

Module 6

Litigating Digital Rights Cases in Africa

*Advanced Modules
on Digital Rights and
Freedom of
Expression Online*



ISBN 978-0-9935214-1-6

Published by Media Legal Defence Initiative: www.mediadefence.org

This report was prepared with the assistance of ALT Advisory: <https://altadvisory.africa/>

This work is licenced under the Creative Commons Attribution-NonCommercial 4.0 International License. This means that you are free to share and adapt this work so long as you give appropriate credit, provide a link to the license, and indicate if changes were made. Any such sharing or adaptation must be for non-commercial purposes and must be made available under the same “share alike” terms. Full licence terms can be found at <http://creativecommons.org/licenses/by-ncsa/4.0/legalcode>.

Table of Contents

Introduction.....	1
Overview of Key Concepts.....	2
<i>Standing.....</i>	<i>2</i>
<i>Jurisdiction</i>	<i>2</i>
<i>Admissibility.....</i>	<i>2</i>
<i>Representation</i>	<i>3</i>
<i>Amicus curiae</i>	<i>3</i>
Litigating at the African Commission on Human and Peoples' Rights.....	4
<i>Overview of the African Commission on Human and Peoples' Rights</i>	<i>5</i>
Stage 1: Registering the Communication	5
Stage 2: Seizure and admissibility.....	7
Stage 3: Proceedings and consideration of the matter.....	9
Stage 4: Recommendations.....	10
Stage 5: Enforcement	11
<i>Practicalities of litigating before the ACHPR.....</i>	<i>12</i>
Litigating at the African Court on Human and Peoples' Rights.....	13
<i>Overview of the African Court on Human and Peoples' Rights</i>	<i>14</i>
Stage 1: Filing a case.....	15
Stage 2: Standing	16
Stage 3: Jurisdiction	17
Stage 4: Admissibility	18
Stage 5: Proceedings	18
Stage 6: Measures and Remedies	19
Stage 7: Enforcement	20
<i>Practicalities of litigating before the African Court</i>	<i>21</i>
Litigating at the East African Court of Justice	22
<i>Overview of the East African Court of Justice</i>	<i>22</i>
Stage 1: Statement reference and statement of claim	22
Stage 2: Standing	23
Stage 3: Jurisdiction	24
Stage 4: Admissibility.....	26

Stage 5: Procedure	26
Stage 6: Measures and Remedies	28
Stage 7: Enforcement	28
<i>Practicalities of litigating before the EACJ</i>	28
Litigating at the ECOWAS Community Court of Justice	28
<i>Overview of the ECOWAS Community Court of Justice</i>	30
Stage 1: Application to the Tribunal	30
Stage 2: Standing	31
Stage 3: Jurisdiction	32
Stage 4: Admissibility	32
Stage 5: Proceedings	32
Stage 6: Remedies	33
Stage 7: Enforcement	33
<i>Practicalities of litigating before the ECOWAS Court</i>	33
Current Status of the SADC Tribunal	34
The Practicalities of Litigating Digital Rights	35
<i>Determining a strategy</i>	35
<i>Gathering evidence</i>	36
<i>Advocacy strategy</i>	39

MODULE 6

Litigating Digital Rights Cases in Africa

- To provide an overview of key concepts and procedural requirements.
 - To set out the stages of litigation at the African Commission on Human and Peoples' Rights.
 - To set out the stages of litigation at the African Court on Human and Peoples' Rights.
 - To set out the stages of litigation at the East African Court of Justice.
 - To set out the stages of litigation at the ECOWAS Community Court of Justice.
 - To examine the current status of the SADC Tribunal.
 - To identify practical steps to litigating digital rights cases.
-

Introduction

The value and ability of litigation to change a systemic issue can be profound. Even though litigation can be a protracted and costly process, it can contribute, in a meaningful way, to the evolution of legal frameworks that truly ensure that human rights are respected, protected and promoted. Strategic litigation is increasingly being used as a tool to advance freedom of expression and digital rights. However, given the somewhat overwhelming contemporary challenges to human rights online, there is a need for the increased utilisation of strategic litigation to hold both state and non-state actors accountable. The ever-evolving digital rights environment means that lawyers, activists and civil society need to be collaborating and litigating strategically in order to be effective in ensuring the rights such as privacy, access to information, freedom of expression, assembly and association are advanced.

This module seeks to give an overview of some of the basic principles involved in litigation, as well as an overview of litigating in various courts across the African continent. It concludes with some practical tips on establishing a litigation strategy.

This module should be read in conjunction with the:

- [Media Defence Report Mapping digital rights and online freedom of expression in East, West, and Southern Africa.](#)
- [Media Defence manual on litigating freedom of expression cases in East Africa.](#)
- [Media Defence West Africa Regional Mechanisms Manual.](#)
- [Media Defence Digital Rights Litigation Guide.](#)

Overview of Key Concepts

Below is a brief overview of some of the procedural requirements that form an essential part of any litigation strategy. The specific procedures of the various courts will be expanded on in their respective sections below.

Standing

The doctrine of standing is commonly understood as the ability of a party to bring a matter to a particular court. It prescribes the right to act before a court or forum and to represent rights or interests. This involves an evaluation of any existing applicable restrictions on whether an individual or NGO can file a case. It usually boils down to a litigant establishing their interest in a matter: who they are, how they are affected, or who they represent, or what interests they represent. To establish standing, a potential litigant would essentially need to demonstrate to the court that there is a sufficient connection between the issue and their interest in the issue. Different courts and tribunals engage with standing differently. Standing is usually the first procedural hurdle that needs to be overcome; accordingly, it is important to ensure what the standing requirements are before committing to a litigation strategy.

Some points to consider when assessing standing:

- Is an individual, community or civil society organisation best placed to bring the matter to the court or forum?
- Would a combination of different applicants be strategic?
- What are the different interests in the matter?
- What are the different risks for instituting a matter?
- What is in the best interest of the case?
- What are the resources or capacity constraints?

Jurisdiction

Jurisdiction refers to determining the ability or competency of a court or forum to consider and decide a particular matter. Jurisdiction can either be based on geographic areas or on the type of legal issue. It can also be based on where the violation occurred. It is an important and well-established principle that needs to be addressed early on in the development of a litigation strategy as it can have a significant impact on the direction of a case.

Admissibility

Admissibility refers to the process applied by international human rights fora to ensure that only cases that need international adjudication are brought before them. It is, therefore, the essence of the principle of subsidiarity. The principle of admissibility requires that all local remedies are exhausted and that consideration be given to whether there are rules relating to prescription and whether the forum recognises the concept of ongoing harm.

Some points to consider when assessing admissibility

- What are the possible local remedies available?
- Are local remedies efficient and reasonable?
- Is it practical for the domestic forum to be seized with the matter?
- Are there prescribed time frames?
- Is the harm ongoing?
- Have efforts been taken to appeal initial decisions?
- Is there a mechanism for direct access?

Representation

Different courts and fora might have different rules relating to legal representation. Sometimes legal representation is not required, but might be useful; other times, the court or forum might facilitate the provision of free legal aid. Representation does not always have to be legal and litigants can sometimes be represented by a person of their choice.

Some points to consider when assessing representation

- Is there a restriction on having legal representation?
- What resources are available for legal representation?
- Who would be best placed to assist with legal representation?

Amicus curiae

An *amicus curiae* is a 'friend of the court'. It is not a main party to the litigation but is accepted by the court or forum to join the proceedings to advise and assist it in respect of a question of law or other issues that affects the case in question. Some individuals, communities or organisations might have first-hand or expert knowledge on a particular topic; their involvement could be of assistance to the court or forum. Interested parties usually need to apply to the court or forum requesting permission to intervene in the matter and typically need to prove that they have an interest in the matter, their submissions will be of use to the court or forum and that they will not be repeating the arguments of the main litigants. Courts and fora usually have the discretion to grant or refuse an *amicus* application. It is worth noting that *amicus* interventions can be particularly useful when litigating digital rights matters as there is often a need for technical and expert analysis given the constant progression within the digital environment.

Some points to consider when assessing *amicus curiae*

- Is there something additional and useful that should be brought to the court's or forum's attention?
- Are there individuals, communities or organisations who might have particular knowledge or interest in a matter?
- Would the *amicus* be neutral, or would the *amicus* be supportive of a particular party?

Litigating at the African Commission on Human and Peoples' Rights

Snapshot of the types of cases that have been heard by the African Commission on Human and Peoples' Rights

SERAC v Nigeria

In 1996, the Nigerian government was brought before the African Commission on Human and Peoples' Rights (**ACHPR** or **the Commission**) for being directly involved in oil production which resulted in the contamination of the environment and which caused environmental degradation and health problems for the Ogoni People. It was alleged that the Nigerian government destroyed and threatened the food sources in the area by irresponsibly authorising oil production.

The communication, which was brought by civil society organisations, Social and Economic Rights Action Center and the Center for Economic and Social Rights, alleged a variety of rights violations including the right to a general satisfactory environment favourable to development and the right to enjoy the best attainable state of physical and mental health. The complaint alleged violations of several rights of the African Charter on Human and People's Rights (**African Charter**).

In 2001, the ACHPR's reached a decision on the merits the communication.

The ACHPR noted that states have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties. The ACHPR went on to find that Nigerian enabled the destruction of Ogoniland and promoted non-state actors at the expense of the wellbeing of the Ogoni people. This was found to be in conflict with its obligations to protect persons against interferences in the enjoyment of rights. The ACHPR made further findings in relation to the rights to food and shelter, environmental rights, and collective rights.

The Nigerian government was found to have violated all of these rights. The ACHPR appealed to the Nigerian government to ensure the protection of the Ogoni people, by, among other things, stopping all attacks on Ogoni communities, ensuring adequate

compensation to victims and preparing appropriate environmental and social impact assessments for any future oil development.

While this matter did not deal with digital or information rights, it is a useful matter to illustrate the ACHPR's stance on non-state actors and state obligations, as well as provide an illustration of the types of recommendation the ACHPR can make. It also demonstrates the ability of NGOs to engage with the ACHPR.

