

Implementing International Social Protection Initiatives in Africa – The Role of Global and Regional Soft Law

Markus Kaltenborn*

Abstract

The issue of social protection has undergone something of a renaissance in the development policy debate in recent years and has lately become a particular focus of interest for several international organizations, primarily for the International Labour Organization (ILO) with its Social Protection Floor Initiative. But promoting social protection systems as a tool for long-term poverty eradication is now also policy priority for the African Union. This article presents several soft law documents which have been adopted both at the global and the regional level which are relevant in this context.

A. International hard law and soft law obligations with regard to social protection

Governments are guided by different motives when they build or expand their social protection systems. One of these motives – though often not the decisive one – is the fact that international law requires such social policy decisions. First and foremost, one should take into account the obligations under international law which the states have entered into by ratifying the relevant ILO conventions or human rights treaties at the global and regional level. Although ILO conventions have so far only been accepted by a few African governments as a binding standard for the design of their national systems of social welfare¹, nearly all members of the African Union (AU)² are parties to the main human rights document for social rights, the *International Covenant on Economic and Social and Cultural Rights* (ICESCR)³. The obligations relating to the right to social security were derived from Arti-

* The author is Professor of Public Law at the Faculty of Law and Director of the Institute of Development Research and Development Policy (IEE), Ruhr University Bochum, Germany; email: markus.kaltenborn@rub.de.

1 For an overview of the ILO standards on social security see <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang--en/index.htm> (accessed on 27.2.2017). The main ILO legal instrument on social protection – the Social Security (Minimum Standards) Convention of 1952 (ILO Convention No. 102) – has been ratified only by seven African countries (Chad, Democratic Republic of the Congo, Libya, Mauritania, Niger, Senegal and Togo).

2 The exceptions are Botswana, Comoros, Mozambique, São Tomé and Príncipe and South Sudan.

3 993 UNTS 3.

cle 9 ICESCR and specified more precisely by the General Comment No. 19.⁴ Similar requirements also include other human rights treaties which guarantee the right to social security, such as the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)⁵, the *Convention on the Rights of the Child* (CRC)⁶, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (CMW)⁷, and the *Convention on the Rights of Persons with Disabilities* (CRPD)⁸. On the regional level, the *African Charter on the Rights and Welfare of the Child*⁹ and the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* can be mentioned.¹⁰ The *African Charter on Human and Peoples' Rights* ("Banjul-Charter") itself does not explicitly guarantee the right to social security, but the African Commission on Human and Peoples' Rights has stated in its implementation guidelines of 2011, that this human right "although... not explicitly protected in the African Charter,... can be derived from a joint reading of a number of rights guaranteed under the charter including the rights to life, dignity, liberty, work, health, food, protection of the family and the right to the protection of the aged and the disabled."¹¹

But it is not only the international "hard law" that is an important source of law which must be taken into account when national social protection law and national social policies are reformed. No less important are the relevant "soft law" documents – at the global level, for example, the *Agenda 2030* as well as the *Social Protection Floors Recommendation* of the ILO, and at the regional level the *Social Policy Framework for Africa* adopted by the AU in 2008, as well as the *Agenda 2063* of the AU. Before these and a few further documents are briefly presented in the following, the question as to why a look at these soft law

4 UN Doc. E/C.12/GC/19. – Even if the interpretation which the Committee on Economic, Social and Cultural Rights makes in its General Comments is not legally non-binding, the General Comments represent the most important source for the interpretation of the Covenant and therefore are very

influential for the understanding of the contents of the individual rights; see *Ilias Bantekas / Lutz Oette*, *International Human Rights Law and Practice*, 2nd ed., Cambridge 2016, pp. 208 et seq.

