

Module 10

**INTRODUCTION
TO LITIGATING
DIGITAL
RIGHTS IN
AFRICA**

*Summary Modules on
Litigating Digital
Rights and Freedom of
Expression Online*

**MEDIA
DEFENCE**



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MODULE 10

INTRODUCTION TO LITIGATING DIGITAL RIGHTS IN AFRICA

- The evolution of the internet and the practicalities of the spread of information online are creating new challenges for protecting human rights.
- Strategic litigation is a powerful tool to advance digital rights and is increasingly being used in a variety of different and innovative ways.
- Litigating digital rights requires an understanding of how to develop an optimal litigation strategy based on core principles.
- Litigating at the various regional courts and forums in Africa is a promising strategy but requires lawyers to appreciate the jurisdiction and procedures of the various forums.

INTRODUCTION

The internet is one of the most powerful tools for facilitating the receiving and imparting of information and ideas. It allows for instant sharing of volumes of information, across borders and to wide audiences. It enables individuals to engage with diverse views and perspectives, and to access an array of resources to assist them to formulate their own views.

While the internet and other technologies offer enormous opportunities, they also present particular challenges. The digital rights landscape is constantly evolving as new technologies develop, and as we increasingly test the ambit of the right to freedom of expression and other rights online.

Even though litigation can be a protracted and costly process, it can contribute, in a meaningful way, to the evolution of legal frameworks that ensure that human rights are respected, protected and promoted. Strategic and test case litigation is increasingly being used as a tool to advance freedom of expression and digital rights. Given the 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. This training 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.

This module should be read in conjunction with the following resources:

- [Advanced Module 6 : Litigating Digital Rights Cases in Africa, Media Defence Advanced Modules on Digital Rights and Freedom of Expression Online](#)
- [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.](#)

FOUNDING JURISDICTION AND STANDING

Founding 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.

One challenge in litigating digital rights issues in Africa is that many cases may involve a major multinational technology platform or telecommunications company in some way. While the African Commission on Human and Peoples' Rights ([ACHPR](#)) has not yet fully reflected on the establishment of jurisdiction for big tech companies, there may be some insights to draw from cases brought against multinational oil companies across Africa. The case of *Friends of the Earth v Shell*¹ provides insight into how to establish jurisdiction when litigating cases involving multinational companies. A judge in the Netherlands agreed to allow a Dutch NGO and four Nigerian farmers to bring a compensation case against Shell for environmental degradation said to be caused by the company's operations in the Niger Delta.²

Establishing standing

The doctrine of standing is commonly understood as the ability of a party to bring a matter to a particular court. This involves an evaluation of any existing applicable restrictions on whether an individual or a civil society organisation (**CSO**) can file a case. It involves a litigant establishing their interest in a matter: who they are, how they are affected, who they represent, or what interests they represent. To establish standing, a potential litigant needs 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, so it is important to ensure what the standing requirements are before committing to a litigation strategy.

¹ Business & Human Rights Resource Center, 'Shell lawsuit (re oil pollution in Nigeria)' (2010) (accessible at: <https://www.business-humanrights.org/en/latest-news/shell-lawsuit-re-oil-pollution-in-nigeria/>).

² The Guardian 'Shell must face Friends of the Earth Nigeria claim in Netherlands' (2009) (accessible at: <https://www.theguardian.com/business/2009/dec/30/shell-oruma-alleged-pollution-claim>).

GENERAL PRINCIPLES AND INTRODUCTION TO DIGITAL RIGHTS LITIGATION

What are digital rights?

It is now firmly entrenched by both the [ACHPR](#)³ and the United Nations⁴ ([UN](#)) that the same rights that people have offline must also be protected online, in particular the right to freedom of expression. As stipulated in article 19(2) of the International Covenant on Civil and Political Rights ([ICCPR](#)), the right to freedom of expression applies regardless of frontiers and through any media of one's choice. Digital rights are basically human rights in the digital era, comprising the rights that are implicated in our access to and use of technologies as well as how fundamental rights play out in the online environment.

The internet does give rise to particular challenges that need to be noted when considering litigation on digital rights issues. The ability to publish immediately on the internet and reach an expansive audience can create difficulties. For example, the borderless nature of the internet can make establishing the true identity of an online speaker more challenging, founding jurisdiction for a claim more complex, or achieving accountability for wrongdoing that has been perpetrated online more difficult. Moreover, it can be challenging to fully remove content once it has been published online, or to contain its impact and spread.

Nevertheless, while the new digital world has certainly created some new issues, there are many that can be readily dealt with by applying a reasonable approach to the established principles of law.

General principles in litigating digital rights

In addition to jurisdiction and standing, there are a number of procedural requirements that form an essential part of any litigation strategy.

