

**The effectiveness and propriety of friendly settlements in the African regional system: A comparative analysis with the Inter-American and European regional systems.**

**Submitted in partial fulfilment of the requirements of the LLM (Human Rights and Democratisation in Africa) of the University of Pretoria**

**By**

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**31 October 2006**

## DECLARATION

I, Lloyd Kuveya, declare that the work presented in this dissertation is original. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree in Human Rights and Democratisation in Africa.

Signed.....

Date.....

Supervisor: Dr Henry Ojambo

Signature...

Date.....

## **DEDICATION**

This dissertation is dedicated to The Almighty God and all of humanity that has suffered human rights violations and oppression in Africa, Europe and the Americas.

## **ACKNOWLEDGMENTS**

I am grateful to the Centre for Human Rights for affording this opportunity to study human rights and democratisation in Africa. It has been an invaluable and challenging experience. I thank Dr Henry Ojambo for his guidance and invaluable assistance in writing my dissertation. A special thanks goes to Professors Joe Oloka-Onyango, Franz Viljoen, Dr Padilla, Dr Kristin Henrard and Chidi Odinkalu for their advice and comments.

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## TABLE OF CONTENTS

DECLARATION	i
DEDICATION	ii
ACKNOWLEDGEMENTS	iii
TABLE OF CONTENTS	iv
LIST OF ABBREVIATIONS	v
CHAPTER 1: THE PROTECTION OF HUMAN RIGHTS THROUGH SETTLEMENT	
1.1 Background to the study	1
1.2 Statement of the problem	2
1.3 Aims and objectives	3
1.4 The significance of the study	3
1.5 Literature review	3
1.6 Research methodology	5
1.7 Limitations of the study	5
1.8 Overview of chapters	6
CHAPTER 2: FOUNDATIONS OF THE FRIENDLY SETTLEMENT PROCEDURE	
2.1 Introduction	7
2.2 Origins of the peaceful settlement of disputes	7
2.3 Methods of peaceful settlement of disputes	9
2.3.1 Negotiation	9
2.3.2 Good offices and mediation	9
2.3.3 Inquiry	10
2.3.4 Conciliation	10
2.3.5 Arbitration	11

2.3.6 Adjudication	11
2.4 Friendly settlement	11
2.5 Advantages of friendly settlement	12
2.5.1 Expediency	13
2.5.2 Convenience	13
2.5.3 Adequate remedy	13
2.5.4 Implementation	14
2.5.5 No prejudice	14
2.5.6 Freedom to negotiate	14
2.5.7 Benefits to the Court	15
2.6 Shortcomings	15
2.6.1 Paying off	15
2.6.2 Impropriety	16
2.6.3 The imbalance of power	17
2.7 Conclusion	17

### CHAPTER THREE: THE LEGAL BASIS OF FRIENDLY SETTLEMENT OF DISPUTES

3.1 Introduction	19
3.2 International Instruments	19
3.2.1 UN Charter	19
3.2.2 UNCLOS	20
3.2.3 International Covenant on Civil and Political Rights	20
3.2.4 International Covenant on Economic, Social and Cultural Rights	21
3.3 The African regional system	22
3.4 The Inter-American regional system	25
3.5 The European Regional system	30
3.6 Conclusion	31

### CHAPTER FOUR: IS THE PROCEDURE EFFECTIVE AND APPROPRIATE?

4.1 Introduction	32
4.2 The practice and jurisprudence of the African Commission	32
4.3 The practice and jurisprudence of the Inter-American regional system	40

4.4 The practice and jurisprudence of the European Court	52
4.5 A comparative analysis	58
4.6 Conclusion	61

## CHAPTER FIVE: ASSESSMENT OF THE PROCEDURE

5.1 Introduction	63
5.2 Conclusions	63
5.3 Recommendations	64

## LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ADDHL	Association pour la Defense des Droits de l'Homme et des Libertes
AU	African Union
CESCR	International Covenant on Economic Social and Cultural Rights
FRUD	Front pour la Restauration de l'Unite et de la Democratic
HRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICSID	International Centre for Settlement of Investment Disputes
OAU	Organisation of African Unity
OP-ICCPR	Optional Protocol to the ICCPR.
PDOIS	Peoples' Democratic Organisation for Independence and Socialism
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
WTO	World Trade Organisation



## CHAPTER ONE

### The protection of human rights through settlement

#### 1.1 Background to the study

The protection of human rights around the world requires the existence of appropriate and effective procedures and mechanisms closely monitored and implemented by progressive judicial and quasi-judicial bodies at the regional and international level. A procedure that has gained legitimacy and acceptance is the friendly or amicable settlement of disputes in the field of human rights. This procedure is provided for in instruments such as the Charter of the United Nations(UN Charter),<sup>1</sup> United Nations Convention on the Law of the Sea(UNCLOS),<sup>2</sup> International Covenant on Civil and Political Rights(ICCPR),<sup>3</sup> World Trade Organisation(WTO),<sup>4</sup> African Charter on Human and People's Rights(African Charter),<sup>5</sup> American Convention on Human Rights(American Convention),<sup>6</sup> European Convention for the protection of Human Rights and Fundamental Freedoms(European Convention)<sup>7</sup> and the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights(Protocol on the African Court)<sup>8</sup>.

Despite the apparent universal existence of the friendly settlement procedure it has not been extensively used in the African regional system. Against this background this study is a comparative analysis of the provisions and application of the friendly settlement procedure in the African, Inter-American and European regional systems. The study further examines in detail the practice and jurisprudence of the three regional systems

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<sup>1</sup> Art 33 of the Charter

<sup>2</sup> Art 25 of the Convention

<sup>3</sup> Art 42 of the ICCPR

<sup>4</sup> Art of WTO dispute settlement procedures

<sup>5</sup> Art 48 and 52 of the African Charter

<sup>6</sup> Arts 48(1)(f) and 49 of the American Convention

<sup>7</sup> Art 38(1)(b) and 39 of the European Convention

<sup>8</sup> Art 9 of the Protocol on the African Court

on a comparative basis. The comparative analysis is relevant for the following reasons. Both Africa and South America share common historical backgrounds in terms of socio-economic development and the nature of human rights violations.<sup>9</sup> Europe has the oldest human rights system and if experience is anything to go by then there might be lessons to be learnt by the younger counterparts.<sup>10</sup> The establishment of the African Court of Human and Peoples' Rights(African Court) to complement the protection mandate of the African Commission on Human and Peoples' Rights(The African Commission) further justifies the comparative analysis as the other regional systems also have regional human rights courts.

### **1.1. Statement of the problem**

The friendly settlement procedure is detailed as provided in the American and European Conventions. In the African Charter and the Protocol on the African Court, the friendly settlement procedure is lacking in detail and precision. Secondly, this procedure has been used extensively in the Inter-American and European regional systems. On the other hand, scant use has been made of the friendly settlement procedure in the African regional system. In the light of the above, the questions to be asked in this study are as follows:

[a] Whether the friendly settlement procedure is an appropriate and effective mechanism for the defence of human rights?

[b] Is the procedure available to individual complainants in the African regional system?

[c] Why has this procedure not been widely used by the African Commission?

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<sup>9</sup> D Padilla 'An African Human Rights Court: Reflections from the perspective of the Inter-American system' (2002) 2 *African Human Rights Law Journal* 186 '...both regions cover enormous geographic areas with extremely diverse populations that speak numerous languages. Both continents have histories marked by repressive governments and military dictatorships. Moreover, the Americas, as well as the African continent, have been the scenes of numerous massive and gross human rights violations in the past, and in some countries these still continue to exist. In terms of international organizations, the Organisation of American states (OAS)...and the Organisation of African Unity (OAU)...have been relatively weak and under-funded institutions. In the field of human rights, both systems have evolved slowly and in piecemeal fashion over time.

<sup>10</sup> European Convention adopted in 1950, Inter-American Charter in 1969 and African Charter in 1981: C Heyns et al 'A schematic comparison of regional human rights systems' (2003) 3 1 *African Human Rights Law Journal* 76

[d] Are there any lessons to be drawn from the European and Inter-American systems and should the African Commission and the African Court adopt a broader and much more proactive approach to the use of the friendly settlement procedure?

### **1.3 Aims and Objectives**

The objectives of this study are to fully explore the nature and legal basis of the friendly settlement procedure as a human rights protection and promotion mechanism. It has been stated that friendly settlements are designed to facilitate negotiations without judicial intervention and that this is precisely the reason why the task of promoting such settlements is assigned to the Commission as it is not a judicial body.<sup>11</sup> This study explores the extent to which both judicial and quasi-judicial bodies may utilize this procedure. To that extent, the practice and jurisprudence of the Inter-American and the European Court shall be closely examined to assess the future practice and role of the African Commission and the African Court in promoting the use of the friendly settlement procedure. It is also the aim of this study to highlight the importance of the friendly settlement procedure as an important dispute resolution mechanism in the settlement of human rights disputes.

### **1.4 The Significance of the study**

The violation of human rights in the world continues despite efforts in setting up mechanisms and instruments for human rights promotion and protection. It is thus pertinent to develop effective procedures to ensure adequate and speedy redress of human rights violations. As stated by Dinah Shelton, 'affording redress to victims not only serves the interests of remedial justice, it may help to reduce the climate of impunity that exists in many of the regions and thereby induce greater compliance with human rights norms.'<sup>12</sup> The main objective of this study is to encourage the use of alternative methods of dispute resolution other than the adversarial judicial system for the increased protection of human rights in Africa.

### **1.5 Literature Review**

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<sup>11</sup> JM Pasqualucchi *The Practice and Procedure of the Inter-American Court of Human Rights* (2005) 147

<sup>12</sup> D Shelton *Remedies in International Human Rights Law* (2005).

There has not been a comprehensive study of the friendly settlement procedure in the African regional system on a comparative basis with the other regional systems. The major sources on the subject of friendly settlements include books by Ankumah,<sup>13</sup> Burgenthal,<sup>14</sup> Davidson,<sup>15</sup> Leach,<sup>16</sup> Murray,<sup>17</sup> Ouguergouz,<sup>18</sup> Pasqualucchi,<sup>19</sup> Shelton,<sup>20</sup> and Umozurike.<sup>21</sup> There are also some journal articles that have broadly examined the practice and procedures of the three regional systems. The authors include Badawi,<sup>22</sup> Benedek,<sup>23</sup> Murray,<sup>24</sup> Okere,<sup>25</sup> Odinkalu,<sup>26</sup> Ojo,<sup>27</sup> Pasqualucchi,<sup>28</sup> Standaert<sup>29</sup> and Welch.<sup>30</sup> Most of these authors have examined the practice and procedures of the different

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<sup>13</sup> EA Ankumah *The African Charter on Human and Peoples' Rights- Practice and Procedure* (1996)

<sup>14</sup> T Burgenthal and D Shelton *Protecting Human Rights in the Americas: Cases and Materials* (1995)

<sup>15</sup> S Davidson *The Inter-American Human Rights System* (1997)

<sup>16</sup> P Leach *Taking a case to the European Court of Human Rights* (2005)

<sup>17</sup> R Murray and M Evans *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000 2004; 'The African Commission on Human and Peoples' Rights and International Law* (2000)

<sup>18</sup> F Ouguergouz *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa'* (2003)

<sup>19</sup> Pasqualucchi (n 11 above)

<sup>20</sup> Shelton (n 12 above)

<sup>21</sup> UO Umozurike *The African Charter on Human and Peoples' Rights* (1997)

<sup>22</sup> IA Badawi El Sheik *The African Commission on Human and Peoples' Rights: Prospects and Problems*

<sup>23</sup> W Benedek 'The African Charter and Commission on Human and Peoples' Rights: How to make it more effective.' (1998) 46 *International and Comparative Law Quarterly*

<sup>24</sup> R Murray 'Decisions by the African Commission on individual communications under the African Charter on Human and Peoples' Rights (1997) *International and Comparative Law Quarterly*

<sup>25</sup> BO Okere 'The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A comparative analysis with the European and American systems' (1984) 6 *Human Rights Quarterly*

<sup>26</sup> CA Odinkalu and C Christensen 'The African Commission on Human and Peoples' Rights: The development of its non-state communications procedures' (1998) 20 *Human Rights Quarterly*

<sup>27</sup> O Ojo and A Sesay 'The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: A comparative analysis with the European and Inter-American Systems.' (1986) *Human Rights Quarterly*

<sup>28</sup> JM Pasqualucchi 'The whole truth and nothing but the truth': Truth Commissions, Impunity and the Inter-American System' (1994) 321 *Boston University International Law Journal*

<sup>29</sup> PE Standaert 'The friendly settlement of human rights in the Americas' (1998-1999) 9 *Duke Journal of International Law* 519

<sup>30</sup> EC Welch 'The African Commission on Human and Peoples' Rights (1992) 43 *Human Rights Quarterly*.

regional systems in general with a view to assessing their effectiveness and suggesting ideas to improve the mechanisms. Patricia Standaert is perhaps the one author who has focused on the friendly settlement procedure, but has confined her treatise to the Inter-American system. This study will focus on the friendly settlement procedure in theory and practice on a comparative basis. The critical analysis of the jurisprudence of the African Commission by Ouguergouz<sup>31</sup> will provide invaluable guidance of the methodology of analyzing the jurisprudence of the other regional systems. An examination of the amicable and judicial dichotomy of dispute resolutions by Murray<sup>32</sup> provides a good grounding for the conceptual analysis of friendly settlements in chapter 2 of this study. Most of the textbooks cited make reference to friendly settlements in one way or another without an in-depth comparative study of its practice in the three regional systems.

## **1.6 Research methodology**

A conceptual analysis as well as empirical study of the friendly settlement procedure, practice and jurisprudence of the three regional systems shall be undertaken. The study shall examine the nature of friendly settlements as provided in various human rights instruments and how the relevant human rights bodies have interpreted them. The study shall critically examine the decisions on friendly settlements by the respective courts and commissions. This will involve library and Internet research.

## **1.7 Limitations of study**

The study is not a comprehensive examination of the communications procedure, but shall be confined to the friendly settlement procedure as one of the human rights protection mechanisms available to human rights bodies. It does not purport to give the most recent cases decided on the basis of friendly settlement, but shall certainly be a critical evaluation of the extent to which the procedure has been utilized from as early as the late 1980s. Although reference shall be made to conciliation methods by bodies such as the World Trade Organisation, the study is limited to the three regional human rights systems.

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<sup>31</sup> Ouguergouz (n 17 above)

<sup>32</sup> Murray (n 16 above)

## **1.8 Overview of Chapters**

Chapter 1 is an introduction of the study on the effective and propriety of friendly settlements. The ensuing chapter traces the foundations and sets up the conceptual and theoretical framework of friendly settlements. Having established the existence of the procedure chapter 3 examines the institutional and legal provisions of friendly settlements in international and regional human rights instruments on a factual level.

The detailed and critical analysis of the friendly settlement procedure is presented in chapter 4. The author makes use of the jurisprudence of the three regional human rights bodies and examines how the procedure has been applied in practice. The practice of the three regional bodies is analysed on a comparative basis to assess the effectiveness of the procedure. The last chapter makes conclusions and gives recommendations regarding the application of the friendly settlement procedure as an alternative method of dispute resolution.

## CHAPTER TWO

### **Foundations of friendly settlement**

#### **2.1 Introduction**

The protection of human rights at the regional level has largely been achieved through the communications procedure as provided in the respective regional human rights instruments. On-site investigations and resolutions have also been utilized with relative success by the supervisory regional institutions such as the Inter-American and African Commissions in human rights protection. Enshrined within the examination of communications is the friendly settlement procedure.<sup>33</sup> This procedure has been described as 'a form of conciliation, one of the traditional methods of peaceful settlement of international disputes.'<sup>34</sup> Indeed, the concept of friendly settlements may be traced from the peaceful settlement of disputes at international law.

