in cases to which they are parties.

gravity and urgency' requiring action to avoid irreparable harm to a person, the Protocol empowers the Court to adopt and order **provisional measures** as may be necessary. Provisional measures may be ordered even before the actual commencement of hearing in a case before the Court.⁶⁶ The Protocol requires that in appropriate cases, the Court should encourage **friendly settlement** between the parties to a case before it.⁶⁷

Under its advisory jurisdiction, the Court's competence is to provide an opinion on any legal matter touching on the Charter or any other relevant human rights instrument. The essence of advisory opinions is to seek clarity on matters such as the scope of substantive rights or the obligations of States Parties through judicial interpretation even in the absence of specific victims and opposing litigators. Although, advisory opinions of the Court are, strictly speaking, considered to be non-binding, the opinions carry very high persuasive force in view of the authority of the Court. An advisory opinion cannot be requested upon facts at issue in a case that is already pending before either the African Commission or the African Court itself.

Access to the Court

With respect to the Court's **contentious jurisdiction**, matters may be brought before the Court by:

- The African Commission on Human and Peoples' Rights
- A State Party which has brought a complaint of human rights violation before the African Commission
- A State Party against which a complaint of human rights violation has been brought before the African Commission
- A State Party whose citizen is the victim of human rights violation
- African Intergovernmental Organisations
- CSOs and NGOs with observer status before the African Commission (where the State in question has made a declaration accepting the right of the Court to receive complaints from non-state actors in accordance with article 34(6) of the Protocol)

⁶⁶ For instance, this was the case in the matter of the African Commission on Human and Peoples' Rights v Libya.

⁶⁷ In the case of the African Commission v Kenya (Ogiek matter), the African Court put its good offices at the disposal of the parties to facilitate a friendly settlement of the matter even though the attempt broke down when the applicant rejected the terms proposed by the respondent state.

- Individuals (where the State in question has made a declaration accepting the right of the Court to receive complaints from non-state actors in accordance with article 34(6) of the Protocol)

Under article 34(6) of the Protocol, non-state actors such as individuals or NGOs can only approach the Court directly against a State where that State has voluntarily accepted and declared that it accepts the competence of the Court to receive cases brought by non-state actors. As at April 2018, only eight of the thirty States Parties to the Protocol had such a declaration in force.⁶⁸ Article 34(6) of the Court's Protocol is therefore a severe limitation on the jurisdiction of the African Human Rights Court as it drastically limits the number of States against which cases may directly be brought before the Court. This is exacerbated by the absence of a culture of inter-state litigation in the field of human rights. When States fail or refuse to call out other States alleged to have violated rights guaranteed in the African Charter and other regional and global human rights instruments, the burden of ensuring that violating States are held accountable falls squarely on individuals and non-governmental organisations. Thus, the design model that allows States Parties to the African Charter to shut out non-state actor direct complaints restricts the effectiveness of the supervisory mechanism of the African human rights system.

With the slim prospect of inter-state litigation before the African Human Rights Court, the indirect route by which non-state actors can bring cases to the Court is through litigation by the African Commission. **One clear advantage of this route is that even organisations without observer status with the Commission can initiate communications before the African Commission that could result in a case before the African Court.** According to the Rules of the Court, where it considers it necessary to do so, the Court may hear the individual or NGO that initiated the communication leading to the case submitted by the Commission. However, it must be emphasized that this does not make the original complainant a party to the case before the Court.

⁶⁸ Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Malawi, Tanzania and Tunisia. Rwanda had previously made such a declaration, but withdrew it in 2016 while a case brought by an individual against it was pending; the Court subsequently decided that States must give one year's notice of any such withdrawal, and such withdrawal would not deprive the Court of jurisdiction over any cases already pending at the time of withdrawal: see Application No. 003/2014, *Ingabire Victoire Umuhoza v. The Republic of Rwanda*, Ruling on the Effects of the Withdrawal of the declaration under Article 34(6) of the Protocol, 3 June 2016.

The Protocol establishing the African Human Rights Court authorizes the African Commission to bring cases to the Court against a State Party to the African Charter who is also a Party to the Court's Protocol.⁶⁹ The African Commission may transmit a case before or after it examines the case on the merits. The Commission may transmit a case it has determined on the merits if it considers that the State Party in question has failed or refused to implement the recommendations of the Commission in the matter. In such cases, the role of the Court is mostly to put its judicial authority at the disposal of the Commission and the victim of the violation.⁷⁰ Where the circumstances of a complaint are such that there is urgency requiring provisional measures, the Commission may either order such measures itself or bring the case before the Court in order to enable the Court make the relevant order for provisional measures.

⁶⁹ African Commission on Human and Peoples' Rights v Libya (Judgment on Merits) 3 June 2016, para 51. As the Court itself has stressed in this case, the art 34(6) declaration does not apply when the Commission is the applicant.

⁷⁰ The Ogiek case against Kenya

Individuals and CSOs/NGOs (with observer status before the African Commission) may bring cases directly before the African Human Rights Court under the following conditions:

- The Respondent State (against which the action is brought) must be a State Party to the Protocol on the African Court and must have made the article 34(6) declaration accepting the competence of the Court to receive cases against that State from non-state actors.
- The case must relate to an alleged violation of rights protected by the African Charter or other human rights instruments to which the Respondent State is party.
- The case must satisfy all the admissibility criteria in article 56 of the African Charter, including especially evidence of exhaustion of local remedies or of inordinate delay of such remedies.
- Applications should generally be in any of the working languages of the Court – English, French, Portuguese and Swahili - which are the official languages of the AU (although in exceptional cases, oral presentation may be allowed in a language other than one of the official languages).
- Applications may be sent either by post or email or may be delivered by hand to the Registry of the Court. All applications must be authenticated.
- No filing fees are payable for cases brought to the Court and in appropriate cases, applicants may benefit from the legal aid facilities of the Court.

