

Amicable Settlement of Disputes and Proactive Remediation of Violations under the African Human Rights System

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Abstract

The communication procedures of international human rights tribunals in a few cases have served as catalysts for amicable settlement of disputes and self-initiated redress of human rights violations. International litigation has the potential of exposing states to undesirable negative publicity which could affect their standing before their donors and in the comity of nations. In a bid to avoid the “naming and shaming” and negative publicity associated with having to defend a potentially scandalous human rights violations case, states in Africa have found it desirable, in some cases, to submit to a private confidential process of amicable settlement or to quickly undertake proactive measures to redress the violations before a decision is made on the merits by the relevant human rights tribunal. This article examines notable examples of amicable settlement of disputes in the African human rights system and the inherent potentials and pitfalls in the use of such mechanisms for the promotion and protection of human rights in Africa. While focusing on the three main regional human rights tribunals in Africa, the article argues the need for the overhauling of the rules of procedures of the three human rights bodies examined, which are largely underdeveloped with regard to the specific requirements and conditions for arriving at a friendly settlement. The article also highlights the importance of funding and professionalism to the proper handling of the friendly settlement procedure and discusses other factors responsible for the underutilization of the friendly settlement procedure by regional human rights tribunals in Africa.

Keywords

Amicable Settlement, Africa, Human Rights Tribunals, African Human Rights System

1. Introduction

The amicable settlement procedure is an important mechanism for the resolution of human rights disputes. Peaceful resolution of conflicts is a general principle of law recognized under the United Nations Charter (Tinoco, 2005; Reisman & Benesch 2003).¹ This method of dispute resolution is common in traditional Africa where peaceful co-existence after legal tussles is a cherished cultural value. Surprisingly, the three main regional human rights tribunals in Africa, namely the African Commission on Human and Peoples' Rights (African Commission), African Court on Human and Peoples' Rights (African Court) and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Rights Committee), have resorted to the friendly settlement procedure in relatively few cases (Viljoen, 2012; Contesse, 2019). This situation is particularly worrisome for the African Commission which is supposed to be a shining example of amicable settlement on the continent. Unlike in Africa, the friendly settlement procedure has been effective in the European and Inter-American human rights systems (Standaert, 1999; Kuveya, 2006; Ziccardi et al., 2018). Settled cases in the European human rights system, for instance, have covered applications alleging violations of every one of the thirteen guaranteed freedoms under the European Convention on Human Rights (Weber, 2007).

Before undertaking a review of the specific cases of amicable settlement by the three main human rights tribunals in Africa, it is appropriate to provide an introductory exposition, for the sake of terminological clarity, of what is referred to as "friendly settlement". The friendly settlement procedure, also referred to as the amicable settlement procedure, may be defined as a voluntary, confidential, non-contentious and quasi-judicial procedure with a view to achieving peaceful and amicable resolution of disputes (Kuveya, 2006). Traditionally, the mechanism has been referred to as "good offices" (Ramcharan, 1982). Some of the widely used approaches of amicable settlement include negotiation, which by far is the simplest and most commonly used method of friendly settlement that entails primarily discussions between the disputing parties with a view to reconciling their divergent views and finding common grounds (Shaw, 2005). Another method of friendly settlement is good offices and mediation. Under this method, a third party, usually a member or members of a human rights tribunal (HRT), encourages the disputants to come to a settlement (Ramcharan, 1982). Other methods of friendly settlement include inquiry and conciliation (Shaw, 2005).

The benefits of the amicable settlement procedure are many. It is a win-win procedure that benefits not only the state but also the victim and even the HRT. Importantly, it helps in reducing the court's caseload and reduces animosity among parties whose matters have been settled by the tribunal. Amicable settlement of both inter-state and individual communications saves a great deal of time and productive man-hour, since the procedure is expeditious and thus not

¹United Nations Charter, article 33. See also European Convention on Human Rights, article 38. See also Rule 33, of the Rules of Procedure of the European Court of Human Rights, 2009; articles 48 of the American Convention on Human Rights (ACHR); African Charter on Human and People's Rights, articles 48 and 52; Protocol on the African Court on Human and Peoples' Rights, article 9.

likely to waste the time of the parties. Rather than going through the process of trial defending an indefensible human rights violation suit at a great expense to the state, it saves money to open a channel of communication with the alleged victim. The process of obtaining evidence, preparing evidence, presenting witnesses, and defending the case may be time consuming and challenging for both parties. Amicable settlement also protects the privacy of the parties involved as the procedure is convenient and confidential thus, saving the state the embarrassment of a public trial. In order words, it affords the state an opportunity to clean up its acts quietly (Murray, 2000). It also helps to find a common ground or meeting point between the parties. As such, no one is left out of the loop and no one feels entirely unsatisfied with the process.

