

The settlement option: friend or foe to human rights protection in Africa?

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ABSTRACT: The friendly settlement procedure has long existed in the Inter-American and the African human rights systems, yet over the past twenty years, it has become increasingly popular in the Inter-American system as a means to protect human rights and deliver remedies to victims. To date, over 150 settlements have been successfully negotiated at the level of the Inter-American Commission of Human Rights. The practice has differed, as has the impact of such settlements across the regions. Reports show that compliance with these agreements is generally better when compared to decisions on individual complaints. In contrast, the African system has rarely seen the amicable settlement option exercised successfully by the parties. This article outlines the advantages and disadvantages of the settlement option for the protection of human rights. The approach taken is an in-depth analysis of the procedure in both systems followed by a comparative analysis of the practice and its impact in the regions. In light of the practice in the Americas and Africa, the article interrogates and evaluates the overall utility of the settlement procedure and its potential for furthering human rights protection at the regional level, and in Africa specifically. This article finds that the settlement mechanism has numerous benefits for human rights protection if it is carried out according to established principles and clear criteria that seek to preserve the integrity of the procedure and the African human rights system more generally.

TITRE ET RÉSUMÉ EN FRANCAIS:

L'option de règlement: ami ou ennemi de la protection des droits de l'homme en Afrique?

RÉSUMÉ: La procédure de règlement à l'amiable existe depuis longtemps dans les systèmes interaméricain et africain des droits de l'homme. Cependant, au cours des 20 dernières années, elle a de plus en plus été utilisée en tant que moyen de protection des droits de l'homme et des victimes dans le système interaméricain des droits de l'homme. À ce jour, plus de 150 règlements ont été négociés avec succès au niveau de la Commission interaméricaine des droits de l'homme. La pratique et l'impact de tels règlements à travers les régions diffèrent. Les rapports montrent que le respect de ces accords est généralement meilleur que celui des décisions relatives à des plaintes individuelles. En revanche, le système africain a rarement vu l'option de règlement à l'amiable être utilisée avec succès par les parties. Cet article décrit les avantages et les inconvénients de l'option de règlement pour la protection des droits de l'homme. L'approche adoptée consiste en une analyse approfondie de la procédure dans les deux

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systèmes, suivie d'une analyse comparative de la pratique et de son impact dans les systèmes régionaux. À la lumière de la pratique dans les Amériques et en Afrique, l'article examine et évalue l'utilité globale de la procédure de règlement et son potentiel pour renforcer la protection des droits de l'homme au niveau régional, et plus particulièrement en Afrique. L'article conclut que le mécanisme de règlement présente de nombreux avantages pour la protection des droits de l'homme s'il est mis en œuvre conformément à des principes établis et à des critères clairs visant à préserver l'intégrité de la procédure et du système africain des droits de l'homme plus généralement.

KEY WORDS: African human rights systems, amicable/friendly settlement, human rights protection, inter-America Commission of Human Rights, African Commission on Human and Peoples' Rights

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1 INTRODUCTION

The *Malawi Children's Rights* case stands out among the human rights cases in the African human rights system because it is one of the few that was successfully resolved through friendly settlement to the satisfaction of the parties.¹ Further, the case is notable because of its wide-reaching impact on enhancing legal protection of the rights and welfare of children in Malawi. The case was filed before the African Committee of Experts on the Rights and Welfare of the Child (African Children's Rights Committee or Committee) to challenge the law that governs child justice, care and protection.² The reason for this stemmed from the fact that the definition of a child set forth in the Children and Young Persons Act of 1969 stated that a child was any person under the age of fourteen, and a youth, anyone under the age of eighteen.³ Moreover, the Act was primarily punitive in nature, rather than restorative. The best interest of the child principle was also absent, resulting in an overly punitive law applicable to children under 18, in contradiction to Malawi's Bill of Rights and obligations under the African Charter on the Rights and Welfare of the Child (African Children's Charter). The effect of this law and its application led to widespread violations of children's rights, and in particular, a

1 Communication 4/Com/001/2014 *IHRDA on behalf of Malawian Children v Malawi*, friendly settlement, Oct.2016 (*Malawi Children's Rights* case) available at <https://www.ihrda.org/2015/12/ihrda-on-behalf-of-malawian-children-v-the-republic-of-malawi/> (accessed 28 August 2019).

2 Children and Young Persons Act of Malawi, 1969.

3 Malawi Fact Sheet: Justice for Children (UNICEF) <https://www.unicef.org/tdad/Malawifactsheetjusticeforchildrenfull.pdf> (accessed 28 August 2019).

significant number of children detained in Malawi's correctional facilities without recourse to effective remedies or child-friendly measures for their rehabilitation and reintegration into society. In response, the friendly settlement committed the state to reform its national laws to bring them into conformity with its obligations under the African Children's Charter and ensure that the best interest of the child principle was duly reflected in these reforms. The resolution did not benefit a single victim but an entire class, highlighting the potential impact and benefit of a successfully negotiated friendly settlement agreement.

While the friendly settlement procedure has existed in both the African and Inter-American human rights systems for as long as these mechanisms have been operating, their practical application, efficacy and impact on the protection of human rights in the regions has differed. Over the past twenty years, this procedure has become increasingly popular in the Inter-American system as a way to settle human rights complaints lodged against states, primarily at the level of the Inter-American Commission on Human Rights (Inter-American Commission). To date, over 150 settlements have been successfully negotiated at the level of the Inter-American Commission. Moreover, the number of settlements has increased substantially over the past twenty years and implementation of these agreements is reportedly to be better overall as compared to implementation of Court judgments in contentious cases.⁴ Not all agreements are successful, however, and when they fail, they can contribute to delayed justice and further exacerbate precarious conditions for victims. This option may also be employed as a dilatory tactic to avoid fulfillment of state obligations to promptly investigate, prosecute and punish violations. According to the practice in the Inter-American system, which will be elaborated further below, friendly settlement has served as an effective tool for protecting human rights of the applicants and victims in many cases, although, given that it is highly subject to the will of the parties, some settlements do fail while others are only partially implemented.