Access to the advisory jurisdiction of the Court is open to:

- Member States of the AU
- The AU or any of its organs
- Any African organisation recognized by the AU⁷¹

⁷¹ In its recent jurisprudence, the African Human Rights Court has ruled that the term 'organisation' embraces both inter-governmental organisations and non-governmental organisations. However, the Court holds the view that the term 'recognized by the AU' as used here is different from holding observer status with the African Commission. According to the court, although the reference to 'African organisation' included non-governmental organisations, such NGOs must have evidence of recognition by the AU. See the Advisory Opinion in Request No 001/2012 - Socio-Economic Rights and Accountability Project (SERAP); Request No 001/2016 - The Centre for Human Rights & 4 Others.

b) The African Committee of Experts on the Rights and Welfare of the Child

Though all African States have since ratified the UN Convention on the Right of the Child (UN CRC), some complaints of exclusion or insufficient representation in the process leading to the adoption of the UN CRC⁷² led African States to develop and adopt a complementary regional instrument – the African Charter on the Rights and Welfare of the Child (the African Children Charter).⁷³ As a stand-alone instrument, the African Children Charter is equipped with its own supervisory mechanism christened the African Committee of Experts on the Rights of the Child (the African Committee of Experts or Committee). The Committee is another regional mechanism for the promotion and protection of human rights, specifically the rights of children in Africa.

The Committee

Article 32 of the African Children's Charter provides for the establishment of the Committee – comprising of eleven mandate holders. Each member of the Committee must be a national of an AU Member State and be reputed to be of 'high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child'.⁷⁴ Following the model of the African Commission on Human and Peoples' Rights, members of the Committee are elected by secret ballot by the AU Assembly from a list of persons nominated by States Parties to the African Children's Charter. Although, the Children's Charter does not say so, in order to ensure independence and impartiality of its members, the Committee of Experts in its Rules of Procedure stipulates that persons holding politically accountable national offices may not become members of the Committee. Once elected, members of the Committee serve in their personal capacities. The Committee elects its own officers who serve as the Bureau of the Committee for a renewable term of two years. The officers of the Committee are the Chairperson, the 1st Vice Chairperson and the 2nd Vice Chairperson, the Rapporteur and the Deputy Rapporteur. The Bureau provides leadership for the Committee towards realization of its mandate and coordinates and supervises the work of the Committee's Secretariat.

The Secretariat

The African Committee of Experts is serviced by a Secretariat headed by a Secretary appointed by the AU usually on the recommendation of the Bureau. The Secretariat also comprises of other professional, technical and administrative staff who assist the

⁷² See for instance, Frans Viljoen's account of this in F Viljoen, International Human Rights Law in Africa.

⁷³ As at June 2018, the African Children's Charter had been ratified by 48 Member States of the AU.

⁷⁴ Art 33 of the African Children's Charter.

Secretary in the performance of the functions of the Secretariat. Services such as keeping the records of the Committee, conducting the communications of the Committee and notifying stakeholder and other interested parties of the activities of the Committee are provided by the Secretariat. The Secretary to the Committee also assists the Committee in the preparation of the budgets, work plan and reports, the organisation of sessions including preparation of the agenda for sessions and serves as the institutional memory of the Committee. The Secretariat is also responsible for the publication (in the official languages of the Committee) of the documents and for releasing non-confidential information and documents. The Secretariat is bound by confidentiality rules which CSOs and NGOs are required to respect.

Mandate and Functions of the Committee

The mandate of the Committee of Experts is to promote and protect the rights enshrined in the African Children's Charter.⁷⁵ This mandate translates into the following functions:

- Collecting and documenting information on matters relating to protection of the rights of the child.
- Commissioning inter-disciplinary assessment of situations on African problems in the fields of the rights and welfare of the child.
- Organizing meetings around the subject of the rights of the child and encouraging national and local institutions concerned with the rights and welfare of the child.
- Giving its views and recommendations to governments on matters of the rights of the child.
- Formulating and laying down principle and rules aimed at protecting the rights and welfare of the child.
- Monitoring the implementation of the Children's charter and ensuring the protection of the rights enshrined in the Charter.
- Interpreting the provisions of the Charter at the request of a State Party, an institution of the AU or any person or institution recognized by the AU or by any State Party.

Functioning and Activities of the Committee

⁷⁵ Art 42 of the African Children's Charter

The Committee performs its functions during and in-between sessions. While the Committee works together in plenary during sessions, it reserves to itself, powers to create special mechanisms by way of assignment of specific tasks or mandates to individual members or a groups of its members.⁷⁶ Special mechanisms carry on the work of the Committee at thematic levels even then the Committee is not in session. As regards its functioning during sessions, articles 43, 44 and 45 of the African Children's Charter lay out the main activities by which the Committee can perform its functions. Civil society organisations are expected to key into these activities in seeking to advance protection of the rights and welfare of the child.