#### **2.2 Origins of the peaceful settlement of disputes**

The source for this kind of dispute resolution appears to be the UN Charter. According to the UN Charter 'all members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.'<sup>35</sup> The objective was therefore to maintain peace and security as well as justice. This is further reiterated in article 33(1) of the UN Charter.<sup>36</sup> An eminent scholar has cited the

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<sup>33</sup> P Van Dijk et al *Theory and practice of the European Convention of Human Rights* 1998 '...it is clear that the drafters of the Convention intended the attempts to reach a friendly settlement to take place simultaneously with the examination of the merits.' 178

<sup>34</sup> Van Dijk et al as above 179

<sup>35</sup> Art 2(3) of UN Charter

<sup>36</sup> Art 33(1) provides that 'the parties to any dispute...shall first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.'

1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States as another source of the peaceful settlement of disputes.<sup>37</sup> The 1970 Declaration notes that:<sup>38</sup>

States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice.

According to Murray,<sup>39</sup> this is supported by the 1982 Manila Declaration on the Peaceful Settlement of International Disputes<sup>40</sup> and the Organisation of African Unity (OAU) Charter.<sup>41</sup> A Commission of Mediation, Conciliation and Arbitration was established by Protocol of 21 July 1964. However the Commission was not utilised as 'African states were unwilling to resort to judicial or arbitral methods of dispute settlement and in general preferred informal third-party involvement through the medium of the OAU.'<sup>42</sup> Other institutions and procedures that have promoted the pacific settlement of disputes include the WTO,<sup>43</sup> the International Centre for Settlement of Investment Disputes (ICSID)<sup>44</sup> and UNCLOS.<sup>45</sup> There are a number of identifiable methods of peaceful settlement of disputes and these deserve some attention.

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<sup>37</sup> MN Shaw *International Law* 2005 917

<sup>38</sup> General Assembly resolution 2625(XXV).

<sup>39</sup> Murray E *The African Commission on Human and Peoples' Rights and International Law* (2000) 152

<sup>40</sup> General Assembly Resolution 37/590

<sup>41</sup> Art XIX of OAU Charter 'The Member States... solemnly affirm and declare their adherence to the following principles... peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration.' Quoted by Murray E (n 38 above)

<sup>42</sup> Shaw (n 37 above) 930

<sup>43</sup> Shaw (n 37 above) 940 'Where bilateral consultations have failed, the parties may agree to bring the dispute to the WTO Director-General, who may offer good offices, conciliation or mediation assistance.' ; CD Ehlerman and L Ehring 'WTO Dispute Settlement and Competition Law: Views from the perspective of the Appellate body's experience' (2002-2003) 26 *Fordham International Law Journal* ... 'the new system of WTO dispute settlement is fundamentally different from the [old GATT] system, which was much more devoted to diplomatic search for consensus.' 1512

<sup>44</sup> Shaw (n 37 above) 943 ICSID 'was established under the auspices of the World Bank by the Convention on the Settlement of Investment Disputes between States and the Nationals of Other States.' Its procedural framework encompasses conciliation and arbitration.

<sup>45</sup> AE Boyle 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction', (1997) 46 *International and Comparative Law Quarterly* 'Article 280 emphasises the freedom of



## **2.3 Methods of peaceful settlement of disputes**

The means through which peaceful settlement of disputes is achieved include negotiation, mediation, good offices, inquiry, conciliation, arbitration and adjudication. Of these methods adjudication is in a class of its own as it is a contentious way of resolving disputes.

### **2.3.1 Negotiation**

Negotiation consists of 'discussions between the interested parties with a view to reconciling divergent opinions, or at least understanding the different positions maintained.'<sup>46</sup> It is the simplest and most commonly used method of dispute resolution. Through mutual discussions the contentious issues are brought in the fore and ironed out with a view to coming up with a negotiated settlement in which there are no losers. Successful negotiations depend on good faith, openness, responsiveness and flexibility of the parties.

### **2.3.2 Good offices and mediation**

Good offices and mediation involve the use of a third party to encourage the contending parties to come to a settlement.<sup>47</sup> Former Secretary-General of the UN, Waldheim, in his 1980 annual report stated that 'I have always regarded it as my duty to exercise my good offices in human rights...'<sup>48</sup> Traditionally, good offices consist in a third party attempting to influence the conflicting parties to enter into negotiations without interfering

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parties to agree at any time to settle a dispute concerning the Convention by any peaceful means of their choice.'

<sup>46</sup> Shaw (n 37 above) 918 'It does not involve any third party...and is normally the precursor to other settlement procedures as the parties decide amongst themselves how best to resolve their differences.'

<sup>47</sup> Shaw (n 37 above) 921

<sup>48</sup> UN DOC A/35/1 sec IX (1980) reprinted in BG Ramcharan 'The Good offices of the UN Secretary-General in the field of human rights' (1982) 130 *American Journal of International Law*

in the negotiations themselves.<sup>49</sup> The practice of good offices in the field of human rights shows that among the purposes for which such good offices have been exercised are:

[a] To promote human rights generally...

[b] To facilitate the establishment or restoration of an attitude of respect for human rights

[c] To alleviate situations of gross human rights violations<sup>50</sup>

Mediation implies the active participation in the negotiating process by the third party and tends to merge with the good offices method.<sup>51</sup>

### 2.3.3 Inquiry

This method is often used in situations where differences in opinion underlie a dispute between parties resulting in the setting up a commission of inquiry to ascertain the disputed facts.<sup>52</sup> Inquiry has been generally used in fact-finding missions.

### 2.3.4 Conciliation

This process involves 'a third-party investigation of the basis of the dispute and the submission of a report embodying suggestions for a settlement.'<sup>53</sup> It thus has elements of both inquiry and mediation. It 'emerged from treaties providing for permanent inquiry commissions...and was intended to deal with mixed legal-factual situations and to operate quickly and informally.'<sup>54</sup> Conciliation is a flexible procedure, which stimulates discussion and continues to monitor progress with a view to reaching a settlement.

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<sup>49</sup> BG Ramcharan as above 132 'The concept good offices in the field of human rights may be traced to articles 2 and 3 of the Hague Conventions 1899 and 1907 on the Pacific Settlement of Disputes.'

<sup>50</sup> Ramcharan (n 48 above) 134

<sup>51</sup> Shaw (n 37 above) 921

<sup>52</sup> Shaw (n 37 above) 923

<sup>53</sup> Shaw (n 37 above) 925

<sup>54</sup> Shaw (n 37 above) 926; See also art 15(1) of the 1928 Geneva General Act on the Pacific Settlement of International Disputes which provides that 'The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of inquiry or otherwise, and to endeavour to bring the parties to an agreement. It may, after the case has been examined, inform the parties of the terms of settlement which seem suitable to it, and lay down the period within which they are to make their decision.'

There are a number of multilateral treaties providing for conciliation processes. These include the 1957 European Convention for the Peaceful Settlement of Disputes; the 1964 Protocol on the Commission of Mediation, Conciliation and Arbitration to the Charter of the Organisation of African Unity; the 1969 Vienna Convention on the Law of Treaties; the 1982 Convention on the Law of the Sea and the 1985 Vienna Convention on the Protection of the Ozone Layer.<sup>55</sup>

### **2.3.5 Arbitration**

This procedure evolved from the diplomatic dispute settlement processes and has since become an important tool of resolving disputes at international law.<sup>56</sup> Some of the elements of arbitration include diplomacy, adjudication, consent and goodwill of the parties. It is an adjudicative process in the sense that the arbitral award is final and binding on the parties and the arbitrator is enjoined to apply legal principles. Arbitration may be done by an arbitral body or by a single arbitrator. It has been held to be an effective, equitable, flexible and speedy method of dispute resolution.<sup>57</sup> The conflicting parties have the right to agree on the forum, adjudicator and procedure of resolution.

### **2.3.6 Adjudication**

The judicial settlement of disputes is perhaps the most familiar method of dispute resolution at the national, regional and international level. It has certain elements, which distinguish it from friendly settlement of disputes. Generally judicial settlement is perceived as adversarial, procedurally formal, culminating in reasoned and binding decisions, public and carries with it punishment and condemnation.<sup>58</sup> The courts, which handle disputes using this method, are presided over by legally trained judicial officers applying legal rules and principles. One of the most critical elements of the judicial

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<sup>55</sup> Shaw (n37 above) 927

<sup>56</sup> Shaw (n 37 above) 952 'The 1899 Hague Convention for the Pacific Settlement of Disputes included a number of provisions on international arbitration the object of which was deemed to be under article 15, 'the settlement of differences between states by judges of their own choice and on the of respect for law.'

<sup>57</sup> Shaw (n 37 above) 953

<sup>58</sup> R Murray *The African Commission on Human and Peoples' Rights and International Law* (2000) 156-177.

settlement procedure is the binding and enforceable nature of the decisions made by the courts.

## 2.4 Friendly settlement

Friendly settlement mainly encompasses negotiations, good offices and mediation, inquiry and conciliation. The bedrock of friendly settlement is the negotiations between the contending parties and the method of resolution adopted by the oversight body. The European regional system would appear to favour the conciliatory approach in its friendly settlement procedures.<sup>59</sup> The American system uses the method of mediation and conciliation.<sup>60</sup> The African regional system seems more comfortable with the use of good offices in the traditional sense of diplomatic efforts which involve establishing contacts with the government concerned, making a visit on the spot through a representative, sending a representative to hold discussions with the government and express concern about the human rights situation.<sup>61</sup> This is not to say, however, that the respective regional systems exclusively adhere to these particular methods of friendly settlement.

Friendly settlement may be defined as a voluntary, confidential, non-contentious and quasi-judicial procedure for the peaceful resolution of disputes at the regional and international level. Some of its perceived features are the informal and flexible nature of the proceedings; constructive dialogue; oral nature of the proceedings; personal contact with the parties; confidentiality; non-binding recommendations or suggestions; reconciliation; consensus and good faith in respect of the proceedings; equal bargaining

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<sup>59</sup> Van Dijk et al (n 33 above) 179 'The term conciliation, which refers particularly to inter-State disputes, has been replaced in the European Convention by friendly settlement because disputes between States and individuals may be...concerned.' Rule 62 of the European Convention permits the Court to take any steps that appear necessary to facilitate settlement.

<sup>60</sup> S Davidson *The Inter-American Human Rights System* 1997 180 'Like the rationale underlying the exhaustion of domestic remedies rule, the Convention's mechanisms, which are designed to facilitate early settlement of a dispute through conciliation, enables the state to rectify its alleged delinquency before the matter gets to court.'; Standaert (n 29 above) 524 'The Commission's initial reluctance and concern with the propriety of its new role as mediator is demonstrated in the first case that the Commission submitted to the contentious jurisdiction of the Court.'

<sup>61</sup> Umozurike (n 21 above) 79 'the quasi-diplomatic intercession of the African Commission, if rid of delays, is likely to achieve faster results than adherence to legalistic procedures akin to those of a court of law.'; Odinkalu and Christensen (n 26 above) 244 'The Commission has, however, held that the primary objective of the communications procedure is "to initiate a positive dialogue, resulting in an amicable resolution between the complainant and the state concerned, which remedies the prejudice complained of."

power between the parties; sustenance of long-term relationships between the parties and community involvement in the proceedings.<sup>62</sup> From these features it is possible to examine the advantages and disadvantages of friendly settlement as a dispute resolution mechanism.

## **2.5 Advantages of friendly settlement**

It is not easy to design a human rights system that is perfect and has no shortcomings. Thus most systems will always have their strengths and shortcomings. The following analysis is an objective assessment of the friendly settlement procedure in the resolution of human rights disputes at the regional level.

### **2.5.1 Expediency**

The procedure is beneficial to the petitioner in that he or she may obtain a remedy expeditiously as opposed to having to await a court decision that is unpredictable and may delay in coming.<sup>63</sup>

### **2.5.2 Convenience**

The confidential mediatory process works to the respondent state's advantage in that the dispute is resolved without a finding by a commission or a condemnatory and binding court decision. Such an arrangement saves the state the embarrassment of being condemned at international level for violating the rights of its own citizens. Thus the state is afforded an opportunity to clean up its act quietly.<sup>64</sup>

### **2.5.3 Adequate remedy**

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<sup>62</sup> Murray (n 58 above) 155-184

<sup>63</sup> *Velasquez Rodriguez v Honduras*, Preliminary Objections case 1987 para 60

<sup>64</sup> Murray (n 58 above) 170 'Indeed, "it is exactly in order to avoid embarrassment and adverse publicity that governments opt for a friendly settlement."

Friendly settlement offers adequate reparation and compensation to the victims of human rights violations.<sup>65</sup> Human rights bodies such as the Inter-American Commission also ensure that the settlement is based on respect for human rights.<sup>66</sup> There is therefore an opportunity to achieve more than would be obtained from a court judgment.

#### **2.5.4 Implementation**

In a friendly settlement process the mediator/conciliator has the right to monitor the full compliance and implementation of the agreement by the negotiating parties. With the exception of the European Court of Human Rights,<sup>67</sup> which has developed a rigorous mechanism for implementation of its decisions and ensuring compliance by the respondents, the commissions in the African and Inter-American systems and the Inter-American Court do not have the ability and capacity to enforce their decisions.<sup>68</sup> Thus friendly settlement achieved with the co-operation of the state is more likely to be implemented. The procedure allows the state to comply with human rights obligations without the bitterness of being subjected to condemnation for human rights violations. The whole procedure also cultivates a sense of ownership of the solution given the participation of all the parties concerned during negotiations and reneging from the undertakings made is less likely.

#### **2.5.5 No prejudice**

Negotiations in the friendly settlement are done in confidence. The details of the negotiations will not be used or referred to in the ensuing contentious proceedings in the

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<sup>65</sup> Shelton (n 12 above) 210 'Nearly all friendly settlements involve compensation.'

<sup>66</sup> Art 48(1)(f) and 49 of the American Convention; Article 52 of the African Charter; articles 38 and 39 of the European Convention.

<sup>67</sup> L Caffisch 'The reform of the European Court of Human Rights: Protocol No. 14 and beyond 2006' (2006) 6 *Human Rights Law Review*

<sup>68</sup> Murray (n 58 above) 186 'The African Commission has no powers of coercion, but then neither have other international instruments which provide for courts...Compliance must be less likely, more difficult to ensure, and less effective, where a final decision on the question of violation is necessary,' quoting H Mosler, 'Political and Justiciable Legal Disputes: A Revival of an Old Controversy' in B Cheng and ED Brown, *Contemporary Problems in International Law. Essays in Honour of Georg Schwarzenberger on his 80<sup>th</sup> birthday.* 216-230 220.

event of non-settlement.<sup>69</sup> This safeguard removes doubts about the impartiality of the mediator as seen in the Inter-American system where reservations have been made regarding the dual role of the Inter-American Commission.<sup>70</sup>

### **2.5.6 Freedom to negotiate**

Friendly settlement presents applicant a real opportunity to be heard, determine the course of the proceedings, confront the respondent state on a personal level and chart the course for future relations with the state.<sup>71</sup> The applicant is in a position to negotiate any form of remedy including compensation, costs and even obtaining state commitments to review its policies and repudiate repugnant legislation.<sup>72</sup> The guilty state may also be ordered to provide redress within a stipulated time. The government might also be willing to pay higher rates of compensation than would be likely to be granted by the courts.<sup>73</sup> The State is also reminded that in the event that it violates its citizens' rights then it shall be called upon to account for its actions. Such a process tends to empower the individual as he or she takes a sovereign state to task over human rights violations.

### **2.5.7 Benefits to the court**

In a system where the court exists the friendly settlement procedure helps in reducing the court's backlog of cases.<sup>74</sup> In the Inter-American system the Inter-American Commission utilises the friendly settlement proceedings broadly and hence few cases are referred to the court.<sup>75</sup> The fact that a case amicably settled is eventually published,

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<sup>69</sup> Leach *Taking a case to the European Court of Human Rights* (2005) 72

<sup>70</sup> Standaert (n 28 above) 532 'With the above ideals in mind, the friendly settlement procedure of the American Convention raises questions as to the propriety of using the Commission as both mediator and would-be prosecutor.'

