POLICY BRIEFING

Human rights protection mechanisms in Africa: Strong potential, weak capacity

Abstract

The African Union (AU) has three principal mechanisms for protecting human rights on the continent: a Charter, a Commission and a Court all devoted to Human and Peoples’ Rights. These are complemented by other specific instruments, by the work of the AU institutions and by various international and national laws. Despite this complex web, human rights are still violated in numerous African countries. The reasons stem from the fact that many legal instruments have not been ratified, that the human rights system suffers from weak capacity and — crucially — that many AU member states lack the political will to improve the situation.

Human rights are an important element of AU–EU relations in the framework of the bi-regional Joint Strategy (JAES), although the results of this partnership have so far been disappointing. The new AU Commission, elected in 2012, may be more ready to engage on a substantive dialogue on the matter. The change presents an important opportunity to deepen the dialogue on dedicated human rights forums and to emphasise human rights as an essential element of common AU–EU approaches to other areas, such as development or peace and security in Africa.
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1. **Africa's human rights architecture**

Despite the numerous instruments available, human rights continue to be violated in many African countries. Political will is essential to overcome present shortcomings.

The promotion of democratic institutions, good governance and human rights is one of the main objectives of the African Union (AU), enshrined in its Constitutive Act (2000). Its predecessor, the Organisation for African Unity (OAU) — founded 50 years ago, in 1963 — also established several mechanisms for the promotion of human rights. Of these the most important ones include the African Charter on Human and Peoples' Rights, the African Commission on Human and Peoples’ Rights (ACHPR) and the African Court of Human and Peoples’ Rights. Many other elements complement these, making Africa’s human rights architecture a thick web of overlapping international, continental and national-level instruments.

Despite the numerous legal and institutional tools available, human rights continue to be violated in numerous African countries. This is a result of the low level of implementation of legal instruments and of the African human rights institutions' lack of capabilities. Key in advancing the promotion of human rights in the continent is the need to build up the political will to overcome these shortcomings. Local activists and civil society organisations (CSOs) continue to fight for human rights on different fronts and some positive moves are visible at the continent's executive body, the African Union Commission (AUC). Continued engagement from international partners, notably the European Union (EU), at both levels will be necessary to advance the protection of basic human rights across Africa.

1.1. **African Charter on Human and People's Rights**


The African Charter on Human and People's Rights (Charter) is the foremost legal instrument for the promotion of human rights in Africa. It was approved by the OAU's Assembly of Heads of State in 1981 and entered into force on 21 October 1986 after being ratified by a majority of members. In 1999 all OAU members had ratified the Charter and at present, only Africa's newest independent state, South Sudan, has yet to ratify it. A Protocol allowing the creation of the African Court on Human Rights has been subsequently adopted.

The Charter establishes duties for states and individuals and recognises the most universally accepted civil and political rights, as well as economic, social and cultural rights. Acknowledging the indivisibility and the collective dimension of rights such as self-determination, peoples'
rights to development and the free disposal of natural resources is perhaps the most distinguishing feature of the African human rights system.

1.2. African Commission on Human and People's Rights (ACHPR)

The organ tasked with the interpretation of the Charter, as well investigating individual complaints referring to its violation is the African Commission on Human and Peoples' Rights (ACHPR). The ACHPR was established according to Art. 30 of Charter and was inaugurated in November 1987. The ACHPR meets on ordinary session twice a year and has its Secretariat in Banjul (Gambia). As a body formally dependent from the AU, the 11 individual members who form the ACHPR are elected by the AU Assembly among the experts nominated by member states. The commissioners subsequently elect a Chairperson and Vice-Chairperson — these posts are currently held by Ms. Catherine Dupe Atoki (Nigeria) and Ms. Zainabo Sylvie Kayitesi (Rwanda). The work of the ACHPR is supported by 15 special mechanisms including special rapporteurs and working groups.

The ACHPR can issue non-binding resolutions, and it has delivered around 300 recommendations via resolutions and communication since it began its work. It has also engaged on a number of promotional missions. So far however, its powers of persuasion and influence have not always been effective. For example, state parties to the African Charter are expected to submit reports to the ACHPR every two years. Despite these provisions numerous states have delayed the proceedings and over ten countries have never submitted a report. The ACHPR also has internal shortcomings: it is supposed to include its concluding observations to the state reports in its Activity Reports but has largely failed to do so. The ACHPR can also — according to its new Rules of Procedures adopted in 2010 — when not in session, forward information regarding serious or massive human rights violations to the AU's Executive or the African Court (if the country is a member), although it has rarely made use of this provision.