Consideration of State Reports⁷⁷

The State Reporting process is one of the main tools of supervision that the Children's Charter puts at the disposal of the Committee. The Children's Charter requires a State Party to submit an **initial report** within two years after the entry into force of the Charter in respect of that State.⁷⁸ **Periodic reports** are then due in respect of a State once every three years after the submission of the initial report. As is the case with the African Commission, the State Reporting procedure of the African Committee of Experts is supposed to be a cooperative process during which the reporting State voluntarily offers honest and useful information on the state of implementation of the Children's Charter, highlighting areas of achievement and challenges encountered in the course of implementation.

Guidelines for the submission, handling and consideration of State Reports released by the Committee of Experts spells out roles for CSOs and NGOs, indicating intervention points by which civil society can assist the Committee and State Parties to advance implementation of the Charter. Accordingly:

- The Committee may authorize the Secretary to send copies of State Party Reports (in whole or part) to stakeholders including national and international non-governmental organisations *with Observer status with the Committee*.⁷⁹
- Stakeholders, including CSOs and NGOs with Observer status with the Committee may submit information or a **complementary report**⁸⁰ on the state of protection

⁷⁶ Special mechanisms whose membership includes independent experts who are not members of the Committee may also be created by the Committee.

⁷⁷ Art 43 of the African Children's Charter.

⁷⁸ A treaty such as the Children's Charter is said to have entered into force in respect of a State when that State has ratified the treaty in accordance with its constitutional processes and has deposited the instrument of ratification with the relevant international authority.

⁷⁹ The Committee of Experts also grants Observer status to CSOs and NGOs on its own terms and conditions. As such, organisations have to separately pursue observer status with the African Commission and the African Committee of Experts as the acquisition of the status before the one mechanism does not confer privileges before the other.

of the rights and welfare of the child in the State whose report is scheduled to be considered.

- The Committee holds (or is supposed to hold) **Pre-sessions** ahead of the consideration of State Reports to enable the Committee to 'elicit further information and to better understand the actual situation of children and or the implementation of the Charter on the ground'.
- Guidelines on the compilation of Complementary Reports released by the Committee are available to guide CSOs and NGOs in the compilation of complementary reports.
- The guidelines stress that information supplied by civil society must be '*specific, credible and objective*' and can either corroborate or provide alternative information to *complement* the report of the State. The overall objective being to 'enhance the quality of constructive dialogue between the Committee and a State Party rather than condemn or being a mere judgmental or antagonistic piece'.⁸¹
- The Committee encourages broad, collective and participatory preparation of complementary reports. CSOs and NGOs may achieve this by working in networks across spatial and thematic boundaries.
- Specific institutions including CSOs and NGOs may also be invited by the Secretary to submit information relating to a given State Report which is to be considered.
- Officials of a Reporting State are usually invited specially to participate during the examination of that State's report. Information supplied in the form of NGO statements and shadow reports are useful materials which the Committee uses in its engagement with a Reporting State.

Since the State Reporting Procedure is to enable the Committee assist the State make progress in the implementation of the Children's Charter, it is expected that the reports will include legislation, policies and programs that advance or hinder the rights guaranteed in the Charter. Under the Committee's Rules of Procedure, CSOs and NGOs working in the area of rights of the child may be invited to provide expert advice in their specific areas of expertise. The consideration of State Reports by the African Committee of Experts also ends in the release of **Concluding Observations** aimed at improving

⁸⁰ The Committee defines a complementary report as a 'factual, objective and succinct representation of the actual situation of children on the ground, presented ... by organisations or individuals and aimed at addressing perceived omissions, deficiencies or inaccuracies in official government report'.

⁸¹ See para 3 of the Committee's Guidelines on Complementary Reports.

the relevant State's implementation of the Children's Charter. Although, the Committee has its own follow-up plan to monitor State's use and implementation of the Concluding Observations, civil society can (and do) play a critical role in monitoring and providing useful information on the use and implementation of concluding observations.

Communications:

The Children's Charter authorizes the African Committee of Experts to receive and examine communications relating to any matter covered by the Charter from 'any person, group or non-governmental organisation' recognized by the AU, a Member State of the AU or the United Nations.⁸² This means any organisation with legal existence within an AU Member State may submit a communication to the Committee. Possibly as a result of the especially vulnerable nature of children, the Committee's Rules also allow a person or an organisation to submit a communication on behalf of a child victim with or without the consent of the child. However, the applicant should be able to show that the action is in the supreme interest of the child. The communications procedure under the Children's Charter is also adversarial and results in a recommendation.

With such liberal standing rules, the communications procedure of the African Committee of Experts is one which CSOs and NGOs working in the area of children's right can explore to hold States Parties (and in extreme cases even non-State Parties) accountable for the violation of guarantees in the Children's Charter.

A communication to the African Committee of Experts will not be considered if:

- i. It is anonymous.
- ii. It is not written in one of the official languages of the Committee.
- iii. It is not duly authenticated and signed by the Complainant or the representative of the Complainant.
- iv. It is brought against a State that is not signatory to the Children Charter, provided that the Committee may admit such a communication if it is in the overall best interest of the child to do so. In which case, the Committee shall collaborate with other related agencies implementing Conventions and Charters to which that State is signatory.

Communications before the African Committee of Experts pass through a process that closely resembles the communications process of the African Commission. A communication once received at the Secretariat of the Committee is registered, passes a

⁸² Art 44 of the Children's Charter.

seizure stage, undergoes admissibility test and goes on to a merit stage and is concluded. Where there is a situation of urgency, serious or massive violations of the Children Charter and the likelihood of irreparable harm to a child victim(s), the Committee is authorized at its own initiative or at the request of a party to the proceedings make orders for **Provisional Measures** against the Respondent State. A copy of the request for provisional measures made to the State concerned is required to be transmitted to the victim, the AU Assembly, the AU Peace and Security Council and the AU Commission to facilitate implementation.

