



Training Manual on Litigation of Freedom of Expression in East Africa

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Chapter 1: Introduction

This module is designed to assist new litigants at the regional level in East Africa on how to litigate cases on freedom of expression and the rights of the media. It therefore concentrates on setting out the processes and procedures for filing and arguing human rights cases before the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights and the East African Court of Justice. It should be read in conjunction with the Training Manual on International and Comparative Media and Freedom of Expression Law which will assist you in developing the content of the arguments being placed before the regional forums. The module is based on the decisions of the various forums as it is believed that this is the best way of learning how a system works in practice. We anticipate that this module will be used to bring more cases, resulting in increasingly positive jurisprudence from the three forums.

1.1 What is the rule of subsidiarity as applied to international human rights litigation and the African human rights system?

The rule of subsidiarity refers to the basic principle that international forums should only be used when domestic (sometimes referred to as "local") forums have failed to enforce human rights. The State has the primary obligation to ensure remedies for violations of human rights and the role of international human rights forums is to ensure that States are complying with these obligations. In practical terms, this means that most cases for the enforcement of human rights should be brought at the domestic level first, where the courts are better placed to judge facts, interpret domestic laws, and ensure enforcement of their decisions. You will need to apply this principle when you look at admissibility.

If for any reason this system fails, cases may be brought against the State at an international or regional forum. In East Africa, the regional mechanisms are:

- the African Commission on Human and Peoples' Rights (the "African Commission");
- the African Court on Human and Peoples' Rights (the "African Court"); and
- the East African Court of Justice (the "East African Court").

Each of these will have different rules to ensure the principle of subsidiarity (including limiting jurisdiction and requiring the exhaustion of local remedies). We will discuss these below.

1.2 What is the purpose and function of international and regional litigation?

Under international human rights law, each State has obligations to respect, protect, and fulfil human rights. The primary obligation is therefore always on the State to ensure enjoyment of human rights and it is the domestic courts of each State that serve the primary function of enforcement of human rights. From a practical perspective, it is also often easier to enforce the decisions of domestic courts because domestic legal systems have developed mechanisms of enforcement that are absent from international forums, which are much more dependent on political pressure. It is for these reasons that international tribunals must always be considered as subsidiary to domestic proceedings.

Subsidiarity: The rule of subsidiarity is the basic principle that international forums should only be used when domestic (sometimes referred to as “local”) forums have failed to enforce human rights.

1.3 What roles do the domestic, regional, and international systems play?

The primary function of international and regional courts and other enforcement mechanisms is to ensure that States comply with their international obligations. Cases should therefore generally be brought to the attention of the domestic courts first, to give the government an opportunity to remedy the violation.

Reasons for bringing cases to regional and international forums include:

- developing pressure to change domestic law;
- achieving concrete remedies (including compensation) for individual clients; and
- as part of a wider advocacy strategy.

Although international forums have a reputation of failing to ensure that their decisions are actually enforced, some countries are very quick to pay compensation when asked to do so by international forums. In some cases, litigation before international human rights forums is the only way to get attention from the domestic government or the international community for specific human rights situations.

1.4 What is your objective in litigating at the domestic or regional level?

The objective is often not purely legal. The advocacy reasons for litigation may often be more important than any legal objective. It is for this reason that the complaint that international decisions are not enforceable is often exaggerated. A victory against a State at the regional level may be used to put pressure on the government at the domestic, regional, and international level. However, in these cases you should usually not bring a case with the expectation that, on its own, it will remedy human rights violations. Instead, it is advisable to bring cases as part of a wider strategy, including through domestic and regional litigation and lobbying.

1.5 When should you take your case to the international and regional human rights system?

Cases should generally be brought to regional forums when the domestic forums have failed or are not available.

However, there are situations where the domestic legal system does not work, for example, because:

- of corruption;
- of long delays;
- the domestic law is itself in violation of international human rights law; or
- the extent of the violations overwhelms the domestic courts.

In these cases you may need to take a case immediately to the international or regional level.

When deciding to take cases before international and regional forums it is important to consider a number of things, including whether:

- there is a possibility that litigation could result in harmful impact;
- there are any unexpected negative consequences of victory; or
- there are any unexpected negative consequences of defeat.

This applies to many issues and should always be a consideration when bringing a case before a regional or international forum.

1.6 How do you file a case with the regional and international systems?

If you decide to file a case before an international forum you will need to ensure that it meets both the *formal* and *content* requirements of that forum. Different systems will apply different rules, and you should therefore refer to the rules of procedure of each system before you file a complaint. The different forums we talk about in this manual (the African Commission; the African Court; and the East African Court of Justice) each have different rules regarding the content and form required for filing a case.

Seizure is the formal process by which the African Commission accepts communications (complaints).¹ With regards to the African Court and the East African Court of Justice, a case including all relevant materials can be sent directly to the Court without first having to go through the seizure procedure.²

1.7 Admissibility: what are the concepts of jurisdiction, exhaustion of domestic remedies and the obligation to file within a reasonable period?

After an international forum is seized of a case, it usually considers whether it can hear the case on the merits. At this point, you need to show the forum what authority it has to hear the case and make a determination.

As we discussed earlier, international forums are established to adjudicate international human rights obligations and are subsidiary to domestic courts. On a practical note, this means that many of the questions will relate to the following:

- whether the court has jurisdiction (i.e. whether the State complained of has allowed it the power to hear this particular complaint);
- whether the government has been allowed to remedy the alleged violation (by demonstrating that the case has been brought before the domestic courts); and
- whether the case has been brought within a reasonable period of time.

¹ See: “Flow Charts” at p.33-34 below.

² See: “Flow Charts” at p.48-49 (African Court) and 60-61 (East African Court of Justice) below.

