

# Legal Framework for Human Rights Protection in Africa

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## ABSTRACT

This chapter examines the development and framework of the African regional human rights system, emphasising its evolution within the broader context of international human rights law. Following World War II, regional human rights systems emerged alongside the United Nations' (UN) efforts, with Africa establishing a distinct framework in response to global standards and regional needs. The study explores how the youngest regional system of human rights protection evolved, what influenced the creation of instruments, such as the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child, and protocols addressing specific issues, including women's rights, disability rights and the rights of older persons. Additionally, the study addresses the roles of key African human rights institutions, including the African Commission and African Court on Human and Peoples' Rights.

## KEYWORDS

African human rights system, African Charter on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, African Court on Human and Peoples' Rights, regional human rights instruments, African Union, Maputo Protocol, Kampala Convention, African Charter on the Rights and Welfare of the Child, human rights institutions in Africa

## 1. Introduction

Following World War II, the United Nations (UN) emerged as the foremost international body advocating for universal human rights. Alongside the UN, various regional human rights systems developed globally, notably in Europe, the Americas and Africa, each contributing distinct perspectives and mechanisms to the broader human rights discourse.

Since the mid-20th century, the global community has actively worked to establish an international framework for the protection and promotion of human rights, which obligates Member States to uphold universal standards. To achieve this vision, the international human rights system developed a body of norms to be applied universally, transcending political and geographical boundaries. While this international framework is designed to be enforceable at the regional and national levels, there

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are significant challenges in providing comprehensive human rights protections solely through an international mechanism. For human rights commitments to be realised, effective and credible regional and national systems must complement the international framework. These regional and national mechanisms are essential for bridging gaps in enforcement and adapting protections per specific regional contexts, bringing the ideals of human rights closer to individuals.

For several years, the UN was cautious, if not outright sceptical, of regional human rights protection systems, such as those emerging in Europe and the Americas. There was a concern that these regional systems may fragment global human rights efforts by setting lower standards than those promoted by the UN, undermining the universality of human rights protections. Some feared that states might use these regional mechanisms as an avenue to evade stricter global human rights scrutiny. By subjecting themselves to regional frameworks, perceived as less demanding, these states could argue that they fulfilled their obligations, avoiding the stringent expectations of the international community under the UN's oversight.

However, this perspective shifted in the 1970s, following the entry into force of two landmark UN treaties: the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>1</sup> and the International Covenant on Civil and Political Rights (ICCPR),<sup>2</sup> both were adopted in 1966 and enforced by 1976. With these legal frameworks reinforcing the UN's human rights mandate, the organisation became more open to the idea of regional approaches as complementary to its universal agenda. In 1977, the UN General Assembly formally encouraged states without regional human rights mechanisms to consider establishing them,<sup>3</sup> marking a significant endorsement of regionalism. This new perspective paved the way for the creation of the African regional human rights system, formally established in June 1981, which has become an essential component of the global human rights architecture.

The formation of regional human rights frameworks was driven in part by the need to fill gaps in the international system and address specific regional challenges. The disconnect between universal standards and the diverse regional realities highlighted the importance of adapting human rights principles to reflect regional contexts and priorities. An exclusively international approach could feel remote from local concerns, necessitating the creation of systems that respected regional differences while upholding universal values. These considerations played a significant

1 UN General Assembly (1966) International Covenant on Economic, Social and Cultural Rights. United Nations, Treaty Series, vol. 993, p. 3, 16 December 1966.

2 UN General Assembly (1966) International Covenant on Civil and Political Rights. United Nations, Treaty Series, vol. 999, p. 171, 16 December 1966.

3 UN General Assembly (32nd sess.: 1977) Regional arrangements for the promotion and protection of human rights, A/RES/32/127, UN General Assembly, 16 December 1977, 'The General Assembly, Mindful of the suggestions made for the establishment, in regions where it does not already exist, of regional machinery for the promotion and protection of human rights, [...] Appeals 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.'

role in the establishment of the African regional human rights system, designed to promote and protect rights based on Africa's socio-political context.

## 2. The Historical Background of the African Human Rights System

The African regional human rights system seeks to harmonise universal human rights standards with the continent's cultural values. It integrates globally recognised human rights norms with an appreciation for African traditions and communal principles. The struggle for human rights in Africa is deeply rooted in the continent's enduring history of hardship, marked by centuries of exploitation, oppression and resistance. The periods of slavery, colonial subjugation, apartheid and neo-colonialism have left a profound imprint on the African society, shaping their collective resolve to establish a robust framework for human rights protection.

A significant milestone in formalising regional human rights protection came in June 1981, when the African Charter on Human and Peoples' Rights (AChHPR),<sup>4</sup> the cornerstone of the African human rights system, was adopted by the 18th Assembly of the Heads of State and Government of the Organisation of African Unity (OAU). However, the journey to adopting the Charter was neither quick nor straightforward. It unfolded over several decades and involved numerous consultations, seminars and conferences, largely driven by African jurists, civil society organisations and human rights advocates, supported by key international entities, such as the UN and the OAU Secretary-General.

The concept of creating a human rights protection mechanism for Africa emerged in the early 1960s. At the first Congress of African Jurists in Lagos, Nigeria, in 1961, delegates adopted a declaration known as the 'Law of Lagos', which urged African governments to establish a regional human rights treaty that would include a court and a commission to oversee compliance.<sup>5</sup> Despite this call to action, African governments at the time did not actively pursue the development of such a framework.

Similarly, the OAU, founded in 1963, made no explicit commitment to human rights protection in its founding Charter.<sup>6</sup> While it encouraged respect for the Universal Declaration of Human Rights (UDHR) in international relations, it imposed no binding national obligation. The OAU addressed issues, such as decolonisation, racial discrimination and the refugee crisis; however, it avoided confronting human rights

4 Organisation of African Unity (OAU) (1981) *African Charter on Human and Peoples' Rights (Banjul Charter)*, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 27 June 1981.

5 African Conference on the Rule of Law, Lagos, Nigeria, 3-7 January 1961: A report on the proceedings of the Conference. [Online]. Available at: <https://www.icj.org/wp-content/uploads/1961/06/Africa-African-Conference-Rule-of-Law-conference-report-1961-eng.pdf> (Accessed: 3 November 2024).

6 Organisation of African Unity (OAU) (1963) *Charter of the Organisation of African Unity* [Online]. Available at: <https://www.refworld.org/legal/constinstr/ou/1963/en/20810> (Accessed: 3 November 2024).

abuses within Member States due to its focus on state sovereignty, territorial integrity and socio-economic development. Despite this limited mandate, the OAU gradually recognised the importance of establishing a regional human rights mechanism. This evolution reflects Africa's commitment to addressing individual and collective rights within its historical and political context, paving the way for a system tailored to the continent's needs and aspirations.

The momentum for regional human rights protection resurfaced in 1967 at the first Conference of Francophone African Jurists in Dakar, Senegal. Building upon the ideas outlined in the Law of Lagos, the delegates reaffirmed the need for an African human rights framework. The resulting Dakar Declaration urged the International Commission of Jurists, in collaboration with other African institutions, to explore ways of establishing a regional mechanism that could better protect human rights on the continent.<sup>7</sup> This renewed effort, though gradual, set the stage for future developments that would lead to the adoption of the AChHPR in 1981.<sup>8</sup>

The UN was instrumental in encouraging the development of a regional human rights system in Africa by organising a series of seminars and conferences across the continent. The UN Human Rights Commission established an ad hoc working group, passing a resolution that urged the UN Secretary-General to provide necessary support for the establishment of a regional mechanism. The Commission's resolution 24 (XXXIV), dated 8 March 1972, explicitly invited the OAU to take proactive steps for establishing a regional human rights mechanism. To underscore the seriousness of this invitation, the resolution offered the UN Secretary-General's support, should the OAU require assistance in realising this goal. Despite these proactive efforts, there was hesitation among African states to endorse a regional convention. To overcome this resistance, conference participants formed a follow-up committee tasked with personally engaging African heads of state and other influential leaders on the importance of a regional human rights framework. The committee undertook numerous missions across Francophone Africa, targeting countries whose leaders were likely to support human rights initiatives and wield influence within the OAU. During these visits, committee members emphasised to heads of state and political authorities the pressing need for a regional human rights commission in Africa, highlighting the urgency of creating a body that would uphold and promote human rights within the African context.

During one of these visits, Léopold Sédar Senghor, then President of Senegal, agreed to propose a resolution for the establishment of an African Human Rights Commission at the next OAU Assembly.<sup>9</sup> He appointed the President of the Supreme Court of Senegal as the head of the committee responsible for drafting the initial

7 Congrès de Juristes Africains Francophones (1967) *Déclaration de Dakar: Conclusions*. Dakar, 5-9 January 1967.

8 Organisation of African Unity (OAU) (1981) *African Charter on Human and Peoples' Rights (Banjul Charter)*, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 27 June 1981.

9 International Commission of Jurists (1985) *Human and Peoples' Rights in Africa and the African Charter: Report of a Conference held in Nairobi from 2 to 4 December 1985*. Nairobi.

text. This preliminary draft, known as the ‘Senghor draft’, laid the foundation for the AChHPR. This groundwork culminated in the adoption of Resolution 115 (XVI) at the 16th Ordinary Session of the Assembly of Heads of State and Government of the OAU in Monrovia, Liberia, from 17 to 20 July 1979.<sup>10</sup> Through this resolution, the OAU formally instructed its Secretary-General to convene a committee of African experts for developing the AChHPR’s preliminary draft. This draft was to include provisions for creating institutions dedicated to the promotion and protection of human and peoples’ rights, marking a significant step forward in establishing a regional human rights system for Africa. The committee, composed of 20 African experts and chaired by Judge Kéba M’baye, gathered in Dakar, Senegal, in 1979. During the opening session, President Senghor encouraged the committee to craft a document that would resonate with African values, address Africa’s specific needs, prioritise the right to development and emphasise the duties of individuals within society.<sup>11</sup> Following 10 days of intense deliberation, the committee produced a preliminary draft of the AChHPR.

In 1979, the UN General Assembly passed Resolution 34/171, which addressed the need for regional frameworks for the promotion and protection of human rights.<sup>12</sup> Among other recommendations, it called upon the UN Secretary-General to assess the feasibility of organising a seminar in developing regions to engage in discussions on establishing and strengthening regional human rights mechanisms. Despite this progress, resistance from certain African governments nearly derailed the AChHPR’s adoption. A critical conference, originally scheduled to finalise the draft in Ethiopia, was postponed due to political opposition. During this tense period, the project faced substantial threats, and the future of the Charter remained uncertain. Amidst this uncertainty, the OAU Secretary-General invited the President of The Gambia to host two ministerial conferences in Banjul, where the draft was completed.