The Rules of the Committee require that a communication sent under its communications procedure should contain the following information:

- Clear particulars of the Complainant(s) and the Party or Parties against whom the complaint has been made.
- The State the Complainant considers responsible for the violation of the rights of the victim(s).
- The name(s) of the victim(s) where the victim(s) is not the Complainant(s) and the public official or authority who has taken cognizance of the situation alleged.
- Statement whether the Complainant desires anonymity or wishes that the identity of the victim(s) be withheld from the State Party against which the communication has been brought.
- A succinct account of the facts upon which the complaint is based, specifying the place and dates of the alleged violations.
- Where possible, the provisions of the Children Charter alleged to have been violated.
- The remedy or remedies sought to redress the alleged violations.
- An indication of any steps taken to exhaust domestic remedies or a statement of the impossibility, ineffectiveness or futility of doing so.
- An indication whether the Communication has previously been submitted to another international settlement procedure.
- The address by which the Complainant wishes to be contacted, stating where available, a telephone number, fax number and email address.

The admissibility criteria for communications to the African Community of Experts are very similar to the criteria in article 56 of the African Charter. In order to be admissible, a communication to the Committee must:

- Be compatible with the provisions of the Constitutive Act of the AU and the African Children's Charter;
- Not be based exclusively on information circulated by the mainstream or social media and not be manifestly groundless;
- Not raise matters already settled or pending before another international body or procedure of the AU or the UN;⁸³
- Have been sent after exhausting available and accessible domestic remedies, unless it is obvious that the domestic procedure is unduly prolonged or is ineffective;
- Not contain any disparaging or insulting language; and
- Be presented within a reasonable period of time after domestic remedies were exhausted or the attempts to exhaust domestic remedies were frustrated.

Once the Committee is satisfied that the communication is admissible, it will proceed to a consideration of the merits and will invite the Respondent State to submit its arguments and evidence on the merits. The Committee is also authorized to encourage and create opportunity for **amicable settlement** of the complaint. It needs also to be noted that the Committee can facilitate access to free legal assistance at the request of an underprivileged victim or even at the initiative of the Committee itself. One benefit of this possibility is that an alleged victim need not be cajoled into accepting unfavourable terms of settlement as a result of lack of legal representation.

After the exchange of evidence and arguments, the Committee may conduct a hearing to allow parties to make oral arguments if the Committee considers it necessary to do so.⁸⁴ Although, the African Children's Charter is the primary instrument of the Committee, parties may rely on all other relevant law (treaty law or jurisprudence), binding or persuasive, to make their cases before the Committee. Complainants may therefore rely on provisions in favour of the child in diverse African instruments to support their cases. Further, according to its Rules, where the Committee deems it necessary or advisable for the determination of a communication, the Committee may undertake an on-site investigation to the State concerned to gather further relevant information and evidence to enable it reach a just decision.

⁸³ Since the increased involvement of Africa's regional economic communities (RECs) in the field of human rights, there is a tendency to also require that matters brought to regional mechanisms are not pending or already settled by the REC Courts.

⁸⁴ The procedures for the submission of arguments and the hearing of communications is set out in the Committee's Revised Guidelines for the Consideration of Communication.

It is important to note that the Committee may decide to solicit or accept interventions from parties other than the Complainant or the Respondent State so long as such an intervention will aid the correct determination of the complaint. Crucially, the Committee may also receive **amicus curiae** briefs from individuals and organisations other than the parties. A person or group interested in submitting such amicus curiae briefs sends an application to the Secretariat indicating:

- The nature of the applicant's interest; and
- The focus of the amicus curiae brief in terms of the facts, evidence, arguments and the law.

The Committee reserves the right to decide whether or not to accept the amicus intervention and must respond to the application within 30 days of receipt of the application. This is an important window for organisations with expertise on child rights or specific thematic issues to present compelling arguments and statements of the law to guide the Committee in its consideration of communications even where such organisations are not a direct party to the communication.

The consideration of the communication ends with a decision of the Committee which must include **recommendation(s)** on actions to be taken by the parties to remedy any violations found by the Committee. It has to be noted that the Committee is subject to the confidentiality requirements imposed by the AU. As such, a decision of the Committee on a communication can only be made public after it has been submitted (in a report) to the AU Assembly and the Assembly has considered and adopted the Committee's report. Once authorized for release to the public, CSOs and NGOs widely publicize the decisions to create awareness on the existence of the decision, pile pressure for implementation on the State Party through the mobilization of shame and to give other States opportunity to align their conduct with the recommendations of the Committee in the given communication.

It is important to note that at its own initiative or at the request of a party, the Committee may review its decision on admissibility or merits.⁸⁵ This means that CSOs and NGOs can have a second chance at promoting a case of alleged violation in the face of an adverse decision if new and credible facts previously unavailable are discovered. It is important to note however, that in some cases, it may be advisable to refrain from further adjudication to protect a child or group of children, especially

⁸⁵ Section XX of the Committee's Revised Guidelines on Communications.

where the very fact of international adjudication can be considered symbolic justice for the victim(s).⁸⁶

The Committee has made elaborate provisions for monitoring the implementation of its decisions. Apart from setting a time line of 180 days for affected States to report to the Committee all measures taken to implement a decision, the Committee has made elaborate follow-up that invokes the structures and policy organs of the AU.