The procedure may, however, be criticized for the imbalance of powers created by the nature of the dispute and the identity of the parties (Standaert, 1999). Most times, third parties such as civil society organizations are excluded from the process of friendly settlement between the representatives of the victims and the state. There is also the concern that government may be “paying off” victims or “buying” their way out of a finding of violation. The friendly settlement procedure generally may prevent the growth of legal jurisprudence, thus reducing the full impact of litigation. For instance, a public interest litigation is usually instituted not only because of the immediate interests of the parties concerned but for all potential litigants at present and in the nearest future. The value of the legal jurisprudence that comes from judgments of judicial bodies cannot therefore, be understated. The bottom-line is that not every kind of case may be resolved through the friendly settlement procedure. There are situations the procedure may be inappropriate and detrimental to the interests of the parties (Standaert, 1999). Yet another shortcoming of the friendly settlement procedure is that it does not imply an acknowledgment of wrongdoing by government unless the wrongdoing is expressly acknowledged in the settlement agreement. From a broader societal point of view, the friendly settlement procedure may undermine the society’s right to know the truth. While friendly settlement is by far not a perfect procedure, it provides a sense of self-empowerment to parties and moves away from the notion that blindly complying with the purist ideas of punishment is the only way to serve the interest of victims of human rights violations. Despite its shortcomings, the amicable settlement procedure has gained popularity in the European and the Inter-American human rights systems mainly (Keller et al., 2010).

Under the European human rights system, articles 38 and 39 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention) regulate the use of the friendly settlement procedure. Once a case has been declared admissible, the European Court of Human Rights (ECtHR) is required to place itself at the disposal of the parties for a friendly resolution of the dispute on the basis of respect for human rights.² The

²European Convention on Human Rights, article 38. See also Rule 33, of the Rules of Procedure of the ECtHR 2009. The Rules restrict access of members of the public to settlement negotiation documents.

procedure is an important tool for the reduction of the caseload of the ECtHR, and it is increasingly resorted to by both the victims of human rights violations and states (Keller et al., 2010). The friendly settlement procedure is envisaged in articles 48 of the American Convention on Human Rights (ACHR) and article 40 of the Rules of Procedure of the Inter-American Commission on Human Rights (IACmHR). While the European regional system tends to favour the conciliatory approach to its friendly settlement procedure, the Inter-American regional human rights system uses both mediation and conciliation (Dijk et al., 2018). Between 1985 and 2018, the Inter-American human rights system has facilitated over 174.³ In recent years, the Commission signs an average of between five and eight settlements per year (Contesse, 2019).⁴

Despite the universal existence and acceptance of the friendly settlement, the procedure has not been used frequently by regional human rights tribunals in Africa (Kuveya, 2006; Viljoen, 2012). A basic question therefore is why has this procedure not been used widely in the Africa human rights system? Below, the article reviews the jurisprudence of the three main human rights bodies in Africa with a view to identifying cases they have resolved through amicable settlement and the peculiarities of each of the human rights bodies in relation to the friendly settlement procedure. The article concludes by pointing out areas in need of reforms in the jurisprudence and rules of procedures of the three main human rights tribunals in Africa and what may be done to make the friendly settlement procedure an effective case management tool and mechanism for quick dispensation of human rights complaints in Africa.

2. The African Human Rights System

The African human rights system is generally regarded as the least developed of all the three main regional systems of human rights in the world (Steiner & Alston, 2000; Gittleman, 1982). Although African leaders came together in 1963 to form the Organization of African Unity (OAU), now African Union (AU), the earliest attempt at creating a common human rights standard for the African continent, similar to the European and Inter-American human rights system, dates back to 1961, during the first ever Congress of African Jurists held in Lagos (Viljoen, 2012; Ayeni, 2011). The Congress led to the adoption of a declaration with the title 'Law of Lagos' where African jurists called on governments to adopt an African convention on human rights with a court and commission. This appeal went unheeded until 1981 when African Charter on Human and Peoples' Rights (African Charter) was adopted, thus paving way for a continental regime of human rights in Africa.

Even though there are many other human rights treaties and standards in Africa, the African Charter is regarded as the principal human rights instrument on the

³Inter-American Commission on Human Rights, "Impact of the Friendly Settlement Procedure", 45, 65, OEA/Ser.L/V/II.167 doc. 31 (1 March 2018).