Indeed, while there are still shortcomings regarding their staffing and administrative resources, the budget allocated to the ACHPR in 2011 is comparable to that of other regional human rights commissions which have been more productive. To some observers therefore, the reasons for the ACHPR's perceived ineffectiveness lay with its leadership and Secretariat. The location of the ACHPR has also been criticised and -after the sentencing to death of nine Gambian prisoners - the World Coalition against Death Penalty has called on the AU to move the ACHPR to a

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3 African Commission on Human and Peoples' Rights http://www.achpr.org/about/
5 Ibid.
The African Court complements the ACHPR. However, only 26 of 54 countries have ratified its Protocol...

...and only 6 allow individuals and NGOs to present complaints directly.

The AU has twice postponed giving the Court a mandate for individual criminal responsibilities.

1.3. **African Court of Human and People's Rights**

A Protocol to the African Charter establishing the African Court of Human and Peoples' Rights (Court) was approved in 1998, and entered into force in 2004. The seat of the Court is Arusha (Tanzania) and it meets four times a year. The Court has 11 judges elected by the AU Assembly; in September 2012 the Court elected Justice Sophia A. B. Akuffo (Ghana) as President and Justice Fatsah Ouguergouz (Algeria) as Vice-President for a two-year term. The Court has jurisdiction over the cases and disputes submitted to it concerning the interpretation and application of the African Charter, thus complementing the mandate of the ACHPR.

However, the Court's jurisdiction applies only to the 26 states which so far have ratified the Court's Protocol. Complaints by individuals and Non-Governmental Organisations (NGOs) are investigated by the Court upon referral by the ACHPR. Only six AU member states - Burkina Faso, Ghana, Malawi, Mali, Rwanda and Tanzania - have made optional declarations under article 34 (6) of the Protocol that entitles citizens to present individual complaints directly. The Court delivered its first judgement in 2009, on an application from the previous year. As of June 2012, 24 applications had been received by the court — two submitted by the AU itself —, which had delivered an opinion on 12 of them.

In 2003 the AU approved the Protocol on the Establishment of the African Court of Justice, which was intended to deal with matters related to economic integration and matters of a political nature. In 2008 a new Protocol was adopted for merging both institutions (Merged Court Protocol) — even if the court of Justice had never come into existence. This court would have two sections: one for general affairs, the other for human rights. Of the 15 member states needed to ratify the Protocol in order to come into force, so far only three have done so. A further complication has emerged in the interim period, as a new draft protocol has been developed by the AU giving the merged court an additional competence to deal with individual criminal responsibility. The AU has on two occasions (June 2012 and January 2013) postponed taking a decision for this 'triple court'. The reasons for a decision not having been taken include a lack of agreement over the definition of 'unconstitutional change of government' and concerns over additional costs. Observers of the process see these obstacles important enough to prevent, or at least significantly delay, the draft protocol's approval.

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7 Frans Viljoen, *AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol*, 23 May 2012
1.4. Other relevant instruments

Numerous other instruments complement the African human rights system. Some, such as the 'African Committee of Experts on the Rights and Welfare of the Child' and the 'Protocol to the African Charter on the Rights of Women', have unique dispositions for promoting human rights.

The African Union’s 'Human Rights Strategy' and 'Action Plan (2012-26)' were approved in 2011.

In addition to these three legal instruments and institutions, the African human rights system is complemented by a number of other instruments promoting specific rights. Some of these include the 'Declaration of Principles on Freedom of Expression in Africa'; the 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa'; the 'OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' and the 'AU Convention on Preventing and Combating Corruption'.

Two further elements of the African human rights system however deserve a more detailed mention due to their uniqueness. The first is the 'African Committee of Experts on the Rights and Welfare of the Child', established by the African Charter on the Rights and Welfare of the Child (ACRWC) — ratified by 45 states. This is the only organ in the world with competence to receive complaints against states based solely on a treaty dealing exclusively with the rights of children. The UN Convention on the Rights of the Child for instance has no similar procedure.