<sup>71</sup> Standaert (n 28 above) 536

<sup>72</sup> Leach (n 69 above) 73

<sup>73</sup> Leach (n 69 above) 73

<sup>74</sup> Caflich (n 67 above) 404 'The court is presently confronted with an accumulated case-load of 82600 applications'... 'These are useful amendments since they encourage friendly settlement, thereby reducing the court's contentious case-load.' 411

<sup>75</sup> Caflich (n 67 above) 405

setting out the brief facts and the terms of the agreement, renders the friendly settlement procedure visible.<sup>76</sup>

## **2.6 Shortcomings**

Although the friendly settlement procedure has been widely adopted as a real option for the resolution of human rights disputes at the regional and international level some fears have been expressed regarding its efficacy and propriety in such cases. Some writers on the practice and procedure of human rights regional systems have identified a number of shortcomings, among them its impropriety, imbalance of power and ineffectiveness.<sup>77</sup>

### **2.6.1 Paying off**

One of the biggest fears is that the respondent government may seek to avoid issues raising clear human rights violations by buying their way out of a commission finding or court judgment. It has been suggested that the government will 'pay off' the individual applicant and thus have the matter settled without going to court in order to avoid embarrassment.<sup>78</sup> However such fears may be allayed in situations where the individual applicant is represented by a competent and diligent human rights expert who is not just content with a financial settlement, which does not take into account the human rights issue at stake. The oversight human rights body is also likely to ensure that the friendly settlement is reached on the basis of respect for human rights and a determination to ensure that human rights are protected. The oversight body should therefore ensure that the remedy available should not negate the overriding objective to protect human rights.

### **2.6.2 Impropriety**

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<sup>76</sup> Art 41 of the Rules of procedure of the Inter-American Commission states, 'If a friendly settlement is reached, the Commission shall adopt a report with a brief statement of the facts and of the solution reached, shall transmit it to the parties concerned and shall publish it.'

<sup>77</sup> Standaert (n 29 above) 529-530. ;Leach (n 69 above) 72

<sup>78</sup> Leach (n 69 above) 72



Some writers have also argued that there are some egregious human rights violations, which do not lend themselves to amicable resolution.<sup>79</sup> It is feared that justice may be sacrificed where gross human rights violations have occurred and the friendly settlement procedure fails to provide an adequate remedy. This is indeed a real fear especially when one considers atrocities perpetrated in countries such as Sudan,<sup>80</sup> Mauritania,<sup>81</sup> Nicaragua<sup>82</sup> and Ethiopia.<sup>83</sup> There are however safeguards put in place in the rules of procedure of the Inter-American Commission to ensure that gross human rights violations are not swept under the carpet without an adequate remedy.<sup>84</sup>

### 2.6.3 The Imbalance of power

One of the biggest concerns has undoubtedly been the balance of power between the victims of human rights violations and the human rights violator. The issue here is that the respondent state has at its disposal financial resources and its national sovereignty as bargaining chips whilst the individual complainant is in a position of weakness as the victim with no financial or political leverage to negotiate a just and fair settlement. It is felt that this power imbalance, which 'does not dissipate at the negotiating table,' makes the use of friendly settlement in international human rights disputes an inappropriate procedure.<sup>85</sup> It is also true however that the international community's revulsion towards human rights violations places the complainant on a moral high ground to stand against an apparently powerful respondent. Secondly the coming in of a new regime replacing an 'old' one that was responsible for the alleged human rights violations may very well level the negotiating field resulting in a just and equitable settlement.<sup>86</sup>

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<sup>79</sup> Standaert (n 29 above) 530

<sup>80</sup> Amnesty International Report 2006 Country human rights situation reports: The Darfur Crisis

<sup>81</sup> As above: Discrimination and slavery against black population.

<sup>82</sup> (n 80 above): Violence against women, and marginalisation of indigenous people.

<sup>83</sup> (n 80 above): Extra-judicial killings of human rights activists and opposition leaders.

<sup>84</sup> Art 41(4) of the Rules of procedure of the Inter-American Commission 'The Commission may terminate its intervention in the friendly settlement if it finds that the matter is not susceptible to such a resolution....'

<sup>85</sup> Standaert (n 29 above) 529

<sup>86</sup> *Peoples' Democratic Organisation for Independence and Socialism v The Gambia* (2000) AHLHR 104 (ACHPR 1996) Report on an amicable resolution 'In 1994 there was a change of government in the Gambia. The present government recognizes that it has inherited the previous government's rights and

## 2.7 Conclusion

The protection of human rights is a crucial mandate for any human rights body and innovation, flexibility, effectiveness and diligence are necessary for the discharge of such an onerous duty. Friendly settlement is a procedure that has been used extensively by various regional and international human rights bodies to protect people from injustices and provide adequate remedies. This procedure is particularly important in the regional human rights systems for the protection of human rights. It is not a concept without credible foundations and should therefore be extensively used by all human rights bodies as a complementary procedure to the existing judicial mechanisms. The procedure may, however, only be used effectively where it is provided for in the human rights instruments setting up the oversight bodies.

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obligations...It concedes that the grievances expressed by the complainants are valid and logical.' Paras 21 and 22 of the African Commission's report.

## CHAPTER THREE

### **The legal basis of the friendly settlement of disputes**

#### **3.1 Introduction**

The existence of friendly settlement as a procedure for the resolution of human rights disputes at the regional and international level has now been established. It becomes necessary to examine the legal status of this procedure in the various regional and international human rights systems. This may be achieved by critically analysing procedural chapters of the relevant human rights instruments to see if they provide for friendly settlements or amicable solutions. The criteria to be used in determining whether a particular instrument provides for this procedure will be the existence of the various methods used in achieving an amicable resolution or friendly settlement of human rights disputes at the regional and international level.

#### **3.2 International instruments**

The friendly settlement procedure features in a number of human rights and humanitarian instruments at international level.<sup>87</sup> Humanitarian instruments shall not be examined and of the international human rights instruments, the UN Charter and the International Covenant on Civil and Political Rights shall be closely analysed because of their influence in the drafting of the African Charter.<sup>88</sup>

### **3.2.1 UN Charter**

In terms of article 33(1) of the UN Charter parties to any dispute have an obligation to settle disputes through peaceful means such as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement or resort to regional agencies. This provision clearly has elements of the friendly settlement procedure as envisaged by regional human rights bodies. However this provision is limited in application to the peaceful settlement of disputes between state parties and does not really apply to individual complainants.

### **3.2.2 UNCLOS**

Article 279 of the 1982 UNCLOS expresses the fundamental obligation to settle disputes peacefully in accordance with article 2(3) of the UN Charter and using the means indicated in article 33, but the parties are able to choose methods other than those specified in the Convention.<sup>89</sup> Article 283 of UNCLOS provides that where a dispute arises the parties are to proceed 'expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means'. Article 284 provides that the parties may resort, if they wish, to conciliation procedures, in which case a conciliation

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<sup>87</sup> BG Ramcharan (n 48 above) 132-133 'The exercise of good offices with respect to human rights or humanitarian matters is quite extensive in present day international organizations, such as the UN, the UN High Commissioner for Refugees, ILO, UNESCO and the International Committee of the Red Cross...In some instances there are express mandates to exercise such good offices, while in others they are based on the concept of inherent or implied competence.'

<sup>88</sup> M Mutua 'The African Human Rights Court: A two-legged stool?'(1999) 347 *Human Rights Quarterly* noting that 'The Commission's formula for considering individual communications closely mirrors that of the UN Human Rights Committee (HRC).'

<sup>89</sup> Shaw (n 37 above) 568

commission will be established, whose report will be non-binding.<sup>90</sup> Once again, this provision is limited to state parties.

### **3.2.3 International Covenant on Civil and Political rights**

In terms of article 41 The Human Rights Committee (HRC) deals with any complaints referred by any state party to the ICCPR. It is however mandatory for the HRC to avail its good offices to the state parties with a view to reaching a friendly solution to the dispute.<sup>91</sup> The provisions of ICCPR are quite comprehensive in that if the state parties are not satisfied with the HRC's resolution of the dispute an ad hoc Conciliation Commission may be appointed to resolve the dispute with the consent of the parties.<sup>92</sup> The Conciliation Commission is given 12 months within which to come up with a solution or a report of its findings.<sup>93</sup> If a friendly settlement is reached the Conciliation Commission will confine its report to a brief statement of the facts and of the solution reached.<sup>94</sup> The friendly settlement procedure provided for in this article shall not be prejudicial to the examination of a communication in terms of article 41 of the ICCPR.<sup>95</sup> The elements of the friendly settlement procedure are clearly present in the ICCPR but are only confined to state parties. The objective of the first Optional Protocol to the International Covenant on Civil and Political Rights (OP-ICCPR) was to enable the HRC to receive and consider individual communications claiming a violation of any of the rights protected in the ICCPR.<sup>96</sup> There is however no provision for friendly settlements involving individual complainants and the legal basis for its application to individual communications is questionable.

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<sup>90</sup> Shaw (n 37 above) 568

<sup>91</sup> Art 41(1)(e) of the ICCPR '...the Committee shall make available its good offices to States Parties with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognised in the present Covenant.'

<sup>92</sup> Art 42(1)(a) of the ICCPR

<sup>93</sup> Art 42(7)(a) of the ICCPR

<sup>94</sup> Art 42(7)(b) of the ICCPR

<sup>95</sup> Art 42(8)

<sup>96</sup> Preamble to the first OP-ICCPR(entered into force on 23 March 1976)

### **3.2.4 International Covenant on Economic, Social and Cultural Rights**

The UN Committee on Economic, Social and Cultural Rights (Committee on ESCR) is a body of independent experts responsible for the implementation of the International Covenant on Economic, Social and Cultural Rights (CESCR). The Committee on ESCR however has no mandate to consider individual complaints and a draft Optional Protocol is being considered to grant it that mandate.<sup>97</sup> The working group established by the Commission on Human Rights has proposed the provision for friendly settlements to be included in the draft Optional Protocol. The NGO Coalition for an Optional protocol to CESCR proposed on 8 February 2006 that mediation and settlement procedures should be an optional, non-mandatory step, be limited in time, confidential and without prejudice to future adjudication of the dispute.<sup>98</sup> These provisions will make friendly settlements effective in resolving human rights disputes before the Committee on ESCR.

### **3.3 African regional System**

The African regional human rights system for the protection and promotion of human rights is governed by the African Charter on Human and Peoples' Rights (ACHPR)<sup>99</sup> and by the Constitutive Act of the African Union (AU Constitutive Act)<sup>100</sup> which replaced the Charter of the Organisation of African Unity in 2001 (OAU Charter).<sup>101</sup> It is within the context and framework of the OAU that the African Commission was established under the ACHPR.<sup>102</sup> This is important especially when one considers the objectives and principles of the OAU and AU on the peaceful settlement of disputes and what inspired

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<sup>97</sup> Available at < <http://www.ohchr.org/english/bodies/cescr/index.htm> > (accessed on 29 September 2006).

<sup>98</sup> Available at [http://www.iwraw-ap.org/news/8feb\\_proceedings.htm](http://www.iwraw-ap.org/news/8feb_proceedings.htm) (accessed on 22 May 2006)

<sup>99</sup> Adopted in Nairobi by the OAU in June 1981 and entered into force in October 1986.

<sup>100</sup> Accepted in Lome in July 2000 and entered into force in May 2001.

<sup>101</sup> Adopted in Addis Ababa in May 1963 and entered into force in September 1963.

<sup>102</sup> Art 30 of the ACHPR states: 'An African Commission on Human and Peoples Rights...shall be established within the Organisation of African Unity to promote human and peoples' rights and ensure their protection in Africa.'

African leaders to adopt a human rights instrument. The peaceful settlement of disputes between states has been one of the founding principles of the OAU<sup>103</sup> and AU.<sup>104</sup>

This principle is clearly reflected in Article 48 of the ACHPR providing for how member states may settle their disputes.<sup>105</sup> The parties, on their own, may initiate bilateral negotiations or any methods of peaceful settlement of disputes. If the parties are not satisfied they refer the matter to the African Commission, which among other things will try 'all appropriate means to reach an amicable solution based on the respect of human and peoples' rights.'<sup>106</sup> The peaceful settlement of disputes in the ACHPR is only available under the inter-state communications procedure. Thus the friendly settlement procedure is clearly not available between individual complainants and states in the ACHPR. These two provisions reflect the influences of the UN Charter<sup>107</sup> and the ICCPR.<sup>108</sup> It is therefore no surprise that there is no provision for friendly settlements under the individual communications procedure. The ACHPR is therefore a unique regional human rights instrument in that regard compared to the Inter-American and the European Conventions. This legal lacuna in the ACHPR has contributed to its lack of effectiveness in the protecting the rights of individual complainants in Africa contrary to the ideals of one of its founding fathers former Senegalese President Leopold Senghar Senghor.<sup>109</sup> It is also of concern that African Commission reports do not contain the

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<sup>103</sup> Art 3 'The member states ...declare their adherence to the following principles: (4) Peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration.'

<sup>104</sup> Art 4 'The Union shall function in accordance with the following principles:...(e) peaceful resolution of conflicts among member states of the Union through such appropriate means as may be decided upon by the Assembly.'

<sup>105</sup> Art 48 'If,...the issue is not resolved to the satisfaction of the two states involved through bilateral negotiation or by any other peaceful procedure, either state shall have the right to submit the matter to the Commission through the Chairman and shall notify the other state involved.'

<sup>106</sup> Art 52 of the ACHPR

<sup>107</sup> See articles 2(3) and 33(1) of the UN Charter

<sup>108</sup> The friendly settlement procedures provided in arts 41(1)(e) and 42(1)(a) & (7)(b) of the ICCPR are available to state parties only.

<sup>109</sup> 'As Africans, we shall never either copy, nor strive for originality for the sake of originality. We must show imagination and effectiveness. We could get inspiration from our beautiful and positive traditions.' Address by President Senghor of Senegal to the meeting of African Experts preparing a draft of the Charter on 28 November 1979, reprinted in NJ Udombana 'Toward the African Court on Human and People' Rights: Better late than never' *Yale Human Rights and Development Law Journal* 2000. See also page 20 'In the area of protection of human rights the (African) Commission stands out as a toothless bulldog.'

terms of the settlement reached but simply the facts, its findings<sup>110</sup> and recommendations.<sup>111</sup> Thirdly in situations of serious or massive human rights violations the African Commission may only examine a communication and undertake on-site investigations upon a request being made by the Assembly of Heads of State and Government (AHSO).<sup>112</sup> This means that the African Commission cannot attempt to reach a friendly settlement *mero motu* in cases of the serious and massive violation of human rights without authority from the AHSO.<sup>113</sup> The rules of procedure of the African Commission (1995) put it beyond doubt that the friendly settlement procedure shall only be available to state parties.<sup>114</sup> Once more, the influence of the ICCPR and the UN Charter may be discerned from the use of the 'good offices' concept as a method of peaceful settlement of disputes.

The African Commission considers the main objective of the communications procedure as initiating:

'a positive dialogue, resulting in amicable resolution between the complainant and the State concerned, which remedies the prejudice complained of. A pre-requisite for amicably remedying violations of the Charter is the good faith of the parties concerned, including their willingness to participate in a dialogue.'<sup>115</sup>

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<sup>110</sup> Art 52 of the ACHPR

<sup>111</sup> Art 53 of the ACHPR

<sup>112</sup> Art 58 of the ACHPR.

<sup>113</sup> Ouguergouz (n 18 above) 641 'Strictly according to the letter of the African Charter, in no way could the Commission seek an amicable settlement of the cases brought to its attention, even keeping the matter strictly confidential between itself and the parties alone. For the implication would then be that...it was making a relatively detailed examination of the object of the communication, which cannot, in theory, be undertaken except at the request of the Assembly of heads of State or, in an emergency, of its Chairman.'