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. The principle of admissibility in regional fora usually requires that all domestic 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. In effect, admissibility dictates that an attempt to resolve a matter domestically should have taken place before approaching a regional or international forum.

Representation

³ ACHPR, 'Resolution on the right to freedom of information and expression on the internet in Africa', ACHPR/Res.362(LIX), (2016) (accessible at: <https://www.achpr.org/sessions/resolutions?id=374>).

⁴ UN Human Rights Council, 'The promotion, protection and enjoyment of human rights on the Internet' A/HRC/32/L.20, (2016) at para 1 (accessible at: https://www.article19.org/data/files/Internet_Statement_Adopted.pdf).

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.

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 affect the case in question. 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.

OVERVIEW OF REGIONAL AND CONTINENTAL COURTS

Litigating at 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 on Human and Peoples' Rights ([African Charter](#)).

Beyond the obligation to consider reports submitted by states, and shadow reports submitted by CSOs regarding states' compliance with the African Charter, the ACHPR is empowered to receive and consider communications, which are like complaints. Communications are the mechanism through which the ACHPR fulfils its function to protect the rights and freedoms guaranteed in the African Charter.

There are several stages involved in the communications process, which are governed by the [Communication Procedure](#).

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.⁵

⁵ For more on standing see Pedersen, 'Standing and the African Commission on Human and Peoples'

The matter can also be brought for the public good as class or representative actions under the *actio popularis* approach, which means that the author of a communication need not know or have any relationship with the victim. This is to enable victims of human rights violations on the continent to receive assistance from NGOs and individuals far removed from their locality.⁶ Furthermore, it is not necessary for cases to be submitted by lawyers, although legal representation can be helpful. Rule 99(16) of the Rules of Procedure provides for the ACHPR to receive *amicus curiae* briefs on communications.

Once a communication has been successfully submitted, a decision by a simple majority of the eleven commissioners is needed for the ACHPR to be seized with a matter, and the ACHPR will then proceed to consider whether the communication is admissible in terms of article 56 of the African Charter, including that all local remedies were exhausted before submitting the communication.⁷

Following a confirmation of admissibility, the ACHPR will give the parties time to present their written arguments. The ACHPR tends to prefer deciding matters on the papers, and 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.

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. 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. The Secretariat of the ACHPR typically issues correspondence reminding states that have been found to have violated provisions of the African Charter and calling on 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:

“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

Rights' African Human Rights Law Journal (2006) (accessible at <https://www.ahrhj.up.ac.za/pedersenm-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).

⁶ For more on *actio popularis*, see *Article 19 v Eritrea* at the ACHPR (2007) (accessible at: <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2007/79>).

⁷ For more on the criteria for exhausting local remedies, see *Sir Dawda K. Jawara v The Gambia* (2000) (accessible at: <http://hrlibrary.umn.edu/africa/comcases/Comm147-95.pdf>) and *SERAC v Nigeria* (2002) (accessible at: <https://www.escri-net.org/sites/default/files/serac.pdf>).

decisions on communications, it has developed human rights jurisprudence in Africa on several aspects consistent with the jurisprudence of other human rights bodies. Nevertheless, the African Commission has only received and decided very few communications related to economic, social and cultural rights.

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."

Litigating at the African Court on Human and Peoples' Rights

The African Court has the mandate to adjudicate matters dealing with states' compliance with the African Charter and other instruments on the protection of human rights ratified by that state. It became operational in 2009.⁸ It complements and reinforces the functions of the ACHPR, but 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:

"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."⁹

The [Practice Directions Guide to Litigants](#) provides guidance on filing a submission. Article 5 of the African Court Protocol indicates who can submit a case to the African Court, including state parties, African intergovernmental organisations, 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. In recent years, The Gambia, Niger and Guinea-Bissau have made the declarations necessary to allow NGOs and individuals to access the African Court

⁸ 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).

⁹ African Court on Human and People's Rights, 'Frequently Asked Questions' (accessible at <https://en.african-court.org/index.php/faqs/frequent-questions>).

directly.¹⁰ However, since 2016, four states have withdrawn their declarations (Tanzania, Rwanda, Cote d'Ivoire, and Benin), leaving only seven states who allow it.¹¹

In respect of legal representation, rule 22 of the Rules of Court 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.” *Amici curiae* are also permitted in the African Court in terms of rules 45(1) and 45(2) of the Rules of Court, and the process for doing so is contained in sections 42-47 of the Practice Directions of the African Court.

At the African Court, jurisdiction needs to be established alongside the determination of admissibility, which is different to the ACHPR. Article 3 of the African Court Protocol and rule 26 of the Rules of Court stipulate the rules regarding jurisdiction.¹²

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, and it may also hold extraordinary sessions. The African Court live streams and makes recordings of its hearings publicly available, which is an advantage for transparency as well as for potential litigants to understand its workings. The African Court consists of eleven judges, although a bench of seven judges constitutes a quorum.