The final draft, later known as the ‘Banjul Charter’ in recognition of The Gambia’s role, was adopted by the OAU Assembly on 28 June 1981 in Nairobi, Kenya.<sup>13</sup> The first country to ratify the Charter was Mali, on 21 October 1981, initiating a wave of regional support.<sup>14</sup> By 21 October 1986, the Charter officially came into force after sufficient ratifications, signalling a new era for human rights protection in Africa. By 1999, every Member State had ratified the Charter, with South Sudan, Africa’s newest state, joining in 2016. Morocco was the last country to join the AU, reinstating its membership in 2017 after initially withdrawing from the OAU in 1984. Although Morocco rejoined the African Union after over three decades of isolation, it has not

10 Organisation of African Unity (1979) Resolution 115 (XVI) at the Sixteenth Ordinary Session of the Assembly of Heads of State and Government. Monrovia, Liberia, 17–20 July.

11 Ouguergouz, 2003, pp. 377–378.

12 United Nations General Assembly (1979) Resolution 34/171 on Regional Arrangements for the Promotion and Protection of Human Rights. A/34/829. Adopted without vote. 17 December 1979.

13 Organisation of African Unity (OAU) (1981) African Charter on Human and Peoples’ Rights (Banjul Charter), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 27 June 1981.

14 Ibid.

yet taken steps to ratify this key human rights instrument, making it the only country of the 55 Member States that is yet to ratify the Charter.<sup>15</sup>

The African Commission on Human and Peoples' Rights (ACHPR), the system's main body for monitoring and promoting the Charter's provisions, was established in 1987.<sup>16</sup> On 2 November of that year, the Commission held its first ordinary session in Addis Ababa, Ethiopia, where it adopted its inaugural resolution, officially designating its headquarters in Banjul, The Gambia. The Commission was designed as the primary institution to monitor and promote the principles enshrined in the Charter. The following year, on 28 April 1988, the Commission presented its first activity Report, documenting its early efforts and setting a precedent for ongoing operational transparency.<sup>17</sup> This report laid the foundation for a practice of accountability that continues to define the Commission's work. Through these reports, the Commission maintained an open dialogue with African governments and civil society, building trust in the system's legitimacy and encouraging states to engage constructively with its findings and recommendations. On 12 June 1989, the Commission's headquarters were formally inaugurated in Banjul, establishing the city as a focal point for regional human rights work. Later that year, on 21 October 1989, the Commission adopted this date as the African Human Rights Day, recognising the Charter's entry into force and as a day to promote human rights awareness across the continent. In June 1989, it convened its first extraordinary session to address urgent issues.

Meanwhile, as Africa's commitment to human rights grew, the OAU took further steps by adopting the Protocol on the African Court on Human and Peoples' Rights (ACtHPR) on 10 June 1998 at the OAU summit in Burkina Faso.<sup>18</sup> This new judicial body was to provide binding resolutions for human rights violations, offering an additional layer of protection to the people of Africa. The Protocol entered into force on 25 January 2004, enabling the Court to start handling cases. In 2006, significant strides were made, as the first judges of the Court were sworn in on 2 July and, by November of that year, the Court began its official operations. The African Union has extended the mandate of the ACtHPR to crimes under international law and transnational crimes, reflected in the 2014 Malabo Protocol.<sup>19,20</sup> With both the ACHPR and

15 African Commission on Human and Peoples' Rights (n.d.) State Parties to the African Charter on Human and Peoples' Rights [Online]. Available at: <https://achpr.au.int/en/states> (Accessed: 3 November 2024).

16 African Commission on Human and Peoples' Rights (n.d.) About ACHPR. [Online]. Available at: <https://achpr.au.int/en> (Accessed: 3 November 2024).

17 African Commission on Human and Peoples' Rights (1988) 1st Annual Activity Report [pdf]. [Online]. Available at: [https://archives.au.int/bitstream/handle/123456789/2074/1st%20Annual%20Activity%20Report\\_E.pdf?sequence=1&isAllowed=y](https://archives.au.int/bitstream/handle/123456789/2074/1st%20Annual%20Activity%20Report_E.pdf?sequence=1&isAllowed=y) (Accessed: 3 November 2024).

18 Organisation of African Unity (OAU) (1998) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998.

19 African Union (2014) Decision on the Draft Legal Instruments, Assembly/AU/Dec.529(XXIII).

20 The Malabo Protocol has not yet received the required 15 ratifications to enter into force. As of 2025, the African Court does not exercise the expanded criminal jurisdiction that the Malabo Protocol would confer, since the instrument remains dormant pending further ratifications.

the ACtHPR actively functioning, Africa's regional human rights system solidified its institutional structure.

The African Charter on the Rights and Welfare of the Child (AChRWC), known as the Children's Charter, was adopted by the OAU in 1990 during its 26th ordinary session in Addis Ababa, Ethiopia.<sup>21</sup> The Charter officially entered into force on 29 November 1999 after ratification by 15 OAU Member States. With the transition of the OAU into the African Union in 2001, the Charter has continued to serve as a cornerstone of the AU's commitment to child protection and welfare. Similar to the UN Convention on the Rights of the Child (UN CRC),<sup>22</sup> the Children's Charter serves as a comprehensive instrument outlining the rights of children and establishing universal principles and norms for their well-being. However, it is distinctive in its approach, tailored to address the unique challenges faced by children in Africa, including issues like harmful cultural practices, child labour and child exploitation.

The Children's Charter is an independent legal document, separate from the AChHPR. It was not designed as an amendment or supplement to the AChHPR, nor is it institutionally tied to it. Instead, it is a dedicated instrument for the explicit protection of children's rights in Africa. The responsibility for monitoring and enforcing the Charter's provisions rests with the African Committee of Experts on the Rights and Welfare of the Child, an autonomous body tasked with overseeing state compliance, advising on best practices and providing recommendations to improve the status and protection of children across African nations.

Another milestone came with the adoption of the Maputo Protocol on 11 July 2003, focusing specifically on women's rights within the African human rights framework.<sup>23</sup> It defines a comprehensive set of rights for African women, addressing areas often overlooked in traditional human rights frameworks. It guarantees women's right to participate in political processes, ensuring equal access and representation alongside men in social and political spheres. The Protocol enhances women's autonomy over reproductive health decisions, empowering them to make choices about their bodies. Additionally, it mandates the eradication of harmful practices, such as female genital mutilation (FGM). Adopted by the African Union in 2003 in Maputo, Mozambique, the Protocol serves as an amendment to the AChHPR.

The year 2016, designated as the 'African Year of Human Rights with a particular focus on the Rights of Women', stressed the region's growing focus on gender equality and women's rights across the continent. The year commemorated the 35th anniversary of the adoption of the AChHPR, the 30th anniversary of its entry into force, the 29th anniversary of the ACHPR's operationalisation and the 10th anniversary of the establishment of the ACtHPR. Additionally, it marked the 13th year of the adoption

21 Organisation of African Unity (OAU) (1990) African Charter on the Rights and Welfare of the Child. CAB/LEG/24.9/49, 11 July 1990.

22 UN General Assembly (1989) Convention on the Rights of the Child. United Nations, Treaty Series, vol. 1577, p. 3, 20 November 1989.

23 African Union (2003) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. African Union, 11 July 2003.

of the Maputo Protocol. This campaign highlighted the ongoing challenges faced by women and the need for effective implementation of the Maputo Protocol and other frameworks aimed at gender equity. The same year, the AU adopted the Protocol on the Rights of Older Persons in Africa, the first regional instrument dedicated to protecting the welfare of the elderly.<sup>24</sup> Recognising the unique vulnerabilities of older individuals, the protocol addressed issues, such as healthcare access, protection from abuse and social security, ensuring older people's dignity and security as integral members of African societies. This focus on the rights of vulnerable populations continued with the adoption of the Protocol on the Rights of Persons with Disabilities in 2018.<sup>25</sup> It affirms the commitment of AU Member States to promote equal treatment and inclusion of individuals with disabilities, aligning Africa's standards with international instruments, such as the UN Convention on the Rights of Persons with Disabilities, and ensuring that people with disabilities have access to opportunities and protections.

In 2019, the AU adopted the Transitional Justice Policy,<sup>26</sup> providing a framework for post-conflict African states to help AU Member States recover from violent conflicts and repression to achieve accountability, lasting peace, justice and reconciliation. The policy addresses current issues in transitional justice and serves as a flexible guide that countries can adapt when creating and implementing their transitional justice systems. This policy represents the AU's broader commitment to address human rights violations and their long-term impacts. Recent efforts to increase transparency and public access to the African human rights system have led to the adoption of digital tools by the ACHPR and ACtHPR. Through online databases and digital access to case documents, individuals, legal practitioners and advocacy groups can easily track case developments and decisions, making the system more accessible and accountable to the public.

Despite these significant advancements, there are widespread human rights violations in the region, caused by contemporary forms of slavery, racism, poverty, corruption, illiteracy, religious intolerance, population displacement and several other factors that expose millions to vulnerabilities. Compounding these challenges, dictatorial regimes and their monopoly are major contributors to human rights violations in the region. The ACHPR has done a lot to bring the issue of human rights into the political discourse in Africa. Nevertheless, the response has been lukewarm. To this day, the AChHPR remains inaccessible to the majority of the people it was designed to serve and largely unknown in the region.<sup>27</sup> A significant barrier lies in the ACHPR's limited accessibility. For many Africans, especially those in remote or marginalised communities, its mechanisms remain out of reach. Many governments have demonstrated limited political will to fully comply with the AChHPR's standards

24 African Union (2016) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa. 31 January 2016.

25 African Union (2018) Protocol on the Rights of Persons with Disabilities. 29 January 2018.

26 African Union (2019) Transitional Justice Policy. 6 February 2019.

27 Ssenyonjo, 2011, p. xv.

or prioritise human rights in their national agendas. In the future, these challenges will need to be addressed to realise a vision of human rights that originally inspired this regional human rights framework.

### 3. Key Legal Instruments in the African Human Rights System

The African human rights system is built upon a framework of legal instruments designed to address the rights of individuals and communities across the continent. Key among these instruments is the AChHPR (1981), or the Banjul Charter, which lays the foundation for human rights protections in Africa by encompassing civil, political, economic, social and cultural rights. Subsequent protocols and conventions expand on this framework to address specific groups and issues, reflecting the evolving understanding of human rights within the African context. These include the Maputo Protocol (2003), which centres on women's rights, the Protocol establishing the ACtHPR (1998), which enforces the Charter's provisions, and the AChRWC (1990), which focuses on children's rights. Other specialised instruments, such as the Kampala Convention (2009) for internally displaced persons, the Protocol on the Rights of Older Persons (2016) and the Protocol on the Rights of Persons with Disabilities (2018), address specific vulnerabilities. Together, these instruments form the African human rights system.

#### 3.1. *The AChHPR*

The recognition of human rights as a formal legal concept emerged gradually in Africa, with the notion of human dignity slowly being integrated into the region's legal framework. This evolving recognition of human rights within the African context must be viewed alongside the broader developments in international law and the UN human rights system. Africa's path to embracing human rights was heavily influenced by the political and social struggles of African states during the colonial era and post-independence period.<sup>28</sup> These experiences provided the impetus for establishing human rights mechanisms tailored to the African experience, culminating in the AChHPR in the 1980s.