Second is the 'Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa'. The protocol — approved in 2000 and which entered into force in 2005 (it has been ratified by 28 states) — is the first international treaty that includes health and reproductive rights. Other pioneering features of the Protocol are the ban of female genital mutilation, the authorisation of abortion in cases of sexual violence and the explicit reference to HIV/AIDS in the context of sexual and reproductive health rights. However, it has faced criticism that it does not duly reconcile women's rights protection with the African traditions.

In addition to these dedicated mechanisms, the AU’s executive bodies have also tried to promote human rights across the continent. A relevant and recent initiative in this regard is the 'Human Rights Strategy for Africa' approved in 2011. The strategy aims to be a 'guiding framework for collective action by the AU, Regional Economic Communities and member states aimed at strengthening the African human rights system...and to address the current challenges', including 'inadequate coordination and collaboration', 'limited capacity of human rights institutions', 'insufficient implementation and enforcement of human rights norms and decisions' and 'limited awareness and access to the African human rights mechanisms'. The Strategy is accompanied by an Action Plan (2012-2016) which foresees inter-institutional cooperation, trainings for institutions, strengthening capacity, facilitating national-level human rights dialogues and launching an Annual Mandela Award.

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8 Centre for Human Rights, African Commission on Human and Peoples' Rights, op. cit.
The Pan-African Parliament has actively promoted the ratification of the AU's human rights instruments, including the 'African Charter on Democracy, Elections and Governance'.

The African human rights system suffers from the fact that few of its legal provisions have been ratified.

Despite its important institutional weaknesses, the PAP has actively promoted the harmonisation of legislative processes and the ratification of AU policies — including those related to human rights. An example is the '11before2011' campaign in support of the 'African Charter on Democracy, Elections and Governance'. Eleven new countries have ratified the Charter since the campaign launch, and this has come into force in February 2012. More generally, the PAP has promoted democracy and human rights in Africa through election observation missions and the work organs such as the PAP Committee on Justice and Human Rights, which has launched, together with other international bodies and CSOs, an Africa-wide campaign on 'Press Freedom for Development and Governance: Need for Reform', that includes a 'PAP Index' and an 'Award on Media Freedom in Africa' in 2013.

The large number of specific and non-specific instruments gives the African human rights system a great potential for the promotion of basic rights in the continent. However, the system suffers from major capacity problems and a lack of political will — notably by AU member states. This is visible on the unreliable country reporting to the ACHPR and on the low level of ratification and implementation of human rights instruments. This is particularly important since, in the absence of enforcement mechanisms, some initiatives aiming to protect human rights in Africa are relevant only on paper. The low level of ratification of AU directives by African countries - lower in fact than UN conventions - has been recognised has an important weakness by AU organs. The new AUC Chairperson Nkosazana Dlamini-Zuma (South Africa), noted on her inaugural address that 'every decision taken by the policy organs of the AU is important and must be implemented...The impact of the policies of the Union can only be measured by how they affect our people on the ground and this can only happen if these policies enunciated in the decisions of the AU are implemented'.

2. **Africa–EU relations and human rights**

Human rights are an important component of relations between the EU and AU institutions. The broader framework of these relations is governed by the Joint Africa-EU Strategy (JAES) agreed between both organisations in 2007. The JAES foresees the establishment of eight...
The results of the AU-EU 'Democratic Governance and Human Rights' partnership have so far been disappointing ...

... but the new AU Political Affairs Commissioner may be more willing to engage on substantive dialogue.

2.1. AU–EU Human Rights Dialogue

Human rights dialogues are regularly held as part of 'platform for dialogue on governance and human rights', which allows the AU and EU to 'jointly address key issues of common concern' and 'formulate shared governance agendas and recommendations' to the JAES as a whole. The 9th AU-EU Human Rights dialogue took place in November 2012, in Addis Ababa, led by the EU Special Representative for Human Rights (EU SRHR) Stavros Lambrinidis, and the AU Political Affairs Commissioner, Dr. Aisha Abdullahi. During the meeting, representatives from the EU and the AU discussed issues such as death penalty, violence against women, the right to development, racism, the rights of migrants; and the implementation of the UN Guiding Principles on Business and Human Rights. Lambrinidis transmitted an encouraging message regarding death penalty: Africa could become the next abolitionist continent. 36 AU member states have already abolished the capital punishment, either by law or in practice. And on the latest UN resolution on the moratorium of the death penalty in December 2012, 24 AU states voted in favour, whereas only eight did it against.