<sup>114</sup> Rule 98 titled 'Amicable Settlement' states that 'Except (sic) for the provisions of the rule 96 of the Rules of Procedure, the Commission shall place its good offices at the disposal of the interested state parties to the Charter so as to reach an amicable solution on the issue based on the respect of human rights and fundamental liberties, as recognized by the Charter.'

<sup>115</sup> *Free Legal Assistance Group v Zaire*, Communication 25/89; *Lawyers' Committee for Human Rights v Zaire*, Communication 47/90; *Union Interfricaine des Droits des l'Homme v Zaire*, Communication 56/91; *Les Temoins de Jehovah v Zaire*, University of Minnesota Human Rights Library, Para 39. See also *Comite Culturel pour la Democratie au Benin, Badjogounne Halairé, El Haj Boubacar Diawara v Benin Republic*, Communications 16/88, 17/88, 18/88. Reprinted in Odinkalu CA and Christensen C (n 26 above) 244; NJ Udombana 'So far , so fair : The local remedies rule in the jurisprudence of the African Commission on human and peoples' rights.' *Human Rights Quarterly* (2002) 11; VO Nmehielle 'The African Human Rights System, its laws, practice and institutions' (2001) 207; Ouguergouz (n 18 above) 643.



This process of initiating positive dialogue sounds more like diplomatic efforts by the African Commission using its good offices to resolve human rights disputes. The provisions on friendly settlements are also not detailed and well written.<sup>116</sup> It is the author's view that the paucity of detail coupled with the inelegant drafting of the ACHPR has greatly contributed to the inefficient manner in which the friendly settlement procedure has been applied in practice by the African Commission. The question to pose is whether a regional system should have looked to international instruments such as the UN Charter and the ICCPR for inspiration in drafting the articles dealing with the friendly settlement procedure. This author is of the view that the drafts people looked in the wrong place as these two international instruments were mainly focusing on disputes involving states to the detriment of individual complainants. The experts were probably influenced by the fact that the international norms of dispute settlement in these instruments were in many respects similar to the African traditional methods of resolving disputes.<sup>117</sup>

Without paying any thought to the individual complainant the friendly settlement procedure was only made available to state parties to the ACHPR. Technically speaking *strictu sensu* therefore, there is no legal basis for the African Commission to apply the friendly settlement procedure when dealing with individual communications. This technical flaw has been maintained even in the Protocol on the African Human Rights Court.<sup>118</sup> This means that the African Human Rights Court will be applying the same flawed provisions if ever an individual complainant and respondent state agree to have their dispute resolved amicably.

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<sup>116</sup> Ouguerouz (n 18 above) 642 Commenting on rule 98 of the rules of procedure 'Some words are clearly missing from the first phrase of this provision...However textual lacunae have not prevented the Commission from seeking an amicable settlement in all the cases brought before it...See also Nmeielle (n 115 above) 207 referring to article 52 of the ACHPR ' In adopting this position, it has been suggested that the Commission appeared to have been inspired by the somewhat inelegant provision in article 52 of the Charter regarding inter-state communications.

<sup>117</sup> Ankumah (n 13 above) 23 'The first attempt to settle the dispute between the member states is an effort to resolve disputes through dialogue and negotiation rather than through confrontation. This amicable settlement of disputes is in conformity with international norms which are also consistent with African tradition.'

<sup>118</sup> Art 9 of the Protocol on the Human Rights Court states 'The court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter.' The provisions of the ACHPR being referred to are articles 48 and 52 as well as rule 98 of the African Commission's rules of procedure which do not provide for friendly settlement in individual communications.

### 3.4 The Inter-American regional system

The protection and promotion of human rights in the American regional system is guaranteed by the American Declaration of the Rights and Duties of Man (American Declaration) 1948 and the American Convention 1969.<sup>119</sup> Thus the Inter-American system has a dual structure in which the Inter-American Commission is mandated to receive individual communications alleging a violation of rights in either the American Convention or the American Declaration.<sup>120</sup> The Inter-American Commission is also said to have a dual mandate, acting as both mediator and would-be prosecutor, in that it attempts to reach a friendly settlement by making its good offices available and where settlement is not reached will investigate, consider, make findings and refer a case to the Inter-American Court. This duality is said to vitiate 'the delicate nature of the traditional role of a mediator.'<sup>121</sup> The American Court of Human Rights (American Court) is the second supervisory institution in the Inter-American System.

The Inter-American Commission was created in 1959 and was recognised as one of the principal organs of the Organisation of American States (OAS) in 1971. Under its first statute of 1960 it had powers to promote human rights awareness and make recommendations to member states. With the entry into force of the American Convention in 1978 the Inter-American Commission's position was strengthened. Thus by the time the American Convention came into force in 1978, the Inter-American Commission was already operational.

The friendly settlement procedure is provided for in the American Convention when the American Commission receives a petition or communication alleging a violation.<sup>122</sup> If a friendly settlement has been reached in terms of article 48(1)(f) of the American

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<sup>119</sup> D Harris and S Livingstone *The Inter-American System of Human Rights* (1998) 1. The American Convention entered into force on 18 July 1978 (also known as the Pact of San Jose)

<sup>120</sup> Shelton (n 12 above) 208. See also Shaw (n 37 above) 355 'The competence of the Commission to hear petitions relates to the rights in the Convention for states parties and to rights in the American Declaration for states not parties to the Convention.'

<sup>121</sup> Standaert (n 29 above) 532

<sup>122</sup> Art 48 (1)(f) of the American Convention states: 'The commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for human rights recognized in this Convention.'

Convention, the American Commission shall draw up a report containing a brief statement of the facts and of the solution reached.<sup>123</sup> This report shall then be sent to the petitioners and state parties and communicated to the Secretary General of the OAS for publication. If a settlement has not been reached the American Commission shall draw up a report stating the facts and its conclusions.<sup>124</sup> The report shall be sent to the concerned states and may contain the American Commission's proposals and recommendations.

The American Commission has further developed the friendly settlement procedure through its rules of procedure. The friendly settlement procedure shall be initiated by the American Commission or at the request of the parties at any stage of the examination of a case.<sup>125</sup> A friendly settlement may only be reached on the basis of respect for the human rights recognised in the American Convention, the American Declaration and other applicable instruments. The consent of the parties is a prerequisite to the initiation or continuance of the procedure.<sup>126</sup> One or more of the American Commission's members may be tasked with the facilitation of negotiations between the parties.<sup>127</sup> The friendly settlement may be terminated on certain conditions. Firstly, it may be terminated if the American Commission finds that the matter 'is not susceptible to such a resolution.'<sup>128</sup> Secondly, if any of the parties do not consent to its application and decides not to continue it, 'or shows no willingness to reach a friendly settlement based on respect for human rights.'<sup>129</sup>

If a friendly settlement is reached the American Commission will adopt a report containing a brief statement of the facts and solution reached and publishes it. However the report will not be published before the American Commission has verified whether

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<sup>123</sup> Art 49 of the American Convention

<sup>124</sup> Art 50 of the American Convention

<sup>125</sup> Art 41(1) of the Rules of Procedure of the American Commission

<sup>126</sup> Art 41(2) as above

<sup>127</sup> Art 41(3) (n 125 above)

<sup>128</sup> Art 41(4) (n 125 above); Harris D and Livingstone S (n 30 above) 3 'Another difference in practice is the less frequent use in the Inter-American system of the friendly settlement procedure, which results partly from the fact that gross human rights violations do not lend themselves easily to mediation and conciliation.'

<sup>129</sup> Art 41(4) (n 125 above)

the victim of the alleged violation has consented to the friendly settlement reached.<sup>130</sup> If a friendly settlement is not reached, the American Commission shall continue to process the case.<sup>131</sup> The Inter-American Court plays a minimal role in the friendly settlement procedure.<sup>132</sup>

The friendly settlement procedure in the Inter-American system is clearly and comprehensively provided and consequently its application has been consistent and effective as shall be seen in chapter 4. If the drafters and experts responsible for coming up with the ACHPR had consulted the friendly settlement provisions in the American Convention some of the textual weaknesses would have been avoided. One may argue that the American Commission's rules of procedure were developed over time and after the ACHPR came into force and therefore there was no point of reference. However the American Convention itself came into force in 1978 just two years before the birth of the ACHPR and there would have been no harm in copying its friendly settlement provisions with the necessary changes to suit African conditions. Additionally the ACHPR provides that 'Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.'<sup>133</sup> The African Commission's rules of procedure may also be amended.<sup>134</sup> It is therefore strange that the African Commission still applies the friendly settlement procedure, which is not provided for in individual communications, when both the African Charter and the rules of procedure may be supplemented and modified to correct the anomaly.

This author is not convinced by arguments that there is absolutely nothing wrong with applying a procedure reserved for inter-state communications to individual communications.<sup>135</sup> The African Commission should be looking elsewhere for inspiration

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<sup>130</sup> Art 41(5) (n 125 above)

<sup>131</sup> Art 41(6) (n 125 above)

<sup>132</sup> Art 54 of the Inter-American Court rules of procedure (as amended on 25 November 2003), provides that the Court may strike the case off the roll when informed that the parties have reached a friendly settlement.

<sup>133</sup> Art 66 of the ACHPR

<sup>134</sup> Rule 121 of the African Commission's rules of procedure provides that: 'Only the Commission may modify the present rules of procedure.'

<sup>135</sup> Nmehielle (n 115 above) 208 'there may be nothing absolutely wrong in the Commission having as one of its objectives, the realization of amicable resolution of human rights disputes presented by individual

and not to a procedure which was designed to cater for disputes between states to be resolved through dialogue and diplomatic negotiations. If it is proper for the African Commission to be inspired by the article 52 procedure then it cannot turn around and discard the standards used in resolving state disputes to adopt those which are perceived to be appropriate. The African Commission has been congratulated for 'systematically seeking an amicable settlement in all cases brought before it' even where the procedure has not been provided for.<sup>136</sup> The African Commission's innovative methods have been justified on the basis of the spirit of the ACHPR and the 'philosophy underlying the machinery for protecting human rights.'<sup>137</sup> Articles 60 and 61 have also been cited as giving the African Commission broad discretion regarding interpretation. In terms of article 60 the African Commission shall seek inspiration from international law on human and peoples' rights particularly from various African instruments, the UN Charter, the OAU Charter, the Universal Declaration of Human Rights, other human rights instruments adopted by the UN and African countries and instruments adopted by the UN specialised agencies. This list does not in any way include or even suggest the Inter-American Convention and the European Convention as sources of inspiration.

When determining substantive legal principles the African Commission shall consider other general or specialised international conventions laying down rules expressly recognised by member states of the OAU, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine.<sup>138</sup> Indeed the African Commission has considered legal precedents of the European Court <sup>139</sup> to interpret a legal principle. It is the view of the author that the African Commission should only refer to other regional systems when seeking to

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complainants, even though that objective is inspired by a procedure reserved for inter-state communications.'

<sup>136</sup> Ouguergouz (n 18 above) 642

<sup>137</sup> Ouguergouz (n 18 above) 642

<sup>138</sup> Art 61 of the ACHPR

<sup>139</sup> In *Huri-Laws v Nigeria*(2000) AHRLR 273 (ACHPR 2000) 41 @278 The African Commission referred to the case of *Ireland v United Kingdom* (1979-80) 2 EHRR 25 in interpreting the meaning of torture , cruel , inhuman and degrading treatment.

interpret certain substantive legal principles and on all other provisions including procedure may seek inspiration from those instruments listed in article 60 of the Charter. Clearly the African Commission has no mandate and competence to apply the friendly settlement procedure when examining individual complaints.<sup>140</sup>

### 3.5 The European regional system

Although a number of treaties have been signed between Council of Europe member states, the most important has been the European Convention. The European Convention was signed on 4 November 1950 and entered into force in September 1953, making it the oldest regional human rights instrument.<sup>141</sup> Before the coming of Protocol 11 the European system consisted of a part-time Commission and a part-time Court. The Commission's function was to constitute a filtering system in deciding which applications were declared admissible, an organ for the establishment of the facts of the particular case and a mechanism of friendly settlement.<sup>142</sup> If no settlement was achieved the matter would be sent to court which would make a decision. Nothing was going to be quite the same again in Strasbourg after the birth on 1 November 1998 of additional protocol no. 11 to the European Convention on the protection of human rights.<sup>143</sup> This instrument completely overhauled the Strasbourg system by bringing about the following developments: the dissolution of the European Commission of Human Rights, the transformation of the European Court of Human Rights into a permanent professional judicial body<sup>144</sup> and the compulsory jurisdiction of the court without any special declaration over all individual applications against states parties to the European Convention.

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<sup>140</sup> F Viljoen 'A Human Rights Court for Africa and Africans' (2004-2005) 30 *Brooklyn Journal of International Law* 5 'Moreover neither the Charter nor the rules of procedure accords the African Commission any role with regard to friendly settlement procedure...Indeed, it has no legal competence to settle cases.'

<sup>141</sup> Shaw (n 37 above) 321.

<sup>142</sup> Shaw (n 37 above) 324.

<sup>143</sup> Caflich (n 67 above) 403.

<sup>144</sup> Currently the European Court has 45 judges whose term of office shall be 9 years and 250 registry lawyers. See Caflich (n 67 above) 404.

The upshot was an unprecedented backlog of cases in the new European Court. Mechanisms had to be introduced to reduce the case-load and improve on other problematic issues. Protocol No 14 of 2004 has proposed some important changes. The content of protocol no14 includes single judges to make decisions on admissibility and jurisdiction as a filtering mechanism, new criterion for admissibility, improvements in the friendly settlement procedure and strengthening the already effective implementation of the court's judgments.

The friendly settlement procedure is provided in the European Convention and the European Court shall apply it at the stage of examination of the case.<sup>145</sup> In terms of article 15 of protocol 14 this may now happen 'at any stage of the proceedings.' After making its decision on admissibility, the Court shall 'write to the parties to inform them that the court is at the parties' disposal for the purpose of securing a friendly settlement and inviting proposals from either party.'<sup>146</sup> The friendly settlement proceedings shall be confidential. If a friendly settlement is reached the European Court shall strike off the case from its roll by way of a decision which shall comprise a brief statement of the facts and the solution reached.<sup>147</sup>

In terms of Article 15 of Protocol No14 the court is called upon, not only to help the negotiations along and to take note of the settlement, but also to adopt a decision briefly recording the facts and the terms of the friendly settlement. The friendly settlement proceedings shall remain confidential, which means that offers or admissions made in the course of such proceedings cannot be relied on later if the dispute is not settled. Finally, the Committee of Ministers shall henceforth supervise the enforcement of the terms of the friendly settlement.<sup>148</sup> These reforms were meant to encourage the application of the friendly settlement procedure in resolving human rights disputes.

### **3.6 Conclusion**

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<sup>145</sup> Art 38(1)(b) of the European Convention provides that the Court 'shall place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the protocols thereto.'

<sup>146</sup> Leach (n 69 above) 71 See also article 38(1)(b) of the European Convention and Rule 62 of the European Court's rules of procedure.

<sup>147</sup> Art 39 of the European Convention

<sup>148</sup> Caflisch (n 67 above) 411.

The use of peaceful methods in the settlement of disputes has clearly been widely embraced in the International bill of rights as well as in the regional human rights systems. The friendly settlement procedure may however not be used to the exclusion of the adversarial procedure. The procedure must be included only as part of the broader framework of the communications procedure as an alternative dispute resolution mechanism. The inter-American Commission and the European Court have a well-defined legal mandate to settle human rights disputes not only between states but in individual complaints as well. In the African regional system the friendly settlement procedure is not comprehensive and its application to individual communications is not legally provided.