The Charter reflected Africa's distinctive historical trajectory and was strongly influenced by the OAU's formation, which was founded on 25 May 1963, with the adoption of the OAU Charter.<sup>29</sup> This OAU Charter laid out the organisation's main objectives, including fostering solidarity among African states, promoting economic and social development, supporting anti-colonial efforts, defending the sovereignty of African nations and encouraging international cooperation. Despite these progressive goals,

28 Bösl and Diescho, 2009, p. 12.

29 Organisation of African Unity (OAU) (1963) Charter of the Organisation of African Unity [Online]. Available at: <https://www.refworld.org/legal/constinstr/oau/1963/en/20810> (Accessed: 3 November 2024).

it did not explicitly address human rights protection as a foundational objective. This omission resulted in a stance of non-interference in human rights abuses within Member States, often prioritising sovereignty and non-intervention over accountability. For example, the organisation remained silent on the large-scale massacres in Burundi in 1972 and 1973, where thousands of Hutu were killed. Similarly, the brutal targeting of Muslims in Western Uganda in 1979, which included acts intended to decimate Muslim communities through violence, arson and destruction of religious sites, went unaddressed.<sup>30</sup> The OAU refrained from condemning these events or initiating discussions about them, viewing such issues as internal matters within the sole jurisdiction of sovereign states.

While the OAU Charter did not explicitly include human rights within its formal mandate, it set an important groundwork for future human rights protections in Africa through four significant means. First, one of its key objectives was to foster international cooperation, with ‘due regard’ to the principles of the UN Charter<sup>31</sup> and the UDHR.<sup>32</sup> This reference to both foundational international instruments implicitly bound African states to uphold human rights principles, ensuring that human rights concerns would not be wholly sidelined in African governance. Second, the OAU became a powerful advocate for the self-determination of African people under colonial rule, actively supporting independence movements across the continent. In its stance against apartheid in South Africa and white minority rule in Rhodesia (now Zimbabwe), it emphasised liberation as an intrinsic human right and rallied international support to dismantle these oppressive regimes.

Third, the OAU addressed the humanitarian crisis of refugees, which was a pressing issue across post-colonial Africa. In 1969, it adopted the Convention Governing the Specific Aspects of Refugee Problems in Africa, an instrument that protected refugees, established state obligations for their welfare and set a precedent for human rights concerns within the region.<sup>33</sup> Fourth, it prioritised the peaceful settlement of border disputes, a significant move in a continent with arbitrary colonial borders. It successfully mediated territorial disputes between countries, such as Algeria and Morocco, Somalia and Ethiopia, and Niger and Dahomey (now Benin).<sup>34</sup> By facilitating peaceful solutions to these conflicts, the OAU promoted regional stability, a necessary condition for developing a framework to protect human rights.

By the 1970s, several factors converged to advance the idea of a formal human rights system in Africa, leading to the adoption of the AChHPR in June 1981. Among these influences was the UN’s emphasis on establishing regional mechanisms tailored to specific human rights issues faced by different continents. Simultaneously, the

30 Ssenyonjo, 2011, p. 5.

31 United Nations (1945) Charter of the United Nations. 1 UNTS XVI, 24 October 1945.

32 UN General Assembly (1948) Universal Declaration of Human Rights, 217 A (III), 10 December 1948.

33 Organisation of African Unity (OAU) (1969) Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention). 1001 U.N.T.S. 45, 10 September 1969.

34 Ssenyonjo, 2011, p. 6.

international community experienced a heightened focus on human rights. Additionally, the horrific human rights abuses in countries such as Uganda under Idi Amin (1971–1979), Equatorial Guinea under Macias Nguema (1969–1979) and the Central African Empire under Jean-Bédél Bokassa (1966–1979) underscored the urgent need for a regional framework that could monitor and address such violations.<sup>35</sup> During this period, regional human rights systems were firmly established in Europe and the Americas, setting a precedent that highlighted the need for Africa to establish its regional human rights mechanism. Recognising this gap, influential African leaders advocated for a regional charter.

Senegal's President Senghor committed to bringing the proposal for a regional human rights mechanism to the OAU's attention. In 1979, the Assembly of Heads of State and Government of the OAU gathered in Monrovia, Liberia, and unanimously called upon the OAU Secretary-General to convene a committee of experts to draft a regional human rights instrument for Africa, inspired by the European and Inter-American human rights conventions. Later that year, a conference was held in Dakar, Senegal, where 20 African experts, led by Judge Kéba M'baye, began drafting the African Charter. After 10 days of intensive discussions, the committee produced the Charter's initial draft. In his opening address at the Dakar conference, President Senghor set a distinct tone for the development of the Charter, urging the committee to create a document that would be rooted in African values and reflect the continent's social, economic and cultural realities.<sup>36</sup> President Senghor emphasised that the Charter should not merely list rights but highlight responsibilities, especially addressing Africa's unique needs, such as the right to development. He emphasised African traditions and priorities, ensuring that the Charter would be a product of African perspectives rather than an adoption of external frameworks.

President Senghor's call for an authentically African approach stemmed from his personal experiences with the European human rights project. As a former member of the French parliament, he had participated in the early discussions surrounding the European Convention on Human Rights (ECHR). He recalled advocating for the Convention's automatic application to European colonial territories, arguing that human rights should extend universally, irrespective of national borders. However, his French colleagues rejected this notion, signalling an unwillingness to apply European human rights protections to African and other colonised populations. For President Senghor, this episode symbolised the hypocrisy embedded within the European human rights model, which championed universal rights while simultaneously denying those rights to colonised people. He stated:

'You have therefore to be careful that your Charter may not be a Charter of the right of the "African Man" ... There is neither frontier, nor race when the freedoms and the rights attached to the human beings are to be protected.

35 Ibid.

36 Senghor, 1979, pp. 78–79.

That does not mean that we have to give up thinking by ourselves and for ourselves. Europe and America built up their system of rights and freedoms by referring to a common civilization: to their respective peoples and to specific aspirations... As Africans we shall neither copy, nor strive for originality, for the sake of originality... We could get inspirations from our beautiful and positive traditions. Therefore, you must keep constantly in mind our values of civilization and the real needs of Africa.<sup>37</sup>

This personal history lent a sense of purpose to President Senghor's address and framed the African Charter as a deliberate departure from the European model. From the outset, the Charter was envisioned as a new framework that would validate African identities, uphold collective responsibilities and address the specific realities faced by African states and peoples. However, the process was not without significant obstacles. Some African governments were resistant to a regional human rights system, fearing that it might challenge their authority or interfere with national sovereignty. This opposition nearly derailed the Charter's progress, as a planned conference on the Charter in Ethiopia to formally adopt the draft was cancelled due to political tensions. In response, the President of The Gambia stepped forward to host two conferences in Banjul, where the draft Charter was finalised. It was in honour of The Gambia's role in rescuing the Charter that the document came to be known as the 'Banjul Charter'. On 28 June 1981, the OAU Assembly adopted the Banjul Charter in Nairobi, Kenya. After ratification by an absolute majority of OAU Member States, the Charter officially came into force on 21 October 1986, marking a major milestone in the establishment of a regional human rights system for Africa.

However, the absence of *travaux préparatoires* on the AChHPR leaves a significant gap in understanding the drafting process.<sup>38</sup> Without these records, the specific contributions, positions and motivations of individual states during negotiations remain unknown. This makes it difficult to trace how certain provisions were included or excluded, or which nations advocated for specific protections or limitations. However, it is known that the draft developed during the Dakar conference was taken forward to the OAU Ministerial Meeting in Banjul in 1980. Here, it underwent minimal language revisions. In June 1981, the OAU Assembly formally adopted the African Charter in Nairobi, Kenya. The final version of the Charter fell short of expectations for a comprehensive human rights system, notably omitting provisions for a judicial body. Instead, it established the ACHPR, with a broad, vague mandate to promote and protect rights, conduct research and interpret the Charter upon request. While the Commission made progress, its limited enforcement powers highlighted the need for a stronger mechanism. This prompted the adoption of the 1998 Protocol to establish the ACtHPR.

37 Ibid.

38 Akinyemi, 1985, p. 210.

The Charter is often compared to the UDHR. While both the African Charter and the UDHR aim to uphold and protect fundamental rights, they differ significantly in scope and focus. The UDHR is universal in nature, designed to apply globally, whereas the AChHPR is grounded in Africa's regional priorities and challenges. For instance, the AChHPR addresses rights that are particularly relevant to the continent's development, such as the right to development (Article 22) and the right to a healthy environment (Article 24), highlighting the shared responsibility of African states. Other unique provisions include the right to participate in cultural life (Article 17) and the right to self-determination (Article 20). It is a legally binding instrument for the states that have ratified it, with compliance overseen by the ACHPR. Similarly, the UDHR's implementation is monitored by bodies, such as the UN Human Rights Committee.

The AChHPR embodies several unique features that distinguish it within international human rights law. It upholds the indivisibility of all rights, encompassing civil, political, socio-economic and cultural rights within a single framework. It recognises all generations of rights, positioning socio-economic rights alongside civil and political rights as fully justiciable. This ensures that socio-economic rights, often marginalised in other international treaties, carry equal weight and enforceability within the African system. As the ACHPR affirmed in the case of *SERAC v. Nigeria*:

‘Clearly, collective rights, environmental rights and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.’<sup>39</sup>

This shows the Charter's intent to provide comprehensive human rights protection, without privileging one category of rights over another. Another defining feature is the absence of a derogation clause. Unlike several human rights instruments that permit states to temporarily suspend certain rights during states of emergency, the AChHPR explicitly disallows derogations. This means that states cannot invoke emergencies or special circumstances as grounds to restrict the rights and freedoms enshrined in the Charter. The only permissible limitations on rights are found in Article 27(2), which allows restrictions solely for the purpose of safeguarding rights and freedoms of others, collective security, morality and the common interest. This strict non-derogation stance, emphasised in *Media Rights Agenda v. Nigeria*, shows the Charter's commitment to rights protection, even under challenging national circumstances.<sup>40</sup>

Additionally, the Charter uniquely enshrines people's rights, recognising the rights of communities and nations as collective entities rather than solely focusing

39 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, African Commission on Human and Peoples' Rights, Communication no. 155/96 (2001), para. 68.

40 *Media Rights Agenda v. Nigeria*, African Commission on Human and Peoples' Rights, Communication no. 224/98 (2000), paras. 68–69.

on individual rights. This includes the rights to self-determination, development and free disposal of natural resources, establishing an important precedent for collective rights in international law. Such provisions address the historical context of Africa, where issues of colonialism, resource exploitation and community rights remain pressing. In the *Endorois* case, the ACHPR highlighted this focus, affirming that ‘the Charter recognises the rights of peoples’.<sup>41</sup> This collective approach aligns with African values of community welfare and underscores the significance of economic and social development as integral to human rights. Furthermore, it imposes duties on states and individuals, which is unique in human rights law. According to the Preamble of the AChHPR, ‘the enjoyment of rights and freedom also implies the performance of duties on the part of everyone’. This reciprocal relationship reflects African communal traditions, where individual actions are often seen in light of their impact on the community. Thus, the Charter positions duties as intrinsic to the exercise of rights.