5 Art. 11 para. 1e CEDAW, 1249 UNTS 13.

6 Art. 26 CRC, 1577 UNTS 3.

7 Art. 27 CMW, 2220 UNTS 3.

8 Art. 28 para. 2 CRPD, 2515 UNTS 3.

9 OAU Doc. CAB/LEG/24.9/49, 11.7.1990. Art. 20 of the African Children's Charter obliges states parties to provide material assistance to parents and other persons responsible for children, cf. *Julia Sloth-Nielsen*, *The Protection of Children's Economic, Social and Cultural Rights under the African Children's Charter*, in: Danwood Mzikenge Chirwa / Lilian Chenwi (eds.), *The Protection of Economic, Social and Cultural Rights in Africa*, Cambridge 2016, pp. 155-179 (164).

10 OAU Doc. CAB/LEG/66.6, 13.9.2000 (According to Art. 13 f States have to "establish a system of protection and social insurance for women working in the informal sector and sensitize them to adhere to it").

11 Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 24.10.2011, <http://www.achpr.org/instruments/economic-social-cultural/> (accessed on 27.2.2017), para. 81.

documents is at all worthwhile, should be addressed: Shouldn't legal scholars as well as legal practitioners have as first priority (or even exclusively) a focus on the applicable law – such as on concrete, enforceable rights and obligations contained in laws, contracts or other hard law documents?

This view is quite widespread, but it falls too short. Soft law standards are of great importance for the development of international law.¹² Its task is to help in the preparation of codifications as well as in the development of new international customary law: In light of the manifold international conflicts of interests, states often find it difficult to achieve the necessary consensus which is needed for the conclusion of new treaties. Hence, the states increasingly resort to the much more flexible soft law instruments. Before the processes of negotiation and ratification of an international treaty have been concluded, or the development of a norm of international customary law can be proved, many years have often elapsed, which may be considered a valuable time loss if there's an urgent need for new governance mechanisms. Soft law norms, which do not require any parliamentary agreement or (in the case of customary law) many years of state practice, are therefore often much better suited than formal legal sources when time is of importance in dealing with an international problem. Furthermore, soft law allows the states to agree on content that goes beyond a minimal political consensus. Soft law standards cannot establish any legally enforceable claims or prohibitions; after all, the parties involved in the norm-setting process are concerned precisely with avoiding legal obligations. But in international relations it is not just the legal bond that is important, but also the political or moral pressure that a norm can produce. As an alternative form of regulation, soft law aims at acceptance rather than coercion; its monitoring does not take place in court proceedings, but usually via required reporting and comparable "soft" control mechanisms.

There are, of course, quite a few resolutions that have been solemnly adopted at international conferences – not least in the Pan-African context – which are hardly worth the paper they are written on. However, an undifferentiated view of the international soft law should

12 See – with special focus on the legal situation in Africa – *Rachel Murray / Debra Long*, The role and use of soft law instruments in the African human rights system, in: *Stéphanie Lagoutte / Thomas Gammeltoft-Hansen / John Cerone* (eds.), *Tracing the Roles of Soft Law in Human Rights*, Oxford 2016, pp. 89-108; see also generally on soft law (or informal law-making) in international relations *Kenneth W. Abbott / Duncan Snidal*, *Hard and Soft Law in International Governance*, *International Organization* 54 (2000), pp. 421-456; *Dinah A. Shelton* (ed.), *Commitment and compliance. The role of non-binding norms in the International Legal System*. Oxford 2003; *John J. Kirton / Michael J. Trebilcock* (eds.), *Hard Choices, Soft Law. Voluntary Standards in Global Trade, Environment and Social Governance*, Farnham 2004; *Daniel Thürer* (2009) *Soft Law*, in: *Rüdiger Wolfrum* (ed.) *Max Planck Encyclopedia of Public International Law*, Oxford 2009; *Joost Pauwelyn / Ramses Wessel / Jan Wouters* (eds.), *Informal International Lawmaking*, Cambridge 2012; *Gregory Shaffer / Mark A. Pollack*, *Hard and Soft Law*, in: *Jeffrey L. Dunoff / Mark A. Pollack* (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, Cambridge 2013, pp 197-222. – Cf. for the following *Markus Kaltenborn*, *Social Rights and International Development: Global Legal Standards for the Post-2015 Development Agenda*, Heidelberg 2015, pp. 17 et seq. .