Although an impressive gender balance has been achieved in the AU's
Topics discussed included death penalty, violence against women, the right to development, racism, the rights of migrants, and business and human rights.

The AU and the EU reaffirmed their commitment to cooperate bilaterally on human rights and within the relevant international bodies.

decision-making bodies - including the election Nkosazana Dlamini-Zuma as the first female Chairperson of the AUC - women’s rights remain a concern across Africa. Women generally have low social status, poor education, are victims of gender violence and die from complications related to pregnancy or giving birth. More awareness-raising, anti-violence strategies and better access to sexual and reproductive health services are necessary15. Often violence against women - identified in the AU-EU dialogue as an area in which to foster cooperation - is especially serious in conflict situations, such as the Democratic Republic Congo (DRC). This makes it important that peace-keeping include training modules on protection of women and children. On a positive note, the African group took the lead in the last UN General Assembly when the first resolution on female genital mutilation was adopted. Related to the issue of gender discrimination is the prosecution of sexual minorities and the protection of Lesbian, Gay, Bi-Sexual and Transgender (LGBT) rights, an issue not included within the AU-EU human rights dialogue - possibly because of the high degree of polarisation that it generates - but which is brought up at the bilateral level. It should be remembered that homosexual relations remain illegal in a huge majority of African countries, leading to harsh punishments including death penalty in some cases.

A topic that was included on the AU-EU human rights dialogue was the right to development. This ‘third generation’ right is explicitly protected by the African Charter, and there have been recent discussions on the need to adopt a binding legal instrument for the right to development. EU SRHR Mr. Lambrinidis has noted that any risk of politicising this instrument should be avoided, whilst it should be ensured that women’s rights are taken into account properly. A number of instruments already exist to monitor states’ compliance with human rights. Poverty and underdevelopment for example are currently addressed by the New Partnership for Africa’s Development (NEPAD), a strategic framework adopted in 2001 by African leaders. NEPAD promotes a voluntary self-monitoring mechanism - the African Peer Review Mechanism (APRM) - which assesses a state’s observance of different international human rights treaties and principles16. Despite some important successes, the APRM has not yet been adopted by all African states and it has suffered from some implementation problems regarding delays and lack of transparency in the countries' self-reporting.

The AU and the EU also took the opportunity provided by the latest dialogue meeting to reaffirm their commitment to cooperate on the topic of human rights not only bilaterally but also in relevant international bodies.

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16 Ibid.
international bodies, including the UN. Also important is the role played by CSOs: the conclusions of the third AU-EU human rights seminar, focused on the right to housing and on elections, were presented at the most recent dialogue meeting.

3. Current debates

Whilst the AU-EU human rights dialogue is the highest-profile bi-regional forum explicitly dealing with human rights, there are a number of other important issues in which the AU is involved — often with support from the EU.

3.1. Peace, security and human rights

Securing and maintaining peace and stability in Africa has received a greatest deal of attention in recent months. This is also the area in which the AU-EU partnership established as part of the JAES has been most functional. The African Peace Facility (APF), included on the JAES framework since 2007 and expanded to include conflict prevention and post-conflict stabilisation elements, has received EUR 740 million from the EU since 2004. The January AU Summit was also dominated by mini-summits on different African which are having increasing humanitarian costs: continued violence in the border areas between Sudan and South Sudan; the situation on eastern DRC after the appearance of the M23 rebellion; political instability in Guinea Bissau; and Somalia, where progress has been made on both the political and military fronts. But it was Mali — on the wake of the French military intervention — that drew most attention. After December’s UN Resolution 2085 giving green light to the West African–led military intervention (AFISMA), international partners, including the AU and EU, have started to provide financial and logistical support for the mission. This includes an EU Training Mission to Mali which will train African troops engaged on re-establishing control of the north of the country on different aspects including ‘international humanitarian law, the protection of civilians and human rights’.

Respect for human rights is increasingly recognised as an essential element of bringing peace and stability to any conflict, and the current Malian crisis is a case in point. The conflict has generated important human rights concerns — including by the International Criminal Court (ICC) (see section 3.2 below) — but not only because of the abuses perpetrated by the terrorist groups which controlled the north of the country for nine months. After the launch of the Franco–Malian intervention, advocacy groups have denounced extrajudicial executions

17 http://ec.europa.eu/europeaid/where/acp/regional-cooperation/peace/index_en.htm
19 http://www.reuters.com/article/2013/02/01/us-mali-rebels-idUSBRE9100OS20130201
in town re-taken by the Malian army, and also that not enough precautions had been taken to avoid civilian deaths\textsuperscript{19}.