The AChHPR has long been noted for its incorporation of ‘African values’ and communitarian ideals, a feature that scholars like Makau Mutua have characterised as the African human rights system’s value-based exceptionalism. Mutua’s seminal critique described the Charter’s emphasis on collective rights and individual duties as reflecting an ‘African cultural fingerprint’, positing that it diverged from Western liberal norms by embedding traditional African communal values.<sup>42</sup> This approach, including Articles 27–29’s enumeration of individual duties to family and society, is often seen as an attempt to reconcile universal human rights with Africa’s communitarian cultural heritage.

Recent literature offers a more critical and nuanced reflection on this exceptionalism. Some scholars observe that early Africanist discourse split between embracing cultural relativism and universalism; however, today there is broad agreement that one must avoid overly romanticising a monolithic ‘African’ concept of human rights.<sup>43</sup> African societies are internally diverse and have changed significantly over time; therefore, appeals to static tradition can be misleading. Some scholars caution that uncritical exaltation of ‘African values’ can be co-opted by governments to justify authoritarian practices or deflect criticism of human rights violations under the guise of cultural sovereignty.<sup>44</sup> For example, measures like denying LGBTQ+ groups legal recognition or clamping down on dissent are sometimes defended as upholding African morals, which is the abuse of cultural relativism.

41 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of *Endorois Welfare Council v. Kenya*, African Commission on Human and Peoples’ Rights, Communication No. 276/2003 (2009), para. 155.

42 Mutua, 1995, pp. 341–417.

43 African Legal Studies. (2024, August 30). Universalism of human rights versus cultural relativism within the African discourse. [Online]. Available at: [https://africanlegalstudies.blog/2024/08/30/universalism-of-human-rights-versus-cultural-relativism-within-the-african-discourse/#\\_ftn4](https://africanlegalstudies.blog/2024/08/30/universalism-of-human-rights-versus-cultural-relativism-within-the-african-discourse/#_ftn4).

44 Ibid.

Thus, while the Charter's drafters deliberately infused regional norms with African communitarian ideals, commentators stress that such ideals must be pursued in tandem with, not at the expense of, universal human rights guarantees. This view echoes earlier moderate positions in African scholarship, which recognise a core of universal rights, yet welcome diverse cultural expressions in implementing those rights.<sup>45</sup> Simultaneously, the prevailing consensus in recent literature is that African human rights exceptionalism should be about innovation and inclusion, such as recognition of collective rights and duties, rather than a rejection of universality. The Charter's unique values (solidarity, dignity and communal responsibility) can enrich global human rights discourse, provided they are not instrumentalised for oppression by state actors. Hence, these unique features of the Charter, including its indivisibility of rights, prohibition on derogations, recognition of peoples' rights and emphasis on individual and collective duties, illustrate a uniquely African perspective on human rights.

Despite its innovations, the African Charter has faced significant criticism in scholarly literature and jurisprudence. Commentators have identified several weaknesses in its provisions and implementation mechanisms. Many civil and political rights in the Charter are subject to 'claw-back' clauses; that is, qualifying language, such as 'except within the law,' which permits national legislation to limit the guaranteed rights. Critics argue that these broad limitations can effectively hollow out the Charter's protections by allowing states expansive latitude to restrict rights under the guise of domestic law.<sup>46</sup> According to Michelo Hansungule, unlike the UDHR (which the Charter draws upon), the African Charter's drafters borrowed broad limitation clauses that 'allow suspension or violation of enunciated rights based on *ordre public* in accordance with domestic legislation', undermining the scope of the rights guaranteed.<sup>47</sup> For example, the rights to freedom of expression, assembly and association are circumscribed by such claw-back clauses, enabling repressive governments to cite national law to justify practices that would violate universal human rights standards.

Another oft-cited weakness is the vagueness of the Charter's enforcement mechanisms and the historical ineffectiveness of its supervisory bodies. The ACHPR, originally the sole implementation mechanism, was given a broad promotional and protective mandate; however, no binding adjudicatory power. In practice, the Commission's decisions have been treated as recommendations, easily ignored by the states. Early critics, such as U. Oji Umzurike and Vincent Nmehielle, noted that the system lacked strong enforcement teeth, with Nmehielle describing Africa's human rights regime at risk of becoming 'a façade, a yoke that African leaders have put around our necks' – a system more ornamental than effective.<sup>48</sup> The Charter entrusts

45 Ibhawoh, 2001, pp. 43–62.

46 Viljoen, 2012, pp. 232–233.

47 Hansungule, 2012, pp. 417–453.

48 Nmehielle, 2001, p. 325.

ultimate oversight to the Assembly of Heads of State and Government, meaning that those accused of violations collectively judge each other – a ‘faulty oversight system’ that undermines the credibility of enforcement.<sup>49</sup>

State non-compliance has been a persistent problem. Many governments failed to submit the required periodic reports under Article 62 of the Charter, and even egregious violations have, at times, gone unremedied. A notorious example was the execution of Ken Saro-Wiwa and others in Nigeria in 1995 despite the ACHPR’s urgent appeal to stay the executions. Nigeria’s disregard for the Commission’s communication starkly illustrated the Commission’s lack of authority to compel compliance.<sup>50</sup> Such incidents expose the institutional weakness of the ACHPR. Additionally, in many African countries domestic human rights NGOs, who are crucial for bringing cases and monitoring implementation, are weak or suppressed, leaving the Commission with little local information or leverage.

### 3.2. *The AChRWC*

The AChRWC,<sup>51</sup> known as the Children’s Charter, was adopted by the OAU in 1990. Similar to the UN CRC,<sup>52</sup> the Children’s Charter serves as a comprehensive instrument outlining the rights of children and establishing universal principles and norms for their well-being. Since the UN CRC is the most widely ratified international treaty worldwide, ratified by every African nation, the question arises why there was a need for a special regional instrument? Recognising the unique challenges faced by children in Africa, regional leaders pursued a stronger framework for child rights at a supranational level, ensuring that African children have a distinct platform for their voices to be heard. Thus, Africa has set a precedent in advancing children’s rights, becoming the first region to adopt a binding legal instrument focused specifically on child protection – the AChRWC.

The UN General Assembly has acknowledged the value of regional agreements for human rights promotion, noting that regional treaties are often better suited to address localised human rights challenges while respecting the cultural, traditional and historical contexts unique to each region.<sup>53</sup> This regional focus allows the Children’s Charter to tackle issues particularly relevant to Africa, where certain priorities may differ from those addressed in international treaties. For example, while the European context may place significant emphasis on a child’s right to know their origins in cases of assisted reproduction, African concerns may be more aligned with protecting children from discriminatory regimes and harmful traditional practices.

49 Heyns, 2004, pp. 679–695.

50 Mutua, 1999, pp. 342–367.

51 Organisation of African Unity (OAU) (1990) African Charter on the Rights and Welfare of the Child. CAB/LEG/24.9/49. 11 July 1990.

52 UN General Assembly (1989) Convention on the Rights of the Child. United Nations, Treaty Series, vol. 1577, p. 3, 20 November 1989.

53 United Nations General Assembly (1957) Draft International Covenants on Human Rights. Third Committee Report no. 362, GA/SHC/362.

The Children's Charter specifically addresses these issues, prohibiting practices that endanger children's welfare or perpetuate prejudice within regional contexts. Another key reason for creating a regional charter is the challenge of safeguarding children's rights in contexts marked by severe economic hardship.<sup>54</sup> The Children's Charter acknowledges these economic realities by omitting provisions such as Article 4 of the UN CRC, which ties the implementation of economic, social and cultural rights to the 'maximum extent of available resources'. Instead, the Children's Charter obligates states to pursue the full realisation of these rights, aiming for more concrete commitments despite economic limitations.

The Children's Charter offers a heightened level of protection compared to the UN CRC, addressing critiques that the UN CRC reflects a predominantly Western perspective. The Children's Charter is attuned to the specific needs, cultural considerations and socio-economic conditions of Africa, providing a more relevant framework for the protection and promotion of children's rights on the continent. The two treaties, the Children's Charter and the UN CRC, represent the sole international and regional human rights agreements covering the entire spectrum of civil, political, economic, social and cultural rights for children. Both treaties encompass numerous similar provisions and share common overarching principles, such as non-discrimination, participation, upholding the best interests of the child and ensuring their survival and development.

African states advocated for several additional issues to be addressed within the Children's Charter, including, but not limited to, children facing the challenges of apartheid, addressing harmful practices targeting girls, such as FGM, dealing with internal conflicts and the displacement of children, providing a clear definition of a child, safeguarding the rights of children with imprisoned mothers, rectifying poor and unsanitary living conditions, acknowledging the African perspective on the responsibilities and duties of communities, fortifying enforcement and monitoring mechanisms, delineating the family's role in adoption and fostering and elucidating the obligations and responsibilities of the child towards their family and community. Hence, the Children's Charter acknowledges the unique status of children in African society, underscoring their need for protection and special care. It recognises that children are entitled to exercise various freedoms, including freedom of expression, association, peaceful assembly, thought, religion and conscience. Its objectives encompass the safeguarding of a child's private life and protection against all forms of economic exploitation, harmful labour, interference with education and actions that jeopardise their well-being, whether physical, social, mental, spiritual or moral. It emphasises the prevention of abuse, maltreatment, detrimental social and cultural customs, exploitation, sexual abuse, including commercial sexual exploitation, and illicit drug use. Additionally, it aims to prevent child trafficking, sale, abduction and begging.

54 Essombe and Diop Tine and Enew, 1998.

The Children's Charter was born out of the belief of African nations that the UN CRC did not adequately address critical socio-cultural and economic aspects specific to Africa. It underscores the importance of incorporating African cultural values and experiences into the discourse on children's rights, addressing issues such as:

- Challenging traditional African beliefs that may clash with children's rights, such as child marriage, parental rights and responsibilities and the status of children born out of wedlock
- Prohibiting the exploitation of children as beggars
- Promoting affirmative action to enhance girls' access to education
- Ensuring that girls have the right to return to school after pregnancy
- Safeguarding expectant mothers and mothers of infants and young children who are incarcerated
- Explicitly stating that the Children's Charter takes precedence over any custom, tradition, cultural practice or religious belief that contradicts the rights, duties and obligations outlined in the Charter
- Offering a clearer definition of a child as an individual under 18 years old
- Outright prohibiting the recruitment of children (those under 18 years old) in armed conflict and addressing child conscription into armed forces
- Prohibiting child marriages
- Protecting internally displaced and refugee children
- Emphasising the role of extended families in the care of the child
- Ensuring the protection of children with disabilities

The key principles guiding the implementation of these rights encompass non-discrimination, the best interests of the child, the right to life, survival, development of the child and child participation. Unfortunately, this chapter cannot go into an in-depth analysis of the Children's Charter; however, it points out some of its distinguishing features compared to the UN CRC. One such distinguishing feature is the best interest principle. Article 4(1) of the AChRWC explicitly establishes the child's best interests as the primary consideration. The use of 'the' rather than 'a' best interests standard, as found in the UN CRC, may seem a minor linguistic difference; however, it carries substantial implications. In the UN CRC, the principle is often interpreted as a procedural fairness requirement, where decision-makers must consider the child's best interests but are not necessarily obligated to prioritise them in their final decision.<sup>55</sup> The principle, while fundamental in international law, remains open to interpretation and is often influenced by prevailing cultural norms around child-rearing. This relative language allows for certain practices to be justified under cultural contexts, which has, at times, led to conflicting interpretations. For example, some regional perspectives have historically viewed the recruitment of child soldiers as an aspect of cultural tradition.<sup>56</sup>

55 Todres, 1998, p. 176.

56 Bennett, 1998, p. 1.

However, the Children's Charter prioritises the child's best interests, asserting that cultural practices cannot override the child's well-being. Article 21 reinforces this by prohibiting any customs that may harm the child's health or life, ensuring that children's safety and welfare take precedence over cultural rights. Under the Children's Charter, Member States are legally obligated to treat the best interests of the child as the central consideration. However, this standard can vary significantly in application within domestic legal systems, where interpretations may reflect local cultural values. Family law is a particularly complex area where the Charter's philosophy is tested. In some contexts, the concepts of parental autonomy and children being considered the 'property' of their parents remain deeply embedded in cultural heritage. These values conflict with the Charter's call to place children's best interests above all else, creating challenges in implementing child-centred protections within the framework of traditional family structures.