be avoided: In many policy areas, legally non-binding declarations, programs and frameworks – under certain political conditions – can achieve much more than the elaboration of detailed treaties, which are then often very hesitatingly ratified, sometimes only under reservation by the signatory states. The policy field of social protection counts as one of those areas where “soft” international governance promises more success than the treaty approach. This can be seen in the recent efforts of individual African governments to strengthen the social protection systems in their countries.¹³ Many of them explicitly refer to the global or regional initiatives and to the statements adopted in this context for their Social Protection Policies and Strategy Papers¹⁴, using these soft law documents both to provide guidance and to legitimize their political programs and legislation.

B. African soft law-approaches to build a regional framework for social protection

The first African initiatives to extend social security across the continent are more than twenty years old.¹⁵ In preparation for the *World Summit for Social Development* (Copenhagen, 1995), the African ministers responsible for human and social development had agreed on a common document – the *African Common Position on Human and Social Development in Africa*, which made it clear that “new and imaginative ways must be found to respond to such common challenges as the persistence of poverty and wide disparities in

- 13 See e.g. Miguel Niño-Zarazúa / Armando Barrientos / Samuel Hickey / David Hulme, Social Protection in Sub-Saharan Africa: Getting the Politics Right, *World Development*, Vol. 40 (2012), pp. 163-176; Victoria Monchuk, Reducing Poverty and Investing in People. The New Role of Safety Nets in Africa Washington D.C. 2014; *Social Security Administration / International Social Security Association*, Social Security Programs Throughout the World: Africa 2015, Washington D.C. 2015; *International Policy Centre for Inclusive Growth / United Nations Development Programme*, Social protection in Africa: Inventory of non-contributory programmes, Brasília / New York 2016.
- 14 See e.g. *Government of the Federal Democratic Republic of Ethiopia*, National Social Protection Policy, Addis Ababa 2014, p. 25; *Government of Ghana* (Ministry of Gender, Children and Social Protection), Ghana National Social Protection Policy, Accra 2007, pp. ii, 2; *Republic of Kenya* (Ministry of Gender, Children and Social Development), National Social Protection Policy, Nairobi 2011, pp. 1, 2, 23, 38; *Government of the Kingdom of Lesotho*, National Social Protection Strategy 2014/15 – 2018/19, Maseru 2015, p. 28; *Republic of Mozambique*, National Basic Social Security Strategy 2010-2014, Maputo 2012, para. 1.1; *Republic of Mozambique*, National Basic Social Security Strategy 2016-2024, Maputo 2016, pp. 6, 11; *Republic of Rwanda* (Ministry of Local Government), National Social Protection Strategy, Kigali 2011, p.25; *Republic of Senegal*, National Strategy for Economic and Social Development 2013–2017, Dakar 2012, p. 42; *Government of Sierra Leone*, The Agenda for Prosperity 2013-2018, Freetown 2013, p. 107; *Republic of Uganda* (Ministry of Gender, Labour and Social Development), The National Social Protection Policy, Kampala 2015, p. 9; *Republic of Zambia* (Ministry of Community Development, Mother and Child Health), National Social Protection Policy, Lusaka 2014, p. 2.
- 15 See generally Bob Deacon, Regional Social Policies in Africa: Declarations Abound, in: Bob Deacon/Maria Cristina Macovei/Luk Van Langenhove/Nicola Yeates (eds.), *World-Regional Social Policy and Global Governance*, London 2010, pp. 162-187.

the quality of life ...¹⁶. Among numerous other proposals made in the paper on poverty reduction, there is also the demand that financial resources and social services should be used in a targeted manner “to improve the conditions of the poor, marginalized and more vulnerable sections of the population”.¹⁷ In this document special emphasis is placed on the role of the family: the “African extended family system” is to be supported “to fulfill its traditional functions of social integration and security”¹⁸.