⁴Argentina has signed the most settlements (31 agreements), followed by Ecuador (27), Peru (15), Guatemala (14), Chile and Colombia (both with 13 settlements). See (Contesse, 2019).

continent (Ayeni, 2018).⁵ The Charter contains 29 substantive provisions covering the three general of human rights, namely civil and political rights; economic, social and cultural rights and what has been regarded as solidarity rights (Viljoen, 2012). The Charter contains four distinctive features. Firstly, it treats all the three generations of rights as indivisible, inseparable and justiceable (Udombana, 2004; Viljoen, 2012).⁶ Second, the Charter introduces a novel concept, peoples' rights, and it has been praised as the first legally binding instrument to provide for peoples' rights (Kiwauka, 1988).⁷ Third, the Charter allows for no derogations. In other words, limitations on the rights and freedoms contained in the Charter cannot be justified on the basis of emergencies and special circumstances. The only legitimate reasons for limitations of the rights are found in article 27(2) of the Charter itself.⁸ Fourthly, the Charter imposes duties on both states and individuals. One fundamental feature of the Charter is the provision creating the African Charter on Human and Peoples' Rights (African Commission). The Commission is mandated to receive individual complaints, examine state party reports, interpret provisions of the Charter, as well as promote and protect human rights on the continent.⁹

Due to the quasi-judicial nature of the African Commission, the African Court on Human and Peoples' Rights (African Court) was established in 1998, through the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights (African Court Protocol).¹⁰ The Court was established to complement the protective mandate of the African Commission.¹¹ The Court is mandated to receive individual communications from states that have ratified the Protocol. In order for individuals and NGOs to access the Court, states are required to make a declaration under articles 6 and 34(6) accepting direct access for individuals and NGOs to the Court. As at July 2018, only eight states, namely Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Malawi, Tanzania and Rep. of Tunisia, have made the requisite declaration.¹² This

⁵Other human rights instruments in Africa include: OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969, Cultural Charter for Africa 1976, African Charter on the Rights and Welfare of the Child 1990, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights 1998, the Constitutive Act of the African Union 2000, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003, Convention on Prevention and Combating Corruption 2003, African Charter on Democracy, Elections and Good Governance 2007, and the AU Convention for the Protection of and Assistance of Internally Displaced Persons 2009, among others.

⁶See generally the preamble of the African Charter which states that civil and political rights cannot be dissociated from economic, social and cultural rights.

⁷See articles 19-24, African Charter.

⁸See *Commission Nationale des Droits de l'Homme et des libertes v Chad* (2000) AHRLR 66 (ACHPR 1995) para 21; *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999), para 41.

⁹See generally article 45 of the African Charter.

¹⁰The African Court Protocol was adopted on 9 June 1998, and came into force on 25 January 2004.

¹¹See article 2 of the African Court Protocol.

¹²See African Court on Human and Peoples' Rights 'Welcome to the African Court'

<http://www.african-court.org/en/index.php/12-homepage/1-welcome-to-the-african-court> (accessed 15 December 2018).

means that only individuals and NGOs from these states may bring a case directly before the Court (Ayeni, 2018).

The third primary human rights body on the African continent is the African Committee of Experts on the rights and welfare of the Child (African Children's Rights Committee), established through the African Charter on the Rights and Welfare of the Child adopted by African leaders on 11 July 1990 (Ayeni, 2018).¹³ African Children's Rights Committee comprises 11 members and it is mandated to receive individual communications in addition to interpreting provisions of the African Children's Charter and examining periodic reports from states.¹⁴ In summary, all the three main human rights bodies, the African Commission, African Court and the African Children's Committee have a mandate to receive and determine inter-state and individual communications arising from any disputes referred to them. However, the focus of this article is not the individual communication procedure of the various human rights tribunals in Africa as such but the competence of the tribunals to undertake amicable settlement of disputes referred to them, and the usefulness of such procedure for human rights protection in Africa.

2.1. African Commission

Being a quasi-judicial body, it is naturally expected that the African Commission would have a very strong mandate under the African Charter for undertaking amicable settlement of disputes referred to it (Viljoen, 2012). However, this is not the case. It is only in relation to interstate communications that the Charter expressly mandates the Commission to 'reach amicable solution'.¹⁵ The lack of 'individual friendly settlement procedure' in the African Charter, some scholars have argued, may be explained by the initial ambiguity surrounding the competence of the Commission to handle individual complaints (Viljoen, 2012). Thankfully, the Rules of Procedure of the Commission now contains the procedure for amicable settlement of disputes by the Commission.¹⁶ Whenever the Commission declares a communication admissible, it shall place its good offices at the disposal of the interested state parties.¹⁷ The Commission, acting through its Bureau, is required to establish contact with the relevant authorities of the state concerned. The Commission afterwards may appoint a Rapporteur, convene a meeting or series of meetings with the parties and facilitate the drafting of a Memorandum of Understanding containing the terms of settlement.¹⁸ The Commission also has the responsibility, through its Rapporteur, to follow-up and monitor implementation of the terms of the agreement and report non-compliance to the relevant organs of the African Union (AU).¹⁹

¹³The African Charter on the Rights and Welfare of the Child entered into force on 29 November 1999.

¹⁴See article 44, African Children's Rights Charter.

¹⁵African Charter, article 52.