While the AChRWC is widely lauded as a progressive, context-sensitive instrument, critics have underscored the gap between its promises and actual practice. In many African countries, deeply entrenched cultural and religious norms have posed obstacles to the implementation of the AChRWC's more transformative provisions. For example, the AChRWC explicitly prohibits child marriage (Article 21(2)); however, the eradication of child marriage has proven difficult in societies where it is an accepted tradition. One prominent case is Nigeria, which ratified the AChRWC and, in 2003, enacted a federal Child Rights Act to domesticate the Children's Charter. However, under Nigeria's federal system, each of the 36 states must separately adopt the Child Rights Act for it to be enforceable locally. For years, several states, particularly in the predominantly Muslim northern regions, have refused to domesticate this Act, objecting to provisions banning child marriage as inconsistent with local custom and Shari'a law.<sup>57</sup> As a result, implementation of the AChRWC in Nigeria has been uneven. This hesitation is rooted in social norms; in some communities, girls are considered ready for marriage at puberty, and attempts to set 18 years as a uniform minimum marriage age have met with pushback.<sup>58</sup>

These challenges have prompted an important debate. On one side, some scholars argue that legal reform is needed to eliminate loopholes that allow child marriage to persist, pointing to Section 61 of the Nigerian 1999 Constitution (which deals with matters of personal law) as a provision that has been interpreted to permit under-age marriage under customary or religious auspices, undermining the spirit of the AChRWC.<sup>59</sup> Without constitutional amendment and the passage of a uniform national law prohibiting child marriage, the rights of the girl child will remain illusory in parts of Nigeria. On the other hand, commentators such as Enyinna Nwauche contend that Nigeria's constitutional framework, if properly understood, does not sanction child

57 Braimah, 2014, pp. 474–488.

58 United Nations Population Fund. (2025). Early marriage in Nigeria. [Online]. Available at: <https://nigeria.unfpa.org/en/topics/child-marriage-1> (Accessed: 22 June 2025).

59 Braimah, 2014, pp. 474–488.

marriage and no religious or customary marriage can trump the fundamental rights of children.<sup>60</sup> Nwauche calls for a negotiated consensus on minimum marriage age, engaging with cultural and religious leaders to reconcile the AChRWC's requirements with local values, and emphasises that even in the case of absent state legislation, the courts should interpret existing law in line with the Children's Charter's object and purpose. This discourse highlights the tension between universal human rights norms and local traditions. A similar tension exists regarding FGM, another practice unequivocally banned by the AChRWC (Art. 21(1)(a)). In some communities, FGM persists due to cultural inertia, despite national laws outlawing it. The mere existence of the AChRWC and domestic legislation is not enough to end such practices; sustained public education and cultural dialogue are required, alongside enforcement, to effect change.

Importantly, the implementation mechanisms for the AChRWC have faced scrutiny. The Children's Charter's enforcement relies on state compliance and the oversight of the African Committee of Experts on the Rights and Welfare of the Child. The Committee, much like the ACHPR, issues recommendations that lack binding force. Without strong domestic incorporation of the AChRWC, the Committee's concluding observations and decisions on communications have had limited impact. For instance, where social or religious opposition to AChRWC norms is strong, governments may be slow to act on the Committee's recommendations. Out of the African Union's 55 Member States, 50 have ratified the AChRWC. The Democratic Republic of Congo became the 50th state to ratify the Children's Charter in December 2020.<sup>61</sup> The Children's Charter, legally and culturally, contextualises the rights of children. To truly impact and positively transform the lives of children in Africa, it is imperative that individuals and governments collectively acknowledge and embrace children's rights as legally binding principles, with corresponding obligations. Nevertheless, the Children's Charter serves as a source of inspiration for African Member States, representing a collective commitment to the rights and well-being of African children, while providing a legal framework for their safeguarding.

The Children's Charter calls for the establishment of an African Committee of Experts on the Rights and Welfare of the Child. This Committee is tasked with promoting and safeguarding the rights delineated in the Children's Charter, actively applying these rights and interpreting the provisions of the Children's Charter as required by state parties, African Union institutions or any other organisations recognised by the African Union or a Member State. The Committee was established in July 2001, approximately a year and a half after the AChRWC became effective. It commenced its operations in 2003. It derives its authority from Articles 32–46 of the AChRWC.<sup>62</sup>

60 Nwauche, 2015, pp. 421–432.

61 African Committee of Experts on the Rights and Welfare of the Child (ACERWC), n.d., Overview of the African Charter on the Rights and Welfare of the Child [Online]. Available at: <https://www.acerwc.africa/en/page/about-the-charter> (Accessed: 3 November 2024).

62 Organisation of African Unity (OAU) (1990) African Charter on the Rights and Welfare of the Child. CAB/LEG/24.9/49. 11 July 1990.

The Committee comprises 11 members elected by the Assembly of Heads of State and Government of the African Union. These members serve in their individual capacities. The selection process involves a secret ballot, with the candidates nominated by State Parties to the Children's Charter.<sup>63</sup> Previously, members were elected by the Executive Council and appointed by the Assembly. However, in February 2020, the Assembly decided to delegate this authority to the Executive Council. Candidates are required to possess high moral standing, impartiality and competence in matters concerning children's rights and welfare. According to the Children's Charter, the members have a five-year term of office. Initially, Article 37 of the Children's Charter prohibited members from being re-elected. However, in January 2015, the African Union Assembly adopted an amendment to Article 37(1), allowing members to be re-elected once for a five-year term.<sup>64</sup> The Committee convenes in two regular annual sessions, each lasting no more than a fortnight. Its inaugural session took place in July 2001. Additionally, the chairperson has the authority to call extraordinary sessions in response to a request from the Committee or any State Party to the Charter.

The Committee is entrusted with the mission of safeguarding human rights across Africa and interpreting the provisions of the Children's Charter. Until December 2020, the Committee had its headquarters in Addis Ababa, Ethiopia. However, subsequently, it relocated its main office to Lesotho, following an agreement between the African Union and Lesotho. Its activities encompass gathering information, issuing general comments, offering guidance and interpretation of the Children's Charter, monitoring the implementation of the Children's Charter and reviewing reports submitted by states and civil society organisations concerning the implementation of the Children's Charter by State parties, accompanied by the issuance of recommendations known as concluding observations. The Committee provides recommendations to governments in collaboration with children's rights organisations and investigates the measures taken by states to execute the Children's Charter, achieved through missions, data collection and state interrogations (as defined in Article 45 of the Children's Charter).

Moreover, the Committee handles communications, which are complaints alleging violations of the Children's Charter by State parties, conducts fact-finding and promotional missions to address systematic child rights violations in State parties and establishes standards and guidelines to assist State parties in fulfilling their obligations. It is tasked with selecting the theme for the annual Day of the African Child, observed on 16 June, to commemorate those who perished in the Soweto uprisings in South Africa. While it lacks the authority to bring cases before the ACtHPR, it is empowered to seek advisory opinions from the Court regarding legal matters about human rights instruments. The Committee is the only treaty body addressing child rights issues that features a unique complaints procedure. This mechanism allows non-party states to submit communications to the Committee on behalf of a child

63 Article 34, African Charter on the Rights and Welfare of the Child. CAB/LEG/24.9/49. 11 July 1990.

64 African Union Assembly (2015) Decision 548 (XXIV), Assembly/AU/Dec.548(XXIV).

from a State that has ratified the Children's Charter. However, this is contingent upon the complaint's ability to demonstrate that it is in the child's best interest.

The Committee's mandate is specifically defined compared to the UN CRC. Article 42 of the Children's Charter emphasises the Committee's role in promoting and protecting these rights. Its responsibilities encompass various actions, including the collection and documentation of information, the initiation of interdisciplinary assessments on children's rights issues in Africa, the organisation of meetings, the support of national and local institutions dedicated to child rights and well-being and the provision of opinions and recommendations to governments as needed. Many of these powers are not granted to the UN CRC. Consequently, the Children's Charter has established a progressive and action-oriented enforcement mechanism. Furthermore, the Committee oversees the Children Charter's implementation and ensures the protection of the rights it enshrines. In contrast, the UN CRC is primarily focused on assessing the progress made by State parties in implementing the CRC. In principle, the Children's Charter represents a robust instrument compared to its parent charter and holds the potential to strengthen children's rights in Africa by establishing effective monitoring and enforcement mechanisms.<sup>65</sup> Nevertheless, there are challenges related to the enforcement mechanisms and the Committee's impact on promoting and safeguarding children's rights appears to be evolving slowly.

### ***3.3. Protocol to the AChHPR on the establishment of an ACtHPR***

The final version of the AChHPR, though a significant achievement, did not fulfil earlier aspirations for a fully comprehensive human rights system in Africa, as it lacked provisions for a dedicated African human rights court. Several advocates and drafters had envisioned a judicial mechanism that could enforce human rights protections with binding authority across the continent. Instead, the AChHPR established the ACHPR, which, while valuable, was granted a broad and vague mandate. Article 45 of the AChHPR assigned the ACHPR various roles, such as promoting and protecting human rights, conducting research, organising seminars and developing principles and rules to address human rights issues across the continent. Furthermore, it was tasked with interpreting the AChHPR's provisions upon request by any Member State, OAU institution or African organisation recognised by the OAU. Although this marked a step forward, the ACHPR's powers were limited to an advisory and promotional capacity.

Historians and legal scholars, such as Christof Heyns, have explored the motivations behind the decision not to establish a judicial body from the outset.<sup>66</sup> Heyns suggests two main explanations for this choice. First, there is an 'idealistic' explanation, rooted in the value placed on traditional African methods of conflict resolution, which emphasise mediation and conciliation over confrontation. In many African cultures, dispute resolution is aimed at restoring harmony and reaching mutually

65 Heyns and Viljoen, 1999, p. 421.

66 Heyns, 2004, p. 684.

agreeable solutions, which could be an explanation for the ACHPR's advisory and non-confrontational mandate. Second is about the political situation in post-colonial Africa, where states were newly independent and fiercely protective of their sovereignty. Having recently overcome colonial rule, African leaders were cautious about creating a supranational court that might impose decisions on their domestic matters, threatening their ability to govern independently.