Overview of the African Commission on Human and Peoples' Rights

The [ACHPR](#) is a quasi-judicial body that is empowered to make non-binding recommendations. It has three main functions:

- The protection of human and peoples' rights.
- The promotion of human rights.
- The interpretation of the [African Charter](#).

The ACHPR consists of eleven members elected by the African Union Assembly from experts nominated by states which are party to the African Charter. The ACHPR holds two ordinary sessions annually, which varies from 10 to 15 days, depending on needs and finances, and the ACHPR may also meet in extraordinary sessions, if necessary.

Beyond the obligation to consider reports submitted by states, and shadow reports submitted by civil society organisations (**CSOs**) regarding states' compliance with the African Charter, the ACHPR is empowered to receive and consider communications. Filing a communication is essentially the same as filing a complaint. Communications are the mechanism through which the ACHPR fulfils its function to protect the rights and freedoms guaranteed in the African Charter. Article 55 of the African Charter empowers the ACHPR to consider communications.

There are several stages involved in the communications process, which are governed by the [Communication Procedure](#). The [Rules of Procedure](#) regulate the ACHPR and establish the procedure in accordance with article 42(2) of the African Charter on Human and Peoples' Rights.

Stage 1: Registering the Communication

This stage is similar to filing a complaint or launching proceedings in a domestic court or forum. The communication must identify the parties and set out the alleged violation. Communications are usually directed to the Secretariat of the ACHPR, which is based in Banjul, The Gambia.

The communication should include:

- Identifying features of the person or organisation filing (e.g. name, nationality, address where correspondence can be received).

- Whether the identifying features should remain anonymous from the state.
- The state alleged to have committed the violation.
- The reason for registering the communication (if being for the public good or on behalf of someone).
- A description of the violation.
- Other steps taken before reaching this point.

Essentially, the communication should include all relevant information that would allow the ACHPR to make a determination as to whether it should engage with the matter.

This stage incorporates important standing considerations. The ACHPR has broad standing provisions. Anyone can register a communication, including CSOs. This includes a state claiming that another state party to the African Charter has violated one or more of the provisions in the African Charter; CSOs (which do not need to be registered with the AU or have observer status); victims of abuses; or interested individuals acting on behalf of victims of abuses. The matter can also be brought for the public good, as class or representative actions, under the *actio popularis* approach.¹

In [*Article 19 v Eritrea*](#), the ACHPR noted that it—

“has adopted an *actio popularis* approach where the author of a communication need not know or have any relationship with the victim. This is to enable poor victims of human rights violations on the continent to receive assistance from NGOs and individuals far removed from their locality. All the author needs to do is to comply with the requirements of Article 56. The African Commission has thus allowed many communications from authors acting on behalf of victims of human rights violations. Thus, having decided to act on behalf of the victims, it is incumbent on the author of a communication to take concrete steps to comply with the provisions of Article 56 or to show cause why it is impracticable to do so.”

This was reiterated in [*Law Society of Zimbabwe and Others v Zimbabwe*](#), in which the ACHPR noted that although the African Charter does not explicitly state those who are eligible to file complaints, through the *actio popularis* approach, the ACHPR adopts a flexible approach that allows everyone including non-victim individuals, CSOs and pressure groups with an interest in the matter to file a communication, for its consideration.

It is not necessary for cases to be submitted by lawyers, although legal representation can be helpful. The Communication Procedure states that preparation, submission and processing of a communication is a relatively straightforward procedure, and that a complainant or author can act on their own without the need for professional assistance – but that legal representation can be useful particularly for the interpretation of rights violations and the

¹ For more on standing see Pedersen, ‘Standing and the African Commission on Human and Peoples’ Rights’ *African Human Rights Law Journal* (2006) (accessible at <https://www.ahrlj.up.ac.za/pedersen-m-p>) and Mayer, ‘NGO Standing and Influence in Regional Human Rights Courts and Commissions’ *Notre Dame Law School* (2011) (accessible at https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1053&context=law_faculty_scholarship).

development of arguments in support of such violations.

Emergency situations

Every communication should indicate if there is an imminent threat to the life, health or personal integrity of a person. The Rules of Procedure provide guidance on matters of emergency.

Rule 79: Decision on matters of emergency

1. The Commission shall treat a situation as a matter of emergency under Article 58(3) of the African Charter, when:
 - a. it is one of serious or massive human rights violations;
 - b. it presents the danger of irreparable harm or requires urgent action to avoid irreparable damage;
2. When a situation of emergency arises during a session of the Commission, the decision to treat it as such shall be taken by the Commission.
3. When a situation arises during the Commission's inter-session period, the decision to treat it as a matter of emergency shall be taken by the Bureau of the Commission, which shall keep other members of the Commission informed and present a report on the situation at the next session of the Commission.

Rule 80: Action on matters of emergency

1. When the Commission has decided to treat a situation as one of emergency, it shall:
 - a. Draw the attention of the Chairperson of the Assembly of Heads of State and Government of the African Union to the matter in accordance with Article 58(3) of the Charter;
 - b. Draw the attention of the Peace and Security Council to the matter in accordance with Article 19 of the Protocol on Peace and Security Council;
 - c. Inform the Executive Council;
 - d. Inform the Chairperson of the African Union Commission of the matter.
2. The Commission as well as its subsidiary mechanisms under the Charter and present Rules, shall also take any appropriate action, including Urgent Appeals.

Stage 2: Seizure and admissibility

Once it has been filed, the ACHPR will seize itself of the communication if it is satisfied that the communication alleges a *prima facie* violation of the African Charter, and it has been properly submitted.

The Secretariat of the Commission will issue a letter to the complainant acknowledging receipt of the communication. At this stage, a letter is sent to the state party concerned.

Article 55(2) of the African Charter requires that the decision by a simple majority of commissioners is needed for the ACHPR be seized with a matter. Once the ACHPR has confirmed it is seized with the matter, it will then proceed to consider whether the

communication is admissible. There are seven formal requirements in terms of article 56 of the African Charter that must be met for a communication to be admissible:

- **Article 56(1) – Indicate the authors:** include your name and address and, if you are not the victim yourself, your relationship with the victim, including on what grounds you represent the victim.
- **Article 56(2) – Compatible with the Constitutive Act of the AU or with the African Charter:** the communication needs to explicitly and clearly discuss the specific violation of rights guaranteed in the African Charter.
- **Article 56(3) – Non-insulting language:** the language should not be aimed at undermining the integrity and status of the institution.
- **Article 56(4) – Evidence other than simply news sources:** the communication should not be based exclusively on news disseminated through the mass media. The evidence must be asserted at this stage but can be presented later.
- **Article 56(5) – Exhaustion:** local remedies must be exhausted before submitting the communication.
- **Article 56(6) – Timeliness:** the communication must be submitted within a reasonable period from the time that local remedies are exhausted
- **Article 56(7) – No conflicting settlements:** the ACHPR does not deal with matters which have been settled by another international mechanism similar to the ACHPR.

These requirements are similar to those listed above at stage 1. Accordingly, it is important at stage 1 to ensure that all relevant information is included to ensure that the admissibility threshold at stage 2 will be met.

The exhaustion of local remedies is often a stumbling block for litigants. But it is important to observe. The reason behind this requirement links to the principle of subsidiarity, and the need to notify a state of its failure and afford it an opportunity to rectify the violation before escalating the matter. It also ensures that the ACHPR does not become a forum of first instance for cases for which an effective domestic remedy exists.

In [*Sir Dawda K. Jawara v The Gambia*](#), the ACHPR explained that a domestic remedy is “considered **available** if the petitioner can pursue it without impediment, it is deemed **effective** if it offers a prospect of success, and it is found **sufficient** if it is capable of redressing the complaint.” The ACHPR went on to give examples of when a remedy would not be available:

- Where the jurisdiction of the courts has been ousted by decrees whose validity cannot be challenged or questioned.
- If the applicant cannot turn to the judiciary of his or her country because of a generalised fear for their life.
- A remedy that has no prospect of success does not constitute an effective remedy.

The ACHPR gave further guidance on admissibility and, in particular, the exhaustion of local remedies in the [*SERAC*](#) decision:

- If a local remedy is unduly prolonged it is not an effective remedy.

- If a right is not well provided for in domestic law, there cannot be effective remedies or any remedies at all.

If a communication is declared inadmissible, the ACHPR will provide reasons for the decision and this will bring the consideration of the communication to a close. Rule 108 of the Rules of Procedure allows for this decision to be reviewed at a later date if the complainant can provide information to the effect that the grounds for inadmissibility no longer exist.

Stage 3: Proceedings and consideration of the matter

Following a confirmation of admissibility, the ACHPR will give the parties time to present their written arguments. Rule 108 provides for the consideration of the substantive issues of the matter:

- Once a communication has been declared admissible, the ACHPR shall set a period of sixty (60) days for the Complainant to submit observations on the merits. These observations shall be transmitted to the State Party concerned for the submission of its observations within sixty (60) days.
- Any written statements submitted by the State Party concerned shall be communicated, through the Secretary, to the Complainant, who may submit any additional written information or observations within thirty (30) days. This time limit cannot be extended.

This entails examining the allegations made and the defences raised with due regard to the provisions of the African Charter and other international human rights norms. The Communications Procedure explains that the Secretariat will prepare a draft decision on the merits for the guidance of the Commissioners.

Rule 88 of the Rules of Procedure allows for oral hearings. However, the ACHPR tends to prefer deciding matters on the papers. It is advisable to only insist on an oral hearing if there are exceptional circumstances to argue or an argument to make that is new to the ACHPR. If an oral hearing does take place, some states send representatives to contest allegations, while some do not. Where an oral hearing takes place, it is advisable to be thoroughly prepared to respond to questions from the commissioners at the hearing of the matter and to prepare the evidence on the basis that the state will be well-represented. CSOs and other interest parties who have been admitted as an *amicus curiae* can also make representations at this stage.