In contrast, the amicable settlement option in the African human rights system is far less common and not as well favoured.⁵ Of the contentious cases brought before the three human rights protection mechanisms in the system,⁶ one of the few settlements successfully negotiated by the parties to date, and endorsed by the African Children's Rights Committee is the *Malawi Children's Rights* case.⁷ The agreement is currently being implemented by the state and remains unprecedented in the history of the African human rights

4 IACHR Report, 'Impact of the Friendly Settlement' (2nd Edition) OEA/Ser.L/V/II.167 doc.31, 1 March 2018.

5 VO Ayeni & TO Ibraheem 'Amicable settlement of disputes and proactive remediation of violations under the African human rights system' (2019) 10 *Beijing Law Review* 406-422.

6 African Commission on Human and Peoples' Rights, African Committee of Experts on the Rights and Welfare of the Child, and the African Court on Human and Peoples' Rights.

7 The *Malawi Children's Rights* case (n 1).

system.⁸ It stands out in part because it reflects important principles that reinforce the integrity of a settlement procedure including fairness, equity, consent of the parties, participation, transparency and accountability. This case raises fundamental questions, primarily, as to the advantages and disadvantages of the settlement option for the effective protection of human rights on the continent; the potential for achieving greater state compliance through the settlement mechanism; why this option is not a common practice in the African human rights system; and finally, whether this option should be promoted in the system and how it should be improved. In light of the practice in the Americas and Africa, respectively, the article seeks to interrogate and evaluate the overall utility of the settlement procedure and its potential for furthering human rights protection at the regional level. To make this determination, the article will seek to measure the benefits of the procedure as per its efficiency, effectiveness, complexity, comprehensiveness, victim participation/agency, interest of the state and sponsoring institution, compliance and effective protection of human rights.

2 RESOLUTION OF CONTENTIOUS CASES IN THE AFRICAN AND INTER-AMERICAN SYSTEMS

The individual complaint mechanism is a common feature of the regional human rights protection systems. In both the African and Inter-American human rights systems, individuals have the possibility to file a human rights complaint against a member state that has ratified the core regional instrument giving the body the mandate to determine whether the state has violated its human rights obligations. In the African human rights system, the core instrument is the African Charter on Human and Peoples' Rights (African Charter); or, the African Children's Charter, specific to the rights of the child. The African Charter not only set forth state obligations on human rights broadly, but lay out the procedures for filing individual complaints, the criteria for determining admissibility of a case, the procedure for making a determination on the merits, honouring the right to remedy and issuing merits decisions, or Court judgments, as well as outlining state obligations on compliance.⁹ Other special mechanisms are provisional or precautionary measures designed to respond to urgent cases where victims' lives or physical integrity are at imminent risk and in need of urgent protection.

While the procedure on individual communications is relatively similar in both systems, the provisions on friendly settlement differ. In the African system, the African Charter specifies that the procedure is only available to interstate communications, limiting its applicability to

8 <https://www.ihrda.org/2018/02/ihrda-malawi-settlement-agreement-malawi-submits-4th-progress-report-to-acerwc/> (accessed 28 August 2019).

9 IAHCR Rules of Procedure (2011); ACHPR Rules of Procedure (2010).

individual communications.¹⁰ The Inter-American system (American Convention and Commission Rules of Procedure) has elaborated a detailed procedure on when and how friendly settlements will be introduced, negotiated and monitored.¹¹ The African system, save the African Children's Rights Committee, has yet to elaborate specific or detailed standards or procedures governing amicable settlements for individual communications, this has contributed to its limited application and impact in the region.

2.1 Practice in the African human rights system

Amicable settlement will be looked at in the context of the three protection mechanisms for the region: the African Commission; the African Children's Rights Committee; and the African Court. This is followed by an analysis of the practice thus far.

2.1.1 African Commission on Human and Peoples' Rights

The African Commission, being the longest standing human rights mechanism in the region, boasts a wide body of jurisprudence and practice, from which the two more recently established mechanisms can build to develop a more robust procedure that is beneficial to all parties, and the mechanisms themselves. The procedure in the African Commission is premised on reaching a resolution through mediation and conciliation.¹² The procedure in the African Charter provides that, 'after having obtained from the States concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of Human and Peoples' Rights, the Commission shall prepare, within a reasonable period of time from the notification referred to in Article 48, a report stating the facts and its findings.'¹³ More specifically, the Rules of Procedure provides that, once a communication has been declared admissible, the Commission puts itself at the disposal of the parties in a bid to secure a friendly settlement of the dispute.¹⁴ The Commission offers its 'Good Offices' for friendly settlement at any stage of the proceedings.¹⁵ If both parties express willingness to settle the matter amicably, the Commission will appoint a rapporteur, usually the Commissioner who has been handling the case, or a Commissioner responsible for promotional activities in the State concerned or a group of commissioners.¹⁶ If a friendly settlement is reached, a report containing the terms of the settlement is presented to the Commission

10 African Charter, art 52.

11 IACHR Rules of Procedure, rule 40.

12 Ayeni & Ibraheem (n 5) 66, citing *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) para 4.

13 Article 52, African Charter.

14 ACHPR Rules of Procedure, rule 90.

15 ACHPR Rules of Procedure (n 14).

16 ACHPR Rules of Procedure (n 14).

at its session. This will automatically bring consideration of the case to an end. On the other hand, if no agreement is reached, a report is submitted to the Commission accordingly by the Commissioner(s) concerned and the Commission will take a decision on the merits of the case.¹⁷

On the procedure set out in the African Charter, an important clarification must be made in that this procedure is provided for under Section III of the Rules of Procedure, which pertains to interstate communications, and not in Section IV, which pertains to other communications, namely individual communications.¹⁸ This is one major distinction between the provisions in the African Charter and the American Convention for example, which has an elaborated procedure made available within the individual complaint procedure of the Inter-American Commission.