Investigations by the Committee

Placing reliance on article 45(i) of the Children's Charter which authorizes the Committee to 'resort to any appropriate method of investigating any matter falling within the ambit of the present Charter', the Committee undertakes investigation visits to the territories of State Parties to the Children's Charter. The Committee defines an investigation mission as one undertaken by 'a team of the Committee of Experts on the Rights and Welfare of the Child to a State Party to ... gather information on the situation of the rights of the child' in that State. The Committee's investigation missions are aimed at finding and collecting 'accurate and reliable information on any issue arising from the Charter'. This is to enable the Committee:

- Assess the general situation of the rights of the child the country visited;
- Clarify the facts and establish responsibility of individuals and the State towards children who are victims of violations and their families; and
- Promote and support the implementation of the rights and welfare of the child by the various administrative, legal and legislative institutions of the affected State.

Thus, the Committee may undertake:

- Investigations arising from a matter referred to it (Committee).
- Investigations initiated by the Committee itself.
- Investigations at the invitation of the State Party concerned.

The Committee insists that States refusing entry to a mission of the Committee must indicate the reasons for such refusal, which reasons shall be forwarded by the Committee to the AU Assembly for a decision. The Committee sets up sub-committees and working groups to undertake missions. Ahead of any mission, the Committee's Guidelines on Investigation Missions requires that a **Preliminary Mission Report** be

⁸⁶ For instance, in cases where sexual violence against the girl child is in issue and there is a need to protect the identity of the child or children involved, or in children are part of a group of victims, some of whom remain vulnerable in trouble zones, continuous litigation may not be to the immediate advantage of the child. In such cases, the awareness created by the initial procedure may be sufficient basis to refrain from further litigation.

prepared, which shall contain all relevant information about the country, its international and national obligations to the rights of the child and the actual situation of the rights of the child prior to the visit. CSOs and NGOs with observer status with the Committee constitute one of the veritable sources for the information to be included in the preliminary mission report.

CSOs and NGOs before the Committee

The Committee of Experts encourages CSOs and NGOs to participate actively in the implementation of the African Children's Charter. CSOs and NGOs generally play important roles in promoting the African Children's Charter especially through popularization and sensitization; monitoring implementation of the Charter; litigation through the communications procedure; and submission of alternative reports. Generally, organizations can (and do) support the work of the Committee and the overall advancement of the rights of children in Africa without entering into any official relationship with the Committee. However, organizations interested in a formal relationship with the Committee can apply and be granted formal recognition as having observer status with the Committee.

Benefits of having observer status with the Committee includes:

- Invitation to attend the formal opening and closing ceremonies of the Committee's sessions and events.
- Participation at meetings of the Committee under conditions set by the Committee.
- Access to non-confidential documents of the Committee, particularly those relating to issues concerning organizations with observer status.
- Invitation to closed sessions of the Committee in matters concerning the relevant organization.
- Participation, without a right to vote, in deliberations at meetings to which the organization is invited.
- Opportunity to be given the floor by the Chairperson, at meetings of the Committee, usually to respond to questions from Members of the Committee.
- Opportunity to request the inclusion of issues of interest on the agenda of meetings and sessions of the Committee.

Observer status with the Committee equally attracts certain expectations on CSOs and NGOs.

- Organizations with observer status are expected to cooperate with the Committee in its work, establish and maintain close relations with the Committee as well as endeavour to consult regularly with the Committee on issues concerning the rights of the child.
- CSOs and NGOs with observer status are also required to submit to the Committee once in every two years, analytic reports of their organizational activities.
- Such CSOs/NGOs reports to the Committee are required to indicate the financial situation of the organization; activities which supported implementation of the African Children's Charter and contain an update of officers of the organization along with details of their election to those offices.

The Committee considers applications for observer status during its ordinary sessions and has the power to suspend or withdraw status granted to an organization at its own discretion.

African Committee of Experts on the Rights of the Child

Criteria for Granting Observer Status to Non-Governmental Organisations (NGOs) and Associations (Governed by Article 42 of the African Children's Charter and Rules 34, 37, 82 and 82 of the Committee's Rules of Procedure)

Section I (Principles to be applied in the grant of Observer Status)

- The aims and objectives of the applicant organization should align with the spirit, objectives and principles of the Constitutive Act of the AU, the African Children's Charter and of the Committee of Experts on the Rights and Welfare of the Child.
- The applicant organization shall undertake to support the work of the AU and the Committee of Experts and to promote dissemination of information on the principles and activities of the Committee.
- The applicant organization should have a recognized reputation in human rights in general and in the promotion and protection of the rights of children. Organizations with similar objectives and interest are encouraged to apply as a coalition.
- An applicant organization should be registered within a State Party to the African Children's Charter at least three years prior to the application, with unrestricted capacity to work in the area of children's rights regionally, within the continent or in the diaspora and must be able to show proof of official registration as well as activities over the period.
- An applicant organization should have - a recognized headquarters and an executive organ; a Constitution or Statute adopted democratically, a copy of which needs to be deposited with the Committee; a representative structure and appropriate mechanisms for accountability to members (who shall be shown to exercise effective control over organizational policies through a transparent and democratic process) and; and administration with a majority of African citizens or Africans in the Diaspora with (where possible) an elected children's representation. These conditions do not apply to International NGOs.
- The Committee reserves the right to deny observer status to an applicant organization that is shown to 'practice discrimination on the basis of such criteria as gender, colour, religion, ethnic group, tribe or race' or one that 'practices any other activity involving children that could be described as the worst forms of work and other abuses'.