Note on *amicus curiae*

Rule 99(16) of the Rules of Procedure provides for the ACHPR to receive *amicus curiae* briefs on communications. During the hearing of a communication in which an *amicus curiae* brief has been filed, the Commission, where necessary shall permit the author of the brief or the representative to address the Commission.

When considering the matter, the ACHPR will have regard to certain sources of law. Article 60 provides:

“The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.”

Article 61 allows the Commission to consider, as a subsidiary measure:

“[O]ther general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.”

After an evaluation of the factual and legal arguments put forward, the ACHPR will make a determination on whether there has been a violation of the African Charter or not. If it finds a violation, a recommendation will then be made.

Amicable settlements are also provided for in the Rules of Procedure. Rule 109 allows the ACHPR, on its own initiative or at the request of any of the parties concerned, to offer its offices for an amicable settlement between the parties. When reaching an amicable settlement, the Commission shall ensure that such amicable settlement:

- Complies with or respects the human rights and fundamental freedoms enshrined in the African Charter and other applicable instruments.
- Indicates that the victim of the alleged human rights violation or, his/her successors, as the case may be, have consented to the terms of the settlement and are satisfied with the conditions.
- Includes an undertaking by the parties to implement the terms of the settlement.

Stage 4: Recommendations

The final determination of the ACHPR is called a recommendation. A recommendation usually includes:

- A decision on admissibility.
- An interpretation of the provisions invoked.
- A discussion on the alleged violation.
- If a violation is found, what the required actions are for the state to remedy the violation.

The recommendations are not legally binding but can become binding if they are adopted by the African Union Assembly of Heads of State and Government pursuant to article 59 of the African Charter.

Rule 98 provides that remedies can be provisional in nature with the aim of mitigating against irreparable harm to the victims of the alleged violation as urgently as the situation demands. This can take place at any time after the receipt of a communication and before a determination on the merits, at the discretion of the ACHPR or at the request of one of the parties.

Some of the past recommendations included compensation, the repeal of legislation, the return of deportees, grants of citizenship, and reform of electoral laws. The ACHPR does not have a discretion to create remedies beyond what has been asked for by the parties.² Therefore, it is important to craft remedies in a way that is clear, concise and includes all the relief that is being sought.

Stage 5: Enforcement

There are no procedures to supervise the implementation of the ACHPR recommendations; however, the Secretariat typically issues correspondence reminding states that have been found to have violated provisions of the African Charter calling upon them to honour their obligations.

Commentary on the contribution of the ACHPR

Responding to Human Rights Violations in Africa Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987–2018)

International Human Rights Law Review (2018)

Manisuli Ssenyonjo has taken the following view in relation to the impact of the ACHPR as well as some of the challenges it faces.

“While there is much progress still to be made, the African Commission has greatly contributed to the regional protection of human rights in Africa. The Commission has exposed human rights violations in most authoritarian African States. Through its decisions on communications, it has developed human rights jurisprudence in Africa on several aspects consistent with the jurisprudence of other human rights bodies. These include jurisprudence on exhaustion of local remedies, State obligations concerning civil and political rights, economic, social and cultural rights as well as group rights such indigenous peoples’ rights and the right to development. Nevertheless, the African Commission has only received and decided very few communications related to economic, social and cultural rights.

² Media Defence, ‘Digital Rights Litigation’ (accessible at <https://www.mediadefence.org/sites/default/files/resources/files/MLDI%20Digital%20Rights%20Litigation%20Guide.pdf>).

Initially, it was thought the Commission would be unable to hold States accountable for violations of human rights and to provide reparations to victims. However, over the years the Commission has confronted human rights violations through its decisions on communications; adoption of resolutions, principles/guidelines, general comments, model laws and advisory opinions; special rapporteurs and working groups to deal with thematic human rights issues; conducting on-site visits; consideration of State reports and adoption of concluding observations; as well as the referral of communications to the African Court.

Nevertheless, compliance with the Commission's 'requests' for provisional measures/letters of urgent appeals, decisions and recommendations of the Commission, as set out in the Communications and concluding observations on State reports, has been low. The insufficient funding of the Commission from the member States budget and human crisis at the Commission's Secretariat, impedes the Commission's capacity to follow-up on implementation as it prevents the Commission from developing effective follow up of its findings during country visits, and recommendations arising from its findings, resulting in the overall weakening of the effectiveness of the Commission."

Practicalities of litigating before the ACHPR

There are some practical considerations that potential litigant should bear in mind when considering an application to the ACHPR.³ Some considerations include:

- **Cost:** The ACHPR is a relatively cost-effective mechanism, given that legal representation is not a requirement, and complainants do not have to travel to the Commission as everything can be addressed through written submissions. Cost implications do, however, arise when there are oral hearings, as this requires being present at the ACHPR.
- **Time:** The timing of the process from beginning to end varies depending on the nature of the matter. The 60-day and 30-day time periods for the parties are relatively standard, but the time within which the final communication is delivered may take several years.
- **Enforcement:** If the State Respondents do not comply with the recommendations, it is usually up to the complainant to address enforcement. This can include engaging with the State Respondent, turning to parliament and relying on domestic courts.

³ See Egyptian Initiative for Personal Rights, 'Filing a Communication before the African Commission on Human and Peoples' Rights' (2013) (accessible at <https://eipr.org/en/press/2016/09/guide-filing-complaints-achpr>).

Litigating at the African Court on Human and Peoples' Rights

Snapshot of the types of cases before the African Court on Human and Peoples' Rights

Ingabire Victoire Umuhoza v. The Republic of Rwanda

Ingabire Victoire Umuhoza was charged by the Rwandan government with:

- Spreading ideology of genocide.
- Aiding and abetting terrorism, sectarianism and divisionism.
- Undermining the internal security of a state, spreading of rumours likely to incite the population against political authorities and mount citizens against one another.
- Establishing an armed branch of a rebel movement.
- Attempting recourse to terrorism, force of arms and such other forms of violence to destabilise established authority and violate constitutional principles.

In 2012, the High Court of Kigali found the applicant guilty. This was appealed to the Rwandan Supreme Court, which in 2018 found Ms Umuhoza guilty of conspiracy to undermine the government and the Constitution through acts of terrorism, war or other violent means, of downplaying genocide, and of spreading rumours with the intent to incite the population against the existing authorities. She was sentenced to 15 years' imprisonment by the Supreme Court.

After exhausting all internal remedies, Ms Umuhoza approached the African Court on Human and Peoples' Rights (**African Court**) alleging an array of rights violations, including a violation of her right to freedom of expression.

Ms Umuhoza was found guilty at the domestic level for minimisation of genocide for remarks she made during a speech at the Kigali Genocide Memorial regarding the crimes against humanity committed against the Hutus. The state respondent argued that "right to express one's opinion is subject to limitations and that considering the social context, the history of and environment in Rwanda, there was reason to enact laws to penalise the minimisation of genocide." The State Respondent urged the African Court to not to view free expression in vacuum and give due regard to the context within the remarks were made.

The National Commission for the Fight against Genocide (**CNLG**) intervened as *amicus curiae* and argued that that the remarks made by Ms Umuhoza regarding the argument that "double genocide" was essentially a way in which to deny the genocide against the Tutsis in Rwanda. They explained that this denial sows the seed of confusion regarding the genocide, creating the allusion that the Tutsis were as guilty as their executioners. The CNLG argued that Ms Umuhoza's remarks were a "revisionist manoeuvre with the peculiar feature of using partial and dishonest methodology to select, disguise, divert or destroy information that corroborates the existence of genocide against the Tutsis."

The African Court recognised the importance of the right to freedom of expression but noted further that this right can be subject to limitations. The African Court confirmed that the conviction was a limitation of Ms Umuhoza's free speech. The African Court sought to establish if it was a legitimate, necessary and proportional restriction.

The African Court found that the laws that criminalise certain speech satisfied the legal leg of the test. On legitimacy, the African Court found that the restrictions on Ms Umuhoza's free speech served the legitimate interest of protecting national security and public order. In terms of necessity and proportionality, the African Court recognised the particular context of the Rwandan genocide, which warranted measures to be adopted by the government to promote social cohesion and concordance among the people. The African Court found that it was "entirely legitimate for the state to have introduced laws on the 'minimisation', 'propagation', or 'negation' of genocide." According to the African Court, statements that "deny or minimise the magnitude or effects of the genocide or that unequivocally insinuate the same fall outside the domain of the legitimate exercise of the right to freedom of expression and should be prohibited by law". After consideration of these specific remarks, the African Court found that the remarks made by Ms Umuhoza did not deny or undermine the genocide committed against the Tutsis. Accordingly, Ms Umuhoza's conviction was found to violate her right to freedom of expression, and it was ordered that the respondent state take all necessary measures to restore her rights and submit a report on the measures within 6 months.

Overview of the African Court on Human and Peoples' Rights

The African Court became operational in 2009. Its mandate is to adjudicate matters dealing with states' compliance with the African Charter and other instruments on the protection of human rights ratified by that state.⁴ The African Court was established by African countries to ensure the protection of human and peoples' rights in Africa. It complements and reinforces the functions of the ACHPR. The African Court has different procedures to the ACHPR, which are laid out in the [African Court Protocol](#) and the [Rules of Court](#).

The relationship between the ACHPR and the African Court has been described as follows:

"Pursuant to Article 2 of the Protocol, the Court is established to complement the protective mandate of the Commission. The African Commission can bring cases to the Court for the latter's consideration. In certain circumstances, the Court may also refer cases to the Commission, and may request the opinion of the latter when dealing with the admissibility of a case. The Court and the Commission have met and harmonised their respective rules of procedure, and institutionalised their relationship. In terms of their Rules, the Commission and the Court shall meet at least once a year, to discuss questions relating to their relationship."⁵

⁴ International Federation for Human Rights, 'Practical Guide: The African Court on Human and Peoples' Rights towards the Africa Court of Justice and Human Rights' (2010) (accessible at https://www.fidh.org/IMG/pdf/african_court_guide.pdf).

⁵ African Court on Human and People's Rights, 'Frequently Asked Questions' (accessible at <https://en.african-court.org/index.php/faqs/frequent-questions>).