In practice, the procedure has been infrequently applied and largely in an *ad hoc* manner.¹⁹ While the procedure was meant to be reserved for interstate complaints, the African Commission has applied the mechanism to individual complaints on several occasions, yet at the significant advantage of state parties and the disadvantage of the individual petitioners who may lack knowledge, participation and consent to the terms of the agreement.²⁰ The practice developed by the Commission has been illustrated in numerous cases where matters have been declared 'amicably solved' even where the complainants' views had not been solicited.²¹ This was evident in one of the earliest cases considered by the Commission, *Peoples Democratic Organisation for Independence and Socialism v The Gambia*, where the state's proposed solution was adopted without due consideration given to the complainant's position. This deferential approach to the state apparatus has been repeated in cases such as *Modise v Botswana* and *Kalenga v Zambia*, whereby on the mere offer to settle a dispute, the state's proposal was readily accepted;²² thereby differentiating it from the process at the Inter-American Commission or the African Children's Rights Committee, which is premised on the participation of the parties, a willingness on both sides to engage in a settlement and consideration of the views of both parties to inform the agreement, one which is held to a standard of conformity with human rights principles.

On one hand, the Commission practice to extend amicable settlement to individual communications even where not explicitly provided for in the Charter should be noted. On the other hand, the lack

17 ACHPR Rules of Procedure, rule 91; BD Mezmur 'No second chance for first impressions: the first amicable settlement under the African Children's Charter' (2019) 19 *African Human Rights Law Journal* 62-84.

18 Sec III, art 52, African Charter.

19 Unpublished: L Kuveya 'The effectiveness and propriety of friendly settlements in the African regional system: a comparative analysis with the Inter-American and European regional systems' unpublished LLM dissertation, University of Pretoria, 2006.

20 Mezmur (n 17) 65; Ayeni (n 5) 414; Kuveya (n 19) 23.

21 Ayeni & Ibraheem (n5 above) 412-413.

22 Kuveya (n 19) 34, 36; Ayeni & Ibraheem (n 5) 412.

of a more detailed procedure with objective criteria and standards for the negotiation process, terms of the agreement and its subsequent implementation creates obvious weaknesses in terms of generating trust in this as an effective mechanism to generate sound and balanced resolutions.²³ The absence of an elaborated procedure has contributed to an inconsistent practice over the years and settlements that have been biased towards the state and unduly subject to the power imbalance and overt influence of state parties.²⁴ One key weakness in the agreements has been the absence of the inclusion of reparations or compensation for victims, which should be integral to the mandate and functions of a human rights protection mechanism. Moreover, the agreements to date have been shrouded in secrecy, meaning that the details of the agreements and resolutions have generally not been made public. This lack of transparency in the procedure can compromise the African Commission's mandate of advancing human rights accountability, justice and reparations for victims of human rights violations.

Due to this series of factors, amicable settlement has not been particularly effective in satisfying victim's rights to justice and a remedy. It has not involved their participation and consultation and has tended to be used in favour of states parties to the detriment of victims. While the mechanism has potential for success and impact in the region, as highlighted in the *Malawi Children's Rights* case, it has yet to become an effective tool for the resolution of individual human rights claims as applied by the African Commission. Finally, while it has been observed that part of the reason for this practice may stem from the initial lack of clarity of the Commission's mandate to adjudicate individual claims, after so many years, and upon considering the evolution of the individual complaint mechanism, the need to fully implement this mechanism for its various benefits is emerging, thereby calling for the need for reforms and strengthening.

2.1.2 African Court on Human and Peoples' Rights

For its part, the Protocol to the African Charter on the Establishment of African Court on Human and Peoples' Rights (African Court Protocol) and the Rules of the African Court stipulate that the Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter.²⁵ The Court Rules set out a procedure less restrictive than what is provided for in the African Charter. It sets out two avenues: out-of-court settlements and settlements negotiated under the auspices of the Court.²⁶ The settlement is dependent on the will of the parties, they then negotiate

23 Ayeni & Ibraheem (n 5) 414.

24 Mezmur (n 17); Ayeni & Ibraheem (n 5) 413 (citing Communication 44/90 *Peoples' Democratic Organisation for Independence and Socialism v The Gambia; Modise v Botswana* (2000) AHRLR 30; *Kalenga v Zambia* (2000) AHRLR 321; F Viljoen *International human rights law in Africa* (2012) 411; Kueveya (n 19).

25 Article 9, Court Protocol.

26 Rule 56 and 57, Rules of Court.

and agree on the terms and report to the Court, which the Court may endorse through a judgment indicating the resolution, or may decide to proceed with consideration of the case.²⁷ The procedure is not on its face restricted to interstate complaints, therefore making the mechanism applicable to cases that come before the Court. It remains relevant with respect to applications filed directly to the Court, giving the parties an option for a negotiated resolution over a judgment finding state responsibility for violations. The criteria on which the Court may decide to endorse or override the settlement is not stated in the Rules. The settlement under the auspices of the Court is one where the Court promotes the mechanism by engaging the parties, facilitates negotiations and the final resolution, which is issued in a judgment of the Court.²⁸ The only suggested criteria for a settlement to be endorsed, according to the Protocol, is that it is based on the respect for human rights, although this is not further elaborated.

In practice, while amicable settlement appears to be an accessible option available to the parties, the Court has not yet endorsed an amicable settlement to date. In some situations, applicants have expressed interest without corresponding state interest to conclude an agreement. Member states' actual knowledge and appreciation of the procedure and how it works seems to be a key factor affecting its regular application. A standard operating procedure to guide negotiations and approve friendly settlements is lacking. Development of criteria and guidelines on the procedure would promise to enhance transparency and accessibility of the procedure, while greater publicity about the procedure can be instrumental to its adoption by states going forward.

2.1.3 African Committee of Experts on the Rights and Welfare of the Child

As to the Committee of Experts, which oversees the implementation of the African Children's Charter, the body has a mandate to receive communications from any person, group, NGO,²⁹ UN member states.³⁰ Procedures on the individual complaint mechanism and amicable settlement are set out in relative detail in the Committee's Revised Guidelines on Communications where amicable settlement is provided either as an out of court settlement or settlement under the auspices of the Committee.³¹ This allows for the parties to voluntarily resolve the dispute any time before a decision is made by the Committee.³² The settlement agreement must be communicated to the Committee for endorsement before it can be concluded, or the

27 Rule 56, Rules of Court.

28 Rule 57, Rules of Court.

29 NGO must be officially recognised by the AU.

30 Art 44, African Charter on the Rights and Welfare of the Child.

31 Sec XIII: Amicable Settlements, African Committee of Experts Guidelines on Communications, available at: https://www.acerwc.africa/wp-content/uploads/2018/07/Revised_Communications_Guidelines_Final-1.pdf (accessed 28 August 2019).

