

## Regional Mechanisms in Africa

### **1. Substantial Framework**

The *Charter on Human and People's Rights* [Charter] codifies a limited number of rights potentially relevant in the context of urban violence and resilience. This is due to the treaty's focus on political as opposed to economic and social rights.

Article 4 Charter ensures the right to life and prohibits any arbitrary deprivation of this right. Article 16 Charter enshrines the right to "enjoy the best attainable state of physical and mental health". The Member States are thus obliged to "protect the health of their people and to ensure that they receive medical attention when they are sick." Article 17 Charter guarantees the right to education and obligates the State Parties to promote and protect morals and traditional values. The right to property is codified in Article 14 Charter. This provision does however not refer to land rights in particular. The right to an adequate standard of living as provided for in Article 11 ICESCR, has not been included in the Charter.

In 2005, the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*<sup>1</sup> entered into force focusing on the female perspective and adding a number of social rights to the Human Rights catalogue. Article 4 guarantees the Right to life for women specifically and Article 12 ensures education and training to women. Article 15 codifies the right to food security, a guarantee not included in the Charter. Article 16 enshrines the right to adequate housing. According to Article 27, the Court has jurisdiction to interpret the Protocol.

The *African Charter on the Rights and Welfare of the Child*,<sup>2</sup> another regional Human Rights instrument equally seeks to guarantee the right to life (Article 5 (1)), the right to education (Article 11), the right to health (Article 14) and the obligation to prevent child abuse and torture (Article 16).

### **2. Procedural Framework**

#### **a. Individual Complaint Procedure before the Commission**

The Charter itself establishes in its Article 30 the Commission on Human and People's Rights [Commission] and mandates it with the promotion of Human and People's rights (Article 45 Charter). In particular, it orders the Commission to "formulate and lay down, principles and rules aimed at

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<sup>1</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000); reprinted in 1 Afr. Hum. Rts. L.J. 40, entered into force Nov. 25, 2005.

<sup>2</sup> African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999.

solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation"<sup>3</sup> and to "interpret all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organization recognized by the OAU".<sup>4</sup>

The Charter provides the possibility of both State complaints (Article 47 ff. Charter) as well as individual complaints (Article 55 ff. Charter). Individual complaints will however only be considered, if the Commission so decides by a simple majority vote (Art. 55 (2) Charter). The Commission does not constitute a formal Court. Its decisions are thus neither binding nor enforceable.

Additionally to the affirmative decision, the individual complaints need to fulfill a number of admissibility prerequisites (Art. 56 Charter). Article 56 (1) Charter prevents the possibility of anonymous complaints and Article 56 (6) Charter imposes the obligation to exhaust all local remedies upon the author.

If the Commission decided to consider the complaint and the author has complied with all admissibility requirements, the case will be reviewed on the merits. In case of a violation of the Charter, the Commission urges the State to undertake the necessary steps in order to comply with the Charter provisions (Article 58 (2) Charter authorizes the Commission to provide "recommendations").

## **b. The African Court on Human and People's Rights**

The African Court on Human and People's Rights has been established in 1998 by Article 1 of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights [Protocol]. Six years later, on 25 January 2004, the Protocol entered into force after the deposit of the 15<sup>th</sup> instrument of ratification.<sup>5</sup>

Article 34 Protocol opens the treaty for accession to any State Party of the African Charter on Human and People's Rights. Currently, the Protocol counts 30 Members States.

### **(1) Jurisdiction of the Court**

The African Court on Human and People's Rights [Court] holds a dual jurisdiction: Article 4 of the Protocol mandates the Court to deliver advisory decisions, Article 3 of the Protocol provides jurisdiction in contentious cases. So far, the Court received four requests for advisory opinion, one of

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<sup>3</sup> Article 45 (1) (b) Charter.

<sup>4</sup> Article 45 (3) Charter.

<sup>5</sup> Article 34 Protocol.

which has been withdrawn.<sup>6</sup> The remaining three requests have not been decided on the merits.<sup>7</sup> The focus will therefore be on the contentious cases.