Article 5(3) of the African Court Protocol provides that: “The Court may entitle relevant Non-Governmental Organizations (**NGOs**) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of this Protocol.” In November 2018, The Gambia became the ninth country to allow non-governmental organisations and individuals to access the African Court directly.⁶ However, in 2019, Tanzania withdrew the right of individuals and NGOs to directly file cases against it.⁷

Stage 1: Filing a case

For applications by individuals and NGOs, the application must:

- Disclose the identity of the applicant, even where the applicant has requested anonymity.
- Comply with the Constitutive Act of the African Union and the African Charter.
- Not contain any disparaging or insulting language.
- Not be based exclusively on news disseminated through the mass media
- Be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.
- Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter.
- Not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the African Charter or of any legal instrument of the African Union.⁸

The [Practice Directions Guide to Litigants](#) provides some useful guidance on filing a submission.

The submissions must be made in writing and submitted to the at the seat of the African Court, which is at Arusha, Tanzania, and can be submitted by post, email, fax or courier. Only one copy needs to be submitted. This copy must be in one of the official languages of the Court (Arabic, English, French and Portuguese). The copy needs to be signed by the applicant or representative and needs to give the details of the parties and indicate the alleged violations as well as the order sought. The submission needs to be accompanied by proof of exhaustion of local remedies. Submissions should be filed within a reasonable time of from the date when local remedies were exhausted.

⁶ African Court on Human and Peoples' Rights 'The Gambia becomes the ninth country to allow NGOs and individuals to access the Court directly' (2018) (accessible at <https://www.african-court.org/en/index.php/news/press-releases/item/257-the-gambia-becomes-the-ninth-country-to-allow-ngos-and-individuals-to-access-the-african-court-directly>).

⁷ Amnesty International, 'Tanzania: Withdrawal of individual rights to African Court will deepen repression' (2019) (accessible at <https://www.amnesty.org/en/latest/news/2019/12/tanzania-withdrawal-of-individual-rights-to-african-court-will-deepen-repression/>).

⁸ African Court on Human and People's Rights 'What are the conditions for sending an Application?' (accessible at <https://en.african-court.org/index.php/faqs/frequent-questions#conditions>).

Stage 2: Standing

Article 5 of the Protocol indicates who can submit a case to the African Court:

- The ACHPR.
- The state party which had lodged a complaint to the ACHPR.
- The state party against which the complaint has been lodged at the ACHPR.
- The state party whose citizen is a victim of human rights violation.
- African intergovernmental organisations.
- A state party with an interest in a case, on submission of a request to the African Court to be permitted to join.
- NGOs with observer status before the ACHPR and individuals, but only against states that have made a declaration accepting the competence of the African Court to receive such cases in accordance with Article 34(6) of the African Court Protocol.

The standing provisions are relatively straightforward save for the complications and challenges presented by article 34(6), which make it difficult for individuals or NGOs to rely on this forum if the state alleged to have committed violations has not made the necessary declaration.

In respect of legal representation, rule 22 provides that “[e]very party to a case shall be entitled to be represented or to be assisted by legal counsel and/or by any other person of the party’s choice.”

Note on *amicus curiae*

Amici curiae are permitted in the African Court. Rule 45(1) of the African Court Rules provides that the African Court may decide to hear “as a witness or expert or in any other capacity any person whose evidence, assertions or statements it deems likely to assist it in carrying out its task”. The African Court is also empowered in terms of rule 45(2) to ask any person or institution to obtain information, express an opinion or submit a report to it at any point. In addition to providing written submissions, *amici curiae* may also be invited to make oral submissions at the hearing of the matter.

The procedure for making a request to act as *amicus curiae* is contained in section 42 to section 47 of the Practice Directions of the African Court. An individual or organisation wishing to act as *amicus curiae* must submit a request to the African Court, specifying the contribution that they would like to make with regard to the matter. If the African Court decides to grant the request, the person or organisation making the request will be notified by the Registrar and invited to make submissions and provided with all pleadings. The Practice Directions make clear that the decision on whether or not to grant a request to act as *amicus curiae* is at the discretion of the African Court.

Stage 3: Jurisdiction

At the African Court, jurisdiction needs to be established alongside the determination of admissibility. This is different to the ACHPR. The African Court's jurisdiction is contained in article 3 of the African Court Protocol, which provides as follows:

- “(1) The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
- (2) In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.”

Article 26 of the Rules of Court stipulates that the African Court shall have jurisdiction over the following:

- To deal with all cases and all disputes submitted to it concerning interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the States concerned.
- To render an advisory opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject of the opinion is not related to a matter being examined by the Commission.
- To promote amicable settlement in cases pending before it in accordance with the provisions of the Charter.
- To interpret a judgment rendered by itself.
- To review its own judgment in light of new evidence in conformity with rule 67 of these Rules.

In 2014, the African Court in [*Konaté v. Burkina Faso*](#) developed its jurisdictional scope as follows:

- **Ratione personae:** The African Court must have jurisdiction over both the complainant and the respondent state. This only arises if the case is brought by an entity contemplated in article 5 of the African Court Protocol, or by an African organisation seeking an advisory opinion.
- **Ratione materiae:** This requires the African Court to consider whether the acts complained of violate the African Charter and other international human rights treaties ratified by the respondent state.
- **Ratione temporis:** This requires the African Court to consider whether the violation occurred after the state concerned had ratified the African Court Protocol or the human rights treaty that it is claimed to have violated. Importantly, the African Court has expressly recognised that violations may be of a continuous nature, which opens its jurisdiction to cases where violations began before the African Court Protocol came into force for any state.
- **Ratione loci:** This requires the African Court to consider whether the violations occurred within the territory of a state party.

Stage 4: Admissibility

Once jurisdiction is established, the African Court will determine if the matter passes the admissibility threshold. After jurisdiction is confirmed, wider questions regarding the admissibility of the case will be considered. The three main admissibility requirements are as follows:

- **Cases brought by the ACHPR:** Rule 118 of the Rules of Procedure of the African Court allows the ACHPR to bring a case to the African Court if it has taken a decision with respect to a communication submitted under articles 48, 49 or 55 of the African Charter and it considers that the state has not complied or is unwilling to comply with its recommendations within 180 days.⁹
- **Cases brought by an individual or NGO:** Rule 40 of the Rules of Procedure sets out that the requirements for admissibility contained in article 56 of the African Charter must all be met in order for a case to be deemed admissible.
- **Cases brought by an African organisation for an advisory opinion:** Article 4 of the African Court Protocol allows any member state of the AU, the AU itself or any of its organs, or any African organisation recognised by the AU to request the African Court to provide an opinion on any legal matter relating to the African Charter or any other relevant human rights instruments.

Stage 5: Proceedings

The ordinary sessions of the African Court are held every year in March, June, September and December, or at any other period as it may deem fit. It may also hold extraordinary sessions. The hearing is conducted by the Presiding Judge, who prescribes the order in which the representatives of the parties are heard. As the African Court live streams and makes recordings of its hearings publicly available, prospective litigants may consider viewing such recordings beforehand to get a general sense of the way in which the African Court operates and engages with litigants.

The African Court consists of eleven judges, although seven judges hearing a matter is sufficient for there to be quorum. Rule 47(1) of the African Court Rules provides that the Presiding Judge or any Judge may put questions to the representatives of the parties. In practice, each of the main parties is allocated time to present arguments on admissibility and the merits (usually approximately 45 minutes), whereafter each judge has the opportunity to question the legal representatives. The legal representatives are then given the opportunity to prepare overnight and return the next day to respond to the questions posed and reply to the other side's arguments.

Rule 47(1) of the African Court Rules also provides that where there are witnesses, experts and other persons appearing before the African Court, the judges are permitted to ask them any questions relating to the matter. Further, the representatives of the parties are entitled to

⁹ See further Rudman, 'The commission as a party before the court - Reflections on the complementarity arrangement' (2016) PER (accessible at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812016000100011).

examine, cross-examine and re-examine the witnesses, experts and other persons who appear before the African Court, as the case may be.

Stage 6: Measures and Remedies

When reaching its decision, the Africa Court will take into account various sources of law. Article 7 of the African Court Protocol provides that the African Court “shall apply the provisions of the [African] Charter and any other relevant human rights instruments ratified by the States concerned”. Other sources of law, may, however, also be considered.

Article 28(1) of the African Court Protocol stipulates that the African Court will render its judgment within 90 days of having completed its deliberations. Parties will be notified of when the judgment is expected to be handed down, and judgments are read in open court. The decision is made by a majority of the members of the panel, with the presiding judge having a casting vote in the event of a tie. Any member of the panel that heard the case may deliver a separate or dissenting opinion.

Article 27(2) of the African Court Protocol provides that “[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the [African] Court shall adopt such provisional measures it deems necessary.” The procedure for making a request for interim measures is contained in the Practice Directions. Any request for interim measures must state the reasons and must specify in detail the extreme gravity and urgency, as well as the irreparable harm that is likely to be caused. The request must be accompanied by all supporting documents that could substantiate the applicant’s allegations, including any relevant domestic court or other decisions. The Practice Directions provide that requests for interim measures must be filed within a reasonable time.

The African Court, as a full judicial body with binding decision-making authority, is likely to grant more effective remedies than the ACHPR. It can order specific amounts of damages, give supervisory interdicts that require the state party to report on implementation of the remedy, and require positive action to guarantee non-repetition

Reparations at the African Court

In *Norbert Zongo and Others v Burkina Faso* the African Court found that the respondent state had violated articles 1, 7 and 9(2) of the African Charter but deferred its ruling on the issues of damages, calling on the parties to make submissions on that point.

In June 2015, after consideration of the submissions the African Court issued its [judgment on reparations](#). In its reasoning, the African Court relied on the trite legal position that states which violate international human rights provisions are required to make full reparation for the damage caused, and relied on its remedial powers in terms of article 27(1) of the Protocol – which enjoins the Court to make an appropriate order to remedy the violation, including the payment of fair compensation or reparation.