\section*{3.2. Criminal justice and the ICC}

The International Criminal Court (ICC), established through the Rome Statute in 2002, remains a contentious issue in Africa. The AU has maintained a highly polarised relation with the ICC and with its former chief prosecutor Luis Moreno-Ocampo, whom Jean Ping (ex-AUC Chairperson) criticised for double standards when it came to African cases\textsuperscript{20}. The AU also issued a resolution in 2009 declaring it would not cooperate in the arrest of Sudanese president Omar Al-Bashir\textsuperscript{21} and backed a demand to the UN Security Council for a deferral of the ongoing procedures in Sudan and Kenya\textsuperscript{22}. ICC's plan to establish a regional office in Addis Ababa was also blocked by African countries.

Despite all of this, there is a great degree of heterogeneity in the position of African countries regarding the ICC, including some countries — notably Botswana — highly supportive of the Court's work. 33 African countries have ratified the Rome Statute and are parties to the ICC. At present the Court is investigating cases concerning human rights abuses in the DRC, Sudan (Darfur), Uganda (Lord's Resistance Army), Central African Republic, Kenya, Libya and Côte d'Ivoire (the cases of Libya and Sudan, not parties to the ICC, were referred to the court by a UN Security Council Resolution). In January 2013, and in response to a request made in July by the Malian government, the ICC opened an investigation for the crimes committed in the northern Mali since January 2012. The Office of the Prosecutor is also currently conducting preliminary examinations on the situation in Nigeria.

Given the continued focus on African cases by the ICC, the existing tension and politicisation may continue, although there are also signs for optimism. One of the most important one was the appointment, in June 2012, of the Gambian lawyer Fatou Bensouda as the new chief prosecutor of the ICC; a decision seen as marking a positive trend by African countries. Also in 2012, the ICC delivered its first verdict, convicting Congolese rebel leader Thomas Lubanga of recruiting child soldiers\textsuperscript{23}. The lessons learnt on this case were the subject of a Joint Seminar organised by ICC and the AU in October (and supported by the

\begin{footnotes}
\item[20] \url{http://www.reuters.com/article/2011/01/30/ozatp-africa-icc-idAFJOE70T01R20110130}
\item[21] \url{http://news.bbc.co.uk/2/hi/8133925.stm}
\item[22] \url{http://www.issafrica.org/iss_today.php?id=1447}
\item[23] \url{http://www.guardian.co.uk/world/2012/mar/14/congo-thomas-lubanga-child-soldiers}
\end{footnotes}
A special tribunal to judge the ex-President of Chad, Hissène Habré, will begin working this month in Dakar.

International Organisation of La Francophonie, the Netherlands and Austria)\textsuperscript{24}. This was the second such seminar aiming to establish greater cooperation and mutual understanding between both parties.

Beyond the ICC itself, the issue of universal jurisdiction and criminal responsibility for human rights violations is also the centre of other debates in Africa. One such debate concerns the draft protocol giving the African Court a mandate over international crimes discussed above—and which some see as having a potentially negative impact on human rights protection\textsuperscript{25}. Another is establishment of a special tribunal to judge Chadian ex-President Hissène Habré for crimes against humanity, war crimes and torture committed during his Presidency (1982-1990). Although there is no date for the process, the special tribunal will start his activities in Dakar (Senegal) on 8 February after Macky Sall’s government and the AU reached an agreement last December. The AU had demanded Senegal to judge Habré in 2006 but former president Abdoulaye Wade had not taken any steps to carry this through\textsuperscript{26}.

\textsuperscript{24} http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr843.aspx

\textsuperscript{25} Frans Viljoen, AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol, 23 may 2012

\textsuperscript{26} http://www.jeuneafrique.com/Article/ARTJAWEB20130201150934
ANNEX: AU LEGAL INSTRUMENTS RATIFICATION MAP

The map shows the status of four binding human rights instruments not yet ratified by all states: Refugee Convention, Women Protocol, Child Charter and the Protocol on the Establishment of the African Court.

States which have ratified all binding instruments - 16
States that have not yet ratified one or two instruments - 28
States that have not ratified more than three instruments - 10

27 Source: African Commission on Human and People's Rights
http://www.achpr.org/instruments/