32 Sec XIII (n 29).

Committee may decide to continue with consideration of the case.³³ The procedure under the auspices of the Committee states that a settlement may be called on by the Committee or the parties with the Committee using its good offices and playing a role of mediator.³⁴ The process is entirely dependent on the willingness and consent of the parties, thus the procedure may be terminated where consent is not present or if the case deals with serious and massive violations of children's rights.³⁵ The provision on serious and massive violations is noteworthy as it intends to ensure protection of child rights through a formal accountability mechanism. This is in line with practice from the Inter-American system whereby cases of serious and massive violations generally do not lend themselves to friendly settlement based on the gravity of the violations and the need to pursue justice in such cases.³⁶ This was best illustrated in the *Velasquez Rodriguez* case, where the Inter-American Commission was not in a position to promote an amicable settlement based on the fact that the rights at issue were not ones that could be addressed through negotiation, thereby establishing the standard of 'necessary and suitable' conditions to enter into a friendly settlement.³⁷

In contrast to the provisions in the African Charter and the African Commission's Rules of Procedure, the Committee's provisions on individual communications and amicable settlement appear to apply to all communications under consideration. The African Children's Rights Committee Revised Guidelines on Communications elaborates the procedure to consider communications and details the amicable settlement procedure.³⁸ The procedure is relatively developed in that it sets out criteria for a friendly settlement, one of the underlying criteria for endorsement is that it respects the rights and welfare of the child as provided in the Children's Charter. This is an important principle that runs through the African system's provisions on amicable settlement (respect for human rights); however, it is still unclear which terms and conditions of a settlement would adequately conform with, or contravene, the Children's Charter or African Charter. This may only be seen through the practice of the Committee or Commission, which has yet to be developed.

In practice, the provisions allow for a wide application of the settlement option, any time before the Committee decides on the merits of the matter.³⁹ It allows parties considerable freedom to negotiate the terms as long as they are in agreement. The procedure is premised on *mutual consent* of the parties and can be terminated under three conditions: where the Committee finds the dispute is not suitable to friendly settlement; where one of the parties withdraws consent; or

33 As above.

34 As above.

35 As above.

36 Mezmur (n 17) 67-68.

37 Mezmur (n 17) 68.

38 African Children's Rights Committee Revised Guidelines (2014), rule XIII.

39 Sec XIII (n 29).

where the matter raises serious and massive violations of children's rights.⁴⁰ Notably, there are provisions on publication of the settlement agreement reinforcing the principle of transparency and accountability while also allowing the parties and public to participate in the monitoring of the implementation of the agreement. The procedure was tested for the first time in 2016 when the Government of Malawi approached the Institute for Human Rights and Development in Africa (IHRDA), the author of the communication, with an express interest to resolve the matter amicably.⁴¹ The state demonstrated willingness to address the issues in the case (law reform to bring national laws into conformity with Malawi's international obligations), indicating that it had already begun to take measures in this regard. The terms were discussed, agreed on, and the draft agreement shared with the Committee for consideration and endorsement.⁴² The agreement was the first successful amicable settlement concluded by the Committee to date; meanwhile, the state has continued to report on a periodic basis as to the implementation of the terms.⁴³ A very noteworthy section of the Revised Guidelines and a clear departure from the practice of the African Commission are the provisions on publication of the terms of the settlement agreement. It states that once the parties endorse the agreement it then becomes public. This practice promotes transparency and accountability and enhances public awareness and monitoring of the agreement. It also reinforces the Committee as an effective human rights protection mechanism.

While this process was relatively smooth and straight forward, in part due to the fact that the state initiated the process and willfully committed to introduce necessary law reforms that it had already begun to consider; it is not clear how other child rights cases that are more complex, involving multiple violations, and requiring various reparations measures, would be resolved. Even where this serves as positive precedent for the region and for the sister mechanisms, it still suggests the need for more detailed guidelines or a manual on amicable settlement beyond what is provided in the Revised Guidelines on Communications.⁴⁴ Much like the Commission, if this procedure is to

40 Revised Guidelines (n 38).

41 *Malawi Children's Rights* case (n 1).

42 The author was at the time serving as the Director of Programs at IHRDA and took part in the negotiations with the Government of Malawi in the case.

43 IHRDA 'Public Statement of IHRDA during the April 2018 Session of the ACERWC' (April 2018) <https://www.ihrda.org/2018/04/statement-by-ihrda-on-the-status-of-implementation-of-the-agreement-between-malawi-and-ihrda-in-the-malawi-childrens-case-31st-ordinary-session-of-the-acerwc/> (accessed 28 August 2019).

44 To encourage the use of friendly settlement, more guidance on the key components or criteria for a friendly settlement would be helpful. Due consideration may be given to the different types of violations or groups affected. Such an instrument can assist the mechanisms and the parties to navigate this procedure and conclude an agreement that can be objectively assessed as human rights compliant. The Inter-American Commission on Human Rights has developed a 'Handbook on the Friendly Settlement Mechanism in the Petition and Case System' which is meant to guide the public and parties on the use of friendly settlement, its components, how it works and best practices.

be promoted as a viable, or even a preferred option to resolve human rights disputes, and given the range of human rights issues that may need to be addressed through this forum; negotiations left solely to the parties without further guidance and standards can have equally detrimental effects.

Beyond this, the settlement of the *Malawi Children's Rights* case is positive precedent in large part because it demonstrates how a human rights dispute can be effectively managed and resolved between the parties in a conciliatory fashion, which is noteworthy for several reasons. It represents a more speedy way to resolve a dispute and seek a remedy to the benefit of the parties and the mechanism itself (reduces backlog of cases); it creates a greater likelihood of compliance where the parties have determined and agreed to the terms as compared to a decision that is imposed on a member state; it is a participatory process that promotes agency of the victims/petitioner who become active players in the process and the outcome affecting them.⁴⁵ Where the settlement is fair and equitable with participation and consent of the parties, it represents a win-win situation for all stakeholders. States avoid the public shame of a decision made against them and benefit from an improved public image by a show of political will to engage and voluntarily resolve the matter. Many of these lessons are reflected in the *Malawi Children's Rights* case including the all important factor of compliance; the state has complied with its periodic reporting obligation, and since succeeded in securing the Constitutional amendment on the definition of a child to conform with the Children's Charter.⁴⁶ In a system where human rights compliance is a persistent challenge, this mechanism provides potential for securing greater compliance by states who understand the mechanism, its role, objectives and how they can benefit from the process.