There is a difference between material damages and moral damages: the former can be addressed in monetary terms, while the latter affects the reputation, sentiment or affection of a natural person. In this instance, the applicants sought both material and monetary damages. Here are some key observations and findings of the African Court regarding moral prejudice:

- **The notion of victim:** A victim does is not necessarily limited to the first-line heirs of a deceased person; other close relatives may also suffer moral prejudice. In this case, the spouses, children, and fathers and mothers of the deceased were found to suffer the most. The Court dismissed the claim by stepmothers, uterine sisters and brothers and step-sisters and step-brothers.
- **The type of evidence required to establish victim status:** Marriage and birth certificates as well as attestations of paternity or maternity, or any other equivalent proof should be produced.
- **Proof of causal link between the wrongful act and the moral prejudice suffered:** Such a link may result from the violation of a human rights, as an automatic consequence, without any need to prove otherwise.
- **The amount of reparation:** This determination should be done equitably and on a case by case basis.

On material prejudice, the Court considered the expenditure and costs incurred by the beneficiaries, which included the lawyer's fees, and the transport and sojourn expenses.

Ultimately, the Court awarded damages to the family members affected by the violations of the state. The state respondent was ordered to pay 25 million CFA per spouse (approximately 43 500 USD), 15 million CFA per child (approximately 26,000 USD), and 10 million CFA per mother or father (approximately 17,400 USD).

Stage 7: Enforcement

It is important to remember that the ACHPR can refer matters to the African Court when it considers that a state (who has signed the Protocol) has not complied or is unwilling to comply with its recommendations. Despite the clear need for strong enforcement mechanisms, the African Court Protocol provides that "[t]he State Parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution". Failures by states to comply with judgments are noted in the African Court's report to the Assembly per article 31 of Protocol.

Commentary on the African Court

[Responding to Human Rights Violations in Africa Assessing the Role of the African Commission and Court on Human and Peoples' Rights \(1987–2018\)](#)
International Human Rights Law Review (2018)

Manisuli Ssenyonjo has taken the following view in relation to the impact of the African Court as well as some of the challenges it faces:

“First, the limited direct access by individuals and NGOs to the Court due to a limited number of States that have accepted the Court’s jurisdiction and allowed individuals and NGOs direct access to the Court. Thus, there is a need for more States to ratify the Court’s Protocol and to allow individuals and NGOs direct access to the Court. This will help to consolidate a pan-African judicial system for the protection of human rights which applies to over 1.2 billion people in Africa. In addition, an amendment of Article 34(6) the African Court Protocol by a decision of the au Assembly of Heads of State and Government to allow individuals and NGOs direct access to the Court would make the Court more accessible to victims of human rights violations in Africa. Until this is achieved, the African Commission should submit more cases to the Court in accordance with Rule 118 discussed above, particularly those cases in which States have failed to implement the Commission’s decisions.

Second, the non-implementation of the Court’s decisions, including refusals to implement, failure to inform the Court of what measures have been taken, and the slow pace or ‘reluctance’ to comply limits the Court’s effectiveness. In 2013, for example, the Court adopted an Interim Report noting that ‘Libya has failed to comply with a judgment of the Court’. It called on the au Assembly of Heads of State to take such other measures as it deems appropriate to ensure that Libya fully complies with the Court Order. However, the Assembly did not take any action. This shows that non-compliance and non-enforcement applies to both the Commission’s recommendations as well as the Court’s orders. Thus, the ability of the au organs to impose sanctions consistently on non-complying States is necessary in order to strengthen the credibility of the African Court’s orders and judgments.”

Practicalities of litigating before the African Court

Currently, the most notable practical consideration with litigating at the Africa Court is that states are either failing to engage with the declaration required under article 34(6) or withdrawing their declaration.¹⁰ The Centre for Human Rights has noted that this is “gravely hampering access to remedy for many victims of human rights violations across the continent.”¹¹ This is presently a considerable challenge to potential litigants who seek redress and to hold states accountable for human rights violations.

¹⁰ Al Jazeera, ‘Africa’s human rights court and the limits of justice’ (2017) (accessible at <https://www.aljazeera.com/programmes/talktojazeera/2017/01/africa-human-rights-court-limits-justice-170107092107153.html>).

¹¹ Centre for Human Rights, ‘Press Statement: Centre for Human Rights expresses concern about Tanzania’s withdrawal of access to the African Court by individuals and NGOs’ (2019) (accessible at <https://www.chr.up.ac.za/latest-news/83-news-chr/1916-press-statement-centre-for-human-rights-expresses-concern-about-tanzania-s-withdrawal-of-access-to-the-african-court-by-individuals-and-ngos>).

Litigating at the East African Court of Justice

Snapshot of types of cases before the East African Court of Justice

Media Council of Tanzania and Others v Attorney-General of the United Republic of Tanzania

In 2019 the East African Court of Justice (**EACJ**) handed down a judgment in which is declared that certain provisions of Tanzania's Media Services Act violated freedom of expression.

A group of civil society organisations approached the EACJ arguing that that “the Act in its current form is an unjustified restriction on the freedom of expression which is a cornerstone of the principles of democracy, the rule of law, accountability, transparency and good governance which [Tanzania] has committed to abide by, through the Treaty.” It was submitted that the Act violated freedom of expression through the criminalising the dissemination of disinformation.

The EACJ was critical of the broad wording of the impugned provision that regulated content restriction. Further, the EACJ found that the provisions relating to fake news and rumours were similarly vague and found them to be in conflict with the EAC Treaty. The EACJ ultimately found that the provisions violated freedom of expression and ordered the Tanzanian government to take measures to bring the Act into compliance with the EAC Treaty.

Overview of the East African Court of Justice

The **EACJ** is a sub-regional court that is mandated to resolve disputes involving the East African Community and its Member States. The EACJ was established by article 9 of the Treaty for the Establishment of the East African Community (EAC Treaty) and is tasked with interpreting and enforcing the treaty.¹² The East African Court of Justice Rules of Procedure (EACJ Rules) govern its functioning while it seeks to ensure adherence to law in the interpretations and application of, and compliance with, the EAC Treaty. The EACJ serves the East African Community (**EAC**), namely Burundi; Kenya; Rwanda; South Sudan; United Republic of Tanzania; and Uganda. It has a First Instance Division and an Appellate Division. The former administers justice and applies relevant law, while the latter confirms, denies or changes decisions taken by the First Instance Division.

Stage 1: Statement reference and statement of claim

A statement of reference (similar to a claim or complaint in domestic litigation) should include an allegation of a human rights violation made by a Partner State, the Secretary-General, or

¹² See further International Justice Resource Center ‘East African Court of Justice’ (accessible at <https://ijrcenter.org/regional-communities/east-african-court-of-justice/>).

a legal or natural person. Article 24 of the EACJ Rules provides for the lodging of a statement of claim. It should be lodged at the court as a statement of reference and should include:

- The designation, name, address and the residence of both the applicant and respondent(s).
- The subject-matter of the reference and a summary of the points of law on which the application is based.
- The nature of any supporting evidence offered
- The relief sought.

A notice of the reference and a copy of the application must be served on each respondent on the Secretary-General.

Article 25 provides for the lodging of a statement of claim. This is used where the issue is between the East African Community and its employees and should include:

- The name, designation, address and where applicable residence of the claimant.
- The designation, name, address and where applicable residence of the respondent.
- A concise statement of facts on which a claim is based and of the law applicable.
- The order sought.

The [EACJ User Guide](#) explains that once a claim or reference has been filed, the Registrar will issue a notification requiring the respondents to file their statement of defence, accompanied by a copy of the statement.

Stage 2: Standing

Article 30(1) of the EACJ Rules provides that any legal or natural person who is resident in a partner state has standing to refer a determination to the EACJ; specifically, the party must be:

- A legal or natural person.
- A resident of an EAC Partner State.
- Challenging the legality of any Act, regulation, directive, decision, and action of the said Partner State or an institution of the Community.

Article 37 of the EAC Treaty allows for parties to be represented when they appear before the EACJ. Parties can be represented by an advocate entitled to appear before a superior court of any of the Partner States.

Note on *amicus curiae*

Amici curiae are allowed to apply to be involved in a matter per article 36 of the EACJ Rules. An application must be made by notice of motion and provide the following information:

- A description of the parties.
- The name and address of the *amicus curiae*.
- A description of the claim or reference.
- The order in respect of which the *amicus curiae* is applying for leave to intervene.
- A statement of the *amicus curiae*'s interest in the result of the case.

Stage 3: Jurisdiction

The jurisdictional requirements of the EACJ are set out in articles 27 and 30 of the EAC Treaty. Article 27 states as follows:

- “(1) The Court shall initially have jurisdiction over the interpretation and application of this Treaty: Provided that the Court’s jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.
- (2) The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction.”

Article 30 states further that:

- “(1) Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.
- (2) The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be.
- (3) The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State.”

Accordingly, jurisdiction can be exercised in the following ways:

- **Ratione personae:** Article 30(1) of the EAC Treaty provides that any natural or legal resident in the EAC may bring a case to the EACJ.
- **Ratione temporis:** Cases could fall within the temporal jurisdiction of the EACJ if they occurred subsequent to the EAC Treaty coming into force. There is a strict two-months rule that guides this exercise of jurisdiction.
- **Ratione materiae:** Article 30(1) of the EAC Treaty authorises legal and natural persons, resident in a state party to the EAC Treaty, to make a reference (the same as filing a

complaint) to the EACJ on whether an act or omission of a state party is an infringement of the EAC Treaty.

Jurisdiction over human rights violations

It is necessary to note that the EACJ does not explicitly have jurisdiction over human rights matters. However, articles 6(d) and 7(2) of the EAC Treaty create scope for human rights matters to be brought before the EACJ.

Article 6(d) states:

“The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include: good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights”.

Article 7(2) states:

“The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.”