A. Jurisdiction

Questions that arise here will include:

- whether the court has jurisdiction over a case involving both the complainant and the respondent State (jurisdiction *ratione personae*);
- whether the subject matter falls within the scope of the forum concerned (jurisdiction *ratione materiae*); and
- whether the violations occurred within a time frame that allows the forum to exercise jurisdiction (jurisdiction *ratione temporis*). Temporal jurisdiction usually refers to whether (i) the violation occurred after the treaty had come into force for a particular country, and (ii) the victim brought the claim before the international forums within a reasonable period of time.

We will look at these concepts in more detail when considering the procedure before the African Commission, the African Court on Human and Peoples' Rights, and the East African Court of Justice.

B. Admissibility

Admissibility is the process applied by international human rights forums to ensure that only cases that need international consideration are brought before international forums. It is therefore the essence of the principle of subsidiarity. When filing a case it is important to remember that the international forum may apply admissibility rules strictly to reduce the number of cases that they consider. This means that special care must be taken to ensure that all the requirements of admissibility are met before deciding to file a case.

C. How do you apply jurisdiction and admissibility to your cases?

In the African regional system, Article 56 of the African Charter on Human and Peoples' Rights (the "African Charter")³ sets out the requirements for admissibility. We deal with these in detail below as applied by the African Commission and the African Court. Both of these forums will apply the test set out in Article 56 of the African Charter, and you will need to meet all these requirements. If you are litigating before the African Commission much of your effort will be expended in convincing the African Commission that you have exhausted domestic remedies and that you have brought the case within a reasonable period of time. With the African Court and the East African Court, care must be taken to argue the jurisdiction of the court (and with the East African Court to frame the violation as a violation of the Treaty for the Establishment of the East African Community (the "East African Treaty")).⁴

1.8 Representation before the Commission

It is not necessary for cases to be submitted by lawyers; however, legal representation can be useful. Article 104 of the Rules of Procedure of the Commission states that

³ Organization of African Unity ("OAU"), *African (Banjul) Charter on Human and Peoples' Rights*, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

⁴ The East African Community, *Treaty for the Establishment of the East African Community*, 30 November 1999: Arusha, Tanzania.

“[t]he Commission may, either at the request of the author of the communication or at its own initiative, facilitate access to free legal aid to the author in connection with the representation of the case.”⁵ Free legal aid shall only be facilitated (i) where the Commission is convinced “[t]hat it is essential for the proper discharge of the Commission’s duties,” (ii) “to ensure equality of the parties before it,” and (iii) where “[t]he author of the communication has no sufficient means to meet all or part of the costs involved.”⁶

1.9 Merits

Merit refers to the main substantive arguments of your case. You should refer to the Training Manual on International and Comparative Media and Freedom of Expression Law to help you develop the substantive arguments of your case in relation to freedom of expression.

However, there are also some strategy questions that you will need to ask yourself:

- What treaties and rules apply to this forum?
- What are the rights protected and the recognised causes of action in this forum?
- What arguments would fail in this forum even if they would succeed in another?
- What arguments are most persuasive in the chosen forum?

You need to study both the substantive and procedural standards applied by each forum, as well as previous freedom of expression cases it has decided.

1.10 Remedies

Different forums provide different remedies. One of the first things you need to decide therefore is what remedies you want, how important they are, and which forums can give them to you.

In some cases, you will be seeking compensation, in some cases you will seek a declaration of your rights and in other cases you will prioritise changes to the law. Usually you will be seeking a mixture of these different remedies. It is advisable to be creative with remedies. For instance, it may be possible to persuade international forums to require States to report on their implementation of decisions on a regular basis (something that the African Commission and the African Court are already doing). If litigation is brought as part of a larger strategy to achieve social change, it will be crucial to plan and develop the most effective remedies.

Some forums do not have an effective mechanism to enforce their decisions. Should you nevertheless bring a case, even if the victory cannot be directly enforced? Could this be useful as a part of a larger advocacy strategy? What are the possible negative impacts of the case (whether you win or lose), and what are the plans made to alleviate

⁵ The African Commission on Human and Peoples’ Rights, *Rules of Procedure*, 2nd Session, 2-13 February 1988: Dakar, Senegal, Rule 104.

⁶ *Id.*

these? These are all things to consider before bringing a case to a regional or international forum.

Chapter 2: African Commission

2.1 Introduction

The Organisation of African Unity (the “OAU”) was established at the height of the decolonization processes in Africa in 1963, in Addis Ababa, Ethiopia. However, the protection of human rights was not a core function of the OAU, and it was only in the late 1970s that pressure from international and regional civil society led to development of the African Charter, which was adopted in 1981. The African Charter established the African Commission, whose functions include deciding complaints (called ‘communications’) lodged by individuals claiming that their rights under the African Charter have been violated.

In 2002, the OAU transformed into the African Union (the “AU”). The Constitutive Act of the AU expressly states that one of its main objectives is to promote and protect human and peoples’ rights. There are a number of AU bodies which have a human rights function and you may need to engage these bodies if you wish to enforce the rights of your clients.

AU bodies which are required to consider human rights include:

- the Assembly of the Union (comprised of Heads of State and Governments of the AU);
- the Executive Council;
- the Pan-African Parliament;
- the Court of Justice;
- the African Union Commission (which is essentially the secretariat of the African Union and should not be confused with the African Commission on Human and Peoples’ Rights);
- the Permanent Representative Committee;
- the Specialised Technical Committees;
- the Economic, Social and Cultural Council; and
- Financial Institutions.

However, none are primarily human rights institutions and none have the power or responsibility to decide human rights complaints. This role was originally given to the African Commission, although its role has subsequently been supplemented by the African Court (see below).

The African Charter did not establish a judicial body with the power to make binding decisions on cases, and indeed the decisions of the African Commission are still officially referred to as recommendations (even though they are adopted by the AU Assembly).