2.2 Practice in the Inter-American system

In contrast to the practice in Africa, friendly settlement has been an increasingly favored mechanism over the past twenty years in the Inter-American system, primarily taking place before the Inter-American Commission as a measure to promote a resolution before the matter is referred to the Inter-American Court on Human Rights for judgment and a finding of state responsibility is made.⁴⁷ The interest to promote this mechanism over the years has been driven by states, the Inter-American Commission itself, and users of the system. This has been reflected in a series of amendments to the Commission's Rules of Procedure (2000, 2011, 2013 respectively), whereby the procedure was

45 Ayeni (n 5) 407-408.

46 IHRDA public statement (n 40).

47 In the Inter-American system, there is no direct access to the Inter-American Court on Human Rights, thus all complaints are filed with the Inter-American Commission on Human Rights and transferred to the Court where the state has not complied with the merits decision. Friendly settlement is a particularly useful tool to encourage states to resolve the matter on their own terms instead of being the subject of a finding of state responsibility made against them.

further elaborated, detailed and integrated into the individual complaint mechanism.⁴⁸ Initially promoted as a strategy to manage the excessive backlog of cases, the mechanism has emerged to prove effective in terms of satisfying victims' rights to participation and reparation, as well as improved compliance by states to deliver on their commitments and obligations.⁴⁹

The procedure is offered as an option to parties after a petition is declared admissible and before a merits determination is made. The reforms over the years have led to a procedure that is more flexible (no strict deadlines for submission of evidence, or concluding the settlement), giving more discretion to parties to decide when to initiate, continue or terminate the agreement, and include basic criteria⁵⁰ for approving the settlement reports. The key components of a friendly settlement include the terms and conditions of the agreement covering the measures that the state will adopt to resolve the matter. This would normally include a wide range of reparations measures to benefit individuals and groups.⁵¹ The terms are put forward by the parties for consideration and agreement. The state's declaration on its responsibility may or may not feature in the settlement agreement; roughly 50 per cent of friendly settlements include a declaration of state responsibility in the Inter-American system, a unique feature of this system's settlement agreements.⁵² Agreements are published and monitored through a follow up mechanism premised on regular reporting on compliance, and publication on the status of compliance in the Commission's annual reports.

While the friendly settlement procedure was merely an option for the parties some twenty years ago, it is now a more fully integrated feature in the individual communication procedure of the Inter-American Commission leading to an increasingly frequent practice in the region.⁵³ Studies on the practice applied in the Americas reveal that the procedure can have multiple positive effects both at the individual

48 ACHR report (n 4); Between 2010-2013, the IACHR instituted several reforms of the friendly settlement procedure with the support of OAS Member States. This included: creation of a friendly settlement working group within the IACHR; establishment of an internal protocol to facilitate processing of friendly settlements; a consultation process with OAS Member States and civil society on how to improve on the procedure; publication of a 2013 report on the impact of friendly settlement procedure in the Inter-American human right system; and the reform of the IACHR Rules of Procedure to better integrate friendly settlement into the individual complaint mechanism; P Engstrom, *The Inter-American human rights system: impact beyond compliance* (2019), <https://doi.org/10.1007/978-3-319-89459-1> (accessed 28 August 2019).

49 IACHR report (n 4) 2.

50 Basic criteria include the voluntary consent, willingness of the parties (victims) to the terms of the agreement and that the agreement is grounded in fundamental human rights principles.

51 Friendly settlements may include all or a combination of the five forms of reparations.

52 P Engstrom *The Inter-American human rights system: impact beyond compliance* (2019), <https://doi.org/10.1007/978-3-319-89459-1> (accessed 28 August 2019).

53 IACHR report (n 4).

and institutional levels.⁵⁴ At the institutional level, it may be particularly effective to address the backlog of cases in an overloaded system; and it can contribute to a more speedy resolution of the case as it is concluded without lengthy or formal procedural phases.⁵⁵ At the individual level, it is capable of delivering comprehensive remedies for the direct victims and may include guarantees of non-repetition which aim to prevent the future recurrence of violations and address structural elements causing violations. Finally, it provides promise with respect to enhancing compliance where the state willfully agrees to the terms as compared to imposed measures through a merits decision or judgment finding state responsibility. Compliance with friendly settlements over merits decisions in the Inter-American system has been recorded at 67 per cent *partial* compliance of friendly settlements over 56 per cent *partial* compliance with merits decisions.⁵⁶ As to total compliance, an estimated 32 per cent of friendly settlements are fully complied with as compared to 5 per cent of merits decisions.⁵⁷

Some of the noted consequences of the procedure relate to the impact of not making a finding of state responsibility for human rights violations. Friendly settlement by its nature does not require a finding of state responsibility by the human rights monitoring body as does a merits decision or African Court judgment. Many advocates and victims feel that this is a crucial element of the human rights complaint process, as a declaration of state responsibility is a form of relief for victims and is the basis upon which they can expect reparations. This may be addressed in the friendly settlement terms by having the state declare its responsibility and adopt subsequent measures to resolve the matter, but it should be a mutually agreed to term and not imposed by the oversight body. Second, this procedure can have a detrimental effect on the development of jurisprudence and norm elaboration, especially regarding novel issues that would further enrich the system, by engaging in a legal analysis and public pronouncement on the case.⁵⁸ The monumental impact of decisions by the Inter-American Commission and judgments by the Inter-American Court over the past twenty years cannot be overlooked in this regard; a rich body of jurisprudence has developed in areas such as the right to life; enforced disappearances of persons; indigenous peoples rights; women's rights; individual and collective reparations; due process; amnesty laws, amongst others. Finally, given that friendly settlements are subject to the will of the parties, if this will is not sustained, it can imply excessive delays without effective implementation.