## CHAPTER FOUR

### **Is the procedure effective and appropriate?**

#### **4.1 Introduction**

The effectiveness and propriety of the friendly settlement procedure as a method of human rights protection may be measured by examining the practice and jurisprudence of the regional human rights mechanisms. The textual drafting of human rights instruments and the way in which the relevant provisions are interpreted, will also determine the effectiveness of the available human rights protection mechanisms. A purposive, progressive and dynamic approach to interpretation would be more effective than a restrictive, conservative and formalistic one especially in the field of human rights. A flexible, comprehensive and accurately drafted human rights instrument would also facilitate greater protection of human rights as well as provide victims with adequate and effective remedies. This chapter shall be an examination of how the friendly settlement procedure has been interpreted and applied by the regional human rights bodies in communications that have been brought before them.

#### **4.2 The Practice and jurisprudence of the African Commission**

A flexible document is not one which can be twisted and abused to make up for certain inadequacies, but is one which offers real choices to the user. The ACHPR has been interpreted as a 'flexible document which if used effectively will enhance the promotion and protection of human rights in Africa.'<sup>149</sup> It is generally agreed that although the African Commission is, under article 52, 'enjoined to reach an amicable settlement in respect of communications from state parties, that mode of settlement is extended to communications from non-state parties.'<sup>150</sup>

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<sup>149</sup> Ankumah (n 13 above) 179 'The African Charter and by implication the work of the African Commission can be more effective through a dynamic and purposeful interpretation of the procedural and substantive provisions of the Charter.'

<sup>150</sup> Umozurike *The African Charter on Human and Peoples' Rights* (1991) 79; Viljoen (n 140 above) 29 'However , even if this strict reading of the protocol is adopted the African Court is still likely to engage in settlement negotiations, scrutinizing and formalizing any agreement parties reach after referral of the case .' See also Ouguergouz (n 18 above) 642

In its conciliatory role the African Commission has sought to initiate ‘a positive dialogue, resulting in amicable resolution between the complainant and the State concerned.’<sup>151</sup> Odinkalu and Christensen identified some subjective and objective criteria necessary to fulfil this objective. It is their view that, ‘as part of the subjective criterion, the Commission requires that the resolution should be to the satisfaction of the parties.’<sup>152</sup> They observe that the objective criterion is twofold as both parties are called upon to ‘act in good faith’ to obtain a resolution ‘which remedies the prejudice complained of.’ This author agrees with these observations and would hasten to point out that there is a critical objective which is missing from the implied criteria. This is that the amicable solution reached should be based on respect for human rights, although this is provided for in article 52 of the ACHPR. It is pertinent at this point to critically evaluate the practice and jurisprudence of the African Commission regarding friendly settlements.

In the case of *Kalenga v Zambia*<sup>153</sup> the complainant filed a communication alleging that he had been falsely imprisoned in violation of article 6 of the ACHPR. According to the report by the African Commission the author of the communication was released after a member of the African Commission effected an amicable settlement. The normal procedure for communications was discontinued and the file closed.<sup>154</sup> Henry Kalenga had been detained without trial since 27 February 1986 and filed his communication with the African Commission on 2 August 1988 seeking immediate release.<sup>155</sup> The African Commission concluded that the matter had been amicably resolved after being informed by the Zambian Ministry of Legal Affairs that Kalenga was released from prison in 1989. This case reveals a number of shortcomings in the practice of the African Commission. There is no indication whether the African Commission sought the views of the complainant to ascertain whether or not he agreed to an amicable settlement of the

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<sup>151</sup> Odinkalu and Christensen (n 26 above) 244 (‘It is the primary objective of the Commission in the Communications procedure to initiate a dialogue between the parties which will result in an amicable settlement to the satisfaction of both and which remedies the prejudice complained of. An inevitable condition of this dialogue is the requirement that both parties act in good faith and show willingness to participate in coming to an amicable resolution.’)

<sup>152</sup> Odinkalu and Christensen (n 26 above) 245

<sup>153</sup> *Kalenga v Zambia* (2000) AHRLR 321 (ACHPR), Communication 11/88, 7<sup>th</sup> Annual Activity Report

<sup>154</sup> *African Human Rights Law Reports* 2000 321

<sup>155</sup> Nmehielle (n 115 above) 209

matter. It appears the African Commission only elicited the views of the state concerned, contrary to the objective of ensuring that both parties should consent and be satisfied with the settlement. There are also no details on the terms of the agreement reached by the parties and affirmation by the African Commission that the agreement was based on respect for human rights. The African Commission also failed to ensure that the complainant was awarded compensation for the alleged wrongful detention, which is an important feature of the friendly settlement procedure. Sadly, the African Commission adopted a similar approach in *Civil Liberties v Nigeria* where the file was closed after information had been obtained that the issue had been amicably resolved.<sup>156</sup>

In both communications the African Commission did not consult the complainant, failed to ascertain compliance with the ACHPR human rights provisions and did not bother to ascertain whether the complainant consented to the terms of the agreement if there was any at all. It was also not concerned with affording the victim adequate and effective remedies in that the issue of compensation was never addressed.

The case of *Bob Ngozi Njoku v Egypt*<sup>157</sup> was a lost opportunity to attempt a friendly settlement. The Complainant, a Nigerian student, was arrested for being in possession of drugs at Cairo airport while in transit from New Dehli to Lagos. His complaint was that the state had violated articles 3 and 4 of the ACHPR which guarantee equal protection of the law and respect for human life and integrity. The African Commission's finding was that there was no violation of the ACHPR and the communication was closed. It went on to authorise Commissioner Isaac Nguema to pursue his 'good offices' with the Egyptian government with a view to obtaining clemency for Ngozi Njoku on purely humanitarian grounds. The African Commission ought to have placed itself at the disposal of the parties with a view to reaching a friendly settlement prior to making a finding of no violation. There was no legal mandate to pursue a friendly settlement after closure of the case.<sup>158</sup>

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<sup>156</sup> *Civil Liberties v Nigeria* (2000) AHLHR 179 (ACHPR 1994), 7<sup>TH</sup> Annual Activity Report.

<sup>157</sup> *Bob Ngozi Njoku v Egypt* (2000) AHRLR 83, Communication 40/90, 11<sup>th</sup> Annual Activity Report.

<sup>158</sup> Ougergouz (n 18 above) 646 ('Here too there is...no effort to achieve an amicable settlement, but rather...the Commission is simply using its good offices, quite apart from any violation of the African Charter')

The African Commission had not learnt any lessons when it dealt with the case of *Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia*.<sup>159</sup> This matter involved the mass expulsion of 517 West Africans from Zambia on the grounds of being in the country illegally. Prior to expulsion most of them had been subject to administrative detention for more than 2 months. The deportees lost all the material possessions they had in Zambia. At its 18<sup>th</sup> session the African Commission decided to pursue a friendly settlement and on 2 August 1996 informed the Zambian government of its intention to continue the efforts towards an amicable resolution of the case. The African Commission later changed its position and made a decision on the merits stating that the process of arriving at an amicable solution can take a substantial period of time. It was held that the deportations constituted a violation of articles 7(1)(a) and 12(5) of the ACHPR.<sup>160</sup> After making its finding of a violation, the African Commission resolved to continue efforts to pursue an amicable solution.

As Ouguergouz correctly observed, the friendly settlement procedure 'presupposes the absence of any decision on the merits of the case.'<sup>161</sup> It is a considerable puzzle as to why the African Commission was pursuing friendly settlement after having made a decision on the merits. It would be more logical if the African Commission had sought to secure settlement in the implementation of their decision and ensure payment of compensation for the losses incurred by the deportees. The European Court was successful in that regard in the case of *Broniowski v Poland*<sup>162</sup> which involved the refusal to indemnify a Polish individual whose family had been forced to move to Western Poland leaving behind their home and property.<sup>163</sup> Thus the African Commission, in its haste, lost another opportunity to act as a conciliatory body and ensure the victims obtained adequate compensation and reparations for their suffering and loss of property.

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<sup>159</sup> *Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996), Communication 71/92, 10<sup>th</sup> Annual Activity Report.

<sup>160</sup> These articles guarantee the right to appeal and the prohibition against mass expulsion of non-nationals respectively.

<sup>161</sup> Ouguergouz (n 18 above) 645

<sup>162</sup> *Broniowski v Poland* (2005) 40 EHRR 21

<sup>163</sup> Caflich (n 67 above) 413

The friendly settlement in the case of *Peoples' Democratic Organisation for Independence and Socialism (PDOIS) v Gambia*<sup>164</sup> was made possible by the change in government, as the current regime was desirous of breaking free of the past injustices perpetrated by the previous government. The complainant alleged in the communication that the voter registration electoral laws were defective and susceptible to widespread fraud. The previous government disagreed with the complainant's contentions. However in July 1994 there was a change in government and the new government condemned the claims of the previous one. The African Commission received a letter from the State accepting complainant's grievances and undertaking to review the electoral laws. The African Commission reacted by informing the complainant of the new government's position and that if they did not receive any opposing views by 1 February 1996 the matter would be considered amicably resolved. The African Commission eventually concluded that the communication had been amicably resolved. Once more the views or consent of the complainant regarding the amicable solution were not obtained contrary to its position that 'the Commission cannot interpret silence as withdrawal of the communication because individuals are highly vulnerable to circumstances that might prevent them from continuing to prosecute a communication.'<sup>165</sup>

The African Commission was more diligent in its efforts to secure a friendly settlement in the case of *Modise v Botswana*.<sup>166</sup> This was a case concerning the denial of citizenship to the complainant. The complainant was engaged in opposition politics and in 1978 he was arrested and deported to South Africa. In all, he was deported four times before taking his matter to the African Commission. On October 1995 the respondent state informed the African Commission that Mr Modise had been granted citizenship. This position was communicated to the complainant's lawyer, Mr Chidi Odinkalu, asking if the granting of citizenship could be considered an amicable solution of the case. Complainant's counsel indicated that a friendly settlement had not been reached and requested further action on the part of the African Commission. Complainant was not satisfied with being granted citizenship by registration as this could be taken away. He

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<sup>164</sup> *Peoples' Democratic Organisation for Independence and Socialism v The Gambia* (2000) AHLHR 104 (ACHPR 1996), Communication 44/90, 10<sup>th</sup> Annual Activity Report.

<sup>165</sup> Nmehielle (n 115 above) 209 (quoting the African Commission in *Kalenga v Zambia*)

<sup>166</sup> *Modise V Botswana* (2000) AHRLR 25 (ACHPR 1997), Communication 97/93, 10<sup>th</sup> Annual Activity Report.

preferred citizenship by birth which is inviolable. Furthermore, citizens by registration could not be presidential candidates. He had lost his property, was separated from his family and could no longer pursue his political ambitions. However the African Commission ruled that the other rights could be obtained through the national courts after taking after acknowledging the naturalisation of the author.

The African Commission then urged the government of Botswana to 'continue with its efforts to amicably resolve this communication in compliance with national laws and with the provisions of the African Charter on Human and Peoples' Rights.' This is rather disappointing in that the African Commission is supposed to take an active part in ensuring that an amicable solution based on respect for human and peoples' rights is reached and not to leave it to the respondent state to continue with the efforts without its involvement. Such practice by the African Commission fails to take into account the power imbalances between the state and individual complainant. Indeed there is no guarantee that the state would act in good faith and make serious efforts to reach a friendly settlement which is human rights compliant. Despite the sterling efforts of Commissioners Janneh and Dankwa to secure an amicable solution, the government of Botswana was not willing to act in good faith.

As rightly feared the government of Botswana acted in bad faith and did not remedy the violation of complainant's right to nationality by birth or descent which meant his participation in politics was not guaranteed. Consequently, Interights had to apply for the reopening of the case.<sup>167</sup> The African Commission found the respondent state to have violated the rights to equal protection before the law, respect for human dignity, freedom of movement, free participation in government, property and family. The government of Botswana was also urged to take 'measures to recognise Mr John Modise as its citizen by descent and to compensate him adequately for violations of his rights.'<sup>168</sup> The African Commission should have terminated the efforts to reach a friendly settlement the moment that the government of Botswana made an offer unacceptable to the complainant and particularly when that offer did not remedy the human rights violations

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<sup>167</sup> *Modise v Botswana* (2000) AHRLR 30 (ACHPR 2000) Communication 97/93, 14<sup>th</sup> Annual Activity Report.

<sup>168</sup> *Modise v Botswana* (n 19 above) 46

complained of. The practice of the African Commission on friendly settlements proved to be ineffective again in this case. As observed 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.’<sup>169</sup>

In the case of *Association pour la Defense des Droits de l’Homme et des Libertes (ADDHL) v Djibouti*<sup>170</sup> the African Commission seemed to have learnt some lessons and demonstrated some consistency regarding friendly settlement practice. In the communication the NGO complained of a series of human rights abuses against members of the Afar ethnic group committed by government troops in renewed fighting with the Front pour la Restauration de l’Unite et de la Democratie (FRUD). There were allegations of extrajudicial executions, torture and rape. The communication, filed in April 1994, claims a violation of about 11 articles of the ACHPR. In October 1996 the complainant applied for postponement whilst they entered into negotiations with the government. In February 1998 the ADDHL communicated that they had signed a protocol with the government with the objective of achieving a lasting settlement to the demands of the victims, refugees and displaced persons. Commissioner Rezag-Bara was mandated to go to Djibouti and find an amicable solution to the dispute. The African Commission, in the meantime, deferred its decision on the merits to the next session pending the outcome of the efforts of Commissioner Rezag-Bara.

During his mission, Commissioner Rezag-Bara met with the Djibouti authorities and the complainant who confirmed that an amicable settlement had already been reached. The president of ADDHL sent a letter to the African Commission indicating that the dispute had been amicably resolved between the parties. The respondent state also communicated with the African Commission confirming that the arrangements for a lasting settlement had been established. The meeting with the Commissioner and the communications from the parties ‘clarified the situation and also confirmed the existence of the settlement reached between the two parties.’<sup>171</sup> The case was closed on the basis

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<sup>169</sup> Odinkalu and Christensen (n 26 above)

<sup>170</sup> *Association pour la Defense des Droits de l’Homme et des Libertes v Djibouti* (2000) AHRLR 80(ACHPR) Communication 133/94, 13<sup>th</sup> Annual Activity Report.

<sup>171</sup> *ADDHL v Djibouti* (n 21 above) 8

of the 'amicable settlement reached by the parties.'<sup>172</sup> The terms of the agreement were not documented.

In the past two decades of its existence the African Commission has facilitated the friendly settlement of not more than 10 communications. This is contrary to Umozurike's thoughts that 'the strength of the Commission, as presently stipulated in the Charter, lies in amicable settlement.'<sup>173</sup> So far the performance of the African Commission in the friendly settlement procedure is not encouraging. In most of the settlements reached the complainants were not consulted with the African Commission preferring to work with the respondent state.<sup>174</sup> This negates the practice of ensuring that both parties consent to the amicable settlement of the dispute. In the *Ngozi Njoku* and *Modise* cases the African Commission encouraged the friendly settlement of the dispute after making a decision on the merits and even when the complainant was not accepting the terms of settlement.<sup>175</sup> The normal practice is to attempt friendly settlement at any stage during the examination of the communication and not after a decision has already been made. The settlement procedure ought to be terminated if one of the parties decides not to continue with it. In most of the friendly settlement cases, the African Commission did not ascertain and satisfy itself that the settlement reached was agreed upon and based on respect for human rights. In its 14<sup>th</sup> annual activity report the case of *Modise v Botswana* had to be reopened after a disputed and an unverified friendly settlement. The African Commission did not endeavour to spell out and endorse the terms of the friendly settlements reached by the parties in the majority of the communications discussed in this essay.

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<sup>172</sup> *ADDHL v Djibouti* (n 21 above) 82 Para 18.

<sup>173</sup> Umozurike (n 21 above) 79 ('He further stated that 'the quasi-diplomatic intercession of the African Commission, if rid of delays, is likely to achieve faster results than adherence to legalistic procedures akin to those of a court of law.')