One explanation that was given for this was that “[t]raditional African dispute settlement

places a premium on the improving relations between the parties on the basis of equity, good conscience, and fair play, rather than on strict legality.”⁷

It is often argued that African States were not amenable to being hauled before an “adversarial and adjudicative judicial institution” to account for the human rights violations that were rife in almost every country. However, in reality, the African Commission exercised, and continues to exercise, its powers as an adversarial quasi-judicial body. Moreover, despite many complaints, the AU continues to adopt their decisions, granting them some legal weight. As with all international forums however, enforcement of decisions remains very difficult.

The process for bringing communications to the African Commission is as follows:

- First, a case is filed by the complainant (by letter);
- Second, the African Commission:
 - declares itself to be seized of the matter;
 - determines jurisdiction and admissibility; and
 - makes a decision on the merits of the case.

2.2 The African Charter on Human and Peoples’ Rights

The African Charter is the main human rights instrument in Africa, used both at the continental level (by the African Commission and the African Court) and by the regional courts (especially the ECOWAS Community Court of Justice, but also to some extent by the East African Court of Justice). It entered into force on 21 October 1986 and aims to reflect the “historical tradition and the values of African civilization.”⁸ The treaty has a number of unique features including that it:

- recognises rights of peoples (group rights), such as rights of all peoples to self-determination⁹ and right of peoples to freely dispose of natural wealth;¹⁰
- equally protects both civil and political rights, as well as economic, social and cultural rights;¹¹
- emphasises the duties of individuals towards the community and State;¹² and
- gives people fleeing persecution the right to obtain asylum (and not just to seek it).¹³

However, despite these unique features, there is very little practical difference between the content of the African Charter and international human rights law as enshrined in other international treaties.

For example, the majority of universally accepted civil and political rights are contained

⁷ Nsongurua J. Udombana, *An African Human Rights Court and An African Union Court; A Needful Duality or Needless Duplication?* (2003) Vol. 28 No. 3 Brooklyn Journal of International Law, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1805963, p. 818.

⁸ The African Charter, *supra* note 3, Preamble.

⁹ *Id.*, art. 20.

¹⁰ *Id.*, art. 21.

¹¹ *Id.*, Preamble

¹² *Id.*, art. 27.

¹³ *Id.*, art. 12.

in the Charter:

- the right to freedom from discrimination (Articles 2 and 18(3));
- equality (Article 3);
- life and personal integrity (Article 4);
- freedom from slavery (Article 5);
- freedom from cruel, inhuman or degrading treatment or punishment (Article 5);
- rights to due process concerning arrest and detention (Article 6);
- the right to a fair trial (Articles 7 and 25);
- freedom of religion (Article 8);
- freedom of information and expression (Article 9);
- freedom of association (Article 10);
- freedom of assembly (Article 11);
- freedom of movement (Article 12);
- freedom of political participation (Article 13); and
- the right to property (Article 14).

Many of these rights will be directly relevant to the work that media organisations do across Africa. Violations of media rights often constitute interferences with a variety of these rights.

Other rights protected in the African Charter may also be relevant, at least to the extent that they relate to stories that media organisations may work on, including:

- the right to work (Article 15);
- the right to health (Article 16); and
- the right to education (Article 17).

It is also important to remember that the African Commission has held that it can read new rights into the African Charter. For example, in *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, the Commission interpreted the Charter to include additional rights:

- the right to housing;¹⁴ and
- the right to food.¹⁵

Such an approach may be needed in the future with regard to rights, such as data protection or privacy, which are not expressly protected in the African Charter.

There is a difference in the way that most of the rights contained in the Charter compare to international human rights treaties (such as the International Covenant on Civil and Political Rights (the “ICCPR”)). Under the ICCPR, their enjoyment may be limited by domestic law, which would allow States to make enjoyment of the rights

¹⁴ African Commission, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Communication 155/96 (2001), par.59-63.

¹⁵*Id.*, par. 64-66.

completely impossible. Thus, for example, Article 9(2), which ensures enjoyment of the right to freedom of expression, states that “[e]very individual shall have the right to express and disseminate his opinions within the law.”¹⁶ However, the African Commission has made the important point that “the law” that may limit the rights contained in the African Charter is to be read as international human rights law rather than domestic laws dictated by the State’s political authority. Therefore, the international law principles of necessity and proportionality apply to all limitations of rights contained in the African Charter.

Key cases on interpretation of “within the law” under Article 9(2) of the African Charter (otherwise known as a “claw-back clause”) include:

*Sir Dawda K. Jawara v. the Gambia*¹⁷

*Media Rights Agenda and Others v. Nigeria*¹⁸

*Kenneth Good v. Republic of Botswana*¹⁹

*Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*²⁰

*Konaté v. Burkina Faso*²¹

In addition to the African Charter, the African States have **adopted a number of Human Rights treaties, including Protocols to the African Charter and standalone Charters**. For example:

- the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2005) (also known as the Maputo Protocol);
- the AU Convention on Prevention and Combating Corruption (2003); and
- the African Charter on the Rights and Welfare of the Child (1999).

Almost as important are **statements by the African Commission that explain or expand the Charter**. These include:

- the Declaration of Principles on Freedom of Expression in Africa (2002);²²
- the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003);²³
- the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben

¹⁶ The African Charter, *supra* note 3, art. 9(2).

¹⁷ African Commission, *Sir Dawda K. Jawara v. The Gambia*, Communication 147/95-149/96 (2000).

¹⁸ African Commission, *Media Rights Agenda and Others v. Nigeria*, Communication 224/98 (2000).

¹⁹ African Commission, *Kenneth Good v. Republic of Botswana*, Communication 313/05 (2010).

²⁰ African Commission, *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, Communication 323/06 (2013).

²¹ African Court, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014).

²² African Commission, *Declaration of Principles on Freedom of Expression in Africa*, 32nd Session, 17 - 23 October 2002: Banjul, The Gambia.