Despite these observed weaknesses, a recent study reflects that the friendly settlement procedure in the Inter-American system proves to be effective in terms of meeting the needs and interests of the parties.⁵⁹

54 As above.

55 Ayeni (n 5) 407 and Engstrom (n 49) 62.

56 Engstrom (n 49) 74.

57 Engstrom (n 49) 75.

58 Ayeni (n 5) 408.

59 Engstrom (n 49) 82-83.

Further it is capable of providing comprehensive reparations; similar to what can be provided for in an Inter-American Commission merits decision or African Court judgment. This is a very critical element to the process as it is meant to satisfy victims' rights to an effective and adequate remedy and reparation for human rights violations. Moreover, these agreements can address individual and group rights claims, as well as structural or institutional weaknesses that would require preventative measures or related reforms, thereby having a broader impact on human rights protection for the population as a whole. While it was found that the duration of both the friendly settlement procedure and the processing of a case on its merits is not very different,⁶⁰ the direct involvement of the victims and parties was a notable difference that has a wide range of positive effects; notably the friendly settlement procedure allows for greater victim participation.⁶¹ It contributes to the restoration of dignity and promotes agency by engaging them directly in the matter affecting them. It is sometimes the first time that victims come face to face with authorities, engaging them in dialogue.

Finally, one notable feature of the Inter-American system is its consistent practice of transparency. It is worth noting that both friendly settlements and merits decisions (those not being referred to the Inter-American Court for adjudication) are published on the Inter-American Commission website and reported on in the Commission's annual report, also readily available online. This practice is an important factor in reinforcing the human rights protection mandate of the Inter-American Commission as it promotes accountability and reinforced public trust and confidence in the system.

3 CONSIDERATIONS AND CRITERIA FOR PURSUING A FRIENDLY SETTLEMENT

A comparative analysis of the African and Inter-American human rights systems reveals that while the application of the procedure has differed between the mechanisms, the procedure presents a viable option for the effective resolution of human rights matters at the regional level. It is apparent from the practice thus far that the procedure needs to be further elaborated in the African system so that clear standards and guidelines are adopted. This will contribute to the strengthening of the system by avoiding *ad hoc* processes that are not grounded in specific human rights principles; it will instill confidence of the parties to enter into these agreements and to clearly understand and fulfill their obligations. In particular, where the procedure is grounded in principles of fairness and equity, while also premised on the equal participation and consent of the parties, especially the victims, this procedure can be equally, if not more effective in providing a resolution to the benefit of the parties. As a consequence, it can

60 Engstrom (n 49) 82.

61 Engstrom (n 49) 83.

contribute to the reduction in the backlog of cases, benefiting the human rights oversight body, and increase the likelihood of compliance leading to greater or more effective human rights protection, as we have seen in the *Malawi Children's Rights* case. A quick scan of the practice in the Inter-American system can provide examples and relevant lessons for consideration when setting out to develop an adequate framework to guide the friendly settlement procedure in the African system. For example, the current procedure, while not mandatory, is institutionalised within the individual complaints mechanism. It is an available mechanism to all parties who wish to pursue it; it is premised on the willing participation of the parties to negotiate the terms; it is subject to the consent of the parties, and the discretion of the Commission to indicate that the matter may be appropriate for settlement and that it respects fundamental human rights principles.⁶² To aid the parties, the Commission makes itself available and provides resources such as copies of relevant judgments and settlements that can serve as objective criteria for developing terms of the agreement.⁶³ The standard practice includes the publication of agreements once approved by the Commission, and a follow-up mechanism requiring parties to report on implementation, which degree of compliance is published in the Commission's annual reports.⁶⁴ It is important to note that while the Commission has introduced tangible criteria for the approval of agreements, it has equally strived to maintain a flexible mechanism whereby there are no deadlines or timeframes for the negotiation of agreements and all OAS member states regardless of their ratification status of the American Convention may participate in the process.⁶⁵

Before elaborating on recommended criteria for a framework to guide friendly settlements at the regional level, there are two important factors for considering the suitability of a friendly settlement procedure as compared to the pursuit of the matter on the merits.

3.1 Nature of the violation: serious or massive

While the nature of the violation has not been extensively commented on to date, it is a factor that has a bearing on whether friendly settlement or adjudication of the case ought to be pursued. The choice of which has a bearing on ensuring effective human rights protection in the region. Both in the African and Inter-American systems, violations categorised as serious or massive in nature, may need to be critically evaluated before entering into a friendly settlement to adequately satisfy principles of justice. While there is no clear definition of the term in the African Charter or the American Convention, it is better understood through the jurisprudence of the regional bodies, whereby multiple violations of the right to life, the right to be free from cruel,

62 Engstrom (n 49) 19.

63 Engstrom (n 49) 22.

64 Engstrom (n 63).

65 Engstrom (n 63).

unusual an degrading treatment or punishment, the right to be free from torture, as well as matters that involve multiple violations and multiple victims, are considered cases that rise to the threshold of 'serious and massive' in the African system, or 'serious and widespread' in the Inter-American system. Cases involving mass arrests, extrajudicial killings, forced disappearances, forced evictions or acts of sexual violence for example, may fall within this category.⁶⁶

The sole reference to serious and massive violations in the African Charter is in article 58 where a different procedure is provided; consequently, friendly settlement is not out-rightly provided for with respect to these types of cases.⁶⁷ The practice is not as clear, however, as a number of cases that rise to this degree of severity are channeled through the individual complaint mechanism and may be subject to friendly resolution. In the African system, the human rights institutions reserve the right to override a friendly settlement and proceed with consideration on the merits. However, established criteria for the basis of this decision and is lacking, and equally relevant jurisprudence on the matter is yet to be developed. This creates a gray area whereby friendly settlement handled by the African Commission may be susceptible to manipulation without established criteria or guidelines for the approval of these agreements.

Human rights doctrine requires that where violations occur, the state is obligated to deliver justice and a remedy. Therefore, engaging in a friendly settlement for serious or massive violations should be avoided. It should not be seen as an opportunity to circumvent state obligations to address impunity for human rights violations. Indeed, on this matter, the African Children's Rights Charter is the only body that has clearly stated in its Revised Guidelines that friendly settlement is not applicable to massive and serious violations.⁶⁸ This is a noteworthy provision that should inform the other institutions when elaborating more detailed guidelines on the friendly settlement mechanism.