Ten years later, the term “social protection” is explicitly incorporated into one of the basic documents of the AU. According to the *Ouagadougou Declaration and Plan of Action on Employment and Poverty Alleviation*¹⁹ being adopted in 2004 at a special conference of the AU, one of the strategic objectives of the AU is the enhancement of “the coverage and effectiveness of social protection for all”²⁰. The central objectives to which the heads of state committed themselves include, among other things, the improvement of the “living condition of the aged, through better social protection services including improved pensions, health and other social security schemes”²¹. Interestingly, in this document there is a lack of reference to African family traditions and their role in the social security system.

Even the 2006 published *Livingstone Call for Action* (the final document of a conference attended by representatives from 13 African countries at the invitation of the AU and the Zambian government) does not explicitly mention the traditional protection by the family. Instead, it emphasizes the importance of cash transfers funded by the state (where necessary with international support): The provision of cash to poor people is regarded as a way “to directly reduce poverty and inequality”, and to enhance economic growth as the transfers are used for both investment and consumption. Moreover, “(t)he provision of transfers increases human capital by helping people to keep healthy educate their children, and support HIV/AIDS affected families”. It is also noteworthy that the document emphasizes the human rights foundation of social protection.

The most comprehensive regional soft law document on social policy issues and an important reference document specifically for social protection issues is the *Social Policy Framework for Africa* adopted in 2008 at a ministerial conference of the AU in Addis Ababa.²² The framework which refers to the earlier soft-law documents lists the various instruments available to African governments in the field of social security: “Measures include extending existing social insurance schemes (with subsidies for those unable to contribute); building up community based or occupation based insurance schemes on a voluntary basis,

16 UN-Doc. A/CONF.166/PC/10/Add. 1, 31.1.1994, Paragraph 4.

17 Paragraph 58.

18 Paragraph 58, see also Paragraph 66.

19 AU-Doc. EXT/ASSEMBLY/AU 3 (III), 8.-9.9.2004.

20 Paragraph 4.

21 Paragraph 8 h).

22 AU Doc. CAMSD/EXP/4(I), 27-31.10.2008, para. 2.2.3. See also *Gemma Wright/Michael Noble*, *Recent Social Policy Developments in Africa*, Global Social Policy, vol. 10(2010), pp. 111-119.

social welfare services, employment guarantee schemes and introducing and extending public financed, non-contributory cash transfers²³. Another important requirement is that "social protection should be a state obligation, with provision for it in national legislation" but also in national development plans and poverty reduction strategy processes. It is, however, rightly noted by critical voices that the human rights foundation of social security is not sufficiently taken into account in the document.²³ Other aspects that are dealt with in the *Social Policy Framework for Africa* are monitoring, evaluation and coordination of social protection programs, funding for social protection, as well as program design and implementation. The AU member states are also encouraged to take advantage of regional and South-South cooperation in social protection practice.

C. The ILO Social Protection Floor Recommendation as leading international standard for African social protection law

In 2012, the ILO adopted (almost in consensus) a document, which since then has shaped the international debates on social protection, and has also given African governments an orientation towards their social policies: the *Social Protection Floor Recommendation*²⁴. The concept of Social Protection Floors, which has been mentioned in a similar form – as a so called "minimum package" – in the *Social Policy Framework for Africa*, provides that in all countries basic social protection has to be established facilitating access to essential medical care and a minimum level of income security. However, this is only one part of the concept, since at the same time there is an obligation to continuously raise this basic guarantee of social protection to the level of the ILO conventions. Both dimensions are rightly regarded as important because the establishment of a social protection floor should not be used as an excuse for not making any additional efforts in favour of the own population. Which forms of social protection – social assistance programs, social insurance, etc. – the countries choose, is left to their own social policy strategy.

23 *Marius Olivier*, Reflections on the Draft AU Social Policy Framework for Africa – With Particular Reference to Social Protection Perspectives', paper presented at the 4th Citizens Continental Conference on the 12th AU Summit, Addis Ababa, Ethiopia, 16-17 January 2009, cited in *Wright / Noble* (note 22), p. 113.