²³ African Commission, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (hereinafter *Fair Trial Guidelines*), DOC/OS(XXX)247 (2001).

- Island Guidelines) (2008);²⁴ and
- the Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (adopted in 2011).²⁵

It is crucial to remember that you are not bound by the four corners of the African Charter when you draft your cases – the African Charter expressly calls on the African Commission to apply international human rights law, stating that the Commission “shall draw inspiration from international law on human and peoples’ rights” (Article 60), and take into consideration “other general or special international conventions” (Article 61).

2.3 Seizure:

The first step in the process of taking a case to the African Commission is **filing a complaint** (called a **communication**) with the Commission. If the communication meets the formal requirements of:

- (i) identifying the parties; and
- (ii) alleging a violation of the Charter,

the African Commission will seize itself of the communication.

Anyone can bring a complaint, including:

- non-governmental organisations*, whether registered in Africa or not. NGOs do not need to have observer status at the African Commission or with any AU body.
- interested individuals acting on behalf of victims of abuses*. In such cases, the authors should usually have the consent of the victims. Although, when it is impossible to get consent, the African Commission may waive this requirement²⁶ (see *Article 19 v. Eritrea*, Communication 275/03).

Communications can also be brought:

- for the public good (*actio popularis*);²⁷
- as class or representative actions; or
- on behalf of another person.

Although seizure is primarily a formal step, **it is important to ensure that you explain as early as possible how you meet the admissibility requirements**. It is advisable therefore at this stage to set out your arguments on each of the requirements under Article 56 of the African Charter (see below).

²⁴ African Commission, *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa* (the Robben Island Guidelines), 32nd Session, 17 - 23 October 2002: Banjul, The Gambia (revised in 2008).

²⁵ African Commission, *Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, 48th Session, 10 - 24 November 2010: Banjul, The Gambia.

²⁶ African Commission, *Article 19 v. Eritrea*, Communication 275/03 (2007), par. 65.

²⁷ African Commission, *Law Society of Zimbabwe et al v. Zimbabwe*, Communication 321/06 (2013), par. 58.

Contents of a communication:

As a minimum you should ensure that your communication includes the following information (as required under Article 56 of the African Charter):

- The name, nationality, and signature of the person or persons filing it, or in cases where the complainant is a non-governmental entity, the name and signature of its legal representative(s);
- Whether the complainant wishes that his or her identity be withheld from the State;
- The address for receiving correspondence from the Commission and, if available, a telephone number, a fax number, and an email address;
- An account of the act or situation complained of, specifying the place, date, and nature of the alleged violations;
- The name of the victim, in a case where he or she is not the complainant;
- Any public authority that has taken cognisance of the fact or situation alleged;
- The name of the State(s) alleged to be responsible for the violation of the African Charter, even if no specific reference is made to the Article(s) alleged to have been violated;
- Compliance with the period prescribed in the African Charter for submission of the communication;
- An indication that the complaint has not been submitted to another international settlement procedure as provided in Article 56(7) of the African Charter; and
- Any steps taken to exhaust domestic remedies. If the applicant alleges the impossibility or unavailability of domestic remedies, the grounds in support of such allegation must be stated.

2.4 Admissibility:

Admissibility is governed by Article 56 of the African Charter, which sets out a cumulative test of seven requirements. Each of these must be met for a case to be admissible. However, the trickiest issues, and the ones on which most cases are declared inadmissible, are the **exhaustion of local remedies** and the **requirement that cases be brought within a reasonable time**. It is therefore crucial that you give particular attention to these issues. It is important to remember that you only have an initial (*prima facie*) evidentiary burden at this stage:

“[O]ne is presumed to have presented a *prima facie* case or shown a *prima facie* violation of rights and freedoms under the Charter, when the facts presented in the Complaint show that a human rights violation has likely occurred. The Complaint should be one that compels the conclusion that a human rights violation has occurred if not contradicted or rebutted by the Respondent State.”²⁸

²⁸ African Commission, *Samuel T. Muzerengwa and 110 Others (represented by Zimbabwe Lawyers for Human Rights) v. Zimbabwe*, Communication 306/05 (2011), par. 56.

You should address the requirements under Article 56 of the African Charter in the same way that the African Commission does by ticking off each element one by one:

A. Identity of the author

Article 56(1) of the African Charter requires that, communications should “[i]ndicate their authors, even if the latter requests anonymity.” Thus make sure that your communication includes 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).

The reasons for the requirement under Article 56(1) are to ensure that the Commission:

- has adequate information and specificity concerning the victims;²⁹
- is in continuing communication with the author;³⁰
- knows the author’s identity and status;³¹
- can be assured of their continued interest in the communication;³² and
- can request supplementary information if the case requires it.³³

B. Compatibility

Article 56(2) requires that the communication be compatible with either the African Charter or the Constitutive Act of the OAU (now the Constitutive Act of the AU).³⁴ This requires sufficient *prima facie* evidence that the complaint relates to a violation of the African Charter. Put another way, all that is required is preliminary proof that a violation occurred and it is not even necessary to set out what article of the Charter has been violated.³⁵

In *Kevin Mgwanga Gunme et al v. Cameroon*, the Commission held that this condition requires that the Communication should:

- “be brought against a State party to the African Charter”;
- “allege *prima facie* violations of rights protected by the African Charter”; and
- “be brought in respect of violations that occurred after [the] State’s ratification of the African Charter, [or] have continued after such ratification.”³⁶

C. Disparaging language

Article 56(3) requires that communications “are not written in disparaging or insulting language directed against the State concerned and its institutions or to the [African

²⁹ African Commission, *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Angola and Thirteen Others*, Communication 409/12 (2014), par. 87.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ The African Charter, *supra* note 3, Article 56(2).

³⁵ See for example *Mouvement des refugies Mauritaniens au Senegal v. Senegal*, Communication 162/97 (1997) (found the communication inadmissible for failure to present *prima facie* evidence that the State party may be responsible for violating provisions of the African Charter).