In 1986, the African Charter officially came into force, leading to the establishment of the ACHPR. The ACHPR took on a role in promoting and monitoring human rights across the continent. However, its limitations soon became evident, especially as it encountered severe human rights violations that required stronger enforcement mechanisms. Recognising these limitations, the OAU adopted the Protocol to the AChHPR on the Establishment of the ACtHPR in 1998.<sup>67</sup> This marked a turning point, reflecting a broader consensus within the continent on the importance of a judicial mechanism that could hold states accountable for human rights violations. According to the Protocol, the ACtHPR would become operational 30 days after the 15th ratification by an African state. This was reached on 25 January 2004, when the Union of Comoros ratified the Protocol in December 2003. The ACtHPR became operational in 2006, with its first judges appointed, and issued its inaugural judgment in 2009.<sup>68</sup> Its primary mandate is to complement and strengthen the ACHPR's functions.<sup>69</sup> Its jurisdiction encompasses all cases and disputes related to the interpretation and application of the Banjul Charter, the protocol associated with the Charter and any other relevant human rights instruments. It holds the authority to issue advisory opinions on legal matters and adjudicate contentious cases.

As mentioned, the AChHPR has been ratified by 54 of the 55 African Union Member States, except Morocco. By ratifying or acceding to the Charter, these states have committed to upholding the principles and obligations outlined within it. However, the number of states participating in the African human rights judicial system is further limited. Only 34 AU Member States have ratified the Protocol establishing the ACtHPR at the time of writing this study. Out of these 34, only 8 states have deposited a declaration under Article 34(6) of the Protocol, which allows direct access to the ACtHPR for individuals and NGOs with observer status before the ACHPR. Without Article 34(6), individuals and NGOs cannot directly submit cases to the ACtHPR. Instead, they must first approach the Banjul Commission, which conducts a preliminary examination and may decide to refer the case to the Court. This additional procedural requirement limits direct individual and NGO access to the Court.

As of October 2024, the 34 African Union countries that have ratified the Court Protocol include Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Cote d'Ivoire, Comoros, Congo, Gabon, The Gambia, Ghana, Guinea-Bissau, Kenya, Libya,

67 Organisation of African Unity (OAU) (1998) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998.

68 Rodríguez and Álvarez, 2020, p.102.

69 Stone, 2012, p. 20.

Lesotho, Mali, Malawi, Madagascar, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Republic of Congo, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia, Uganda and Zambia. The 8 AU Member States that have deposited Article 34(6) are Burkina Faso, The Gambia, Ghana, Guinea-Bissau, Mali, Malawi, Niger and Tunisia. This means that they have recognised the Court's jurisdiction to accept complaints by individual citizens and NGOs.

### **3.4. Protocol to the Achpr on the Rights of Women in Africa**

The Protocol to the AChHPR on the Rights of Women in Africa, commonly referred to as the Maputo Protocol, is a legally binding supplement to the African Charter, specifically for protecting the rights of women across the continent.<sup>70</sup> Adopted by the African Union Assembly of Heads of State and Government in July 2003 in Maputo, Mozambique, this Protocol marked a significant step forward in human rights. The Protocol formally entered into force on 25 November 2005. At the time of writing this study, in October 2024, 44 of the 55 AU Member States had ratified the Protocol, all of whom were parties to the broader African Charter.

The Maputo Protocol is the result of two interconnected drafting efforts: one initiated by the African women's rights movement and another led by the Inter-African Committee on Harmful Traditional Practices Affecting Women's and Children's Health. Together, these groups worked to elevate the visibility of women's issues, such as reproductive rights, protection from gender-based violence and harmful practices, such as FGM. As a legally binding instrument, the Protocol draws its authority from the AU Constitutive Act,<sup>71</sup> which replaced the OAU in 2002, and it supplements the AChHPR. Adopted at the AU's inaugural summit in Durban, South Africa, the AU Constitutive Act introduced significant reforms, which touched on women's rights. It included the 'promotion of gender equality' as a founding principle, which was absent from the 1963 OAU Charter.

The AU has shown a strong commitment to gender equality within its structures. At its founding, it introduced the '50/50 parity principle' for electing AU Commission members, ensuring balanced gender representation. This principle has influenced other institutions, such as the ACHPR, where female leadership has increased. Following the adoption of the Maputo Protocol in 2004, the AU Assembly adopted the Solemn Declaration on Gender Equality in Africa, reaffirming its commitment to women's rights. Although non-binding, the Declaration urges Member States to address issues such as HIV/AIDS, conflict prevention, gender-based violence and gender-sensitive development.

The Maputo Protocol addresses the widespread discrimination and harmful cultural practices faced by African women, despite the existence of the African Charter

70 African Union (2003) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. African Union, 11 July 2003.

71 Heads of State and Government of the Member States of the Organisation of African Unity (2000), Constitutive Act of the African Union. Organisation of African Unity (OAU), 1 July 2000.

and other international instruments. It seeks to ensure the effective implementation of existing commitments. The Protocol, in Article 32, protects women's rights in several key areas:

- **Equality and non-discrimination:** The Protocol explicitly addresses the elimination of all forms of discrimination against women. Articles 2, 8 and 9 mandate measures to eliminate discrimination, ensure equal access to justice and promote women's participation in governance. Article 12 guarantees equal education for women and girls as a foundation for societal equality.
- **Protection against violence:** Articles 3–5 affirm women's rights to bodily autonomy and freedom from violence, including domestic abuse, sexual harassment, trafficking and harmful practices, such as FGM.

Furthermore, the Protocol dedicates several provisions to rights relating to marriage and family life. Articles 6 and 7 protect women's rights within marriage and family, covering issues such as property rights, marriage registration, the minimum age of marriage and protections in polygamous unions. Women are guaranteed equality during separation, divorce or annulment. Another element of the Protocol is health and reproductive rights. Unlike several human rights instruments, the Maputo Protocol explicitly addresses women's reproductive health, including access to comprehensive health services, maternal health, autonomy over reproductive choices, maternal mortality, HIV/AIDS prevention and sex education. The Protocol extends its protections to economic, social and cultural rights, recognising that women's rights extend beyond political and civil spheres into economic and cultural domains. Articles 13–19 extend protections to economic participation, employment, housing, food security and environmental health, while advocating for property ownership and sustainable development.

In addition to securing basic rights, the Protocol acknowledges the important role women play in peace and security. Articles 10 and 11 recognise women's roles in peacebuilding and provide protection during armed conflicts, including for refugees, displaced women and prohibitions against child soldier recruitment. The Maputo Protocol pays special attention to vulnerable groups among women, including widows, elderly women, women with disabilities and women in distress. Articles 20–24 offer protection for these groups, acknowledging the unique challenges they face. At the time of its adoption, the Maputo Protocol complemented existing instruments, such as the African Charter and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which were widely ratified but often poorly implemented. The AChRWC, addressing children's rights, including protections for the girl child, had less support. Following the Protocol, two additional instruments emerged. The AU Solemn Declaration on Gender Equality in Africa, though non-binding, urged Member States to address key issues, such as gender-based violence, healthcare and conflict resolution. Moreover, the SADC Gender Protocol, applying only to ratifying

Southern African Development Community (SADC) states, introduced stronger but regionally limited obligations for gender equality.

### ***3.5. African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa***

The Kampala Convention, officially named the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa,<sup>72</sup> addresses internal displacement within the African continent. Adopted in 2009, this treaty confronts internal displacement caused by armed conflicts, natural disasters and large-scale development projects. With the continent consistently facing substantial numbers of internally displaced persons, the Kampala Convention provides a legally binding framework for African Union Member States to protect and assist these vulnerable populations. Despite widespread ratification, internally displaced populations in Africa remain high. This shows ongoing challenges related to the Convention's implementation.

Historically, internal displacement in Africa has been caused by various societal and political factors, although global attention to internally displaced persons grew only after the Cold War. Unlike refugees, who benefit from specific protections under the UN High Commissioner for Refugees (UNHCR), internally displaced persons lack equivalent international support, as no single UN agency has been designated to meet their needs. However, efforts to address forced migration in Africa are not entirely new. The Kampala Convention builds on previous legal frameworks, such as the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the UN's 1998 Guiding Principles on Internal Displacement. Before the full ratification of the Kampala Convention, sub-Saharan Africa was already home to nearly 10 million internally displaced persons, representing more than half of the world's internally displaced population at the time, with significant numbers in the Democratic Republic of the Congo, Sudan and Somalia.<sup>73</sup> Several of these displacements were triggered by violence, which has often been tied to historical factors, such as colonial legacies, political instability and internal conflicts, compounded by environmental factors, such as drought and climate change.

The Kampala Convention, adopted in 2009 by the AU, is the first regional treaty to address internal displacement. Drafted with input from organisations such as the UNHCR and the International Committee of the Red Cross, it defines displaced persons as those forced from their homes due to conflict, violence, rights abuses or disasters without crossing international borders. The Convention places primary responsibility on states to protect and assist displaced persons and outlines protections in 23 articles, from preventing arbitrary displacement to ensuring durable resettlement solutions. Widely praised for advancing standards on internal displacement, the

72 African Union (2009), African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 23 October 2009.

73 Maru, 2011, p. 102.

Convention builds on the 1998 UN Guiding Principles; however, it faces uneven implementation. Key states, such as Sudan, have yet to ratify it or adopt national policies. To bolster its impact, the AU has introduced measures such as the 2017 Harare Plan of Action, a 2018 model law for domestic legislation, and declared 2019 the ‘Year of Refugees, Returnees and Internally Displaced Persons’.

### ***3.6. Protocol to the AChHPR on the Rights of Older Persons in Africa***

The Protocol to the AChHPR on the Rights of Older Persons in Africa represents a significant step towards recognising and protecting the rights and welfare of older people in Africa.<sup>74</sup> Adopted by the African Union in 2016, this Protocol addresses the unique challenges faced by older persons, a group whose rights have often been overlooked within broader human rights frameworks. In line with the African Charter’s principles of dignity, equality and social justice, the Protocol acknowledges the importance of safeguarding the rights of older individuals to ensure they lead dignified, secure and fulfilling lives.

The Protocol, adopted on 30 January 2016, in 32 articles, ensures that older persons can fully and equally enjoy their inherent human rights while upholding African values, customs and traditions. As of now, 20 countries have signed the Protocol, with 12 formally ratifying it. Its provisions address equality and non-discrimination, obliging states to prohibit all forms of age-related discrimination, combat stereotypes and ensure older persons’ equal protection under the law. It requires states to adapt their legal systems to provide fair treatment, legal aid and training for officials to handle issues affecting older persons sensitively. Respect for autonomy is emphasised, as states must protect older persons’ right to make decisions about their well-being and offer support in cases of incapacity.