¹⁶See Rules of Procedure of the African Commission on Human and Peoples' Rights (2010), rule 90.

¹⁷Rule 90(1), Rules of Procedure of the African Commission on Human and Peoples' Rights (2010).

¹⁸Rule 90(4), Rules of Procedure of the African Commission on Human and Peoples' Rights (2010).

¹⁹Rule 90(8), Rules of Procedure of the African Commission on Human and Peoples' Rights (2010).

The very first communication submitted to the African Commission against the government of The Gambia, *Peoples' Democratic Organisation for Independence and Socialism v The Gambia*, was struck out by the Commission on 31 October 1996 following amicable resolution of the issues raised in the communication.²⁰ The friendly resolution in this case was made possible by the change in government as the new government at the time was desirous of dissociating from the past injustices of the previous administration (Kuveya, 2006). The communication alleged some flaws and defects in the electoral laws which the previous regime disagreed with. Following the change of government in July 1994, the new government sent a letter to the African Commission accepting the complainant's grievances and undertaking to review the electoral laws. The Commission consequently informed the complainant about this development and added that if the Commission did not receive any response from the complainant by 1 February 1996, the matter would be considered resolved amicably. Eventually the matter was considered as amicably resolved even though the consent and views of the complainants were not received.

In *Modise v Botswana*,²¹ the complainant had been deported four different times from Botswana to South Africa on the basis that he was a 'prohibited immigrant'. On 3 March 1993, the complainant submitted a communication to the African Commission. The Commission requested the government of Botswana to consider the possibility of an amicable resolution. On 19 June 1995, while the communication was still pending before the Commission, the government of Botswana granted Mr Modiose a certificate of citizenship by registration. In its decision, the Commission urged the state to 'continue with its efforts to amicably resolve the communication'. Following interventions by an international NGO, INTERIGHTS, and the legal counsel in the case, John Modise was eventually granted full nationality (Louw, 2005). Again in this case, certain offers were made initially by the government which were unacceptable to the complainant and did not remedy the violations complained of. Clearly the Commission should have terminated the process there and then. As argued by Odinkalu and Christensen 'Clearly, effective protection under the Charter can only be secured if the Commission actively engages in the process of ensuring and verifying that an amicable settlement complies with the criteria set out by the Commission itself' (Odinkalu & Christensen, 1998).

In 1988, a communication was submitted to the African Commission against the government of Zambia. The Communication, *Kalenga v Zambia*,²² relates to allegation of false imprisonment. The applicant was released following an amicable settlement initiated by a member of the African Commission. The African Commission concluded this matter had been amicably resolved after being informed by the Zambian Ministry of Legal Affairs that Kalenga had been released

²⁰Communication 44/90 *Peoples' Democratic Organisation for Independence and Socialism v Gambia*, para 24.

²¹*Modise v Botswana* (2000) AHRLR 30 (ACHPR 2000).

²²*Kalenga v Zambia* (2000) AHRLR 321 (ACHPR 1994).

from prison in 1989. There was no indication that the Commission sought the views of the complainants especially whether or not they agreed to the settlement. There are also no details on the terms of the settlement and an affirmation that the settlement was based on respect for human rights.

In another case, *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*, submitted by the Senegalese non-governmental organisation (NGO), *Rencontre Africaine pour la Défense des Droits de l'Homme*, on behalf of 517 West Africans who were expelled from Zambia on 26 and 27 February 1992, on grounds of being in Zambia illegally, the African Commission found violation against the government of Zambia but rather than issue specific reparation orders, decides to pursue an amicable resolution of the case.²³ In one of the few cases submitted against Djibouti before the African Commission, *Association pour la Défense des Droits de l'Homme et des Libertés v Djibouti*,²⁴ the Commission highlighted the importance of amicable settlement. The communication alleged a series of human rights abuses against members of the Afar ethnic group committed by government troops. A member of the Commission met with the complainant during a mission to Djibouti, following which the complainant indicated to the commission that the issue had been settled amicably.

In another interesting decision involving Cameroon, *Open Society Justice Initiative (on behalf of Pius Njawe Noumeni) v Cameroon*,²⁵ a radio station operated by Pius Njawe was banned in November 1999. When a new application was submitted to government for a fresh license to operate the radio station, government refused to approve the application. This prompted the Open Society Justice Initiative (OSJI) to submit a complaint to the African Commission on behalf of Pius Njawe on 28 June 2004. On 8 December 2005, representatives of the government of Cameroon notified the African Commission that amicable settlement was underway. The complainant (OSJI) informed the Commission on 28 April 2006 that government had dropped all criminal charges against Pius Njawe and released equipment of the radio station that were confiscated. Government also committed itself to granting provisional authorization for the operation of the station. In the spirit of “give and take”, the complainant also agreed to withdraw the communication before the Commission. The Commission however requested the parties to submit to the Commission’s Secretariat a copy of the amicable settlement between the parties.