### 1. Ratione Personae

Article 5 Protocol provides the right to initiate proceedings to the following entities: the Commission, the State Party, which had lodged a complaint to the Commission, the State Party against which the complaint has been lodged at the Commission, the State Party whose citizen is a victim of human rights violation and the African Intergovernmental Organizations. “When a State Party has an interest in a case, it may submit a request to the Court to be permitted to join”.<sup>8</sup> The acceding State Parties accept this jurisdiction *ratione personae* automatically through ratification of the Protocol.<sup>9</sup>

Individuals and Non-Governmental Organizations on the other hand, are not granted standing before the Court unless the respective Member State accepted this optional jurisdiction<sup>10</sup> by submitting an additional declaration.<sup>11</sup> So far only seven States submitted such a declaration,<sup>12</sup> which significantly limits the Court’s jurisdiction in this regard.

### 2. Ratione Materiae

The Court is provided with an exceptionally broad subject-matter jurisdiction. Article 3 and 7 Protocol not only mandate the judicial body with the power to hear “cases and disputes submitted to it concerning the interpretation and application of the Charter and this Protocol” but equally provide the right to review cases relating to “any other relevant Human Rights instrument ratified by the States concerned”. This clause extends the Court’s jurisdiction *ratione materiae* to *inter alia* the Convention Governing the Specific Aspects of Refugee Problems in Africa, the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on the Rights of Women in Africa on a regional level and the ICCPR and ICESCR on an international level.

## (2) Course of Proceedings

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<sup>6</sup> *The African Court on Human and People’s Rights*, Request No. 001/2011 - The Republic of Mali.

<sup>7</sup> *The African Court on Human and People’s Rights*, Request No. 002/2011 - The Great Socialist Peoples’ Libyan Jamahiriya; Request No. 001/2012 - The Socio- Economic Rights and Accountability Project (SERAP); Request No. 002/2012 - The Pan African Lawyers’ Union (PALU) and Southern African Litigation Centre.

<sup>8</sup> Article 5 (6) Protocol.

<sup>9</sup> *Zimmermann, Bäumlér: „Current Challenges Facing the African Court on Human and People’s Rights”*, 7 KAS International Reports (2010) 38, 43.

<sup>10</sup> Art. 5 (3) and 34 (6) Protocol.

<sup>11</sup> *Zimmermann, Bäumlér: „Current Challenges Facing the African Court on Human and People’s Rights”*, 7 KAS International Reports (2010) 38, 43 f.

<sup>12</sup> Burkina Faso, Côte d’Ivoire, Ghana, Mali, Malawi, Rwanda and Tanzania.

If possible, the Court may try to reach an amicable settlement in a case pending before it according to Article 9 Protocol.

In cases of extreme gravity and urgency, the legal body is mandated to order provisional measures in line with Article 27 (2) Protocol in order to prevent irreparable harm.

Once the Court found a conduct to be in violation of the Charter, it shall order remedies including “payment of fair compensation or reparation.”<sup>13</sup>

The decisions of the Court are binding for the parties concerned. The Member States are under an obligation to comply with the judgment.<sup>14</sup> The Council of Ministers monitors the execution of the judgments on behalf of the Assembly of Heads of State and Government of the OAU.<sup>15</sup> Additionally, the annual report of the Court specifies cases of non-compliances.<sup>16</sup> Yet, the Court, like any other international legal body lacks solid enforcement possibilities.

### **c. Reporting Procedure before the African Committee of Experts on the Rights and Welfare of the Child [Committee]**

Article 32 of the African Charter on the Rights and Welfare of the Child establishes a Committee to “to promote and protect the rights and welfare of the child.” This Committee is mandated to “monitor the implementation and ensure protection of the rights enshrined in this Charter.”<sup>17</sup> Article 43 of the Charter establishes a reporting procedure according to which each party “shall undertake to submit to the Committee [...], reports on the measures they have adopted which give effect to the provisions of this Charter and on the progress made in the enjoyment of these rights”. The Committee reviews these reports and adopts recommendations.

## **3. Practice of the Court, the Commission and the Committee**

### **a. The Court**

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<sup>13</sup> Article 27 (1) Protocol.

<sup>14</sup> Article 30 Protocol.

<sup>15</sup> Article 29 (2) Protocol.

<sup>16</sup> Article 31 Protocol; Zimmermann and Bäumlner refer to this option as a “Naming and shaming policy”, *Zimmermann, Bäumlner: „Current Challenges Facing the African Court on Human and People’s Rights”*, 7 KAS International Reports (2010) 38, 48.