These articles were relied on in [*Burundi Journalists’ Union v Attorney General of the Republic of Burundi*](#). In 2013, the Burundi Journalists Union filed a reference with the EACJ alleging that the Press Law enacted in Burundi restricted freedom of the press, which is a cornerstone of the principles of democracy, rule of law, accountability, transparency, and good governance. Before turning to the merits of the matter the EACJ needed to determine whether the reference was properly before it and whether it had jurisdiction to engage it. Finding that it did have jurisdiction, the EACJ reasoned that the interpretation of the question whether articles 6(d) and 7(2) of the EAC Treaty were violated in the enactment of the Press Law is a matter squarely within the ambit of this EACJ’s jurisdiction. In essence, the EACJ read freedom of expression into the above articles and held that the violations of freedom are justiciable as violations of the EAC Treaty, accordingly, clothing it with jurisdiction.

[Media Defence](#) has noted that “the judgment is strong precedent for future cases as it removes any doubts over whether the EACJ can consider freedom of expression cases despite its lack of explicit human rights jurisdiction. This makes the EACJ a viable forum before which to test the laws of East African states relevant to the media.”

Stage 4: Admissibility

The EACJ does not apply the same admissibility criteria applied by the ACHPR and the African Court. The two key considerations for the EACJ are as follows:

- **Two-month rule:** Article 30(2) of the EAC Treaty requires references to be filed with the EACJ within two months of the alleged violation. This time frame is narrow and can be difficult to comply with. In *Attorney General of Uganda and Another v Awadh and Others*, the EACJ held that it would not be flexible on this requirement. It is also necessary to note that there is no provision in the EAC Treaty that recognises the concept of continuing violations.
- **Local remedies:** There is no requirement that all domestic remedies must be exhausted first. In *Democratic Party v Secretary-General and the Attorneys General of the Republics of Uganda, Kenya, Rwanda and Burundi*, the EACJ held that this jurisdiction is not voluntary and that once an applicant can show an alleged violation of the EAC Treaty, the EACJ must exercise jurisdiction. Where it does not have jurisdiction, the EACJ has held that:

“Jurisdiction is quite different from the specific merits of any case ... As it is, it should be noted that one of the issues of agreement as set out by the parties is that there are triable issues based on Articles 6, 7, 27 and 30 of the Treaty. That is correctly so since once a party has invoked certain relevant provisions of the Treaty and alleges infringement thereon, it is incumbent upon the Court to seize the matter and within its jurisdiction under Articles 23, 27 and 30 [to] determine whether the claim has merit or not. But where clearly the Court has no jurisdiction because the issue is not one that it can legitimately make a determination on, then it must down its tools and decline to take one more step.”

Stage 5: Procedure

Chapters VII and XII of the *EACJ Rules* provide for written and oral proceedings. Rule 54(1) provides that pre-trial proceedings take place after the close of pleading and allow the Principal Judge to determine issues in dispute, the possibility of mediation, the need for evidence and whether argument should be written or oral. Rule 53(3) and (4) provides:

“If the matter is to proceed to hearing the Division shall fix the date for commencement of hearing.

In any case where there is no need for evidence and all parties opt to present legal arguments in writing, the Division shall prescribe the time within which the parties shall file their respective written legal arguments and may fix the date on which the parties shall appear before a bench of three judges to deal with any other matter the Division thinks necessary.”

The *User Guide* explains the process of oral hearings as follows:

“One Party, usually the Claimant, first begins [Rule 62]. He states his case and produces his evidence — including calling his witness(es) to give evidence. The Respondent questions the Claimant (in cross-examination). If there is anything that is not clear, the Claimant may re-examine the witness further; and/or comment on any new points raised [Rule 63].

As the witnesses give evidence, the judge(s) take down notes. Simultaneously, a full audio recording of the proceedings is made [Rule 65]. If the case is not concluded for each hearing, a new date is set when the hearing will be continued. That process is known as Adjournment. The Court will always fix a specific date when the case will carry on. If any date is fixed at a later stage, then the Court will notify all the parties of the new date.”

The above steps take place at the level of the First Instance Divisions. Judgment shall be delivered within sixty (60) days from the conclusion of the hearing except where the EACJ is unable to do so. In some instances, the EACJ might elect to provide a decision at the close of the hearing and provide reasons at a later date.

A decision from the judgment or any order of the First Instance Division can be appealed per article 77 of the Rules of Procedure on:

- Points of law.
- Grounds of lack of jurisdiction.
- Procedural irregularity.

Written notice must be given when doing so and state the grounds of the appeal.

An intended appellant must lodge a notice of appeal within 30 days from the date of the decision. Parties are also entitled to review a judgment. Article 35 of the EAC Treaty read with article 72 of the EACJ Rules of procedure provides:

“An application for review of a judgment may be made to the Court only if it is based upon the discovery of some fact which by its nature might have had a decisive influence on the judgment if it had been known to the Court at the time the judgment was given, but which fact, at that time, was unknown to both the Court and the party making the application, and which could not, with reasonable diligence, have been discovered by that party before the judgment was made, or on account of some mistake, fraud or error on the face of the record or because an injustice has been done.”

An application for review of a judgment may be made to the EACJ only if it is based upon the discovery of some fact which by its nature might have had a decisive influence on the judgment if it had been known to the Court at the time the judgment was given, but which fact, at that time, was unknown to both the Court and the party making the application, and which could not, with reasonable diligence, have been discovered by that party before the judgment was

made, or on account of some mistake, fraud or error on the face of the record or because an injustice has occurred.

Stage 6: Measures and Remedies

Article 38(3) of the EACJ Treaty provides that a partner state or the Council shall take, without delay, the measures required to implement a judgment of the EACJ. Article 39 of the EACJ Treaty allows for the issuance of interim orders when it is considered necessary to do so. Article 69(2) of the EACJ requires all orders of the EACJ to clearly specify the relief granted or other determination of the case.

Stage 7: Enforcement

Article 44 provides, amongst other things, that the rules of civil procedure applicable in the state in question will govern the execution of a judgment of the EACJ that imposes a pecuniary obligation. Rule 74 provides that a party who wishes to execute an order of the EACJ must make an application in accordance with Form 9 of the Second Schedule to the EACJ Rules.

Practicalities of litigating before the EACJ

The time limitations of the EACJ undoubtedly pose practical challenges for litigants. Other challenges that have been noted include administrative challenges, lack of enforcement mechanisms, and funding challenges.¹³

Litigating at the ECOWAS Community Court of Justice

Snapshot of the types of cases before the ECOWAS Community Court of Justice

Federation of African Journalists and Others v The Republic of The Gambia

A challenge was brought against The Gambian Criminal Code which created criminal offences for sedition, false news and criminal defamation. Several journalists had been arrested and charged as a result of the Code. They argued that this limited their freedom of expression. The Federation of African Journalists, as well as three nationals of The Gambia who were living in exile due to fear of persecution as a consequence of their work as journalists, approached the ECOWAS Court seeking the following relief:

- Declaratory relief that The Gambia, in enforcing statutory provisions of the Criminal Code, violated the following rights:

¹³ Luambano, 'Litigating Human Rights Through the East African Court of Justice: Overview and Challenges' *Journal of Law, Policy and Globalisation* (2018) (accessible at <https://www.iiste.org/Journals/index.php/JLPG/article/view/41719/42940>).

- The right to freedom of opinion and expression under article 9 of the African Charter and article 19 of the International Covenant on Civil and Political Rights (ICCPR).
 - The right of journalists under article 66(2) of the Revised ECOWAS Treaty.
 - The right to liberty and security under article 6 of the African Charter and article 9(1) of the ICCPR.
 - The right of Gambian citizens to return to The Gambia under article 12(2) of the African Charter and Article 12(4) of the ICCPR.
- A declaration that in subjecting the fourth applicant to torture or other cruel, inhuman or degrading treatment or punishment, and causing him physical harm, psychological and emotional injury, The Gambia acted in violation of his human rights, the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment under article 5 of the African Charter and article 7 of the ICCPR.
 - A Declaration that in maintaining the statutory provision The Gambia had continued to act in gross violation of the applicants' rights and in breach of their obligations under the Revised Ecowas Treaty, African Charter and the ICCPR.
 - An order mandating and compelling The Gambia to repeal the relevant statutory provisions immediately or otherwise amend its laws in order to meet its obligations under international law including under the African Charter, the ICCPR and customary international law.
 - An order mandating and compelling The Gambia to effectively enact and implement laws, regulations and safeguards in order to meet its obligations under international law prohibiting torture and other cruel, inhuman or degrading treatment or punishment including under the African Charter, the ICCPR and customary international law.
 - An order for reparations, including physical, psychological, social and economic rehabilitation in respect of the violations of the second, third and fourth applicant's human rights.

Amnesty International, the Canadian Journalist for Freedom of Expression, the Committee to Protect Journalists, Freedom House, Pen International, Reporters without Borders and the Right2Know Campaign brought an application to join the proceeding as *amici curiae*.

In 2018, the ECOWAS Court made a finding that it had jurisdiction to entertain the matter, despite a preliminary objection by The Gambia. In its decision on the merits the ECOWAS Court found that:

- The enforcement of the impugned statute violated rights of the applicants under articles 6, 9 and 12(2) of the African Charter, articles 9, 12(4) and 19(2) of the ICCPR, and article 66(2)(c) of the Revised ECOWAS Treaty.
- Subjecting the applicants to torture, inhuman and degrading treatment violated their rights under article 5 of the African Charter and article 7 of the ICCPR.

The ECOWAS Court reasoned that the imposed criminal sanctions were disproportionate and not necessary in a democratic society where freedom of speech is a guaranteed right, and ordered that the legislation be reviewed. The Criminal Code was found to be overbroad and would “cast excessive burden upon the applicants in particular and all those who would exercise their right of free speech and violates the enshrined rights to freedom of speech and expression under Article 9 of the African Charter, Article 19 of the ICCPR and Article 19 of the UDHR”.

The Gambia was ordered immediately repeal and/or amend the Criminal Code in line with its obligations under international law, especially article 1 of the African Charter, the ICCPR and the ECOWAS Revised Treaty. The Gambia was further ordered to pay damages to the applicants for the violation of their rights.