The amicable settlement practices of the African Commission may be criticized for being too much defensive of the state, and showing little regard for human rights and the interests of the victims. In practice, the African Commission does not really initiate amicable settlement (Viljoen, 2012). The Commission merely transmits “a reconciliatory state response to the complainants for

²³Communication 71/92 *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*.

²⁴*Association pour la Défense des Droits de l'Homme et des Libertés v Djibouti* (2000) AHRLR 80 (ACHPR 2000).

²⁵*Open Society Justice Initiative (on behalf of Njawe Noumeni) v Cameroon* (2006) AHRLR 75 (ACHPR 2006).

their acceptance". Thus, in some of the cases discussed above where the Commission claimed to have resolved amicably, the consents of the victims or their legal representatives were rarely obtained. It has been argued that the friendly settlement procedure "presupposes the absence of any decision on the merits of the case" (Oguergouz, 2003). It is therefore puzzling why the African Commission in some cases reviewed above offered its good offices to the peaceful resolution of the disputes even after a decision on the merits.²⁶ The amicable settlement procedure ought to be followed at any time before the issuance of a decision of the merits. It is also important for the Commission to ensure parties, especially the victims and complainants, agree to the terms of the settlement. Despite a clear provision in its 2010 Rules of Procedure, there is hardly any post-2010 decision settled amicably by the Commission. This poor records in amicable settlement underscores the little regard given to this procedure by the African Commission, litigants and states.

2.2. African Court

The Protocol establishing the African Court states that the Court may "try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter".²⁷ This provision may also imply that the friendly settlement jurisdiction of the Court is limited to cases between states since that is the tenor of article 48 of the African Charter (Viljoen, 2012). However, the Rules of Procedures of the Court extends the friendly settlement procedures to individual communications. The Rules of Procedure of the African Court recognize two types of amicable settlement procedure.²⁸ In the first case, the parties reach an amicable settlement, out of court and independently of the Court's intervention. Usually, the Court has powers to either accept or reject this settlement. Where it accepts the settlement, the Court issues a judgment setting out a brief statement of the facts of the case and the solutions proposed and accepted by the parties (Viljoen, 2012). The solutions are incorporated into the judgment of the Court. In the second instance, the Court plays a very active role in the process of settlement. It is required under this procedure that both parties must consent to every component of the solutions proposed and the agreement reached must be "based on respect for human and peoples' rights".²⁹ If the terms of the agreement and the conditions under which they were arrived at are acceptable to the Court, it will then issue a judgment similar to the one above setting out a brief statement of the facts of the case as well as the solutions. It must be noted that negotiations between parties are treated as confidential and may not be relied upon in any subsequent proceedings of the Court.

²⁶See for example *Bob Ngozi Njoku v Egypt* (2000) AHRLR 83, Communication 40/90, 11th Annual Activity Report; *Modise V Botswana* (2000) AHRLR 25 (ACHPR 1997), Communication 97/93, 10th Annual Activity Report.

²⁷See article 9 of the African Court Protocol.

²⁸See rules 56 & 57 of the Rules of Procedure of the African Court on Human and Peoples' Rights.

²⁹See rule 57 of the Rules of Procedure of the African Court.

Although the legal instruments establishing the African Court provide for the possibility of amicable settlement of disputes,³⁰ the Court has achieved little success in this regard. There have been no reports of the Court using the amicable settlement procedure to resolve a case since its operationalization in 2006. Despite the low record of achievement on amicable resolution of disputes, a former Judge of the Court, Ouguergouz J, has pointed out that the Court may be in a better position to persuade a state to ‘soften its position’ in anticipation of an “unfavorable judicial decision” (Ouguergouz, 2005). Despite Ouguergouz’s view above, the basic question is whether the Court is indeed best suited for the role of amicable settlement of disputes and whether such role enhances or impedes the Court’s efficiency (Ebobrah, 2011). While the Court clearly has an advantage over the African Commission in relation to contentious jurisdiction, such as advantage is obviously lacking in the friendly settlement procedure. This fact perhaps explains why the Court in its Rules of Procedure tones down the role of the Court in amicable settlement of disputes.³¹ The Rules only makes reference to the competence of the Court to engage in amicable settlement of disputes. Thus, while the court creates room for the friendly settlement procedure under its Rules, it does not envisage a significant role under the procedure. In fact, Ebobrah has questioned whether the Court would add any value to the process of amicable settlement under the African human rights system (Ebobrah, 2011).

It must be noted that in terms of Rule 56(3) of its Rules of Procedure, the Court may decide to proceed with a matter even though notice of an amicable settlement has been given in the case. This approach may become necessary where a violating state intends to use the amicable settlement procedure to “settle” the applicants thereby stifling publicity or deflecting attention from its egregious human rights records. According to Rules 57(2) of its Rules of Procedure, negotiations aimed at amicable settlement are confidential and the contents of such negotiations, if it breaks down, cannot be mentioned or relied upon in a subsequent proceeding before the Court.