<sup>174</sup> Ankumah (n 13 above) 181 ('In the cases which have been supposedly settled amicably, it appears that the Commission has sought to 'resolve' the cases by dealing only with state officials, not the alleged victims or their representatives...It is not sufficient if a state decides to provide a particular relief without the consent of an alleged victim or his or her representatives.')

<sup>175</sup> *Ngozi Njoku v Egypt* (n 9 above) and *Modise v Botswana* (n 19 above) respectively.



The one commendable effort made by the African Commission was giving its commissioners the mandate to facilitate negotiations between the parties.<sup>176</sup> The efforts made by Commissioners Umozurike, Dankwa and Rezag-Bara are really commendable. From the foregoing analysis it is clear that the African Commission must develop more comprehensive rules of procedure and rigorous standards for the application of the friendly settlement procedure. The rules of procedure will be useful in the effective application of the friendly settlement procedure. Most legal instruments adopted at the national, regional and international level are living documents amenable to amendments to suit prevailing conditions. Twenty-five years after the OAU adopted the ACHPR the African regional system continues to make do with a document fraught with deficient procedural and normative provisions.<sup>177</sup> The European system is in the process of coming up with protocol number 15 to further modify the European Convention to make it more effective. One of the objectives of protocol number 14 to the European Convention was to make the friendly settlement procedure more effective to reduce the backlog of cases being handled by the European Court.<sup>178</sup> There is no doubt that The African system needs reform to make it more effective and political will is required to make this possible.<sup>179</sup> The advent of the African Human Rights Court is significant in the possible development of jurisprudence on the application of friendly settlement and other procedures. The African Human Rights Court itself will be using friendly settlement and it is therefore critical that it too develops its rules of procedure.

#### **4.3 The practice and jurisprudence of the Inter-American regional system**

The practice and jurisprudence of the Inter-American Commission and Court on the use of the friendly settlement procedure has largely been influenced by the history and state of human rights in the region. The Inter-American Commission was established 19 years

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<sup>176</sup> In the *Modise v Botswana* and *ADDHL v Djibouti* cases.

<sup>177</sup> Compendium of key human rights instruments of the African Union (2005) 20 ('Also sometimes called the 'Banjul Charter', the African Charter was adopted by OAU in Nairobi, Kenya in June 1981.')

<sup>178</sup> Caflich (n 67 above)

<sup>179</sup> C Heyns 'The African regional human rights system: In need of reform?' (2001) 2 *African Human Rights Law Journal* 173 ('The ideal option for the future would indeed be the reform of the system by means of a protocol, designed to rectify these and other defects in a systematic and comprehensive manner.');

The rules of procedure of the Inter-American Commission have been amended at the 116<sup>th</sup> and 118<sup>th</sup> sessions in 2002 and 2003 respectively. See Basic documents pertaining to human rights in the Inter-American system (2004) 141.

before the entry into force of the American Convention.<sup>180</sup> Although the Inter-American Commission had a mandate in terms of its amended 1966 statute to examine communications submitted to it the friendly settlement procedure was not provided for.<sup>181</sup> The American Convention strengthened the system by widening the mandate of the Inter-American Commission and creating a court. As with anything new that is introduced into a system used to operating in a certain way the Inter-American Commission was reluctant to use the friendly settlement procedure in resolving the kind of human rights violations perpetrated in the Americas.<sup>182</sup> It is no surprise therefore that the Inter-American Commission decided not to apply the friendly settlement procedure in the Honduran Disappearance cases which became subject to preliminary objections by the government of Honduras before the Inter-American Court.<sup>183</sup> After the promulgation of the American Declaration 'state parties, petitioners and the Court came to expect and demand technical competence, formal procedures and explicit deadlines.'<sup>184</sup> In its ruling on the preliminary objections made the Inter-American Court held that:

Taken literally, the wording of Article 48(1) of the Convention...would seem to establish a compulsory procedure. Nevertheless, the Court believes that, if the phrase is interpreted within the context of the Convention, it is clear that the Commission should attempt such friendly settlement only when the circumstances of the controversy make that option suitable or necessary, at the Commission's sole discretion.<sup>185</sup>

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<sup>180</sup> Shaw (n 37 above) 354-355 ( The American Convention, which came into force in 1978, contains a range of rights to be protected by states parties...The Inter-American Commission on Human Rights was created in 1959 and its first statute was approved by the OAS Council in 1960.)

<sup>181</sup> See Resolution of the Second Special Inter-American Conference, partly reprinted in Basic documents pertaining to human rights in the Inter- American system (n 31 above)

<sup>182</sup> C Cerna 'Commission Organisation and Petitions' in Harris D and Livingstone S (n 119 above) 102 ('The reason for this was that the Convention procedure revolves around the central notion that human rights violations can be solved by means of a friendly settlement, whereas the Commission had historically been used to documenting violations of a kind which it considered did not lend themselves to a friendly solution.'). See also Harris 'Regional Protection of Human Rights: The Inter-American Achievement' (n above) 3 ('Another difference in practice is the less frequent use in the Inter-American system of the friendly settlement procedure, which results partly from the fact that gross human rights violations do not lend themselves easily to mediation or conciliation.')

<sup>183</sup> *Velasquez Rodriguez* case, Preliminary Objections, judgment of 26 June 1987; *Fairen Garbi and Solis Corrales* case, Preliminary Objections, judgment of 26 June 1987; *Godínez Cruz* case, Preliminary Objections, judgment of 26 June 1987.

<sup>184</sup> Pasqualucchi (n 11 above) 135 quoting Farer Tom 'The rise of the Inter-American Human Rights Regime: No longer a Unicorn, Not yet an ox,' in The Inter American System of Human Rights.

<sup>185</sup> T Burgenthal and D Shelton (n 14 above)124

In commenting on the meaning of the provisions of article 45(2) of the Inter-American Commission's regulations the Court said:

The foregoing means that the Commission enjoys discretionary, but by no means arbitrary, powers to decide in each case whether the friendly settlement procedure would be a suitable or appropriate way of resolving the dispute while promoting respect for human rights.<sup>186</sup>

The Court further stated in the *Velasquez Rodriguez* preliminary objections case that:

Irrespective of whether the positions and aspirations of the parties and the degree of the government's cooperation with the Commission have been determined, when the forced disappearance of a person at the hands of a State's authorities is reported and that State denies that such acts have taken place, it is very difficult to reach a friendly settlement that will reflect respect for the rights to life, humane treatment and to personal liberty.<sup>187</sup>

This judgment seemed to give the Inter-American Commission the discretion to decide in which case it will attempt to reach a friendly settlement. This author agrees with Cerna that there is no provision in the American Convention 'to suggest that the Commission may determine which cases are susceptible to settlement and which are not.'<sup>188</sup> The Inter-American Court had to deal with the same issue in the *Caballero Delgado and Santana* case.<sup>189</sup> Whilst acknowledging that the Inter-American Commission had some discretion in applying the friendly settlement procedure, the Inter-American Court reiterated that it did not have arbitrary powers. It further stated that:

Only in exceptional circumstances and, of course, for substantive reasons may the Commission omit the friendly settlement procedure because the protection of the rights of victims or of their next of kin is at stake. To state, as the Commission does, that this procedure was not attempted simply because of the 'nature' of the case does not appear to be sufficiently well-founded.<sup>190</sup>

After this judgment it is now the practice of the Inter-American Commission to ask if the parties would consider pursuing friendly settlement to resolve the dispute and if either

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<sup>186</sup> Buegenthal and Shelton (n 14 above)

<sup>187</sup> *Velasquez Rodriguez*, para46.

<sup>188</sup> Cerna (n 182 above ) 102 ('...the Commission should not place itself in a position...to exclude certain cases because of the nature of violations involved, since the Convention itself establishes no such hierarchy.')

<sup>189</sup> *Caballero Delgado and Santana v Colombia*, Preliminary Objections, Judgment of 21 January 1994. Series C No 17.

<sup>190</sup> *Caballero Delgado and Santana v Colombia* (n 41 above) Para 27

one or both of the parties reject the proposal the procedure will not be attempted.<sup>191</sup> The power to decide whether the friendly settlement procedure will be applied and continued now lies in the hands of the parties to the dispute. Thus the Inter-American Commission in practice is guided by the jurisprudence of the Inter-American Court, the provisions of the American Convention and its rules of procedure. When one reads the friendly settlement reports one is impressed by the meticulous detail and fidelity to the American Convention demonstrated by the Inter-American Commission. The African Commission could emulate the practice of the Inter-American Commission in this regard especially after amendments to its rules of procedure and the ACHPR. Statistics reveal minimal application of the friendly settlement procedure compared to the European Court's statistics. The following table shows the decisions taken by the Inter-American Commission on admissibility and cases decided on the merits as well as by friendly settlement from 1996 to 2005.<sup>192</sup>

Year	Inadmissible cases	Admissible cases	Friendly settlements	Merits
1996	6	8	1	16
1997	5	13	1	23
1998	10	35	2	25
1999	5	26	4	30
2000	8	36	13	22
2001	9	29	8	4
2002	6	38	4	11
2003	10	38	11	6
2004	11	45	3	4
2005	18	53	8	7

<sup>191</sup> Cerna (n 182 above) 102

<sup>192</sup> available at <<http://www.cidh.oas.org/annual.eng.htm>> (accessed 11 October 2006)

The Inter-American Commission is not doing badly regarding friendly settlements when compared to the African Commission's jurisprudence as the latter has applied the procedure in less than 10 cases from 1994 to 2005.<sup>193</sup> Harris's suggestion that in practice the Inter-American Commission makes less frequent use of the friendly procedure than the European Court because of the gross human rights violations in the Americas is plausible.<sup>194</sup> The following examination of the jurisprudence of the inter-American Commission will indeed show that there have been gross human rights violations in the Americas, but there has always been an attempt to utilise the friendly settlement procedure. From 1996 to 2000 there was a steady increase of cases resolved amicably before declining until 2003 when there was another rise. It is clear that the Inter-American Commission was also reluctant to use the friendly settlement procedure in the 1990s. It is not necessarily true, however, to suggest that in all cases of gross human rights violations the friendly settlement procedure is always unsuitable.

In the case of *Farida Herrera Jaime and others v Colombia*, the communication alleged violations of the rights to life, humane treatment and access to justice.<sup>195</sup> In a cruel twist of fate two attorneys, Faride and Oscar, were attacked and killed by grenades and rifle fire by a counter insurgency patrol made up of regular members of the national police as well as the elite corps of the national police who were hiding in ambush. The three other people in the vehicle sustained injuries. The reason for the attack was apparently the existence of information according to which members of a guerrilla group had been travelling in the same area in a vehicle of the same make but different colour. The police officers tried to manipulate evidence and cover up the case which was eventually tried by military criminal tribunal. The accused were found not guilty despite evidence to the contrary. After processing the case the Inter-American Commission made itself available to the parties to reach a friendly settlement. The parties presented the terms of the friendly settlement agreement to the Inter-American Commission and signed it on 27 May 1998.

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<sup>193</sup> African Human Rights Law Reports (2000) Subject index 22

<sup>194</sup> Harris (n 119 above) 3

<sup>195</sup> *Faride Herrera Jaime, Oscar Ivan Andrade Salcedo, Astrid Leonor Alvarez Jaime, Gloria Beatriz Alvarez Jaime, Juan Felipe Rúa Alvarez v Colombia* Report 46/99 Case no 11.531, available at <<http://www.cidh.oas.org/annualrep/98eng/friendly/Colombia%2011531.htm>>(accessed 11 October 2006)

The efforts to bring about the settlement were led by the 'Working Committee for the search of a friendly settlement in the cases of *Roison Mora and Faride Herrera et al.*' This working Committee was made up of government representatives, a commission of jurists and a collection of lawyers representing the victims. In terms of the friendly settlement agreement the government undertook to hold a public act of reparation in the presence of the Colombian President, the victims and their relatives and representatives. They would also agree on the appropriate mechanism of remembering the deceased victims. The government also undertook to separate from service state agents involved in grave human rights violations and ensure that the alleged perpetrators were retired, investigated, judged and sanctioned. The parties were ordered to report on progress in the implementation of the agreement at all regular sessions of the Inter-American Commission. The detailed terms of the agreement were outlined. There is also a statement that the agreement shows compliance with human rights provisions in the American Declaration and acknowledgment of the efforts made to resolve the dispute amicably.

This case is evidence that friendly settlements have been reached even in cases of gross human rights violations. A lot also depends on the attitude of the respondent state and the parties to be involved in the negotiations if the friendly settlement procedure is to be invoked successfully. The Inter-American Commission can appoint expert working groups to assist in the conciliation and mediation process. The terms of the friendly settlement should always have to be approved by the Inter-American Commission to ensure compliance with human rights provisions. It is also clear that the decision to pursue friendly settlement is not the prerogative of the Inter-American Commission.

The Inter-American Commission closely monitored and facilitated the negotiations in the case between *Jose Alberto Guadarrama Garcia and the United Mexican States*.<sup>196</sup> This was a case involving the forced disappearance of Jose Garcia in which the petitioners alleged violation of the rights to life, humane treatment, personal liberty, fair trial, privacy and judicial protection. The victim was abducted by four men in the presence of his mother who managed to identify one of the police officers responsible for her son's disappearance. In the friendly settlement procedure, the Inter-American Commission

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<sup>196</sup> *Jose Alberto Guadarrama Garcia v Mexico*, Petition 11.807, Report No 69/03, available at <<http://www.cidh.oas.org/annualrep/2000eng/Mexico.11808.htm>> (accessed 11 October 2006)

helped identify experts to carry out forensic investigations, hosted several meetings with federal government, the local state and the victim's representatives as well as family members and closely monitored the full implementation of the agreement. The state publicly acknowledged responsibility in the press, paid compensation to the family's victim in the sum of \$1,083,957-00 (one million and eighty-three thousand nine hundred and fifty seven Mexican pesos.) and arrested and prosecuted the accused. The Inter-American Commission applauded the efforts of all the parties in reaching this friendly settlement, in particular the 'excellent' attitude of the local state of Morelos.

This case underlines the importance of the active participation of the conciliatory body, the role of non-governmental organisations in representing victims of human rights violations and the necessity of the government's political will and co-operation in achieving friendly settlement of human rights disputes. The Centre for Justice and International Law (CEJIL) and Christian Action for the abolition of torture (ACAT) played an important role in advocating the interests of the victim and the cause of justice. The office of the Attorney-General, National Human Rights Commission and the Foreign Affairs as well as Interior Ministries also actively participated in the negotiations.

In an almost similar case of *Valentino Carrillo Saldana v Mexico*, the State paid \$102,661-00 to the victim's widow as compensation, offered scholarships to his children until they reach the legal age of majority and would issue a public statement.<sup>197</sup> The principal offender, a cavalry captain in the army was convicted and sentenced to 20 years in prison although 5 other army officers were acquitted. The case involved the extrajudicial killing of Mr Saldana by the military. The Inter-American Commission undertook to monitor the full implementation of the friendly settlement and would certify delivery of the benefits to the victim's family.

The Republic of Ecuador was a party to 7 of the 8 friendly settlement cases brokered by the Inter-American Commission in its 2001 report. In one of these cases, the Comision Ecumerica Deprechos Humanos (CEDHU) filed a communication in which it alleged the violation of the rights to humane treatment, personal liberty, fair trial, private property

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<sup>197</sup> *Valentino Carrillo Saldana v Mexico*, Petition 107/00, Report No 11.808, available at <<http://www.cidh.org.annualrep/2000eng/Chapter III/Friendly/Mexico11.808.htm>> (accessed 11 October 2002)

and judicial protection to the detriment of four Colombian nationals.<sup>198</sup> The four were suspected of the crimes of robbery, attempted kidnapping and homicide. They were held incommunicado by members of the National Police for 13 days during which time their money was expropriated and they were tortured. In the friendly settlement agreement all four were each awarded a one-time compensatory payment of US\$10000(ten thousand United States dollars) to be paid from the national budget covering consequential damages, loss of income and moral damages. The state further pledged to bring civil and criminal proceedings and pursue administrative sanctions against those persons who participated in the violations.