To address economic exclusion, the Protocol calls for the removal of age-related barriers in employment and the development of systems ensuring access to adequate pensions or a universal income for retirees. It mandates protection against abuse, including harmful traditional practices, such as accusations of witchcraft, particularly targeting older women. Additionally, the Protocol guarantees the property and inheritance rights of older women, protecting them from gender-based violence and discrimination. It promotes family- and community-based care systems, urging states to strengthen traditional support networks and prioritise older persons in service delivery. It provides a framework to incorporate older persons’ rights into national legislation and social policies across the continent, aiming to uphold their dignity, equality and well-being.

### ***3.7. Protocol to the AChHPR on the Rights of Persons With Disabilities in Africa***

The Protocol to the AChHPR on the Rights of Persons with Disabilities in Africa, adopted on 29 January 2018, represents a significant step forward in the promotion

74 African Union (2016) Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons in Africa, 31 January 2016.

and protection of the rights of persons with disabilities across the continent. It emphasises the equal dignity and inherent rights of persons with disabilities, addressing the social, economic and cultural factors that have disproportionately affected them. Building on the African Charter, it addresses specific challenges, such as poverty, systemic discrimination and harmful cultural practices. It emphasises equality, dignity and the full participation of persons with disabilities in all areas of life, setting standards for Member States to eliminate discrimination and enhance accessibility. To date, 13 African countries have signed the Protocol and 10 have ratified it.

The Protocol's 44 articles outline key protections and obligations for states, including adopting legislative, administrative and budgetary measures to uphold its principles. It mandates the mainstreaming of disability considerations into policies, reforming discriminatory laws and prohibiting harmful practices. States are required to actively engage persons with disabilities and their representative organisations in decision-making processes. Core rights include non-discrimination, equality before the law, life, liberty and security. The Protocol ensures equal recognition before the law, guarantees dignity and access to services and protects against arbitrary detention, violence and abuse. It establishes a detailed framework for African states to follow for promoting and safeguarding the rights of persons with disabilities. The goal is to achieve a more inclusive society where persons with disabilities can exercise their rights, live with dignity and fully participate in all aspects of life.

#### **4. Institutional Framework for Human Rights Protection in Africa**

This section provides an overview of the institutional framework for human rights protection in Africa. The focus will primarily be on the ACHPR and the ACtHPR, two central institutions that play direct roles in monitoring, promoting and enforcing human rights. The ACHPR, as the primary human rights body, oversees state compliance with the African Charter, while the ACtHPR offers a judicial mechanism for accountability, issuing binding decisions on cases of rights violations. Together, these institutions form the backbone of the African human rights system, advancing human rights protections and standards across Member States. While both institutions play central roles in monitoring, promoting and enforcing human rights, they are analysed in greater detail in other chapters of this publication. Consequently, this section provides a concise discussion to set the context for their roles within the broader African human rights system.

The broader institutional landscape includes several other important bodies and mechanisms that contribute to human rights protection in Africa. The African Committee of Experts on the Rights and Welfare of the Child focuses specifically on children's rights, addressing issues such as child labour, exploitation and education, and advocating for policies that support the well-being of Africa's youth. The Peace and Security Council plays an important role in addressing conflicts and security threats that can result in human rights abuses, working to maintain stability and prevent

crises through peacekeeping missions and early warning systems. The Pan-African Parliament serves as a deliberative body representing African citizens, promoting democratic principles and ensuring that human rights remain a priority within the AU's legislative and policy-making processes.

The African Peer Review Mechanism complements these efforts by reviewing Member States' governance and human rights performance, encouraging accountability, transparency and reform. The AU Commission acts as the executive arm, coordinating and implementing AU human rights policies, while the Economic Community of West African States (ECOWAS) Court of Justice, though primarily a regional body for West Africa, contributes to human rights protection by addressing violations within its jurisdiction. The role of non-governmental organisations (NGOs) cannot be overlooked. NGOs are essential partners in the human rights framework, often serving as intermediaries between AU institutions and local communities. However, both the African Court and the ACHPR have been criticised for their over-reliance on civil society organisations and NGOs, raising concerns about representativeness, sustainability and the limited engagement of national governments and institutions in the system's implementation.

#### **4.1. ACHPR**

The ACHPR is a quasi-judicial entity with the responsibility of advancing and safeguarding human rights across the African continent. Its mandate includes the interpretation of the AChHPR and the examination of individual complaints related to Charter violations. Its functions encompass the investigation of human rights abuses, the formulation and endorsement of action plans to promote human rights and the establishment of effective channels of communication with Member States to gather firsthand information on human rights violations.

The African Union, which was originally established under the name OAU (in 2001, the OAU legally became the African Union), was conceived and established in 1963 in Addis Ababa, Ethiopia, with 32 signatory governments,<sup>75</sup> during a time when state sovereignty held paramount importance and the heads of state were particularly focused on safeguarding the hard-won independence of their nations. The OAU Charter made only a passing reference to human rights. Nevertheless, 18 years later, in response to widely condemned violations of fundamental liberties in various Member States, the OAU's governing body endorsed the AChHPR (commonly known as the Banjul Charter).<sup>76</sup> In late 1987, the ACHPR, established by the Banjul Charter, commenced its operations. The Banjul Charter draws considerable influence from previous international human rights documents, notably the UDHR<sup>77</sup> and the two

75 Organisation of African Unity (OAU) (1963) Charter of the Organisation of African Unity.

76 Organisation of African Unity (OAU) (1981) African Charter on Human and Peoples' Rights (Banjul Charter), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 27 June 1981.

77 UN General Assembly (1948) Universal Declaration of Human Rights, 217 A (III), 10 December 1948.

International Covenants – the Covenant on Civil and Political Rights<sup>78</sup> and the Covenant on Economic, Social, and Cultural Rights.<sup>79</sup> However, the drafters of the Banjul Charter, led by the distinguished Senegalese jurist Kéba M'baye aimed to imbue the document with a distinct African character.<sup>80</sup> While the Charter's 29 articles, detailing rights and freedoms, largely pertain to individuals, a significant number involve the collective rights of peoples. The Charter commences with an assertion of non-discrimination, explicitly prohibiting differentiation based on factors such as 'race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'.<sup>81</sup> It enumerates a range of civil and political rights and subsequently addresses economic, social and cultural rights. The Charter breaks new ground by including rights of peoples in Articles 19–24, along with outlining duties in Articles 25–29. These duties apply to both state parties and individuals. The Commission was inaugurated on 2 November 1987, following elections during the 23rd Assembly of Heads of State and Government. Initially based in Addis Ababa, Ethiopia, it relocated to Banjul, The Gambia, in 1989. It meets biannually, with sessions lasting 8–10 days, raising concerns about whether this timeframe is sufficient for thorough deliberation. Furthermore, the Charter lacks provisions for emergency procedures, limiting the Commission's responsiveness to urgent human rights issues.

The ACHPR has eleven members who are elected through secret ballots at the Assembly of Heads of State and Government. Based on Article 31 of the Charter, these members, each serving six-year terms that can be renewed, are selected from among individuals of the highest repute in Africa, known for their exceptional moral character, integrity, impartiality and competence in human and peoples' rights matters, particularly emphasising on individuals with legal expertise.<sup>82</sup> The Charter ensures impartiality in the election and tenure of Commission members, as outlined in Article 39(2), which permits removal only if the Commission unanimously deems a member unable to fulfil their duties. Article 31 mandates that members act independently, serving in a personal capacity rather than as state representatives, with a limit of

78 UN General Assembly (1966) International Covenant on Civil and Political Rights. United Nations, Treaty Series, vol. 999, p. 171, 16 December 1966.

79 UN General Assembly (1966), International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

80 Kannyo, 1984, p. 128.

81 Organisation of African Unity (OAU) (1981) African Charter on Human and Peoples' Rights (Banjul Charter), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 27 June 1981.

82 'The Commission shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience'. Article 31, African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). [Online]. Available at: <https://www.refworld.org/docid/3ae6b3630.html> (Accessed: 30 October 2023).

one national per state on the Commission.<sup>83</sup> Members elect a chairperson and vice-chairperson for renewable two-year terms. Article 43 safeguards the Commission's autonomy, granting members diplomatic privileges to prevent state interference. These provisions collectively establish the Commission as an independent entity capable of performing its functions impartially.

However, the Commission faces significant challenges that undermine its independence and authority. Article 33 allows state parties to appoint Commission members, raising concerns about bias, as nominees may align with their states' views on human rights. Allocating seats to independent entities, such as bar associations or NGOs, could enhance impartiality. Article 50 further limits the Commission's authority by requiring the exhaustion of domestic remedies, which is often impractical in non-democratic nations. Unlike the Inter-American system, the Charter lacks an escape clause for cases where local remedies are unavailable, leaving this provision vague and reliant on domestic laws. Confidentiality requirements under Article 59 weaken the Commission's impact. Closed-door proceedings and non-disclosure of offending states prevent international pressure from being leveraged effectively. Moreover, the Commission lacks the authority to independently investigate violations and relies on the Assembly to act on its findings, further limiting enforcement powers.

Despite these constraints, the Commission utilises specialised mechanisms, such as rapporteurs, working groups and committees, to address specific concerns, including freedom of expression, women's rights and the prevention of torture. These mechanisms report their findings during regular sessions, contributing to the Commission's broader human rights efforts. The Commission's primary functions, as outlined in Article 45 of the African Charter, include promoting and protecting human and peoples' rights, interpreting the Charter and performing tasks assigned by the Assembly of Heads of State and Government. These functions encompass conducting studies, formulating legal principles, cooperating with other institutions and providing recommendations to governments. However, it lacks the authority to declare domestic laws incompatible with the Charter's provisions, limiting its ability to address rights violations effectively. While the Rules of Procedure, adopted in 1988, softened the rigid language of the Charter, they did not fully overcome its constraints. These rules introduced improvements, such as recognising NGOs and legal experts, and emphasised the importance of petitions; however, the Commission's powers remain restricted. Despite these efforts, the limitations of the Charter hinder the Commission's ability to fulfil its mandate, reducing its impact as a protector and advocate for human rights.

83 'The members of the Commission shall serve in their personal capacity'. Article 31, African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). [Online]. Available at: <https://www.refworld.org/docid/3ae6b3630.html> (Accessed: 30 October 2023).

The Commission employs three distinct human rights monitoring procedures: the state-reporting procedure, the inter-state complaints procedure and the individual complaints procedure.

1. State-reporting procedure: States must submit reports every two years on their adherence to the Charter. NGOs can submit shadow reports and may obtain observer status.
2. Inter-state complaints procedure: States can resolve disputes through written communication or lodge complaints directly with the Commission. If unresolved within three months, the Commission examines the case and submits a report to the Assembly of Heads of State and Government. This procedure is rarely used.
3. Individual complaints procedure: According to this procedure, states, individuals or organisations acting on behalf of an individual may submit a complaint to the Commission. Complaints should be sent to the Commission's Secretariat, which registers the complaint upon receipt. Subsequently, the complaint is forwarded to the Commission for examination. The Commission must decide by a simple majority (at least six members) whether it should consider the complaint. This decision hinges on whether the complaint alleges a *prima facie* violation of the Charter and conforms to the provisions of Article 56 of the Charter.<sup>84</sup> Admissible cases involve gross human rights violations. If accepted, the Assembly may request a detailed report. The Commission's recommendations are not legally binding and confidentiality is maintained unless the AU Assembly approves public disclosure.