Although the legal instruments establishing the African Court provide for the possibility of amicable settlement of disputes,³² the Court has achieved little success in this regard. Despite the low record of achievement on amicable resolution of disputes, some commentators have pointed out that the Court may actually be in a better position to persuade a state to “soften its position” in anticipation of an “unfavorable judicial decision” (Viljoen, 2012). It seems quasi-judicial human rights bodies in general have an advantage over judicial human rights bodies in the area of amicable settlement of disputes (Ebobrah, 2011). In the In-

³⁰African Court Protocol, article 9 (stating that the Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter). This provision derives also from article 52 of the African Charter which empowers the African Commission, whose protective mandate the Court complements, to ‘try all appropriate means to reach an amicable solution based on the respect of human and peoples’ rights’. This provision, however, relates only to inter-state communications.

³¹*Id.* See also rule 26(1) (c) of the Rules of the African Court.

³²See article 9 of the African Court Protocol.

ter-American human rights system, for instance, friendly settlement of disputes has been championed by the relevant quasi-judicial body (Shelton, 1983). In the spirit of positive complementarity, the Court ought to defer to the African Commission and possibly the African Children's Rights Committee in respect of friendly settlement. While the African Court may continue from time to time to undertake some friendly settlement proceedings, the Court should focus primarily on its adjudicatory role; leaving the primary responsibility for amicable settlement of disputes within the African human rights system to the African Commission and the African Children's Rights Committee.

2.3. African Children's Rights Committee

The African Children's Rights Committee may on its own initiative promote amicable on the basis of the best interest of the child.³³ However, the process shall continue only on basis of mutual consent of the parties. Prior to consideration of the merits of a communication, the Committee may set a time for parties to express their for amicable settlement.³⁴ The process may be terminated on any of the following grounds: if the Committee finds that the dispute is not suitable for amicable resolution; if the any of the parties withdraws its consent to the process or the subject matter involves a serious or massive violation of children's rights.³⁵ Once a settlement has been reached, the Committee shall adopt a report setting out the facts, the issues and the terms of settlement reached. The report is transmitted to the parties for their endorsements and signatures, after with the Committee shall adopt the report and authorise its publication.³⁶ The terms of the settlement must be based on respect for human rights. Amicable settlement concluded outside the auspices of the Committee must be reported to the Committee.³⁷

Quite recently, on 27 October 2016, the African Children's Rights Committee, considered amicable settlement in the fourth communication submitted to it: *Institute for Human Right and Development in Africa v Malawi*.³⁸ The settlement was reached during the 28th Ordinary Session of the Committee in 2016. The communication alleged that contrary to the provisions of the African Children's Charter which fix the age bracket of children as persons below 18 years, the Constitution of Malawi does not accord children-related protections to persons between the ages of 16 and 18 years. While the matter was pending before the Committee, both parties to the communication met; and the state agreed to

³³ACERWC Revised Guidelines for the Consideration of Communications (2014), rules XIII(2).

³⁴ACERWC Revised Guidelines (2014), rules X and XII.

³⁵ACERWC Revised Guidelines (2014), rules XIII(2).

³⁶ACERWC Revised Guidelines (2014), rules XIII(2)(v)-(viii).

³⁷ACERWC Revised Guidelines (2014), rules XIII(iii)

³⁸ Communication No 004/Com/001/2014 Institute for Human Right and Development in Africa v Malawi. See International Bureau for Children's Rights, "Malawi, IHRDA Reach Amicable Settlement in Child Rights Case before ACERWC"

<http://www.ibcr.org/en/medias-en/malawi-ihirda-reach-amicable-settlement-child-rights-case-acerwc/> (accessed 14 April 2019). See also ACERWC, "Decisions on Communications" <https://www.acerwc.africa/decisions-on-communications/> (accessed 14 April 2019).

amend its Constitution and other laws by 31 December 2018 to afford protection to children up to the age of 18 years.³⁹ This is a welcome development, and one that should be encouraged by HRTs in Africa. It could have taken the Committee several months if not years to finally decide the case on the merits and additional months to transmit the decision to the relevant state organ. Even then, state officials may still be embroiled in arguments over the decision before attempting to prepare a Bill to repeal the relevant laws. The amicable settlement procedure has shorted-circuited the unnecessary delay and waiting period. In fact, it is possible that based on the state's commitment, government officials may, in practice, begin to offer children-related protection to Malawians aged 16 to 18 years.