Section II (Procedure for applying)

- An applicant organisation shall submit an application stating its intention addressed to the Committee at least three months before the session at which the application is to be considered.
- The application shall be accompanied by the constitution, statute or charter of the applicant organization; an updated list of members of the organization; details of sources of fund (including contributions from external sources, amounts and names of donors, with special mention of direct or indirect contribution by a state); a memorandum of past and present activities; organizational links (including links outside Africa) and any other relevant information on the identity and area of activity of the organization.
- Documents shall be submitted in English and French and in sufficient copies for all members of the Committee.
- NGOs in the Diaspora are required to submit names or information of at least two AU Member States or CSOs recognized by the AU that are acquainted with the work of the applying organization and that are willing to certify the authenticity of the applying organization.

The Committee's Relationship with other mechanisms of the African Human Rights System

As an independent treaty supervisory organ responsible for supervising the implementation of the African Children's Charter, the Committee is established in terms similar to the African Commission on Human and Peoples' Rights. The Committee operates as an independent institution of the AU and is not in a hierarchical relationship with the African Commission. This means for instance, that the Committee's decisions cannot be the subject of 'appeal' to the African Commission. It also means that the Committee generally cannot be a party before the African Commission, just as the African Commission generally cannot be a party before the Committee. CSOs/NGOs and individuals cannot also simultaneously bring actions based on the same set of facts before both the Commission and the Committee, nor can a matter which has been concluded by the Commission be brought afresh before the Committee or vice versa. Despite their respective independence, the African Commission and the African

Committee of Experts adopted a Resolution in 2009⁸⁷ by which both institutions agreed to establish a formal relationship of cooperation. Under the cooperation agreement, the Commission's Special Rapporteur on the Rights of Women in Africa collaborates with the Committee especially on matters relating to the rights of the child. In furtherance of the cooperation between the two institutions, the Commission and the Committee have made joint letters of appeal⁸⁸ and adopted a joint General Comment on ending Child Marriages in Africa.

The Committee's relationship with the African Court is less straightforward since the Court's activities are almost exclusively judicial.⁸⁹ Despite recognizing that 'the Committee is the primary monitoring body of the Children's Charter' and that 'the Committee having access to the Court would facilitate more effective exercise of its mandate concerning serious violations of children's rights', the African Court takes the view that under its current Protocol, the Committee has 'standing to request for an advisory opinion' but does not have standing to bring a matter under the contentious jurisdiction of the Court.⁹⁰ This means that for an action involving the rights of the child in Africa to reach the Court in its contentious jurisdiction, such an action has to be brought by the African Commission if the affected State has not made the declaration allowing non-state actors and individuals to bring cases against it to the African Court.

⁸⁷ Resolution 144 of 27 May 2009, adopted in Banjul, the Gambia.

⁸⁸ For instance, a joint letter of appeal was sent to the Republic of Tanzania in August 2017 on the situation of pregnant girls and teenage mothers who are not allowed to return to school.

⁸⁹ Friendly settlement which is allowed by the African Court's Protocol for instance, may not be seen by everyone as strictly a judicial function.

⁹⁰ See Advisory Opinion, Request no 002/2013 In the Matter of Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child Before the African Court on Human and Peoples' Rights. The Opinion is dated 5 Dec 2014.

c) **Other AU Bodies with functions that impact on the protection of rights**

Apart from the core human rights supervisory mechanisms in Africa, a number of AU organs and institutions have mandates and functions that have critical direct or indirect impact on the protection of human rights on the continent. They include the AU Assembly of Head of States and Government (AU Assembly), the AU Executive Council, the Permanent Representatives Committee, the AU Commission and to a lesser degree, the Pan- African Parliament. For instance, the AU Assembly is the ultimate organ of the AU responsible for making human rights treaties and conventions that African States adopt. The AU Assembly is generally also the platform on which appointment and or election of mandate holders of the various rights supervisory mechanisms take place. The funding (including approval of the budgets) of these human rights mechanisms is also largely a function of the AU Assembly.

Other organs such as the AU Executive Council, the Permanent Representatives Committee (made up of the Ambassadors of African States to the AU and or Ethiopia) and the AU Commission play different but connected and important roles in supporting the relevant activities of the AU Assembly. For instance, the consideration of the budgets does not start and end with the AU Assembly, creating important roles for organs such as the AU Executive Council and the Permanent Representatives Committee. Similarly, the drafting of human rights instruments begins within the AU Commission framework and only culminate in the AU Assembly for adoption. Supervision of the work of the core human rights mechanisms (possibly with the exception of the African Court) is also usually a function of the AU Commission. The implication of all of these is that advocacy work can occasionally take place at forums other than the core human rights mechanisms.