Despite the formal language used in the Charter, the Programme of Action, the Guidelines for National Periodic Reports and the current State of the Commission is less than satisfactory. Several factors contribute to the Commission's demonstrated weaknesses. First, many states fail to fulfil their reporting obligations under Article 62 of the Charter. Early reports, such as those from Rwanda, Tunisia and Libya, were

84 Communications relating to human and peoples' rights referred to in Article 55 received by the Commission shall be considered if they:

1. Indicate their authors, even if the latter request anonymity,
2. Are compatible with the Charter of the Organisation of African Unity or with the present Charter,
3. Are not written in disparaging or insulting language directed against the state concerned and its institutions or to the Organisation of African Unity,
4. Are not based exclusively on news disseminated through the mass media,
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter,
7. Do not deal with cases that were settled by the states involved following the principles of the UN Charter, the Charter of the Organisation of African Unity or the provisions of the present Charter.

vague, lacked detailed content and were hindered by inadequate preparation time, translations and review durations. This undermined the establishment of a reliable baseline for future assessments. Second, as stated in a 1989 workshop organised by the African Association of International Law and several Nordic human rights institutions, the African Commission has ‘suffered from insufficient equipment, resources, and support to make it fully operational’.<sup>85</sup> Financial constraints of the OAU further affected its operations.

Third, the most significant challenge facing the Commission is beyond its control. In many African states, human rights NGOs are either absent or weakly established, leaving the Commission without critical local information or advocacy networks. South Africa is an exception, hosting a significant number of active NGOs; however, elsewhere, the scarcity of such organisations limits the Commission’s capacity to address rights abuses effectively.<sup>86</sup> In nearly 20 Member States, no openly active human rights or social justice organisations could be identified, while in another dozen or so, the editors found just one or two institutions with somewhat tangential objectives.

#### 4.2. ACtHPR

The ACtHPR, based in Arusha, Tanzania, is an international judicial body established by African Union Member States to implement the AChHPR. It is one of three regional human rights tribunals, alongside the European and Inter-American Courts of Human Rights. The Court was created to address the ACHPR’s limitations, whose non-binding decisions and resource constraints hindered its effectiveness. This led to the adoption of a Protocol to the Banjul Charter in 1998, which came into force in 2004 after the 15th ratification. The Court became operational in 2006, delivering its first judgment in 2009.<sup>87</sup> The Court complements the Commission’s work, with jurisdiction over cases related to the interpretation and application of the Charter, its protocol and other human rights instruments. It issues advisory opinions and adjudicates contentious cases, strengthening the African human rights system.

The Court comprises 11 judges nominated by AU Member States and elected by the Assembly of Heads of State and Government. Judges serve six-year terms, renewable once. The president works full-time in Arusha, while the other 10 judges serve part-time, with administrative functions handled by a registrar. At the time of writing this chapter, in October 2024, the Court had delivered 416 decisions, comprising 246 judgments and 170 orders, and had 124 pending cases.<sup>88</sup> Furthermore, the Court has delivered 15 advisory opinions.

The ACtHPR possesses authority over all cases and disputes brought before it concerning the interpretation and application of the Charter and other pertinent human

85 Benedek, 1990, p. 250.

86 Wiseberg and Reiner, 1990, p. 185.

87 Rodríguez and Álvarez, 2020, p.102.

88 African Court Cases|Statistic. [Online]. Available at: [www.african-court.org](http://www.african-court.org) (Accessed: 1 October 2024).

rights instruments ratified by the involved states. It exercises adjudicatory and advisory jurisdiction. Regarding adjudicatory jurisdiction, complaints may be initiated by the Commission, states, individuals and non-governmental organisations. Additionally, the Court may permit relevant non-governmental organisations with observer status before the Commission and individuals to directly file cases before it, given that the state against which the application is lodged has declared its acceptance of the Court's competence to receive such communications. The Court's judgments are legally binding and the respective states are obligated to comply with and ensure the execution of these judgments. The African Union's Council of Ministers oversees the enforcement of these judgments. Regarding advisory jurisdiction, the Court, at the request of a Member State of the African Union, the African Union or any African organisation recognised by the African Union, can provide legal opinions on matters related to the Charter or other relevant human rights instruments. This is permissible as long as the subject matter of the opinion is not concurrently under examination by the Commission.

A unique feature of the ACtHPR is its direct accessibility for individuals and NGOs, aligning it with the European and Inter-American Courts of Human Rights. This provision allows cases to be filed directly against governments, provided the state has accepted the Court's jurisdiction. At present, 34 AU Member States have ratified the protocol establishing the African Court. However, only eight of these countries – Burkina Faso, Malawi, Mali, Ghana, Tunisia, The Gambia, Niger and Guinea Bissau – have formally recognised the Court's jurisdiction to accept complaints from individual citizens and NGOs. Four countries – Rwanda, Tanzania, Benin and Côte d'Ivoire – initially supported this jurisdiction; however, they withdrew later, citing various national interests and concerns. Legal scholarship has started describing this wave of withdrawals as a looming 'crisis of design and judicial practice' that threatens to undermine the Court's purpose. Adjolohoun (2020) argued that unless institutional and political incentives are recalibrated, more states may follow Rwanda, Tanzania, Benin and Côte d'Ivoire in disengaging from the Court's individual-access regime.<sup>89</sup>

To hear a case, the Court must confirm its jurisdiction by meeting four criteria: material (human rights violations under the Charter or similar instruments), personal (authorised complainants), temporal (violations after ratification) and territorial (violations within the state's territory). The Court's rulings are binding for all AU Member States, carrying concrete legal and reputational significance for all parties involved.<sup>90</sup> Every case brought before the Court, moreover, advances norms of human rights and the rule of law. The Court handles around eight cases annually, reflecting the complexity of its work. Its caseload is expected to grow as more countries accept its jurisdiction and the awareness of its role increases. However, a key challenge is the

<sup>89</sup> Adjolohoun, 2020, pp. 1–40.

<sup>90</sup> Africa Center for Strategic Studies, n.d., African Court on Human and Peoples' Rights. [Online]. Available at: <https://africacenter.org/spotlight/african-court-on-human-and-peoples-rights/> (Accessed: 3 November 2024).

lack of coordination between the ACtHPR and the ACHPR. Although their mandates are complementary, the two institutions have yet to develop a cohesive strategy for collaboration, limiting their effectiveness in harmonising human rights protections.

## 5. Conclusion

The African human rights system, anchored by the AChHPR and supported by instruments such as the Maputo Protocol and various protocols on children's and older persons' rights, stands as a promising framework for human rights protection across the continent. Despite political and procedural challenges, the ACHPR has laid the foundation for a regional system capable of addressing Africa's unique socio-political realities and advancing human rights in the region. One of the most important achievements is the ACtHPR, which, though underutilised, represents an avenue for binding recourse for victims of human rights abuses. The Court's establishment generated significant hope among marginalised groups, such as indigenous and minority peoples, who have often found themselves disenfranchised within national justice systems. However, the limited ratification of its Protocol and the hesitancy of many states to grant individuals and NGOs direct access to the Court restrict the full realisation of its potential. Additionally, the need for cooperation and procedural alignment between the ACtHPR and the ACHPR remains critical. Addressing these obstacles requires African states' political will through increased ratifications, declarations granting individual and NGO access and adherence to the Court's rulings. Furthermore, public awareness and accessibility are essential for a stronger human rights culture in Africa. Many African citizens, particularly in remote and vulnerable communities, remain unaware of their rights under the Charter and the recourse available through regional mechanisms.

As the youngest human rights system matures, it faces significant challenges and opportunities. Regional bodies are grappling with emerging issues. For example, the African Charter contains no explicit right to privacy or digital freedom, limiting adaptability to today's interconnected digital era.<sup>91</sup> African civil society and experts have highlighted widespread internet shutdowns and online censorship as threats: at least 12 African countries experienced 19 internet disruptions in 2021, often during elections or protests.<sup>92</sup> The ACHPR has acknowledged that digital rights require attention – it created a Special Rapporteur on Freedom of Expression in 2004 and updated its Declaration of Principles on Freedom of Expression and Access to Information in 2019 to address internet-era challenges. Nevertheless, concrete enforcement against digital rights violations remains nascent.

91 Chekol and Doğan, 2024, pp. 1598–1634.

92 Collaboration on International ICT Policy for East and Southern Africa (CIPESA). (28 October 2022). Digital rights prioritised at the 73rd session of the ACHPR. Available at: <https://cipesa.org/2022/10/digital-rights-prioritised-at-the-73rd-session-of-the-achpr/>.

Similarly, the climate crisis poses a dire test for the African system. The ACHPR has recognised climate change as ‘one of the most defining human rights challenges of our time’, commissioning a study on the human rights–climate nexus and urging states to adopt rights-based climate policies.<sup>93</sup> In a landmark move, a coalition of African NGOs and the Pan African Lawyers Union in 2025 petitioned the African Court for an advisory opinion on states’ obligations regarding climate change – the first time the Court’s advisory jurisdiction was invoked for climate justice.<sup>94</sup> However, institutional responses are slow. The African Union’s 2014 Cyber Security and Personal Data Protection Convention entered into force in 2023.<sup>95</sup> Overall, the African system’s engagement with digital and environmental rights is cautiously advancing, marked by normative progress and bold civil society advocacy. However, it is hampered by limited resources and political will to confront these 21st-century challenges. Nonetheless, the promise lies in a rights-based framework that respects Africa’s cultural diversity and addresses its socio-economic realities. Moving forward, a stronger African human rights system, backed by political commitment, cooperative institutional reform and widespread public engagement, can serve as a transformative force, advancing justice and dignity for all African people.

93 African Commission on Human and Peoples’ Rights. (6 November 2022). The African Commission on Human Rights: Policy measures towards climate change and human rights protection. [Online]. Available at: <https://achpr.au.int/en/news/press-releases/2022-11-06/african-commission-human-rights-policy-measures-towards-climate>. (Accessed: 22 June 2025).

94 Business & Human Rights Resource Centre. (28 October 2022). Africa: Climate justice activists to submit petition to ACHPR seeking Court’s opinion on human rights obligations of African states in the context of climate change. [Online]. Available at: <https://www.business-humanrights.org/en/latest-news/africa-climate-justice-activists-to-submit-petition-to-achpr-seeking-courts-opinion-on-human-rights-obligations-of-african-states-in-the-context-of-climate-change/> (Accessed: 22 June 2025).

95 Carnegie Endowment for International Peace. (July 2023). Continental cyber security policymaking: Implications of the entry into force of the Malabo Convention for digital financial systems in Africa. <https://carnegieendowment.org/events/2023/07/continental-cyber-security-policy-making-implications-of-the-entry-into-force-of-the-malabo-convention-for-digital-financial-systems-in-africa?lang=en> (Accessed: 22 June 2025).

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