Overview of the ECOWAS Community Court of Justice

The [ECOWAS Community Court of Justice](#) (**ECOWAS Court**) is the judicial body of the Economic Community of West African States (**ECOWAS**). The ECOWAS Court was established in terms of the [Revised Treaty of the ECOWAS](#) (**ECOWAS Revised Treaty**). The mandate of the ECOWAS Court includes ensuring the observance of law and of the principles of equity in the interpretation and application of the provisions of the Revised Treaty and all other subsidiary legal instruments adopted by ECOWAS. It serves the ECOWAS member states: Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Sierra Leone, Senegal and Togo. The [ECOWAS Protocol](#), the [ECOWAS Supplementary Protocol](#), and the [Rules of the Community Court of Justice](#) (**Rules**) provide guidance on the procedures of the ECOWAS Court.

Stage 1: Application to the Tribunal

Cases are to be filed before the Court through written applications addressed to the Registry. Article 11 of the ECOWAS Protocol requires that an application addressed to the Registry must set out the subject matter of the dispute, the parties involved, and a summary of the argument. Rule 33 specifically requires:

- The name and address of the applicant.
- The designation of the party against whom the application is made.
- The subject-matter of the proceedings and a summary of the pleas in law on which the application is based.
- The form of order sought by the applicant.
- Where appropriate, the nature of any evidence offered in support.

Stage 2: Standing

The ECOWAS Court has fairly broad standing provisions. Article 10 of the Revised Treaty provides that the following litigants may approach it:

- Member states.
- The Executive Secretary (now the President of the ECOWAS Commission).
- The Council of Ministers.
- Community Institutions.
- Individuals.
- Corporate Bodies.
- Staff of any Community Institution.
- National Courts of ECOWAS Member States.

Despite this covering a wide range of potential litigants, adherence to the standing provision is strictly applied by the ECOWAS Court. In [*Ocean King v Senegal*](#), the ECOWAS Court found that “an applicant will lack the requisite standing to bring a claim to the Court for determination if the issue raised does not fall within those over which they have been granted the right of access.”

Note on *amicus curiae*

The ECOWAS Protocol and the Rules do not explicitly provide for *amicus curiae* briefs. However, as discussed above, in [*Federation of African Journalists*](#), interveners were accepted as *amici curiae*. In that matter the Court granted an application in terms of article 89 of the Rules, allowing the NGOs to join the suit as interveners/ *amici curiae*.

Accordingly, a party interested in being admitted as *amicus curiae* should follow the rules applicable to interveners before the ECOWAS Court per Chapter III of the Rules. Rule 89, in particular, notes that an application to intervene must be made within six weeks of the publication of the notice of an application initiating proceedings. The application must contain:

- The description of the case.
- The description of the parties.
- The name and address of the intervener.
- The intervener's address for service at the place where the ECOWAS Court has its seat.
- The form of order sought, by one or more of the parties, in support of which the intervener is applying for leave to intervene.
- A statement of the circumstances establishing the right to intervene.

The application must be served on the parties. The President will give the parties an opportunity to submit their observations before deciding on the application, whereafter the President will refer the application to the Court to determine if the application to intervene should be granted.

Stage 3: Jurisdiction

Article 9(4) of the ECOWAS Protocol, as amended by the ECOWAS Supplementary Protocol, formally recognises that the ECOWAS Court “has jurisdiction to determine cases of violation of human rights that occur in any Member State.” Article 10(d) of the ECOWAS Supplementary Protocol states that access to the ECOWAS Court is open to “[i]ndividuals on application for relief for violation of their human rights.”

The ECOWAS Court can exercise jurisdiction in the following ways:¹⁴

- **Ratione personae:** Any individual alleging a violation of human rights committed in any member state may bring a case before the ECOWAS Court. Applications from organisations acting on behalf of a group of people whose rights have been violated can also be accepted.
- **Ratione temporis:** Human rights cases must be brought within three years of the cause of action arising. In instances where violations are ongoing, it will give rise to a cause of action *die in diem* (day in and out) and postpones the running of time.
- **Ratione materiae:** The ECOWAS Court has jurisdiction over all human rights violations that occur in the jurisdiction of members of ECOWAS.

Stage 4: Admissibility

Admissibility at the ECOWAS Court is not as strictly applied as it is in the other courts; however, it is important to note that applications that are brought cannot be pending before another court of similar status. The ECOWAS Court does not require the exhaustion of domestic remedies, but will neither hear matters that have been determined on the merits by domestic courts, nor does it hold appellate jurisdiction over domestic courts.

Stage 5: Proceedings

Rule 35 prescribes that once an application has been filed, the defendant has a month to lodge his or her defence. The ECOWAS Court will then, per rule 39, issue a preliminary report containing recommendations as to whether a preparatory inquiry or any other preparatory step should be undertaken. The ECOWAS Court may, per rule 43, either at its discretion or on application by a party, order that witnesses prove certain facts. Once the ECOWAS Court is satisfied with all the preliminary inquiries the matter will go to oral proceedings.

Cases that need to be dealt with as a matter of urgency

Chapter IV of the Rules provides for expedited procedures. Cases can be determined pursuant to an expedited procedure derogating from the provisions of these Rules, where

¹⁴ For a comprehensive discussion on jurisdiction at the ECOWAS Court see Media Defence ‘Training Manual on Litigation of Freedom of Expression in West Africa (accessible at <https://10years.mediadefence.org/wp/wp-content/uploads/2018/11/Legal-resources-6-West-Africa-Regional-Mechanisms-Manual.pdf>).

the particular urgency of the case requires the ECOWAS Court to give its ruling with the minimum of delay.

An urgent application needs to be lodged in a separate application along with the application initiating proceedings. The ECOWAS Court will provide all parties with an opportunity to present their arguments and will then deliver its ruling.

Stage 6: Remedies

The ECOWAS Court will issue a judgment once it has finalised the matter, it shall include the grounds for the decision and the operative part of the judgment, including the decision as to costs. This is done in terms of rule 60 of the Rules. The remedies available to the ECOWAS Court are similar to those offered at a domestic level. Remedies can include declarations and mandatory orders. The ECOWAS Court does not have scope to create remedies and is accordingly limited to base the remedy on what was put before it by the parties.

Stage 7: Enforcement

The judgments of the ECOWAS Court are binding. Member States are required to take immediate steps to comply with the remedy. Despite this, concerns have arisen regarding the legitimacy of the enforceability of the ECOWAS Court. [Olisa Agbakoba Legal](#) has noted that:

“[E]nforcement of judgments of the ECOWAS Court has been a major problem and this relates to the fact that neither the ECOWAS Revised Treaty, Supplementary Protocols or other legal instruments make provisions regarding the means of enforcing the issued writ of execution where Member States fail to voluntarily comply with the terms of the judgments of the Court. However, Article 77 of the ECOWAS Revised Treaty empowers the authority of heads of state and government of ECOWAS to impose certain sanctions on any member state who fails to fulfil its obligations to the community through suspension of new community loans or assistance, suspension of disbursement on on-going community projects or assistance programmes, exclusion from presenting candidates for statutory and professional posts and suspension from participating in the activities of the community.

This power is however yet to be exercised by the apex organ of ECOWAS. Thus, unless Member States are compelled to comply with the judgments of the ECOWAS Court, the confidence in the Court will completely be eroded so much so that the Court may be unable to entertain any applications from any person in respect of the violations of the fundamental rights of the citizens of ECOWAS.”

Practicalities of litigating before the ECOWAS Court

There are two notable challenges that ought to be taken into account by potential litigants:

- Establishing jurisdiction at the ECOWAS Court.
- Competing competencies between the ECOWAS Court and national courts appear to have also caused some concern.

The expanded jurisdiction that accompanied the Supplementary Protocol seems to have created some tension between the ECOWAS Court and its domestic counterparts. Despite its seeking to make the ECOWAS Court more accessible, it has to some extent complicated the jurisdictional requirements that ultimately create access.¹⁵

Current Status of the SADC Tribunal

The SADC Tribunal was established in 2005 with the mandate of ensuring adherence to, and proper interpretation of the provisions of, the SADC Treaty and subsidiary instruments. However, following several rulings against the Zimbabwean government, the Tribunal was suspended in 2010. In 2014 a Protocol was adopted which sought to do away the Tribunal's power to adjudicate individual disputes against a State party.

The Law Society of South Africa challenged the decisions taken by the South African government to support the suspension, and the decision to sign the Protocol. In 2018 the South African Constitutional Court handed down judgment in Law Society of South Africa and Others v President of the Republic of South Africa and Others in which the President was ordered to withdraw his signature from the 2014 SADC Protocol. The Constitutional Court found the actions of the President to be unconstitutional, unlawful and irrational. In 2019 the Tanzanian High Court in Tanganyika Law Society v Ministry of Foreign Affairs and International Cooperation of the Republic of Tanzania ruled that:

“The suspension of the operations of the SADC Tribunal; and failure or refusal to appoint Judges contrary to the clear Treaty provisions, was inimical to the Rule of law as a foundational principle inherent to the legitimacy of the Community; and as expressly entrenched in the Treaty. Respondents are enjoined pursuant to the respective Treaty obligations; to give effect to the Treaty.”

The Tanzania High Court similarly condemned the decision of the Tanzanian President in relation to the suspension of the SADC Tribunal.¹⁶

While other states in the region are not bound by these domestic decisions, they may nevertheless serve as pressure points for further litigation. However, at the time of writing, the SADC Tribunal remains defunct.

¹⁵ Ojomo, 'Competing Competences in Adjudication: Reviewing the Relationship between the ECOWAS Court and National Courts' African Journal of Legal Studies (2014) (accessible at https://brill.com/view/journals/ajls/7/1/article-p87_5.xml?language=en).

¹⁶ ICJ, 'Tanzanian High Court condemns unlawful stripping of SADC Tribunal's powers rendering the rule of law a "pipe dream"' (2019) (accessible at <https://www.icj.org/tanzanian-high-court-condemns-unlawful-stripping-of-sadc-tribunals-powers-rendering-the-rule-of-law-a-pipe-dream/>).