The government of Malawi has since submitted two reports to the Committee on implementation of the amicable settlement.⁴⁰ On 25 January 2017 and 25 April 2017, the government of Malawi informed the Committee that it has adopted a Bill which amends the Constitution of Malawi. Following these reports, the state requested that Committee should consider closing the case as the government of Malawi has fully complied with the terms of the agreement. The Committee extended its appreciation to the state for the efforts and urged the state to look into all other relevant laws with provisions on the definition a child. This is a very important development as it demonstrates the capacity of the amicable settlement procedure to induce constructive dialogue and engagement as well as voluntary compliance by states. In the meantime, it remains to be seen whether the African Children's Committee will continue to use the amicable settlement procedure or abandon it the way the African Commission has done. Since the communication procedure of the Committee is relatively under-developed compared to the African Commission and the African Court, it is not out of place to give the Committee some more time to evolve its amicable settlement jurisprudence.

3. Proactive Remediation of Violations

Another practice which though falls short of the friendly settlement procedure but nonetheless useful and noteworthy is proactive remediation of violations. Proactive remediation of violations, in the context of the complaint procedure of HRTs, is a process whereby states engage in "damage control" after complaints have been lodged with a relevant HRT. It may be borne out of a genuine concern for the victims or merely a "public relations stunt", depending on the nature of the state implementing the remediation. Unlike amicable settlement which is a mutual process that involves both parties to the case, with or without the supervision of the HRT, proactive remediation is mostly a one-sided process con-

³⁹Institute for Human Right and Development in Africa v Malawi, "IHRDA-Malawi Settlement Agreement: Malawi Submits 4th Progress Report to ACERWC" <https://www.ihrda.org/2018/02/ihrda-malawi-settlement-agreement-malawi-submits-4th-progress-report-to-acerwc/> (accessed 14 April 2019).

⁴⁰ACERWC: 29th Activity Report submitted to the African Union following the 29th Session of the African Committee of Experts on the Rights and Welfare of the Child (2nd 9th may 2017) 26-27.

trolled by government officials.

One case under the African human rights system which clearly demonstrates the practice of proactive remediation is *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (Ogoniland case)*.⁴¹ The case was submitted to the African Commission in 1996, challenging the environmental degradation of Ogoniland, which continues to have severe impact on the means of livelihood and health of the Ogoni people. Prior to the Commission's decision in October 2001, the civilian administration that took over power in May 1999 had taken some "remedial actions" as an act of acknowledgement of the inappropriate actions of the previous regimes (Viljoen, 2017). In a *Note Verbale* submitted to the African Commission in October 2000, the government admitted "the gravamen" of the complaint and outlined the "remedial measures" it was taking to redress the violations. The remedial measures stated in the *Note Verbale* include the establishment of a number of national institutions such as the Federal Ministry of Environment, the Niger Delta Development Commission and a Judicial Commission of Enquiry to investigate allegations of human rights violations. In acknowledging the significance of these "proactive remedial measures", the Commission urges the government to keep it informed of the "outcome" of the "work" of the institutions.

In another communication decided by the African Commission, *Media Rights Agenda v Nigeria*,⁴² Niran Malaolu and three other journalists were arrested and detained without trial. The other journalists were released but Malaolu was denied access to his lawyer, doctor and family. Following a secret trial conducted under the Treason and Other Offences (Special Military Tribunals) Decree of 1986, he was convicted to life imprisonment. While the communication was pending before the Commission, the Nigerian government granted clemency to Malaolu alongside 95 others on 4 March 1999. The law under which he was tried, the Treason and Other Offences (Special Military Tribunals) Decree of 1986, was also repealed, in preparation toward return to civil rule in May 1999.⁴³ This remediation happened before the Commission's decision which was formally adopted on 6 November 2000 and there was no clear indication of an amicable settlement procedure initiated before these remedial steps were taken.

In 2005, some Zimbabwean NGOs submitted a communication to the African Commission, *Scanlen & Holderness v Zimbabwe*,⁴⁴ alleging that a 2002 law of Zimbabwe, the Access to Information and Protection of Privacy Act (AIPPA), contravened various provisions of the African Charter. In its decision adopted

⁴¹*Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (Ogoniland case)* (2001) AHRLR 60 (ACHPR 2001).

⁴²Communication 224/98 *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).

⁴³See Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No 63 of 1999, Laws of the Federation of Nigeria. This law repealed not only the Treason and Other Offences (Special Military Tribunals) Decree 1986 but also Treason and Treasonable Offences Decree 1993.

⁴⁴Communication 297/2005 *Scanlen & Holderness v Zimbabwe*.

on 3 April 2009, the Commission recommended among other things the repeal of sections 79 and 80 of the AIPPA and the decriminalization of offences relating to accreditation and practice of journalism. However, earlier in 2007, while the communication was still pending before the Commission, the government of Zimbabwe adopted the Access to Information and Protection of Privacy (Amendment) Act which repealed sections 79 and 80 of the 2002 Act.⁴⁵ The Amendment Act also repealed section 83 of the AIPPA, which criminalised activities relating to accreditation and the practice of journalism. Thus, at the time of the Commission's decision, a few of the violations alleged had been redressed.