³⁶ African Commission, *Kevin Mgwanga Gunme et al v. Cameroon*, Communication 266/03 (2009), par.71.

Union].”³⁷ The phrases have been explained in case law of the African Commission. In *Ilesanmi v. Nigeria*, the African Commission held that:

“disparaging means ‘to speak slightingly of ... or to belittle and insulting means to abuse scornfully or to offend the self-respect or modesty of ...’ The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute.”³⁸

The factors to consider will include:

- whether the “language is aimed at unlawfully and intentionally violating the dignity, reputation or integrity of a judicial officer or body;”³⁹
- “whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence” in the administration of justice;⁴⁰
- whether the language is “aimed at undermining the integrity and status of the institution and bring it into disrepute.”⁴¹

See the following cases for an analysis of disparaging language:

*Ilesanmi v. Nigeria*⁴²

*Ligue Camerounaise des Droits de l’Homme v. Cameroon Communication*⁴³

*Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v. Zimbabwe*⁴⁴

However, later cases have emphasised that the African Commission should not use this sub-article to violate the right to freedom of expression:

“Article 56(3) must be interpreted bearing in mind Article 9(2) of the African Charter which provides that ‘every individual shall have the right to express and disseminate his opinions within the law’. A balance must be struck between the right to speak freely and the duty to protect state institutions to ensure that while discouraging abusive language, the African Commission is not at the same time violating or inhibiting the enjoyment of other rights guaranteed in the African Charter, such as in this case, the right to freedom of expression.”⁴⁵

One occasion when Article 56(3) was applied to hold a case inadmissible was *Ligue Camerounaise des Droits de l’Homme v. Cameroon*, where the African Commission

³⁷ The African Charter, *supra* note 3, Article 56(6).

³⁸ African Commission, *Ilesanmi v. Nigeria*, Communication 268/03 (2005), par. 39.

³⁹ African Commission, *Eyob B. Asemie v. the Kingdom of Lesotho*, Communication 435/12 (2015), par. 56 (quoting African Commission, *Zimbabwe Lawyers for Human Rights v. Zimbabwe*, Communication 293/04 (2009), par. 91).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² African Commission, *Ilesanmi v. Nigeria*, Communication 268/03 (2005).

⁴³ African Commission, *Ligue Camerounaise des Droits de l’Homme v. Cameroon*, Communication 65/92 (1997).

⁴⁴ African Commission, *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v. Zimbabwe*, Communication 284/03 (2009).

⁴⁵ *Id.*, par. 91.

condemned the use of words such as “Paul Biya must respond to crimes against humanity”; “30 years of the criminal neo-colonial regime incarnated by the duo Ahidjio/Biya”; “regime of torturers”; and “government barbarisms”, as insulting language.⁴⁶

While it is debatable whether the balance was properly struck in the case, it is informative of the language to avoid in drafting your communications with the African Commission. A good rule of thumb is that allegations of violations and failings are acceptable, but personal attacks or insults toward the alleged perpetrators of the violations are not.

D. Mass media

Article 56(4) requires that the communication should not be “based exclusively on news disseminated through the mass media.”⁴⁷ The African Commission noted in *Sir Dawda K. Jawara v. The Gambia* that the section seeks to exclude cases that are based “exclusively on news disseminated through the mass media,” without more information.⁴⁸ This means that there must be some corroborating evidence, although the African Commission has made it clear that the amount of corroborating evidence required is not high.⁴⁹

E. Local remedies

Article 56(5) requires that communications be sent to the Commission only “after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.”⁵⁰ Before bringing a dispute to the African Commission, the complainant must have utilized all the legal or judicial avenues or forums available domestically to resolve the matter. “Local remedies” are any judicial/ legal mechanisms put in place at the domestic level to ensure the effective settlement of disputes.

In arguing that local remedies were unavailable in the home state, the complainant must make specific and detailed statements about why they were unable to exhaust domestic remedies.⁵¹ In cases where the complainant has made generalized statements regarding the unavailability of domestic remedies, the Commission has found this to be insufficient to satisfy the requirements of Article 56(5).

From a practical perspective, it is crucial to submit all the information on all the steps taken to exhaust local remedies. Be careful to argue the human rights issues at the domestic level as the African Commission may not accept that local remedies have been exhausted unless you make the same human rights arguments at the domestic level that you intend to make before the African Commission.

⁴⁶ African Commission, *Ligue Camerounaise des Droits de l’Homme v. Cameroon*, Communication 65/92 (1997), par. 13 (internal quotation marks omitted).

⁴⁷ The African Charter, *supra* note 3, Article 56(4).

⁴⁸ African Commission, *Sir Dawda K. Jawara v. The Gambia*, Communication 147/95-149/96 (2000), par. 24.

⁴⁹ *Id.*, par. 26 and 27.

⁵⁰ The African Charter, *supra* note 3, Article 56(5).

⁵¹ African Commission, *Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria*, Communication 388/07 (2010), par. 65-66.

This generally means that the case must have been brought to the highest appellate court for a decision (in different systems this may be the Supreme Court or the Court of Cassation). It usually does not matter that the complainant knew that the case would be unsuccessful – a case must still be appealed through the system.