In the Inter-American system, it is similar; the Inter-American Commission reserves discretion to terminate a friendly settlement if it deems *the matter is not susceptible to such a resolution*.⁶⁹ The fact that the case involves serious or massive violations may qualify here based on the fact that such a resolution can be seen to contradict principles of justice and interests of the victims.⁷⁰ For example, as in the case of *Velasquez Rodriguez v Honduras*, some violations may be so egregious

66 African Commission Communication 227/99 *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR) 2003 http://www.achpr.org/files/sessions/33rd/communications/227.99/227_99_democratic_republic_of_congo_burundi_rwanda_uganda.pdf; and 279/03 – 296/05 *Sudan Human Rights Organization, Centre on Housing Rights and Evictions v Sudan* http://www.achpr.org/files/sessions/45th/communications/279.03-296.05/achpr_45_279.03_296.05_eng.pdf (accessed 28 August 2019).

67 Art 58, African Charter.

68 Sect XIII (2)(iv)(e) African Children's Rights Committee Revised Guidelines.

69 Art 41 IAHCR Rules of Procedure.

70 Mezmur (n 17) 67; *Velasquez Rodriguez v Honduras* (Preliminary Objections) IACHR (26 June 1989).

that they would not be susceptible to an agreement that does not include state accountability measures to investigate, prosecute and punish perpetrators.⁷¹ The friendly settlement therefore cannot be seen as an opting out of state responsibility for the most serious violations. For some victims, the pursuit of justice and accountability against the state and receiving a public declaration of state responsibility is an important form of satisfaction that cannot be equally satisfied in a friendly settlement agreement.⁷² It may be one of the reasons why the practice in the Inter-American system reflects a higher number of cases involving serious and massive violations being determined on their merits; even though each case is decided on a unique set of factors, namely the interest of the parties (states and victims), and does not always produce a coherent practice.

The nature of the violation therefore is an important consideration that the parties and the human rights body should consider, in terms of ensuring that serious and massive violations are effectively brought to justice and victim reparations satisfied. Alternatively, if such cases are resolved through friendly settlement, the establishment of objective criteria would be a helpful measure to ensure that the agreements are effectively in line with human rights principles (such as the duty to investigate, prosecute and punish is adopted as a key component of the agreement).

3.2 Strategic case with precedent setting value

The other element that figures as an important consideration with respect to the appropriateness of the friendly settlement procedure and human rights protection in the region is whether the case is being brought as part of a larger strategy to trigger large-scale reforms, to address long-standing injustices, or to challenge structural, institutional weaknesses. In short, if the matter represents an emblematic case with potential for norm elaboration on a novel issue, or is likely to set precedent that will expand human rights protection on a particular topic or for a special group, the case would be better suited for adjudication where a determination on the merits is made, an elaboration of the rights violations is laid out, and a finding of state responsibility is published. This type of case contributes to the development of rich jurisprudence, expanding rights protection that becomes a reference for the region and beyond. Friendly settlement for such cases may satisfy the victims' immediate interests, at the expense of establishing important protection that could benefit an entire population. For these reasons, the victims and their lawyers may prefer to pursue a case on its merits; and depending on the facts and

71 As above; Inter-American jurisprudence places emphasis on the duty to investigate, prosecute and punish where violations are found constituting a fundamental principle in all decisions emanating from the Inter-American system of human rights.

72 *Mtikila v Tanzania*, App. 11/2011, African Court, Reparations, (13 June 2014), http://www.african-court.org/en/images/Cases/Ruling%20on%20Reparation/Ruling_on_Reparation_Appl.011-2011.pdf (accessed 28 August 2019).

circumstances of the case, the Commission may also decide that the matter *may not be susceptible to be settled through this forum*. In terms of furthering human rights protection in the region, a friendly settlement may not be most conducive to achieve this goal and should be carefully considered before opting for this procedure.

Similarly, where rich jurisprudence exists on an established matter, a friendly settlement is well suited to be applied given that the parties would have sufficient information on what the outcome would likely be, and this in turn can propel them to enter into friendly settlement to quickly dispense with the case and allow them to focus on delivering an adequate and prompt remedy, rather than getting tied up in lengthy adjudication of the matter.

3.3 The need for objective criteria (guidelines) for friendly settlements

A closer look at the practice in the Inter-American and African systems confirms that there are no clear or objective criteria governing friendly settlements. At present, the parties have considerable freedom to decide if and when they want to enter into a settlement agreement. They are free to discuss and agree to the terms, impose timeframes for implementation and any other relevant matters. The two main criteria set out in the Inter-American and African systems are the element of voluntariness or consent by the parties, and the requirement that the agreement be in line with human rights principles. Given the complexity of human rights matters coming before the regional systems, where many cases involve multiple violations and numerous victims; and given the potential for such cases to have a long-lasting and broad impact on advancing human rights protection in the region, the elaboration of a framework for friendly settlements can provide critical and practical guidance for the parties with respect to negotiating and agreeing to terms that are indeed grounded in human rights principles.

The framework would benefit from setting out basic, fundamental principles that would be used to govern such agreements. These may include principles of justice, fairness, equity, non-discrimination and the fundamental right to a remedy. Friendly settlements are capable of providing comprehensive reparations and this too should be elaborated for the parties so as to provide them with sufficient information about the key components of a friendly settlement and to ensure their right to remedy is adequately satisfied through this procedure. Further, the principle of *victim-centredness* is important to emphasise so as to ensure that the agreement is informed by victims' interests for justice and a remedy. Importantly, victim participation and consultation foster empowerment and the restoration of their dignity through the process. Further, the element of accountability and transparency should feature in the criteria; these guard against the strategic use of the agreements by states to circumvent their obligations to investigate, prosecute and punish perpetrators, or maintain decisions hidden from the public eye. The endorsement by the oversight body should be premised on these

principles and guidelines and if the agreements do not meet the minimum criteria set out in the framework, the human rights institution would have an objective basis upon which it can set aside the agreement and decide to pursue the matter on its merits.