The Practicalities of Litigating Digital Rights

Determining a strategy

A holistic litigation strategy is as much about the anticipated outcome as it is about the steps needed to reach that outcome. Developing a strategy can take some time, particularly when there is a long-term vision. However, time is not always available, and strategies sometimes have to be developed very quickly. Whether it is urgent or protracted there are three key tenants for every litigation strategy, and in this regard the tripod analogy is useful. In order for a tripod to be balanced and useable each leg needs to be of equal length and strength. The same rationale is applicable to a litigation strategy, with the three being:

1. Procedural considerations.
2. Administrative capabilities.
3. Substantive goals.

These considerations are largely interdependent and need to be given equal consideration. If one is not properly considered, or if one fails, there is the possibility that the entire strategy will fail.

Procedural requirements

The procedural considerations are those that relate to actual court process and requirements. The considerations listed above will form an important part of developing a strategy. By way of brief recap, it is important to consider the following:

- Standing.
- Jurisdiction.
- Admissibility.
- Representation.
- *Amicus curiae* involvement.

Other procedural considerations include which parties to cite, court mandated time frames, procedures regarding interim remedial measure, conflicts of interest, and rules regarding the gathering of information. Another important consideration is that of mandate. It is imperative that lawyers have received the requisite mandate to act, particularly when acting for broader community groups. It is advisable to set out the terms of reference and mandate agreement upfront to avoid any procedural mishaps along the way.

Administrative capacity

Administrative considerations include:

- The financial implications of the litigation from beginning to end including any unexpected costs and possibilities of appeals or cost orders.

- Capacity to deal with the matter.
- Expertise and skills.
- The setting up of a team and the distribution of roles.
- Internal and external time frames.

Drawing up budgets, developing calendars, and ensuring there are sufficient financial and human resources form an important part of the development of a sustainable strategy.

Substantive requirements

This leg is all about the legal substance. Here, the facts, law and remedy all need to be considered in detail. This includes understanding and mapping out the following:

- Nature of the legal challenge.
- Rights are implicated.
- Extent to which the facts support the legal challenge.
- Proposed remedy.
- Alternative remedies.
- Rights implicated.
- Applicable legal frameworks.
- Domestic, regional or international law and jurisprudence.
- Overcoming a limitations / restrictions analysis.
- Issue of costs.
- Reputational development or backlash.
- Safety and security of litigators and clients.
- Forms of research and advocacy that will be of use to the case.
- Parallel and complimentary strategies.
- Social, economic, political and cultural considerations.
- Systemic issues.
- Reliability and legitimacy of the judicial body

Linking research, advocacy and litigation is key in the development of a substantive strategy.

Gathering evidence

The ordinary rules of evidence apply to digital evidence, which must still meet the minimum standards of relevance and reliability in order to be admitted. Different types of evidence can be useful for proving a case and provide clarification regarding the facts of the case. This can include evidence of violation, expert evidence, digital evidence and witness evidence. The rapidly evolving digital landscape is providing both opportunities and challenges in relation to the gathering of evidence. On the one hand, there is a large quantity of available digital information, whereas on the other hand, collecting and analysing the evidence can be challenging and technical.¹⁷

¹⁷ Human Rights Center UC Berkley School of Law 'Digital Fingerprints: Using Electronic Evidence to Advance Prosecutions at the International Criminal Court' (2014) (accessible at https://www.law.berkeley.edu/files/HRC/Digital_fingerprints_interior_cover2.pdf).

Unlike traditional evidence, digital evidence can be more complex given the volume of available data, its velocity, its volatility and its fragility.¹⁸ Courts should consider legal and technical requirements when considering the admissibility of evidence.¹⁹ Legally, courts should consider:

- The legal authorisation to conduct searches and seizures of information and communication technology and related data.
- The relevance, authenticity, integrity, and reliability of digital evidence.

Technically, the courts should consider:

- The digital forensics procedures and tools used to extract, preserve, and analyse digital evidence.
- The digital laboratories whereby analyses are performed and the reports of digital forensic analysts.
- The technical and academic qualifications of digital forensics analysts and expert witnesses.

Fortunately, there is a wealth of resources that can assist lawyers and activists when trying to capture, collect and present evidence of digital rights violations.

Collecting, preserving, and verifying online evidence of human rights violations

From a technical perspective, [Open Global Rights](#) has listed an array of modules, apps and tools that seek to assist human rights activists with the collection, preservation, and verification of online evidence of human rights violations.

Documenting During Internet Shutdowns

Witness has published [blog series](#) with practical tips on how to overcome challenges of capturing, storing and disseminating information during an internet shutdown. The blog series includes information on the following:

- [Setting up a phone for offline documentation](#)
- [Should I use this documentation app?](#)
- [Maintaining verifiable media during an internet shutdown](#)
- [Backing up phone media without internet or a computer](#)

¹⁸ UNODC E4J University Module Series: Cybercrime, 'Module 4: Introduction to Digital Forensics' (2019) (accessible at <https://www.unodc.org/e4j/en/cybercrime/module-4/key-issues/digital-evidence.html>).

¹⁹ UNODC E4J University Module Series, 'Module 6: Practical Aspects of Cybercrime Investigations and Digital Forensics' (2019) (accessible at <https://www.unodc.org/e4j/en/cybercrime/module-6/key-issues/digital-evidence-admissibility.html>).

- [File sharing and communication during an internet shutdown](#)

Detecting censorship and traffic manipulation

The [Open Observatory of Network Interference](#) is a useful, free resource that detects censorship and traffic manipulation on the internet. Their software can help measure:

- Blocking of website
- Blocking of instant messaging apps (WhatsApp, Facebook Messenger and Telegram)
- Blocking of censorship circumvention tools (such as Tor)
- Presence of systems (middleboxes) in your network that might be responsible for censorship and/or surveillance
- Speed and performance of your network.

Creating partnerships with experts and technical organisations can be of great use. Harmonising technology with the law and presenting viable evidence to courts can go a long way in advancing digital rights and freedom of expression.

Not all digital evidence needs to be over technical and complicated. Videos or online sources can play a role in proving rights violations, but verification remains key. Widespread dissemination of information can be useful, however, with disinformation on the rise, it is important to verify information – such as videos – before relying on it or using it as evidence. Amnesty International has set up a Digital Verification Corps hub, which uses tools to verify information found in videos posted on YouTube and circulated via WhatsApp.²⁰ Timing is verified through a comparison between time periods in the videos and reports of the United Nations Human Rights Council, and confirmation of the events is verified by comparing footage to Google Earth and Google Maps. This level of verification can be useful and ensure that accurate information can be put before courts and tribunals.

Digital rights and freedom of expression violations often are accompanied by technical terms that many people, including judges, do not fully understand. It is therefore important to be able to simplify the technicalities in a way captures the rights violation. For example, the legal team may consider engaging with technical partner organisations or *amici curiae* with technical expertise to assist the litigators and the court in better understanding the concepts that are before it.

Litigators should also make use of the plethora of toolkits available that can assist in understanding technical terms. See for example:

- [Media Defence Report Mapping digital rights and online freedom of expression in East, West, and Southern Africa](#)
- [Media Defence Manual on freedom of expression law](#)
- [Media Defence Training Manual on Digital Rights and Freedom of Expression Online](#)

²⁰ Amnesty International, 'Using digital verification methods to investigate human rights violations in Rwanda' (2019) (accessible at <https://www.amnesty.org/en/latest/campaigns/2019/04/using-digital-verification-methods-to-investigate-human-rights-violations-in-rwanda/>).

- Media Defence Digital Rights Litigation Guide

Advocacy strategy

Litigation alone is not enough to effect substantive change or effectively disrupt the status quo – advocacy is an essential component.²¹ This can include social media campaigns, public awareness, parallel processes to other non-judicial fora, media statements, protests and any other creative activity that elevates the profile of the case, informs the public and tells a story. Advocacy can express ideas, explain problems, and influence the way people understand an issue in order to secure broader community support.

Start a #

Something as simple as creating a hashtag can go a long way. #FeesMustFall, #MeToo and #BlackLivesMatter turned from hashtags into mass movements and challenged systemic issues.

Learn and teach

Engaging with community-based activists, experts and academics can ensure that everyone is informed of their rights, the issues and their available remedies. During the early 2000s, the Treatment Action Campaign in South Africa developed a strategy to educate people in South Africa about HIV/AIDS. The education focused on the technical medical component of the disease, as well a rights-based component that enabled people to be rights literate. Community health care workers, activists, lawyers and other medical experts worked together to ensure that everyone understands the issues and is empowered to address them.

More recently, Ndifuna Ukwazi, an organisation based in South Africa, has begun developing different techniques to assist community members with addressing access to housing and unlawful evictions. They host regular workshops where people with legal skills would explain the law to the community, in an effort to ensure that those persons could then train other members of their community. This has developed into a sustainable model where community members educate each other. The communities began learning how to represent themselves in unlawful evictions matters and could be available to assist others who might not have easy access to legal services. This campaign has been effective in ensuring that people have agency and are empowered to solve legal challenges.

Sharing information online, hosting workshops and developing infographics can all assist with the ensuring that there is an informed society, an informed judiciary and an informed government.

Tell stories not statements

²¹ See APC, 'Advocacy Strategies and Approaches' (accessible at <https://www.apc.org/en/advocacy-strategies-and-approaches-overview>); Call Hub, 'Advocacy Strategies' (accessible at <https://callhub.io/advocacy-strategies/>); and Call Hub, 'Grassroots Advocacy' (accessible at <https://callhub.io/grassroots-advocacy-definition-strategies-and-tools/>).

Issues around digital rights and freedom of expression affect people differently, and their different experiences can play an important role in the way's others understand the issues and how others relate to the issues. People, including judges, are often more likely to show empathy to an issue that is a human issue. Sharing stories about how people have been affected, and letting people tell their own stories can go a long way in strengthening an advocacy campaign and in turn can support the litigation.

Meaningful actions

Actions have proven to be an effective means of drawing attention to an issue. Actions can range from protests and disruptions, to petitions and submissions to those in power. They can include visual statements such as paintings, posters or billboards. These should be strategic and impactful and should send the right message.