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.¹³

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 of the African Union in terms of article 31 of the African Court Protocol. However, persistent non-compliance by states with the Court’s orders has become a serious issue, with research finding that 75% of states do not comply with its decisions.¹⁴

¹⁰ African Court on Human and Peoples’ Rights ‘Declarations,’ (accessible at: <https://www.african-court.org/wpafc/declarations/#:~:text=The%20Court%20shall%20not%20receive,institute%20cases%20directly%20before%20it%20C>).

¹¹ *Id.*

¹² For more on jurisdiction, see *Konaté v. Burkina Faso* in the African Court (accessible at: <https://en.african-court.org/images/Cases/Judgment/Judgment%20Appl.004-2013%20Lohe%20Issa%20Konate%20v%20Burkina%20Faso%20-English.pdf>).

¹³ For more on the African Court’s deliberations on reparations, see the judgment from *Norbert Zongo and Others v Burkina Faso* (2015) (accessible at: <https://en.african-court.org/images/Cases/Ruling%20on%20Reparation/Application%20No%20013-2011%20-%20Beneficiaries%20of%20late%20Norbert%20%20Zongo-Ruling%20on%20Reparation.PDF>).

¹⁴ Lilian Chenwi, ‘Successes of African Human Rights Court undermined by resistance from states,’ *The Conversation* (2021) (accessible at: <https://theconversation.com/successes-of-african-human-rights-court-undermined-by-resistance-from-states-166454>).

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:

“First, [there is] 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...

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... 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.”

Litigating at the East African Court of Justice

The East African Court of Justice ([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](#) and is tasked with interpreting and enforcing it.¹⁵ The East African Court of Justice Rules of Procedure ([EACJ Rules](#)) govern its functioning. The EACJ serves the East African Community ([EAC](#)), namely Burundi; the Democratic Republic of the Congo; Kenya; Rwanda; South Sudan; the 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 former.

At the EACJ, a statement of reference is the equivalent of a claim or complaint in domestic litigation and includes allegations of a human rights violation made by a Partner State, the Secretary-General, or a legal or natural person. Articles 24 and 25 of the EACJ Rules provide for the lodging of a statement of reference.¹⁶

Rule 30(1) of the EACJ Rules provides that any legal or natural person who is resident in a partner state may bring a case to the EACJ to challenge the legality of any Act, regulation, directive, decision, and action of a Partner State or an institution of the Community on whether it is an infringement of the EAC Treaty. Cases could fall within the temporal jurisdiction of the EACJ if they occurred after the EAC Treaty came into force. Further jurisdictional requirements

¹⁵ For more see International Justice Resource Center ‘East African Court of Justice’ (accessible at: <https://ijrcenter.org/regional-communities/east-african-court-of-justice/>).

¹⁶ See the EACJ User Guide for more information: <https://eacj.org/wp-content/uploads/2014/05/User-Guide.pdf>.

are set out in articles 27 and 30 of the EAC Treaty.¹⁷ In terms of rule 36 of the EACJ Rules, *amici curiae* are allowed to apply to be involved in a matter.

In terms of admissibility, article 30(2) of the EAC Treaty requires references to be filed with the EACJ within two months of the alleged violation, an unusually short period.¹⁸ There is also no provision in the EAC Treaty that recognises the concept of continuing violations. However, there is no requirement that all domestic remedies must be exhausted first before approaching the EACJ.¹⁹

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. Chapters VII and XII of the [EACJ Rules](#) and the [User Guide](#) provide for the procedures for hearing cases.

In terms of enforcement, article 44 provides, among 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.

For more information, see Media Defence's [Manual on Litigating Freedom of Expression Cases in East Africa](#).

Litigating at 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 ([Revised Treaty](#)). 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.”

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

¹⁷ 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. For more, see *Burundi Journalists' Union v Attorney General of the Republic of Burundi* (2015) (accessible at: <https://www.eacj.org/?cases=burundi-journalists-union-vs-the-attorney-general-of-the-republic-of-burundi>).

¹⁸ In *Attorney General of Uganda and Another v Awadh and Others* (2011), the EACJ held that it would not be flexible on this requirement (accessible at: <https://www.eacj.org/?cases=omar-awadh-and-6-others-vs-attorney-general-of-uganda>).

¹⁹ In *Democratic Party v Secretary-General and the Attorneys General of the Republics of Uganda, Kenya, Rwanda and Burundi* (2013), 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 (accessible at: <https://www.eacj.org/?cases=democratic-party-vs-the-secretary-general-east-african-community-and-the-attorney-general-of-the-republic-of-uganda-and-the-attorney-general-of-the-republic-of-kenya-and-the-attorney-general-of-the-r>).