A communication is inadmissible if the case has not been brought to the domestic forums, if it is pending before the national courts, or if the complainant fails to show that they have made an effort to appeal. It is an established principle in international law that a State should be given the opportunity to redress an alleged wrong within the framework of its own domestic legal system before it is dealt with at the international level.⁵² This requirement safeguards the role of domestic courts to decide the matter before it is brought to any international adjudicative body. However:

“the local remedies rule is not rigid. It does not apply if: local remedies are inexistent; local remedies are unduly and unreasonably prolonged; recourse to local remedies is made impossible; from the face of the complaint there is no justice or there are no local remedies to exhaust, for example, where the judiciary is under the control of the executive organ responsible for the illegal act; and the wrong is due to an executive act of the government as such, which is clearly not subject to the jurisdiction of the municipal courts.”⁵³

The ‘remedies’ referred to in Article 56(5) include all judicial remedies that are easily accessible to obtain justice:

“The fact remains that the generally accepted meaning of local remedies, which must be exhausted prior to any communication/complaint procedure before the African Commission, are ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice.”⁵⁴

Any local remedies must be “available, effective, and sufficient”

The onus is on the respondent State to demonstrate that there exist local remedies that are available, effective, and sufficient. If it meets that burden, the onus is on the complainant to show why in that particular case they were not required to exhaust that remedy.

- A remedy is “available” if the petitioner can pursue it without impediment;⁵⁵
- A remedy is “effective” if it offers a reasonable prospect of success;⁵⁶ and

⁵² African Commission, *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Angola and Thirteen Others*, Communication 409/12 (2014), par. 96.

⁵³ *Id.*, par. 99.

⁵⁴ African Commission, *Southern Africa Human Rights NGO Network and Others v. Tanzania*, Communication 333/06(2010), par. 64 (internal citation and quotation marks omitted).

⁵⁵ African Commission, *Michael Majuru v. Zimbabwe*, Communication 308/05 (2008), par. 79; African Commission, *Sir Dawda K. Jawara v. The Gambia*, Communication 147/95-149/96 (2000), par. 32.

⁵⁶ African Commission, *Michael Majuru v. Zimbabwe*, Communication 308/05 (2008), par. 79; African Commission, *Sir Dawda K. Jawara v. The Gambia*, Communication 147/95-149/96 (2000), par. 32.

- A remedy is “sufficient” if it is capable of redressing the complaint.⁵⁷

Available?

The requirement that a remedy be “available” is closely related to the purpose behind the requirement to exhaust domestic remedies:

“One purpose of the exhaustion of local remedies requirement is to give the domestic courts an opportunity to decide upon cases before they are brought to an international forum, thus avoiding contradictory judgements of law at the national and international levels. Where a right is not well provided for in domestic law such that no case is likely to be heard, potential conflict does not arise.”⁵⁸

Although this requirement appears to grant the most leeway to complainants, it has generally been applied in cases where the jurisdiction of the courts has expressly been ousted by the State (such as by military decrees in the *SERAC and CESR v. Nigeria*).⁵⁹ It will be interesting to see how this requirement will be developed by the African Court.

Effective?

It appears that in situations where the rule of law is exceedingly weak and court decisions are not implemented, or the court system is corrupt, such remedies would not be effective. Even though the African Commission has expressed this principle, in practice it has been more difficult to prove that remedies are not effective:

“It is not enough for a Complainant to simply conclude that because the State failed to comply with a court decision in one instance, it will do the same in their own case. Each case must be treated on its own merits. Generally, this Commission requires Complainants to set out in their submissions the steps taken to exhaust domestic remedies. They must provide some *prima facie* evidence of an attempt to exhaust local remedies.”⁶⁰

Therefore, local remedies should be *actually attempted*; a complainant cannot rely on past or other experiences for not attempting. The African Commission has held that:

“it is incumbent on the Complainant to take all necessary steps to exhaust, or at least attempt the exhaustion of local remedies. It is not enough for the Complainant to cast aspersions on the ability of the domestic remedies of the State due to isolated incidences.”⁶¹

One case where the African Commission did hold that local remedies would be ineffective is *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and*

⁵⁷ African Commission, *Michael Majuru v. Zimbabwe*, Communication 308/05 (2008), par. 79; African Commission, *Sir Dawda K. Jawara v. The Gambia*, Communication 147/95-149/96 (2000), par. 32.

⁵⁸ African Commission, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Communication 155/96 (2001), par. 37.

⁵⁹ *Id.*; African Commission, *Law Society of Zimbabwe et al v. Zimbabwe*, Communication 321/06 (2013), par. 71-72.

⁶⁰ African Commission, *Obert Chinhamo v. Zimbabwe*, Communication 307/05 (2007), par. 84.

⁶¹ African Commission, *Article 19 v. Eritrea*, Communication 275/03 (2007), par. 67.

Development in Africa (on behalf of Andrew Barclay Meldrum) v. Zimbabwe,⁶² where the complainant was deported despite a High Court order in his favour preventing the deportation. The African Commission held that following the government's failure to implement such a decision of the court, the complainant could not be expected to exhaust any further judicial remedy as this would clearly be ineffective as the government would continue to disregard the court orders.⁶³

Sufficient?

The remedies that the domestic law offers must be sufficient to remedy the harm caused. This issue may arise in cases where the domestic law provides some, usually administrative, remedies. One example may be where the harm complained of is the State's failure to investigate and prosecute violent crimes; the existence of the right to launch private prosecutions cannot be a sufficient domestic remedy requiring exhaustion.⁶⁴

An interesting debate that has not yet been settled by the African Commission is whether local civil remedies will be sufficient in certain cases. The European Court of Human Rights has stated that in some cases civil remedies are not sufficient.⁶⁵ This argument was expressly made in *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt* (which involved sexual violations and physical assaults), and the African Commission held that the case was admissible albeit without expressly taking a position on the effectiveness and sufficiency of civil remedies in such cases.⁶⁶

Exceptions to the rule of exhaustion of domestic remedies

The primary strategy for taking cases to the African Commission should be to ensure

⁶² African Commission, *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v. Zimbabwe*, Communication 294/04 (2009).

⁶³*Id.*, par. 54.

⁶⁴ African Commission, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/02 (2006), par. 70.

⁶⁵ *E.g.*, European Court of Human Rights, *Assenov and Others v. Bulgaria*, Application No. 24760/94 (1998), par. 85-86.