<sup>17</sup> Article 42 (b) of the African Charter on the Rights and Welfare of the Child.

Since its establishment in 2004, the Court has finalized 28 cases<sup>18</sup> and 84 cases are still pending.<sup>19</sup> It took the Court 5 years to render its first decision<sup>20</sup> and another four years to deliver a decision on the merits.<sup>21</sup>

Many of the individual applications were declared inadmissible due to lack of jurisdiction (the respective Member State has not submitted the additional declaration according to Article 34 (6) Protocol).

So far the Court has not decided a case concerning the rights of the child or the Protocol on the Rights of Women in Africa. Due to the Charter's focus on civil and political rights, cases relating to economic and social rights in urban contexts have so far not been the primary focus of the Court.

One of the most prominent cases concerned the murder of a journalist in 1998.<sup>22</sup> The Court found in 2014 that Burkina Faso had violated the Charter because it failed to properly investigate the murder.

#### **b. The Commission**

To the present day, the Commission has decided 311 cases in total.<sup>23</sup> 15 complaints were initiated against Kenya.<sup>24</sup> In the area of economic, social and cultural rights, the Commission decided 8 cases.<sup>25</sup>

Cases relating directly to urban violence or urban resilience are basically non-existent. A significant number of cases results from incidences in rural areas.

Regarding Kenya, the communication Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya might however be of interest.<sup>26</sup> "The complaint is filed [...] on behalf of the Endorois community. The Complainants allege violations resulting from the displacement of the Endorois community, an indigenous community, from their ancestral lands, the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practice their religion

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<sup>18</sup> Website of the African Court on Human and People's Rights, Finalized Cases, <http://en.african-court.org/index.php/cases/2016-10-17-16-18-21#finalised-cases>.

<sup>19</sup> Website of the African Court on Human and People's Rights, Pending Cases, <http://en.african-court.org/index.php/cases/2016-10-17-16-18-21#pending-cases>.

<sup>20</sup> *African Court on Human and People's Rights*, Application .No 001/2008, *Michelot Yogogombaye v. the Republic of Senegal*.

<sup>21</sup> *African Court on Human and People's Rights*, Applications No 009&011/2011 – *Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher Mtikila V. The United Republic of Tanzania*.

<sup>22</sup> *African Court on Human and People's Rights*, Application No. 013/2011 - *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement v. The Republic of Burkina Faso*.

<sup>23</sup> *Online Database for the Commission*, <http://caselaw.ihrda.org/>.

<sup>24</sup> *Online Database for the Commission*, <http://caselaw.ihrda.org/country/kenya/>.

<sup>25</sup> <http://caselaw.ihrda.org/doc/search/?kw=98252>.

<sup>26</sup> *African Commission on Human and People's Rights*, Communication No. 276/03, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*.

and culture, as well as the overall process of development of the Endorois people.”<sup>27</sup> The Commission found a violation of Articles 1, 8, 14, 17, 21 and 22 of the Charter and recommended to “recognise rights of ownership to the Endorois and Restitute Endorois ancestral land.” to “ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle”, to “pay adequate compensation to the community for all the loss suffered”, to “pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the reserve and to “grant registration to the Endorois Welfare Committee”.<sup>28</sup>

The communication *Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi v. Zimbabwe* related to the issue of wrongful killings through the use of excessive force.<sup>29</sup> The Commission found a violation of Article 1 and 4 of the Charter<sup>30</sup> and recommended to “Undertake law reform to bring domestic laws on compensation in case of wrongful killings into conformity with the African Charter and other international standards” and to “pay compensatory damages to the legal heirs and next of kin of the four deceased persons.”<sup>31</sup>

### **c. The Committee**

Kenya has so far complied with its reporting duties and submitted both the initial and the follow up report to the African Committee of Experts on the Rights and Welfare of the Child.<sup>32</sup>

Having considered Kenya’s report, the Committee made the following recommendations to the country:

With regards to the right to education, “about 65% of children aged between 3 and 6 years have no access to pre-school facilities; - the level of schooling among girls remains low; - the transition by children from primary to secondary school is still challenging: the Committee noted that secondary education is not free, which hampers efforts to keep children in school. The Committee recommends

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<sup>27</sup> *African Commission on Human and People’s Rights*, Communication No. 276/03, Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya para. 1.