In a concluding paragraph of the friendly settlement report the Inter-American Commission reiterated the importance of the procedure by stating that:

The IACHR verifies that the friendly settlement provisions of the American Convention make it possible to conclude individual cases in a non-contentious manner, and has proved in cases regarding several countries, to be an important means of resolving alleged human rights violations that can be used by both parties.<sup>199</sup>

The Peruvian state unjustly removed Dr Pablo Ignacio Livia Robles as Principal Provincial Prosecutor on 24 April 1992 after 8 years in office. He challenged the dismissal, but the Constitutional Tribunal ruled his case inadmissible as he had been dismissed through an executive Decree Law No 25446. Dr Robles filed a petition with the Inter-American Commission alleging violation of the rights to humane treatment, to have one's honour and dignity recognised equality before the law, fair trial and judicial protection.<sup>200</sup>

The Peruvian State acknowledged its responsibility for violation of the rights alluded to. The acknowledgement was explicitly stated in a joint press release signed by the Peruvian state and the Inter-American Commission. The state undertook to pay the

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<sup>198</sup> *Rodrigo Elicio Munoz Arcos, Lis Artemio Munoz Arcos, Jose Morales Rivera, Segundo Morales Molanos v Ecuador*, Petition 11.441, Report No.104/01, available at <<http://www.cidh.org.annualrep/2001eng/Ecuador11.441.htm> > (accessed 11 October 2006)

<sup>199</sup> Friendly settlement report no 104/01 against Ecuador (n 50 above) Para 11.

<sup>200</sup> *Pablo Ignacio Livia Robles v Peru*, Petition 12.035, Report No 75/02, available at <<http://www.cidh.org.annualrep/2002eng/Peru12.035.htm>> (accessed 11 October 2006)



victim US\$20000(twenty thousand U.S. dollars) as compensation for material and moral damages and agreed to restore him to his post as Lima's Principal Provincial Prosecutor. The Inter-American Commission stated that the state's consent to pursue the friendly settlement 'avenue was evidence of its good faith to honour the Convention's purposes and objectives, based on the principle of *pacta sunt servanda*.'<sup>201</sup>

The Inter-American Commission successfully facilitated a friendly settlement agreement in a very difficult case which took almost a decade to finalise.<sup>202</sup> This was a case involving the forced displacement of the indigenous people of Los Cimientos in 1981 by the Guatemalan army during an armed conflict. The army displaced 672 families who fled after they were threatened and two of their members were killed. They left behind their homes, livestock and crops which were either destroyed or stolen. About 280 families returned but they were evicted once again. The Human Rights Legal Action Centre and the Runujel Junam Council of ethnic Communities filed a communication on their behalf alleging violations of the rights of assembly, freedom of association, to property, equal protection and judicial protection.

The friendly settlement negotiations were initiated by the parties and the Inter-American Commission organised several working meetings during which negotiations were pursued and feedback on progress given. The Rapporteur for Guatemala was also actively involved. Eventually the government purchased two estates to resettle the 280 families who had returned and further undertook to compensate the other families. The friendly settlement agreement was ratified by the Inter-American Commission as being in accordance with human rights provisions of the American Convention.

However in the case of *Awes Tingni v Nicaragua* the Inter-American Commission had to file a complaint against Nicaragua before the Inter-American Court in June 1998.<sup>203</sup> When the communication was filed with the Inter-American Commission in 1995 negotiations for the demarcation and titling of land belonging to the indigenous people of

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<sup>201</sup> Friendly settlement report no 75/02 against Peru (n 520 above) Para 14.

<sup>202</sup> *Community of San Vicente Los Cimientos v Guatemala*, Petition 11.197, Report No 68/03, available at <<http://www.cidh.org.annualrep/2003eng/Guatemala11.197.htm>> (accessed 11 October 2006)

<sup>203</sup> SJ Anaya and C Grossman 'The case of *Awes Tingni v Nicaragua*: A new step in International law of indigenous peoples' (2002) 19 *Arizona Journal of International and Comparative Law* 7.

Awás Tingni had started. Whilst this was going on the Nicaraguan government was formalising an agreement to grant a second logging concession to a Korean-owned company. Most of the area sought by the Korean company was part of the Awás Tingni Community's traditional land. The government was negotiating in bad faith. Although the second concession was eventually cancelled the Inter-American Commission was unhappy with the Nicaraguan government's failure to demarcate and title Awás Tingni traditional lands.<sup>204</sup> The Inter-American Court held that the Government of Nicaragua had violated the property rights of the Awás Tingni community.

The two cases on indigenous peoples' rights demonstrate that it is not necessarily the nature of the rights violated which determines the success or failure of the friendly settlement procedure. The attitude of both parties to the negotiations and whether or not the government has some vested financial interests will greatly influence the process. This is one of the reasons why it is the Inter-American Commission's practice to place itself at the disposal of the parties with a view to securing a friendly settlement even in cases of gross human rights violations.

One such case involved alleged violations of the rights to life, liberty and personal security, fair trial, judicial protection and protection from arbitrary arrest, slavery and servitude.<sup>205</sup> The communication was filed by Human Rights Watch and CEJIL on behalf of the victim. José Pereira was seriously injured and another rural worker was killed when both attempted to escape from the 'Espírito Santo' Estate where they were being enslaved and in bondage with 60 others. In the framework of an on-site visit to Brazil the Inter-American Commission received testimonies on the situation of conditions analogous to slavery in general and this case in particular. The conclusion was that Brazil had violated human rights contained in the American Convention and certain recommendations were made. The Inter-American Commission then initiated friendly settlement proceedings during which both parties provided additional information at working meetings and hearings. The parties formally presented a signed friendly settlement agreement at the 118<sup>th</sup> session of the Inter-American Commission.

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<sup>204</sup> Anaya and Grossman (n 203 above) 7

<sup>205</sup> *Jose Pereira v Brazil*, Petition 11.289, Report No 93/03, available at <<http://www.cidh.org.annualrep/2003eng/Brazil11.289.htm>> (accessed 11 October 2006)

In the agreement the state recognised international responsibility and made commitments to the trial and punishment of the persons responsible, pecuniary measures of reparation, preventive measures, legislative changes and measures to monitor and punish slave labour. Jose Pereira was paid R\$52000 (fifty-two thousand reais) as compensation. The state also undertook to submit annual reports to the Inter-American Commission on progress made in the implementation of its commitments.

In this case two issues are worth mentioning. The Inter-American Commission may carry out onsite investigations and make recommendations to the state before initiating friendly settlement proceedings. The parties have the opportunity to negotiate, make submissions and present their formal friendly settlement agreements at the conciliatory body's regular sessions.

It is also the practice of the Inter-American Commission to order precautionary measures whilst friendly settlement negotiations are in progress as a protection mechanism to prevent irreparable harm before a final decision is made.<sup>206</sup> This was another case of the displacement of indigenous people for developmental projects to be carried out on their ancestral lands. The government of Chile granted a permanent electrical concession to power giant ENDESA Company to construct a hydroelectric plant in Ralco, the area where the petitioners lived. The Inter-American Commission ordered precautionary measures for the company to desist from flooding the lands as negotiations were proceeding. The Chilean government finally signed a comprehensive friendly settlement agreement with its indigenous people covering compensation, ratification of ILO Convention 169, ensuring their participation in development projects and constitutional recognition of their existence in Chile.<sup>207</sup>

The Inter-American Commission has also initiated negotiations towards friendly settlement of a dispute during a working visit to the respondent state.<sup>208</sup> The

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<sup>206</sup> See the case of *Mercedes Julia Huenteao Berouza and others v Chile*, Petition 4617/02, Report No 30/04, available at < <http://www.cidh.org.annualrep/2004eng/Chile4617.02.htm> >(accessed 11 October 2006)

<sup>207</sup> See 'Final Friendly Settlement Agreement between the state of Chile and the petitioning Mapuche Pehuenche Families of the Upper Bio Bio (n above) para 35 of the report.

<sup>208</sup> *Sergio Schiavanni and Maria Teresa Schnack v Argentina*, Petition 12.080, Report No 102/05, available at < <http://www.cidh.org.annualrep/2005eng/Argentina12.080.htm> >(accessed 11 October 2006)

communication was lodged by the Comision de Familiares de Victimas Indefensas de la Violencia Social e Institucional de la Republica de Argentina-COFAVI ('Committee of Relatives of Defenceless Victims of Social and Institutional Violence of the Republic of Argentina'), el Centro de Estudio Legales y Sociales-CELS ('Centre for Legal and Social Studies'), CEJIL and Human Rights Watch in February 1998. Sergio Sciavanini was allegedly killed during a clash between members of the Buenos Aires Provincial Police and a gang of thieves who had taken a number of people hostage. The police allegedly shot at him as he attempted to escape from the patisserie. The petitioners claimed that the police used excessive force and that their response to the shot fired by the thieves was disproportionate. They alleged that the state was responsible for violating the rights to life, personal integrity, due process guarantees and judicial protection. The police officers who participated in the shootout were acquitted for lack of evidence even though their conduct was considered excessive, wrong and illegitimate.

The friendly settlement process was initiated by the Inter-American Commission on its working visit to Argentina. The process included exchange of written communications, proposals between the parties, negotiations in Argentina and four working meetings between the parties at the Inter-American Commission headquarters. The state accepted responsibility of the police officers role in the death of Sergio Schiavanni and agreed to set up an ad hoc tribunal to determine the quantum of economic reparations to the victim's family. Argentina also undertook to set up a technical team to make legislative reforms to its criminal procedure laws.

In most of the cases reviewed the Inter-American Commission was actively involved in the friendly settlement processes between the parties to the dispute and upon ratification of the agreement, it always ensured that the terms agreed upon were in conformity with human rights provisions in the American Convention and Declaration. The inter-American Commission would also follow the provisions on friendly settlement in the American Convention and its rules of procedure. Another important feature of the practice of the Inter-American Commission is that during negotiations it would supervise most of the proceedings and both parties would always be present. Therefore it is always easy for the Inter-American Commission to ascertain the consent of the parties to continue with negotiations and accept the final friendly settlement agreement. The procedure has therefore been effective in resolving human rights disputes.

#### 4.4 The practice and jurisprudence of the European Court of Human Rights

In practice, when the European Court writes to the parties informing them that the court is at their disposal to secure a friendly settlement, it will enclose together with that invitation the admissibility decision.<sup>209</sup> Prior to the coming of the permanent European Court, the European Commission had the discretion to decide on the procedure to be followed regarding friendly settlement.<sup>210</sup> The European Commission also had the power to give the parties a provisional opinion on the merits. The provisional opinion would serve the purpose of motivating the parties to reach a friendly settlement.<sup>211</sup> It would depend on the circumstances of each individual case whether the European Commission took an active or passive role in the procedure. Generally, in inter-state applications where the parties are on equal terms the European Commission took a more passive role. It would be more actively involved in overseeing the negotiations and scrutinising the friendly settlement agreement reached in individual applications to assess compatibility with the European Convention and ensure that justice is done.<sup>212</sup>

The European Court has not continued the practice of giving provisional opinions to stimulate negotiations. Leach states that 'the Court's role in the friendly settlement procedure is often little more than a post box.'<sup>213</sup> In terms of its rules 'once an application has been declared admissible, the Registrar, acting on the instructions of the Chamber..., shall enter into contact with the parties with a view to securing friendly settlement.'<sup>214</sup> Once the Registry informs the Chamber that a friendly settlement has been reached, the latter shall, after verifying that the settlement has been reached on

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<sup>209</sup> Leach (n 69 above) 71

<sup>210</sup> Rule 53 of the European Commission's rules of procedure.

<sup>211</sup> P Van Dijk and Van Hoof et al *Theory and practice of the European Convention on human rights* (1998) 180

<sup>212</sup> Van Dijk and Van Hoof et al as above 181

<sup>213</sup> Leach (n 69 above) 72

<sup>214</sup> Rule 62(1) of Rules of Court (as amended by the court on 17 June and 8 July 2002)

the basis of respect for human rights as provided in the European Convention and its protocols, strike the case off its roll.<sup>215</sup>

In practice when one of the parties comes up with proposals they will be posted to the other party and if there are no proposals the European Court does not prod the parties to settle.<sup>216</sup> Thus it is rare for the European Court to become actively involved in facilitating friendly settlement. This is a weakness in the practice of the European regional system. Article 15 of Protocol 14 has tried to address this weakness by calling on the European Court to be at the disposal of the parties at any stage of the proceedings and to take note of the settlement. The European Court's rules of procedure also grant the Court wide discretion to 'take any steps that appear appropriate to facilitate such a settlement.' Leach comments that 'the Court's role in agreed friendly settlements is not merely to 'rubber-stamp' the decision', but will continue considering the case if the agreement is not in accordance with human rights provisions.<sup>217</sup>

The practice of the European Court may lead one to believe that very few cases are transacted by way of friendly settlement. This is not the position. In fact there are more friendly settlements in the European regional system than in the Inter-American and African regional systems put together. The probable explanation for this is the nature of cases brought before the European court and the confidence that European nationals have in the Court which has led to a flood of cases being filed for consideration.<sup>218</sup> This is however not to say that there are no ordinary cases before the African or Inter-American Commissions. As a more developed and much older compatriot than the two other regional systems the European system also has a large pool of lawyers in the Court's Registry who assist parties to reach friendly settlements. Approximately 1.4 % of the cases handled by the European Court are concluded by friendly settlement and the

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<sup>215</sup> Rule 62(3) of Rules of Court (n 66 above)

<sup>216</sup> Leach (n 69 above) 72

<sup>217</sup> Leach (n 69 above) 73

<sup>218</sup> Harris (n 119 above) 2 'the right to a fair trial and freedom of expression ...are the stock in trade of the European Commission and Court.' Also of the 37 friendly settlement decisions in 1999, 28 of them involve fair trial rights, available at <<http://www.echr.coe.int/NR/rdonlyres/0/SurveyofActivities1999.pdf> > (accessed 11 October 2006), and many immigration cases have also been settled amicably.

procedure has become such an important tool for reducing the backlog of cases.<sup>219</sup> Indeed the reduction of the case load before the European Court may be enhanced through the use of the friendly settlement procedure as a dispute settlement method to complement the contentious method of dispute resolution.

The following table shows the different decisions taken by the European Court of Human Rights between 1998 and 2005. In 1998 there were no cases settled by friendly settlement by the court as it started operating under its new mandate on 1 November 1998. The highest numbers of friendly settlements were made in the year 2000. In the same year there were many communications which were filed before the European Court for consideration.<sup>220</sup> There were also many communications declared admissible in 2000. This might have contributed to the large number of cases resolved through the friendly settlement procedure.

Year	Inadmissible cases	Admissible cases	Merits	Friendly Settlement
1998	3658	762	105	-
1999	3520	731	131	37
2000	6776	1086	446	230
2001	8989	739	725	151
2002	17868	578	665	151
2003	17272	753	548	128
2004	20350	830	629	68
2005	27612	1036	1040	37

1. Statistical table showing provisional figures of decisions by the European Court.<sup>221</sup>

<sup>219</sup> Caffisch (n 67 above) 411.

<sup>220</sup> Available at <<http://www.echr.coe.int/NR/ronlyres/0/SurveyofActivities2000.pdf>> (accessed 11 October 2006), about 30069 communications were filed with the European Court.