⁶⁶ African Commission, *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, Communication 323/06 (2013), par. 65-67.

that all domestic remedies are exhausted – however, there are certain circumstances where it is not necessary to exhaust domestic remedies.

Exceptions to the rule of exhaustion of domestic remedies include those situations where:

- local remedies are non-existent;⁶⁷
- “local remedies are unduly and unreasonably prolonged”;⁶⁸
- “recourse to local remedies is made impossible”;⁶⁹
- “it is impractical or undesirable for the [c]omplainant to seize the domestic courts in the case of each violation”;⁷⁰ or
- “from the face of the complaint there is no justice or there are no local remedies to exhaust.”⁷¹

The main exceptions to the exhaustion requirement are as follows:

a) Unduly prolonged

One of the primary exceptions to the rule on exhaustion of local remedies is where local remedies are unduly prolonged. The basic principle is that **if the domestic legal system is so inefficient that it takes too long to receive a remedy from the local courts**, a case may be brought to the African Commission without first exhausting remedies at the local level.

The length of a delay in the exhaustion of local remedies that will allow you to take a case to the African Commission will depend on:

- the facts of the case;
- the nature of the domestic legal system; and
- the length of time it takes for comparative cases to be finalised.

In one case relating to elections, the African Commission noted that, “[m]ore than four years after the election petitions were submitted, the Respondent State’s courts have failed to dispose of them and the positions which the victims are contesting are occupied and the term of office has almost come to an end.”⁷²

What constitutes unduly prolonged procedure under Article 56(5) has not been defined by the African Commission. There are therefore no standard criteria used by the African Commission to determine if a process has been unduly prolonged, and the African Commission has thus tended to treat each communication on its own merits.

⁶⁷ African Commission, *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Angola and Thirteen Others*, Communication 409/12 (2014), par. 99 (internal quotation marks and emphasis omitted).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*, par. 100.

⁷¹ *Id.*, par. 99.

⁷² African Commission, *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa v. Zimbabwe*, Communication 293/04 (2008), par. 61.

In some cases, the African Commission takes into account the political situation of the country, and in other cases, the judicial history of the country or the nature of the complaint.

b) Where the victim has fled his country

Where a victim has been unable to utilize local remedies out of fear for his safety, the African Commission has stated:

“The existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness. Therefore, if the applicant cannot turn to the judiciary of his country because of generalised fear for his life (or even those of his relatives), local remedies would be considered to be unavailable to him.”⁷³

However, the burden of proof that it is impossible to exhaust domestic remedies because the complainant has fled the country has been held to be quite strict, as stated in the case *Obert Chinhamo v. Zimbabwe*:

“This Commission holds the view that having failed to establish that he left the country involuntarily due to the acts of the Respondent State, and in view of the fact that under Zimbabwe law, one need not be physically in the country to access local remedies; the Complainant cannot claim that local remedies are not available to him.”⁷⁴

This exception will therefore only apply in limited circumstances where the victim can demonstrate a fear of returning to his country and has done everything in his power to exhaust domestic remedies despite fleeing his country.

c) Situations of serious or massive violations

To use this exception, the complainant must demonstrate the nature and scope of the violation and must show, for example, that there are so many victims and the violations are so serious that it is impractical to try to bring the case before local courts.⁷⁵

E. Reasonable time

Article 56(6) of the African Charter⁷⁶ states that communications received by the Commission will be considered if they “are submitted within a reasonable period from the time local remedies are exhausted.”⁷⁷ This requirement has been difficult to apply

⁷³ African Commission, *Sir Dawda K. Jawara v. The Gambia*, Communication 147/95-149/96 (2000), par. 35.

⁷⁴ African Commission, *Obert Chinhamo v. Zimbabwe*, Communication 307/05 (2007), par. 82; see also African Commission, *Michael Majuru v. Zimbabwe*, Communication 308/05 (2008), par. 100.

⁷⁵ African Commission, *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Inter africaine des Droits de l'Homme, Les Témoins de Jehovah v. Democratic Republic of Congo*, Communication 25/89-47/90-56/91-100/93 (1996), par. 37.

⁷⁶ The African Charter, *supra* note 3, Article 56(6).

⁷⁷ It is also important to remember that throughout the proceedings communications must be submitted within a reasonable time. See *id.*

since there is no clear interpretation of a “reasonable period” in the African Charter. In early cases, communications were held admissible even when they were filed up to 12⁷⁸ or even 15 years⁷⁹ after the violation or after local remedies were exhausted.

However, it is now advisable to submit cases as soon as possible; at least within ten months and preferably within six months of the exhaustion of domestic remedies.⁸⁰ The African Commission treats every case on its own merit depending **on the reasons given for delay.**⁸¹

- Unlike other similar human rights treaties, the African Charter does not expressly include a six-month rule– however, the Commission has stated that the six-month rule “seem[s] to be the usual standard”⁸² so try to get your case to the Commission within six months of the exhaustion of domestic remedies.
- If you fail to do so, you need to give compelling factual and contextual reasons for why you failed to do so:

“[W]here there is a good and compelling reason why a Complainant does not submit his Complaint to the Commission for consideration, the Commission has a responsibility, for the sake of fairness and justice, to give such a Complainant an opportunity to be heard.”⁸³

In the absence of a standard defining “unreasonable” delay, the African Commission decides cases based on the facts and context of each case. In practice, this has meant an almost unfettered discretion by the African Commission.

Case law relating to “reasonable period” and “unreasonable delay”

⁷⁸ African Commission, Information Sheet No. 3 – Communication Procedure, at 5-6 n. 5, available at http://www.achpr.org/files/pages/communications/procedure/achpr_communication_procedure_eng.pdf (citing African Commission, *Embga Mekongo Louis v. Cameroon*, Communication 59/91 (1995)).

⁷⁹ African Commission, *John Modise v. Botswana*, Communication 97/93 (2000).