24 Recommendation concerning National Floors of Social Protection, Recommendation 102, http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:R202 (accessed on 27.2.2017); see also *Michael Cichon / Christina Behrendt / Veronika Wodsak*, The UN Social Protection Floor Initiative: Moving forward with the Extension of Social Security, *Internationale Politik und Gesellschaft* (IPG) 2011, pp. 32-50; *Bob Deacon*, The social protection floor and global social governance: Towards policy synergy and cooperation between international organizations, *International Social Security Review*, Vol. 66, 3-4 (2013), pp. 45-67; *Krzysztof Hagemeyer / Roddy McKinnon*, The role of national social protection floors in extending social security to all, *International Social Security Review*, Vol. 66, 3-4 (2013), pp. 3-19; cf. in this context also the information provided by the *Global Coalition for Social Protection Floors* at <http://www.socialprotectionfloors.coalition.org/our-work/our-library/> (accessed on 27.1.2017).

In a sense, the basic protection provided for in the ILO Recommendation is comparable to the core obligations set out in *General Comment No. 19* on Art. 9 ICESCR as a minimum standard of social security.²⁵ Considering now that the *2030 Sustainable Development Agenda*, which was also adopted by consensus at the UN General Assembly²⁶, explicitly refers to the social protection floor concept of the ILO²⁷, it seems obvious that the obligation to provide basic social protection can be viewed as having been generally accepted by States as binding customary international law. The *Agenda 2063 of the African Union* – one of the core documents of present-day and future African regional integration – makes particularly clear that the African continent is not excluded from this general development of international social protection law, because it also supports the two-pillar approach proposed by the *Social Protection Floor Recommendation*.²⁸

D. Conference “Law for Development: Strengthening Social Protection Systems in Africa”

The international hard law and soft law obligations of African countries with regard to social protection form the background for a conference which the *African Law Association*, together with the *Institute for Development Research and Development Policy* (IEE), *Ruhr-University Bochum*, organized in November 2016; the event has been hosted by the *Federal Ministry for Economic Cooperation and Development* (BMZ) in Berlin.²⁹ Experts from both African and European research institutes discussed not only the international legal framework but also the current challenges of national social protection law in African countries. Some of the speakers gave an overview of the general legislative development in specific regions and countries (ECOWAS, South Africa), whereas other presentations had a focus on special subjects such as community healthcare insurance or the role of the middle class in the development of social protection systems. The interaction of state law and customary law for social protection in African countries has also been addressed at the conference, as well as the contribution of the ILO to the development of a rights-based approach to social protection in Africa. Three of the presentations given at the Berlin conference – the first one by *Stephen Devereux* (Institute of Development Studies, Sussex / University of

25 Core obligations are not subject to the principle of progressive realization (Art. 2[1] ICESCR); see *Manisuli Ssenyonjo*, *Economic, Social and Cultural Rights in International Law*, 2nd ed., Oxford/Portland 2016, pp. 105 et seq.

26 UN Doc. A/RES/70/1, 25.9.2015; <https://sustainabledevelopment.un.org/post2015/transformingourworld> (accessed on 27.2.2017).

27 Sustainable Development Goal [SDG] 1.3, supplemented by the SDG 3.8, which is specifically aimed at health care.

28 *The African Union Commission*, *Agenda 2063, Framework Document, The Africa We Want*, 2015, <http://www.un.org/en/africa/osa/pdf/au/agenda2063-framework.pdf> (accessed on 27.2.2017), p. 34.

29 The conference agenda is available at: http://www.rechtinafrika.de/download/formulare/Agenda_revised%20CVs.pdf (accessed on 27.2.2017).

the Western Cape) on “The Right to Social Protection in Africa: From CCCDFPRTs to CLSPPPs“, the other two by *Letlhokwa George Mpedi* (University of Johannesburg) on “Social Protection Law in the Republic of South Africa” and by *Hatem Elliesie* (Max Planck Institute for Social Anthropology in Halle/Saale) on “Traditional Forms of Social Protection in Africa”– are printed in this volume of “Law in Africa”.