<sup>28</sup> *African Commission on Human and People’s Rights*, Communication No. 276/03, Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya pp. 41 f.

<sup>29</sup> *African Commission on Human and People’s Rights*, Communication No. 295/04 Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v. Zimbabwe para. 1.

<sup>30</sup> *African Commission on Human and People’s Rights*, Communication No. 295/04 Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v. Zimbabwe para. 144.

<sup>31</sup> *African Commission on Human and People’s Rights*, Communication No. 295/04 Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v. Zimbabwe para. 145.

<sup>32</sup> See Website of the African Committee of Experts on the Rights and Welfare of the Child, <http://www.acerwc.org/ratification-data/>.

that the State Party adopt and implement a policy of integrated development for young children, with all attendant measures such as financial and human resource allocation, as well as scaling up facilities. [...] The Committee recommends that the State Party take all necessary measures and steps to encourage the education of girls. It also recommends a review of the Law on Education with regard to defining the age bracket that should benefit from compulsory free education in a bid to give greater effect to that law and further recommends that free education be extended to the secondary level so as to provide opportunities for all children to continue their studies.”<sup>33</sup>

Relating to the right to health, the Committee noted that the “immunization coverage (56%); - malnutrition with the nutritional status of children aged below 5 years which has not improved in five years; - stunted growth rate of 30%; - 22% of the children are underweight; - low full-time breastfeeding rate; - only 9-15% of health centers are equipped to provide obstetric care; - HIV/AIDS prevalence rate remains high even though it was observed to have dropped from 13.5 to 9.4%. Unwanted pregnancies have, in some cases, caused adolescents to interrupt their schooling. Data indicates that 21% of adolescents had early pregnancies in 2005 and 46% of those who were uneducated had begun to have babies. As for women in general, 4 out of 10 who die as a result of high-risk abortion complications are aged below 20 years. Adolescents in general are more exposed to risky pregnancies. The Committee recommends an improvement in the health indicators through the implementation and intensification of programs, and improvement in the technical platforms of existing health centers in order to enable them to provide adequate care. The Committee further recommends that measures should be taken for a better health cover that will enable the population to have easy access to primary healthcare, particularly by bringing health centers closer to the populations, a better distribution of healthcare workers between the urban and rural areas, and free healthcare especially for pregnant women and children below 5 years.”<sup>34</sup>

Finally, the Committee considered cases of child abuse and torture and found that “recent statistics (2003-2004) indicate that about 3097 rape cases were reported at national level. The number could be higher since this data only represents that mentioned by the Police. More often, sexual delinquents are acquitted by the courts because of complexities which create fear and doubt in parents or guardians who prefer arrangements to the detriment of the rights of victims. The Committee

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<sup>33</sup> *African Committee of Experts on the Rights and Welfare of the Child*, Recommendations and Observations to the Government of Kenya by the African Committee of Experts on the Rights and Welfare of the Child concerning the Initial Report on the Implementation of the African Charter on the Rights and Welfare of the Child, Doc. No. SA2590, pp. 2 f.

<sup>34</sup> *African Committee of Experts on the Rights and Welfare of the Child*, Recommendations and Observations to the Government of Kenya by the African Committee of Experts on the Rights and Welfare of the Child concerning the Initial Report on the Implementation of the African Charter on the Rights and Welfare of the Child, Doc. No. SA2590, pp. 3 f.

recommends that the Kenyan Government take effective and urgent measures to combat the phenomenon of violence against children, through: - actions to raise the awareness of and inform the population on the phenomenon, - training of judicial police officers and magistrates for an effective application of sanctions on perpetrators of these acts of violence, - encouragement and establishment of a denunciation mechanism, - establishment of an Institution for monitoring and assistance to victims."<sup>35</sup>

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<sup>35</sup> *African Committee of Experts on the Rights and Welfare of the Child*, Recommendations and Observations to the Government of Kenya by the African Committee of Experts on the Rights and Welfare of the Child concerning the Initial Report on the Implementation of the African Charter on the Rights and Welfare of the Child, Doc. No. SA2590, p. 4.