<sup>221</sup> Available at <[http://www.echr.coe.int/NR/ronlyres/0/2005\\_SURVEY\\_COURT\\_.pdf](http://www.echr.coe.int/NR/ronlyres/0/2005_SURVEY_COURT_.pdf)>(accessed on 11 October 2006)

There has been a marked decline in the number of friendly settlement cases before the European Court since 2002. With the amendments brought about by Protocol 14 it is hoped that friendly settlement cases will increase. Although most of the cases decided by conciliation methods concern fair trial rights and freedom of expression, there have also been serious cases which were settled amicably. The case of *Koksal v Netherlands* involved the alleged torture and death of the applicants' son and father in police custody.<sup>222</sup> The friendly settlement process was facilitated by the Court Registry who brought the parties together for negotiations in The Hague. The settlement terms included the payment of 140,000 Netherlands guilders as compensation and an expression of 'deepest regret' at the man's death by the government.<sup>223</sup>

The case of *Kinay and Kinay v Turkey* involved the burning of the petitioners' houses and subsequent evictions by Turkish security forces and village guards in 1994.<sup>224</sup> In the settlement agreement the government expressed regret over destruction of individual homes, property and possessions as a result of the actions of state agents. It further regretted the failure by the authorities to carry out 'effective investigations into the circumstances surrounding such events.'<sup>225</sup> The state further accepted its responsibility for the violations of the right to protection against torture, right to respect for private and family life and an effective remedy. The applicants were paid 59,000 euros each in compensation.

In the cases of *Macir v Turkey and Guler v Turkey* each of the applicants claimed that a relative had been shot and killed by the Turkish security forces in the mid-1990s.<sup>226</sup> In each of the cases the relatives were paid 70,000 euros in compensation. The government also made a statement of regret and acknowledged violation of the right to life and an effective remedy. In *Ali Erol v Turkey*, the government acknowledged the need to bring its domestic laws in conformity with freedom of expression provisions in

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<sup>222</sup> *Koksal v Netherlands* No 31725/96, 20.03.01.

<sup>223</sup> Leach (n 69 above) 72

<sup>224</sup> *Kinay and Kinay v Turkey*, No 31690/96, 26.11.02.

<sup>225</sup> Leach (n 69 above) 76

<sup>226</sup> *Macir v Turkey*, No 28516 /95, 22.4.03; *Guler v Turkey*, No 46649/99, 22.4.03.



the European Convention and undertook to amend the laws.<sup>227</sup> There was also an agreement to pay damages in compensation. The applicant had been prosecuted in the criminal courts on charges of inciting people to hatred or hostility based on race or religion.

Discrimination cases have also been resolved amicably in the European regional system. In the Grand Chamber decision of *Varey v UK*, the applicants, who were members of a gypsy community, were refused permission to station a residential caravan on land which they owned.<sup>228</sup> They complained that the measures taken against them were targeted and discriminatory. The European Commission had given a provisional opinion on the merits finding a violation of the right to respect for private and family life. The matter was amicably settled with the government paying 60,000 British pounds in compensation and 15,599 British pounds in legal costs. In *Sutherland v UK* the applicant challenged the minimum age for homosexual activities which was set at 18 for men as opposed to 16 for women.<sup>229</sup> The applicant claimed that this provision violated the right to respect for private and family life and protection from discrimination. The case was resolved on the basis that the Sexual Offences (Amendment) Act 2000 which came into force on 8 January 2001 had the effect of equalising the age of consent.<sup>230</sup>

The applicant in *Fielding v UK* alleged that the provision which granted social security benefits to widows upon death of their spouses, but not available to widowers, was discriminatory.<sup>231</sup> The friendly settlement agreement<sup>231</sup> included the enactment of the Welfare Reform and Pensions Act 1999 which made bereavement benefits available to both men and women and payment of 14,500 British pounds being the sum equivalent to what widows received. The gypsies were also not spared in Italy when they were deported to Bosnia-Herzegovina at gunpoint in 2000.<sup>232</sup> The case was settled after the

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<sup>227</sup> *Ali Erol v Turkey*, No 35076/97, 20.6.02.

<sup>228</sup> *Varey v UK* No 26662/95, 14.12.00, (2000) 30 EHRR CD39.

<sup>229</sup> *Sutherland v UK* No 25186/94, 27.3.01.

<sup>230</sup> Leach (n 69 above) 75

<sup>231</sup> *Fielding v UK*, No 36940/97, 29.1.02. See also *Matthews v UK* 40302/98, *Crossland v UK* No 361120/97, 9.11.99 'unavailability of widows' allowance to widowers.'

<sup>232</sup> *Sulejmanovic and others and Sejdovic and Sulejmanovic*

government undertook to revoke the deportation orders and allow the applicants and their families to return to Italy. The government further undertook to provide temporary shelter for the gypsy families and let their children attend school. Each of the applicants also received 7,746.90 euros and the child suffering from Down's syndrome received 45,090.10 euros for medical attention.<sup>233</sup>

There have been friendly settlements in conscientious objection cases in both the Inter-American and European Regional systems.<sup>234</sup> In both cases the applicants were members of the Jehovah's Witnesses. In the Inter-American case the applicant, an Ombudsman, alleged his right to equal protection before the law had been violated. He further argued that he was discriminated against as a Jehovah's Witness because the Bolivian Defense Service Act exempted Roman Catholics from military service to the exclusion of other faiths and Jehovah's Witnesses. The petitioner also alleged a violation of the victim's right to judicial protection as the Constitutional Court had ruled that conscientious objection cases could not be brought to courts of law. In June 2005 the Bolivian government enquired if the Ombudsman would be willing to resolve the case with a friendly settlement. In the friendly settlement agreement the government agreed to give Mr Bustos a document of completed military service which served as an exemption certificate. The government also undertook to include the right to conscientious objection to military service in a preliminary draft to amend military regulations.

In the *Stefanov v Bulgaria* case, the applicant was convicted and sentenced for refusing to serve in the Bulgarian army. He argued that the prosecution violated his right to freedom of thought, conscience and religion provided in article 9 of the European convention. In terms of the friendly settlement agreement all criminal proceedings and penalties imposed on Bulgarian citizens since 1991 for refusing military service because of their conscientious objection, but who were willing to perform alternative civilian service, were to be dismissed and quashed.<sup>235</sup> Total amnesty was to be granted in all

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<sup>233</sup> Leach (n 69 above) 76.

<sup>234</sup> *Alfredo Diaz Bustos v Bolivia* Petition 12.475, Report No 97/2005(Inter-American Commission); *Stefanov v Bulgaria* No 34382/97,5.4.00. (European Court).

<sup>235</sup> Leach (n 69 above) 74

these cases. Whilst performing the community service, the conscientious objectors had the same rights as other Bulgarians to manifest their beliefs after hours and during days off without disturbance.

Besides the extra-judicial killings, torture and violation of property rights cases in Turkey, most of the friendly settlement cases in the European regional system are ordinary human rights violations. This partly explains why between 1998 and 2005 the European Court recorded 802 friendly settlement cases as opposed to the Inter-American Commission's 53 and the African Commission's 6. Part of the reason is also the large number of communications filed with European Court.<sup>236</sup>

#### **4.5 Comparative analysis**

The three regional human rights systems exhibit some differences regarding the application of the friendly settlement procedure as a tool for the resolution of human rights disputes in a non-contentious manner. There are differences in the mediators responsible for facilitating the negotiations between the parties, the practice and procedure adopted by the oversight bodies and the jurisprudence on friendly settlements.

In the European regional system an adjudicatory human rights court is the body responsible for the resolution of individual and inter-state communications. The Court Registry is responsible for initiating and supervising negotiations for a friendly settlement. This however does not preclude even the Grand Chamber from being actively involved in the efforts to secure an amicable solution. It is also the responsibility of the Court to verify the friendly settlement and ensure compliance and compatibility with provisions of the European Convention. The European Court is also well-staffed with a pool of 250 lawyers in its Registry and 45 judges. This ensures that more cases are considered and resolved without much strain on the officers.

In the Inter-American system the court does not take part in the friendly settlement of disputes. Rather it is the Commission which places itself at the disposal of the parties

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<sup>236</sup> Between 1998 and 2005 219525 were filed with the European Court. See 2005 Court Survey (n 72 above).

with a view to reaching a friendly settlement. This is similar to the African system in which the African Commission is the body that has the mandate to facilitate the friendly settlement of disputes. However in the African System the African Court on Human and Peoples' Rights (African Court) 'may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter.'<sup>237</sup> It will be of great interest to see how the African Court will handle its caseload as many people are likely to flood this judicial body with communications in order to obtain binding decisions. The court might not have adequate time to discharge both the conciliatory and judicial mandate and may encourage the African Commission to deal with all friendly settlements. The Commissioners at both the Inter-American Commission and The African Commission are responsible for initiating, facilitating and supervising friendly settlement negotiations.

In terms of practice and procedure the European Court is less active than the Inter-American Commission in the friendly settlement of human rights disputes, yet more cases have been resolved amicably by the latter than with the former oversight body. The African Commission is the least active body in the application of the friendly settlement procedure. The major setback has been the procedural defects in the ACHPR and the lack of detail in the African Commission's rules of procedure. The Inter-American has the most comprehensive rules of procedure on friendly settlements and consequently has been able to apply them assiduously. The ruling by the Inter-American Court that the provisions of article 48(1)(a) of the American Convention are mandatory has meant that the Inter-American Commission may choose not to apply the friendly settlement procedure only in exceptional circumstances where the interests of the victim and justice will not be served and reasons must be given for adopting such a position.<sup>238</sup> It is hoped that the African Court shall guide the African Commission and hand down useful practice directions on this and other legal issues.

The Inter-American Commission has also been more active in verifying whether the applicant has agreed to the friendly settlement terms and in ensuring that the settlement is in accordance with the relevant human rights instruments. From the examination of

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<sup>237</sup> Art 9 of the Protocol on the African Court.

<sup>238</sup> *Caballero Delgado and Santana v Colombia* (n 41 above)

the African Commission's practice on friendly settlements this cautious and diligent approach is distinctly lacking.<sup>239</sup>

The jurisprudence of both the African Commission and the Inter-American Commission reflects the gross human rights violations perpetrated in the respective regions. Cases of forced disappearance, extra-judicial killings, torture, and slavery have been handled by the two regional human rights bodies. The Inter-American Commission and the European Court friendly settlement reports contain details of the terms of the friendly settlement agreements entered into by the parties. This is not the position in the friendly settlement jurisprudence of the African Commission where the terms of the agreement are not detailed enough and at times are not there at all. Interestingly the cases in the European and Inter-American systems are almost always settled with the payment of compensation to the victims and their families where appropriate. In the African regional system the remedy of compensation has been sadly neglected. One would have expected that compensation would have been paid in the friendly settlement of at least three cases before the African Commission.<sup>240</sup>

#### **4.6 Conclusion**

The Inter-American Commission's practice and procedure on friendly settlements appears to be the best if rid of delays. It is comprehensive, consistent and effective. The European System may have thrown away the baby with the dirty water when it abolished the European Commission. They ought to have retained the European Commission in setting up the court. The European Commission would have been more actively involved in friendly settlement negotiations and complement the work of the European Court today. As stated by Caflich, in the long run a return to the 'two-tiered system of the Commission and the Court' may prove unavoidable.<sup>241</sup> The African Commission needs to do more to improve its practice and procedure in friendly settlements to make it effective. So far the results have been disappointing.

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<sup>239</sup> In *Association pour la Defense des Droits de l'Homme et des Libertes v Djibouti* The African Commission was however quite diligent.

<sup>240</sup> In the cases of *Modise v Botswana*; *Kalenga v Zambia* and *Association pour la Defense des Droits de l'Homme et des Libertes v Djibouti*.

<sup>241</sup> Caflich (n 67 above) 413-414 ' even before the coming into effect of the Protocol (No 14) an outside 'group of wise persons' has been mandated to examine other modifications.'

## CHAPTER FIVE

### **Assessing the effectiveness and propriety of friendly settlements**

#### **5.1 Introduction**

The peaceful resolution of disputes is certainly an important mechanism at the regional and international level. The methods applied at the international level may differ slightly from those used at regional level but the principle of settling disputes in a non-contentious and conciliatory manner remains the common denominator. The extensive use of good offices, negotiations, conciliation, mediation and arbitration is clear testimony of the significance of the settlement of disputes through peaceful means. The issue to be settled is whether the friendly settlement procedure as a method of resolving human rights disputes is effective and appropriate.

#### **5.2 Conclusions**

In the Inter-American and European regional systems the friendly settlement procedure has been an effective tool in resolving human rights disputes. There are a number of reasons why the procedure has been working well and producing the desired results under these regimes. First of all, both systems have more experience in the field of human rights and are well-funded.<sup>242</sup> It is therefore an easy task for the Inter-American Commission to conduct working visits to countries where human rights violations have been or are being committed and to hold several meetings with the parties to a dispute with a view to reaching a friendly settlement. The European Court has the adequate financial resources to employ a vast number of lawyers and judges to consider the large number of communications filed through its registry office.

Secondly the human rights instruments in the Inter-American and European regional systems have comprehensive friendly settlement provisions which may be applied in

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<sup>242</sup> C Heyns et al (n 10 above) 84 The European Court's annual budget by 2003 formed 17,6% of the budget of the Council of Europe at 29,8 million euros. The Inter-American Court and Commission's combined budget of US\$3.5 million formed 5.6% of the annual budget of the Organisation of American States of US\$78 million. The annual budget of the African Commission from the AU by 2003 stood at US\$760,000.

inter-state and individual communications. The rules of procedure are also detailed and precise. As a result most of the friendly settlement agreements are in accordance with human rights provisions in the regional human rights instruments. The terms of the friendly settlements often include pecuniary compensation, non-pecuniary reparations, amendment of legislation, introduction of new laws and an acceptance of international responsibility for the human rights violations committed. In that regard the friendly settlement procedure has been effective in the Inter-American and European regional systems.

It is the view of the author that the friendly settlement procedure may properly be applied in the resolution of human rights disputes. It is however critical that the supervisory body closely monitors the negotiations in order to equalise the power imbalance between the individual complainant and a state party. It is also a must that the supervisory body verifies that the complainant has consented to the settlement terms and lastly that the agreement is compatible with human rights provisions. The various non-governmental organisations that take up cases of human rights violations will also have to be actively involved in the negotiations. They should be competent enough to offer sound counsel and ensure that the vital interests of the people they represent are protected and advanced. Indeed credible organisations such as CEJIL, Human Rights Watch, Amnesty International, and Interights have a key role to play in protecting and advancing the cause of the downtrodden especially in friendly settlement proceedings. The lawyers at the European Court Registry also have an onerous task of facilitating negotiations and ensure that there is justice and fairness in the whole process.

### **5.3 Recommendations**

The African Commission has a lot to learn from the other regional systems and from its traditional methods of dispute settlement.<sup>243</sup> The African regional human rights system has great potential especially with the establishment of the African Human Rights Court. There is need for more financial and human resources for the monitoring of human rights protection to be effective. The ACHPR has to be amended and the rules of procedure for the African Commission and the Court have to be more comprehensive in relation to the

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<sup>243</sup> Murray (n 58 above) 200 'Rather than the amicable approach being just an African one, aspects of amicable and judicial methods are evident in all regional and international mechanisms including those deemed more "effective".'

friendly settlement procedure. The African Commission should assume a more active role in facilitating and encouraging negotiations between parties. There is need for an effective verification and ratification process to ensure that the rights of individual complainants are protected. The African Commission's jurisprudence on friendly settlements must increase and the reports should be more detailed to include remedies such as compensation. With these changes the amicable solution of disputes in the African regional system could just be as effective and appropriate as it is in the Inter-American and European regional systems.

The amendment of the ACHPR would be the most definitive step to take to make it more effective. The amendment should touch on both the procedural and substantive provisions. The African Union has the responsibility of appointing a team of African jurists to come up with a protocol amending the ACHPR. It will be critical for the team of experts to be professional and cautious so as not to come up with proposals that may negatively affect the efficacy of the ACHPR as it stands today. In amending the provision on friendly settlement the team of experts may derive some inspiration from similar provisions in the European Convention and Inter-American Convention as well as their rules of procedure.

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