Examples of proactive remediation of human rights violation may also be found in the rapidly developing sub-regional courts in Africa. In *Djotbayi Talbia and Others v Nigeria*,⁴⁶ a case decided by the Community Court of Justice of ECOWAS, ten applicants, who were aboard a foreign vessel rendering assistance to another vessel in distress at 16 nautical miles off the coast of Nigeria, were arrested and detained by the officials of the Nigerian Navy on the allegation that the applicants were taking crude oil on board. They were paraded before national press as crude oil thieves. On 27 July 2004, a Federal High Court in Nigeria ordered their release as subsequent investigation revealed the cargo being loaded on their vessel was fuel oil, not crude oil.⁴⁷ The Nigerian government initially refused to immediately release the applicants; however, they were released soon after a complaint was submitted to the ECCJ.⁴⁸ In other words, the applicants were released prior to, but in anticipation of, the Court making the pronouncement to that effect. The proactive remediation approach is more and more being resorted to by states rather than engage in full-blown friendly settlement procedure where some wrongdoings will have to be admitted before an agreement is signed by the parties. The merit of this new approach is however open to criticism as states tend to cherry-pick what action is sufficient as proactive remedy of the violation. The consent of the victim is rarely sought and the human rights body is not invited to sign off on any action taken.

4. Conclusion

There is no question that the amicable settlement procedure helps international human rights tribunals to engage in constructive dialogues with states. If properly deployed, the procedure has the potential to reduce HRTs' work load and backlog of cases, and this is why the procedure has been critical to the overall success story of the European and the Inter-American human rights systems. Despite its potentials, the friendly settlement procedure has hardly made any noticeable impact on how the three primary human rights tribunals in Africa

⁴⁵See Access to Information and Protection of Privacy (Amendment) Act of 2007. The Amendment Act was gazetted and entered into force on 11 January 2008.

⁴⁶ECW/CCJ/APP/10/06 *Djotbayi Talbia & 14 Others v Nigeria & 4 Others*.

⁴⁷As above.

⁴⁸The applicants were later released by the government of Nigeria after this complaint had been filed. See ECW/CCJ/APP/10/06 *Djotbayi Talbia & 14 Others v Nigeria & 4 Others*.

conduct their businesses. As the article indicated, the three main regional human rights tribunals in Africa have resorted to the friendly settlement procedure in relatively few cases. The situation is both surprising and worrisome. It is surprising because in Africa, the popular sentiment is in favour of friendly and out-of-court settlement of disputes; and it is worrisome because African leaders opted for the African Commission, instead of a fully-fledged judicial body, with the objective that the Commission would be a beacon of amicable settlement of human rights disputes on the continent. Contrary to the views that “the strength of the Commission, as presently stipulated in the Charter, lies in amicable settlement” (Kuveya, 2006), the scorecard of the Commission in friendly settlement procedure is less than satisfactory.

While instances of amicable settlement in the African human rights system in general are undeniably few and far between, the few examples discussed in the article however demonstrate that amicable resolution of complaints is a crucial channel through which the communication procedure of HRTs in Africa can make a difference at the domestic level. Human rights bodies in Africa need to play a much more active role in initiating amicable settlement of disputes brought before them. Parties generally interpret the same events differently, and in many cases, there are settled aspects of disputes agreed to by both parties; this fact in itself justifies the need for friendly settlement procedure. Drawing from the practice of the European and the Inter-American regional human rights systems, the fundamental elements that should form the basis of amicable settlement procedure in the African human rights system include the following: the settlement must be acceptable to the parties; it must be human rights-compliant and the memorandum of understanding between the parties should form part of public records by including the texts of the agreement in the final decision of the human rights body.

There is no doubt that the friendly settlement procedure in the African human rights system is in need of reforms to make it more effective, victim-driven, result-oriented and based on respect for human rights. Funding is key to implementing an effective friendly settlement procedure. Without funding, the various regional human rights tribunals in Africa, especially the ones best suited for amicable settlement such as the African Commission and the African Children’s Rights Committee, may not be able to undertake working visits to countries where human rights violation occurs, hold series of meetings with parties and employ specialists to assist with the friendly settlement processes. The proper handling of the friendly settlement procedure requires a high degree of professionalism especially by the registry and other *ad hoc* staff. It may also be crucial to review the Rules of Procedure of the various human rights tribunals, especially the African Court and the African Children’s Rights Committee, to make precise, detailed and comprehensive provisions for friendly settlement procedure. Human rights tribunals in Africa should ensure they monitor negotiations leading to amicable settlement between parties; ensure that both parties consent

to the settlement and the settlement is approved by the tribunal after it has been found to be based on respect for human rights.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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