B. Sub-regional Courts

In addition to the continental mechanisms above, international supervision of the protection of human rights in Africa also takes place at the sub-regional level. International courts established by the various RECs originally for the purpose of dispute settlement in the field of economic integration have become active for human rights adjudication in some parts of Africa. Initially, the EACJ, the ECOWAS Court and the Southern Africa Development Community (SADC) Tribunal were the three sub-regional courts that entertained human rights claims. However, following the backlash against the SADC Tribunal over the *Campbell v Zimbabwe* case, the Tribunal is no longer empowered to receive suits from non-state actors. Thus, the EACJ and the ECOWAS Court are currently the two sub-regional courts exercising human rights jurisdiction.

d) The East African Court of Justice (EACJ)

The EACJ is the judicial organ of the East African Community. Established in article 9 of the 1999 Treaty of the EAC, the EACJ's primary role is to ensure adherence to law in the interpretation and application of, and compliance with the Treaty. The Court is made up of two divisions – the First Instance Division (headed by a Principal Judge and comprising five other judges) and the Appellate Division (headed by the President of the Court and comprising of four other judges). The EACJ currently operates from Arusha, Tanzania (the temporary seat of the Court) but has sub-registries in the Partner States of the EAC.⁹¹ The EACJ has an acquired human rights jurisdiction in the sense that it is not expressly conferred by the EAC Partners.⁹² Following a judgment of the EACJ in the case of *Katabazi v Secretary General of the EAC and Others*⁹³ where the EACJ affirmed its competence to interpret and apply the EAC Treaty even in actions containing claims alleging human rights violations by EAC Partner States in disregard of Treaty obligations to respect and protect human rights, the EACJ has incrementally established itself an a forum for human rights litigation in East Africa.

Human rights claims before the EACJ are generally in the form of an action or suit (reference) inviting the EACJ to interpret and apply the EAC Treaty. Articles 6(d) and 7(2) of the EAC Treaty stipulate respectively that 'recognition, promotion and protection of human rights in accordance with the provisions of the African Charter on Human and Peoples' Rights' and 'the maintenance of universally accepted standards of human rights' constitute fundamental and operational principles of the East African Community. The EACJ has adjudged that 'the wording ..."in accordance with the provisions of the African Charter on Human and Peoples' Rights", creates an obligation on the EAC Partner States to act in good faith and in accordance with the provisions of the Charter. Failure to do so constitutes an infringement of the Treaty'.⁹⁴ East African States have not opposed this position of the EACJ.

Accordingly, a citizen or a resident of any of the six (6) Partner States of the EAC may challenge the violation of his or her rights by a Partner State. Potential litigants must remember that:

⁹¹ The High Court of each Partner State serves as a sub-registry for the EACJ. Sub-registries of the EACJ can currently be found in Burundi, Kenya, Rwanda, Tanzania and Uganda. A sub-registry is yet to be established in the South Sudan (which is the latest State to join the EAC).

⁹² In art 27(2) of the EAC Treaty, it is provided that the jurisdiction of the EACJ will be expanded to include competence over human rights amongst other claims. This expansion which is supposed to be by the adoption of a protocol to that effect has however, not happened formally.

⁹⁴ Para 64 of the judgment of the Appellate Division of the EACJ in *Democratic Party v The Secretary General of the EAC and Others*, (Unreported) Appeal No. 1 of 2014.

- The EACJ is available for claims of human rights violation emanating from any of the Partner States of the EAC: Burundi; Kenya; Rwanda; South Sudan; Tanzania or Uganda.
- In addition to cases (references) from Partner States of the EAC and the Secretary General of the EAC, the Court is also empowered to receive cases (references) from Legal and Natural Persons (including individuals and NGOs).
- Only EAC Partners can be respondents before the EACJ.
- Actions (cases or references) by legal and natural persons must be filed within two months of the offensive or violating act or omission.
- The action is usually for a declaration that the Partner State is in breach of the EAC Treaty by violating the human rights of the victim.
- The African Charter especially, has emerged as a preferred source of claims of human rights violation before the EACJ.
- A party dissatisfied with the decision of the First Instance Division of the EACJ may appeal to the Appellate Division. The decisions of the Appellate Division are final.
- The decisions of the EACJ are generally binding on the parties.
- The African Court of Human and Peoples Rights and the African Commission on Human and Peoples' Rights will generally decline to consider cases that have previously been brought before the EACJ.
- Based on the EACJ's jurisprudence, there is no requirement to exhaust local remedies in actions before the Court.

The human rights decisions of the EACJ have mostly been declaratory but EAC Partner States have generally respected these decisions. The EACJ is therefore a veritable forum for human rights litigation in most of East Africa.

e) The ECOWAS Community Court of Justice (ECOWAS Court)

In West Africa, the ECOWAS Court is established in articles 6 and 15 of the 1993 Revised Treaty of the Economic Community of West African States (ECOWAS). First envisaged under the 1975 Treaty of ECOWAS, the ECOWAS Court was formally established by a Protocol adopted by ECOWAS Member States for that purpose.⁹⁵ The ECOWAS Court is a

⁹⁵ Protocol A/P1/7/91

single chamber court made of seven independent judges, one of whom is elected by his or her peers to serve as President of the Court. The ECOWAS Court is located in (and operates from) Abuja, Nigeria. However, the Court may and does move to any other suitable location within the territories of ECOWAS Member States.

The main mandate of the ECOWAS Court is to ensure the observance of law and of the principles of equity in the interpretation and application of the ECOWAS Treaty and other legal instruments of the Community. In 2005, following advocacy led by the Court itself, but involving civil society in West Africa,⁹⁶ an additional protocol was adopted to expand the jurisdiction of the court and improve access to the court.⁹⁷ The 2005 Supplementary Protocol of the ECOWAS Court gives the Court an advisory jurisdiction and a contentious jurisdiction. The contentious jurisdiction of the Court includes competence to receive and 'determine cases of violations of human rights that occur in any Member State'. In a shift from the 1991 Protocol which only gave access to Member States and some ECOWAS Institutions, the 2005 Supplementary Protocol grants access to individuals and corporate bodies 'for any act of the Community which violates the rights' of such individuals or corporate bodies, and to persons who are victims of alleged human rights violation occurring in any Member State. In the case of persons who are victims of alleged human rights violation, the action must not be filed anonymously and must not have been brought before another international court.