Other elements that can feature within the guidelines are the factors mentioned above, the nature of the violation and the value of the case for setting precedent, generating structural or legal reforms, or expanding protection of human rights through norm elaboration (strategic value of the case). While these need not be requirements, they can be elaborated on for the benefit of the parties to fully consider the facts of their case and the implications of a friendly settlement on human rights protection at the individual and societal level. Other aspects that the guidelines may touch on are procedural issues including the timelines for, and methods of implementation of the agreements. Parties may be encouraged to discuss and mutually agree on reasonable timelines for implementation of the agreement. Depending on the circumstances of each case and agreement, there will be aspects (public apology) that may be subject to immediate implementation, while other aspects (law reform) that may require a longer period. Setting mutually agreed upon timelines facilitates the monitoring of implementation of agreements. If implementation is excessively delayed, the parties would have the option to review the terms or consider termination, and opt to pursue the matter through the normal course of adjudication.

Also, the method of implementation may also be discussed and determined mutually between the parties. There are some cases where this may be more relevant such as with cases that affect entire communities and call for collective measures.⁷³ It is equally important that the measures employed are culturally relevant and conducive to local communities' traditions, customs and social welfare.⁷⁴

Another aspect that can benefit from further clarification and a standard operating procedure is the element of review and approval by the relevant human rights oversight body. While the criteria provide an objective basis for evaluation, it would be helpful to establish a procedure for the endorsement and whether it will be guided by one or a panel of appointed Commissioners/Judges for the task. The process of monitoring and reporting on the implementation of the agreement is equally important to set out clearly. The guidelines should establish that the agreements are made available to the public and that regular reports be provided by the parties to ensure implementation is on course. These are good practices, of which the African Children's Rights Committee is already putting into place with the monitoring of the *Malawi Children's Rights* case.

73 *Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Enderois Welfare Council v Kenya* 276/2003 ACHPR (4 February 2010) <https://www.refworld.org/cases/ACHPR,4b8275a12.html> (accessed 28 August 2019); The case involves mass eviction of an entire indigenous community.

74 *Center for Minority Rights* (n 73).

In terms of the African human rights system, beyond the need for a specialised framework on friendly settlements, there may be need to clarify the practice with respect to complaints by individuals. According to the African Charter, the language suggests that friendly settlement is an option only available to states not individuals meanwhile Rule 109 of the Commission's 2010 Rules of Procedure suggest that amicable settlement is applicable to all communications. In practice, friendly settlements have been applied to individual communications, but clarification of this practice grounded in the African Charter or its interpretation would be important for the increased use of this mechanism without subjecting the Commission to legal challenges by state parties.

Finally, once guidelines are adopted, the friendly settlement mechanism can be widely promoted as a measure capable of delivering on victims', applicants', and states' interests in resolving the matter amicably before a finding of state responsibility is issued. This can be done by integrating the measure in the individual complaint mechanism. Second, greater awareness of the mechanism among state and the public is necessary. To date, it is presumed that the AU member states are not fully aware of this mechanism and how it can be employed to their benefit. The fact that this mechanism can shield states from public naming and shaming is an incentive that is likely to incentivise them to seeking a resolution before a finding of state responsibility is made public. Moreover, by voluntarily engaging in a friendly settlement, this contributes to improving the public image of the state by showing good faith in resolving the matter and meeting victim demands. Therefore, where the human rights regime has so far been largely premised on naming and shaming of states, sometimes with little tangible outcomes, the friendly settlement mechanism presents a different spin, a more positive and constructive approach to addressing human rights violations and more effectively delivering reparations to victims. States should be brought on board to learn about the benefits of the mechanism and to thereby enhance protection of human rights in the region, both at the individual and broader, societal level.

4 CONCLUSION

We have seen from the analysis above that friendly settlements can have both positive and negative elements and effects on human rights protection in the region. In the Inter-American system it has proven to deliver results particularly in the areas of effectiveness, comprehensiveness, compliance and even victim's agency and empowerment through their effective participation in the agreements. Specifically, it may represent a win-win situation for all parties by avoiding the naming and shaming of states; by generating a resolution and delivery of reparations to the victims; and finally, by reducing the backlog of cases that can otherwise compromise the integrity of the human rights protection system by failing to deliver decisions in a timely manner.

To date, the practice of friendly settlement has varied across the regions for different reasons. In the Inter-American system it has been promoted in large part to manage the backlog of cases that would otherwise be left clogging the system, resulting in excessive delays. In the African system it has not become widely used and when it has, it has been a process frequently manipulated by states, leading to agreements concluded largely in their favour, rather than in the best interest of the victims and the protection of their rights to remedy and justice. As such, friendly settlement is a tool that depending on the approach taken, can be used to advance the respect for human rights or undermine them. In order for the African human rights system and its mechanisms to uphold the fundamental rights enshrined in the African Charter, as well as other core instruments, a specialised framework should be considered to guide parties on the best practices and international principles to be applied when negotiating and sanctioning such agreements.⁷⁵ A specialised framework on friendly settlement would lay out objective criteria for their endorsement, when and how to initiate negotiations, standards for monitoring and termination of agreements, and best practices. An objective and transparent process will reinforce confidence in the mechanism, and in turn, encourage parties to engage the mechanism.

At present, the African Commission, as the institution most accessible to the public and receiving the largest number of human rights communications in comparison to the other mechanisms, is struggling with a backlog of cases, causing considerable delays in the processing time of communications. On average, a communication can take several years to be considered before a merits decision is adopted. Delays aside, compliance with Commission decisions is a persistent challenge; coupled with a weak enforcement mechanism. This combination of factors demands creative solutions and strategies to ensure that the regional human rights protection mechanism can effectively deliver on its mandate in a timely fashion. In response, the friendly settlement procedure represents several unexplored opportunities for enhanced human rights protection in the region. The *Malawi Children's Rights* case is a prime example of fundamental reforms that a successfully negotiated settlement can deliver.

To render the friendly settlement procedure more effective and impactful in Africa, the Commission, the Committee and the Court, would be further strengthened by introducing relevant amendments to their rules of procedure and by putting in place guidelines governing the friendly settlement procedure.

75 This may be in the form of guidelines or similar tool. The IACHR published a 'Handbook on Friendly Settlements in the Petition and Case system' that aims to assist the users of the system to navigate this mechanism, while at the same time providing best practices with respect to the key components of these agreements.