[ECOWAS Protocol](#), the [ECOWAS Supplementary Protocol](#), and the [Rules of the Community Court of Justice](#) provide guidance on the procedures of the ECOWAS Court.

Article 11 of the ECOWAS Protocol sets out how cases may be filed to the ECOWAS Court. It has fairly broad standing provisions detailed in article 10 of the Revised Treaty, including that community institutions or their staff, individuals, corporate bodies, member states and the national courts of ECOWAS countries may approach it.²⁰ Applications from organisations acting on behalf of a group of people whose rights have been violated are also accepted.

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.

The ECOWAS Protocol and the Rules of the Community Court of Justice do not explicitly provide for *amicus curiae* briefs. However, in [Federation of African Journalists and Others v The Gambia](#),²¹ interveners were accepted as *amici curiae*. In that matter, the Court granted an application in terms of article 89 of the Rules of the Community Court of Justice, allowing the CSOs to join the suit as *amici curiae* interveners. It seems that this has opened the door to *amici* applications at the Court going forward, and *amici* have been successfully admitted in later cases including [Amnesty International Togo v The Togolese Republic](#) and [SERAP v Federal Republic of Nigeria](#).

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 hold appellate jurisdiction over domestic courts.

The remedies available to the ECOWAS Court are similar to those offered at a domestic level. Remedies can include declarations and mandatory orders, but 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.

The judgments of the ECOWAS Court are binding: the 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, as the power given by the ECOWAS Revised Treaty to heads of state and governments to impose sanctions has yet to be exercised.²²

²⁰ See *Ocean King v Senegal* for more on how strictly adherence to the standing provision is applied by the ECOWAS Court (accessible at: http://www.worldcourts.com/ecowasccj/eng/decisions/2011.07.08_Ocean_King_Nigeria_Ltd_v_Senegal.pdf).

²¹ ECOWAS Court Suit No. ECW/CCJ/APP/36/15 (2018) (accessible at: http://prod.courtecawas.org/wp-content/uploads/2019/02/ECW_CCJ_JUD_04_18.pdf).

²² For more, see Olisa Agbakoba Legal 'Enforcement of the Judgments of the ECOWAS Court' (2018) (accessible at: https://oal.law/enforcement-of-the-judgments-of-the-ecowas-court/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration).

The ECOWAS Court has recently demonstrated its willingness to progressively address digital rights issues placed before it. In two prominent cases, it recently ruled against states who had shut down access to the internet and/or social media in violation of the right to freedom of expression. In June 2020, the Court ruled that the September 2017 internet shutdown ordered by the Togolese government during ongoing protests in that country was illegal and an affront to the applicants' right to freedom of expression.²³ In a similar case in 2022, the Court held that the government of Nigeria's banning of social media platform Twitter was also illegal.²⁴

For more information, see Media Defence's [Training Manual on Litigation of Freedom of Expression in West Africa](#).

The practicalities of litigating digital rights

1. **Determining a strategy.** There are three key tenets for every litigation strategy: procedural considerations, administrative capabilities, and substantive goals. These considerations are largely interdependent and need to be given equal consideration.
2. **Gathering evidence.** Different types of evidence can be useful for proving a case and providing clarification regarding the facts: this can include evidence of a violation, expert evidence, digital evidence and witness evidence and testimony. 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.²⁵ 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.²⁶
3. **Advocacy strategies.** Litigation alone is not enough to effect substantive change or effectively disrupt the status quo — advocacy is an essential component.²⁷ 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.

For more information on the practicalities of litigating digital rights, see the recently published [Strategic Litigation Toolkit](#) by the Digital Freedom Fund.

²³ Economic Community of West African States Community Court of Justice, Suit no. ECW/CCJ/APP/61/18 (2020) (accessible at:

https://www.accessnow.org/cms/assets/uploads/2020/07/ECOWAS_Togo_Judgement_2020.pdf).

²⁴ SERAP v. Federal Republic of Nigeria (2022) (accessible at:

<https://globalfreedomofexpression.columbia.edu/cases/serap-v-federal-republic-of-nigeria/>).

²⁵ 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).

²⁶ For more see UNODC E4J University Module Series: Cybercrime, 'Module 4: Introduction to Digital Forensics' (2019) (accessible at: <https://www.unodc.org/e4j/en/cybercrime/module-4/index.html>).

²⁷ 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/>).

CONCLUSION

Litigating digital rights involves some particular challenges related to the digital realm. However, jurisprudence is beginning to develop in domestic as well as regional courts that defends freedom of expression and information online. While some African regional courts struggle with enforcement of their rulings, and not all are easily accessible, they have demonstrated their willingness to rule to defend fundamental human rights and provide an important avenue for using litigation to advance digital rights in Africa.

For more comprehensive information on how to litigate digital rights in Africa, see [Module 6](#) of Media Defence's Advanced Modules on Digital Rights and Freedom of Expression Online.