Since the 2005 Supplementary Protocol confers a human rights jurisdiction without indicating the applicable human rights instruments on which claims may be based, the ECOWAS Court, relying on article 4 (h) of the revised ECOWAS Treaty has ruled that the African Charter on Human and Peoples' Rights especially, but also other global and regional human rights instruments may be the source of human rights claims before it. The ECOWAS Court has equally established through its jurisprudence that there is no requirement to exhaust local remedies before cases alleging violations of human rights can be brought before it and that NGOs may bring actions on behalf others who are unable to bring such actions themselves.

Prospective litigants need to remember that:

Ø The ECOWAS Court is available for human rights claims emanating from any of the 15 Members States of ECOWAS: Benin; Burkina Faso; Cape Verde; Côte d'Ivoire; Gambia; Ghana; Guinea; Guinea Bissau; Liberia; Mali; Niger; Nigeria; Senegal; Sierra Leone; and Togo.

⁹⁶ Details of the evolution of the human rights mandate of the ECOWAS Court and the role played by civil society can be found in ...

⁹⁷ See Supplementary Protocol A/SP.1/01/05

- Ø The ECOWAS Court receives human rights claims from legal (corporate) and natural persons.
- Ø Actio Popularis (actions brought by CSOs and NGOs on behalf of disadvantaged groups) are allowed.
- Ø Only ECOWAS Member States can be respondents before the ECOWAS Court.
- Ø Applicants do not need to exhaust local remedies before bring a human rights claim before the ECOWAS Court.
- Ø The ECOWAS Court makes declaratory and mandatory orders in human rights cases and its decisions are final and binding.
- Ø The African Charter is a preferred source of human rights claims before the ECOWAS Court but the Court also accepts claims based on other global and regional human rights instruments.
- Ø The ECOWAS Court will generally not accept an action based on facts previously brought before another international court.
- Ø Filings before the ECOWAS Court are generally free and can be done electronically.
- Ø The working languages of the ECOWAS Court are English, French and Portuguese.
- Ø The African Court of Human and Peoples Rights and the African Commission on Human and Peoples' Rights will generally decline to consider cases that have previously been brought before the EACJ.

Member States generally comply with the decisions of the ECOWAS Court but there have been cases of non-compliance which by States even if no State challenges the competence of the Court to receive and determine human rights cases.

PART FOUR

7. Using regional and international resources for domestic protection of human rights

A key element of the human rights project is to guarantee the effective protection of the human rights of everyone (citizens and residents of every country) at the national level – the level closest to the people and which should, in principle, be the most accessible and have the greatest capacity to respond. It is for these reason that virtually every international human rights instrument requires or invites States Parties to give recognition to the rights in the instrument and to take legislative and other measures to give effect to the guaranteed rights within their domestic legal systems.⁹⁸ This means that the norms in global and regional human rights instruments and the human rights jurisprudence that emanates from treaty supervisory bodies and human rights courts can only be fully realized if and when the norms and jurisprudence are given effect at the national level.

As governments are generally not eager to allow international or domestic human rights standards to constrain their space and ability for political manoeuvre, in practice in many countries it is left up to individuals (beneficiaries of norms and judgments) and civil society to ensure that these standards are given life at the national level. Although, legal codification and judicial enforcement remains for many rights the most secure and effective form of guarantee, the use of national human rights commissions and other institutions such as national parliamentary procedures can be complementary options that individuals and CSOs/NGOs may choose to explore, depending on the prevailing realities in each national legal system.

Generally, the particular way in which a national legal system gives effect to international human rights standards depends on whether a given State has a monist or a dualist orientation or approach to the relationship between national law and international law. At a basic level, in States with a monist orientation, international law (including international human rights law) exists in a unitary relationship with national law, and international law is directly applicable within the domestic legal system once the constitutionally recognized procedure for ratification of international treaties has been met, and the international standard supersede in the event of a conflict between national and international law. For States with a dualist orientation, the general rule is that international standards need to pass through a process of transformation into national legislation in order for them to have the force of law and become applicable

⁹⁸ For instance, see art 1 of the African Charter.

before national judicial and quasi-judicial institutions.⁹⁹ In practice, this clear cut dichotomy does not always exist.

Where domestic criteria for legal enforcement are met, individuals and NGOs/CSOs should be able to directly seek enforcement of international human rights norms or judgments of human rights court in the national courts. However, even where the criteria are not met for domestic legal effect, human rights defenders may still cite such international standards as persuasive support materials to complement applicable national and international standards.

8. Conclusion

There is a huge potential for applying international human rights law – global and regional norms and institutions – for enhancing the protection of human rights in Africa. Slowly but surely, the landscape for human rights protection in Africa has grown in size and scope, creating vast opportunities for civil society to explore to the advantage of the various victims of abuse and violation on the continent. This handbook has outlined some of the most active and promising aspects of the human rights protection system applicable in Africa. The gains that have been recorded thus far, have been largely due to the perseverance and doggedness of civil society actors and human rights defenders working hand in hand to stretch the existing mechanisms to realize their vast potentials. However, there is still so much more to be done and some much more to be achieved. This handbook is our reminder to that effect.

⁹⁹ For instance, in compliance with sec 12 of the 1999 Constitution of the Federal Republic of Nigeria, the African Charter was legislated into national law in 1981. Accordingly, the African Charter is cited in the national courts as a source of law.

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