⁸⁰ African Commission, *Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Centre for the Protection of Human Rights) v. Kenya*, Communication 375/09 (2011), par. 59.

⁸¹ *Id.*

⁸² African Commission, *Michael Majuru v. Zimbabwe* (2008), Communication 308/05, par. 109.

⁸³ African Commission, *Darfur Relief and Documentation Centre v. Sudan*, Communication 310/05 (2009), par. 79; African Commission, *Southern Africa Human Rights NGO Network and Others v. Tanzania*, Communication 333/06(2010), par. 71 (quoting African Commission, *Darfur Relief and Documentation Centre v. Sudan*, Communication 310/05 (2009), par. 79) (internal quotation marks omitted);

It is very difficult to identify the uniting principle in these cases, but the basic principle is to file within as short a period as possible and to provide compelling explanations for any delay beyond six months:

- *Michael Majuru v. Zimbabwe*: the communication was submitted to the African Commission twenty two months after the complainant fled Zimbabwe. He argued that the delay was caused both by his need for psychotherapy and by his lack of funds. However, the African Commission was not convinced by his explanation, holding that 22 months was “clearly beyond a reasonable man’s understanding of reasonable period of time.”⁸⁴
- *Darfur Relief and Documentation Centre v. Republic of Sudan*: the African Commission held that a period of 29 months between the time when the High Court dismissed the matter and when the communication was submitted to the African Commission was unreasonable.⁸⁵
- *Obert Chinkhamo v. Zimbabwe*: the communication was submitted to the African Commission ten months after the complainant allegedly fled from his country. Due to the circumstances in this case, the Commission decided that the communication complied with Article 56(6) of the Charter stating that; “[t]he Complainant is not residing in the Respondent State and needed time to settle in the new destination, before bringing his Complaint to the Commission. Even if the Commission were to adopt the practice of other regional bodies to consider six months as the reasonable period to submit complaints, given the circumstance in which the Complainant finds himself, that is, in another country, it would be prudent, for the sake of fairness and justice, to consider a ten months period as reasonable.”⁸⁶
- *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Angola and Thirteen Others*: the African Commission clarified that a reasonable time runs either from the date of exhaustion of domestic remedies or, in cases where exhaustion is either unnecessary or impossible, from the date of the violation of the African Charter.⁸⁷

G. *Ne bis in idem*

Article 56(7) states that the Commission does “not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the [OAU] or the provisions of the present Charter.”⁸⁸ This means that communications that have been finalised by some other international mechanism(s) similar to the African Commission are inadmissible.⁸⁹ The African

⁸⁴ African Commission, *Michael Majuru v. Zimbabwe*, Communication 308/05 (2008), par. 110.

⁸⁵ African Commission, *Darfur Relief and Documentation Centre v. Sudan*, Communication 310/05 (2009), par. 78, 80.

⁸⁶ African Commission, *Obert Chinkhamo v. Zimbabwe*, Communication 307/05 (2007), par. 89.

⁸⁷ African Commission, *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Angola and Thirteen Others*, Communication 409/12 (2014), par. 107.

⁸⁸ The African Charter, *supra* note 3, Article 56 (7).

⁸⁹ *E.g.*, African Commission, *Amnesty International v. Tunisia*, Communication 69/92 (1993).

Commission will, however, consider communications that have been discussed by non-judicial or adjudicatory international bodies.⁹⁰

The African Commission has held that:

- Article 56(7) codifies the *non bis in idem* rule which ensures that no State may be sued or condemned more than once for the same alleged human rights violations, and seeks to uphold and recognize the *res judicata* status of decisions issued by international and regional tribunals and/or bodies.⁹¹
- The matter in contention, which must relate to the same facts and parties, “must have been “settled” – *i.e.* it must no longer be under consideration in an international dispute-settlement procedure.”⁹² Here, there is conflicting opinion from a 1988 case where the African Commission held that even cases pending before other international dispute settlement mechanisms were barred.⁹³
- The decision must have been by “an[y other] international adjudication mechanism, with a human rights mandate” and not a political entity.⁹⁴

2.5 Review of admissibility decision

Rule 107(4) of the African Commission Rules of Procedure states that “[i]f the Commission has declared a Communication inadmissible this decision may be reviewed at a later date, upon the submission of new evidence, contained in a written request to the Commission by the author.”

While it is very rare for the African Commission to change its mind, even where it has clearly made a glaring mistake in the law or the facts where there is new information that relates to an admissibility question, you may try to persuade the Commission to set its decision aside.

2.6 Advisory Opinions

One way of getting the African Commission to consider a legal issue is to request an Advisory Opinion under Article 45(3) of the African Charter. However, this is not a popular process as it does not allow remedies against individual States.

The African Commission has only issued one Advisory Opinion, which was on the United Nations Declarations on the Rights of Indigenous Peoples. While a request for such an advisory opinion needs to be brought by an African organisation recognised

⁹⁰ African Commission, *Bakweri Land Claims Committee v. Cameroon*, Communication 260/02 (2004), par. 53

⁹¹ *Id.*, par. 52.

⁹² African Commission, *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Angola and Thirteen Others*, Communication 409/12 (2014), par. 112.

⁹³ African Commission, *Mpaka-Nsusu Andre Alphonse v. Zaire (Democratic Republic of Congo)*, Communication 15/88 (1988), par. 2-3.

⁹⁴ African Commission, *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Angola and Thirteen Others*, Communication 409/12 (2014), par. 112 (quoting African Commission, *Sudan Human Rights Organisation and the Centre on Housing Rights and Evictions v. Sudan*, Communication 279-03-296-05 (2009), par. 104) (internal quotation marks omitted).

by the AU, in practice this means that any African registered NGO with observer status may ask the African Commission for an advisory opinion. However, it is crucial to remember that this cannot be a contentious case presented as a request for an advisory opinion. It should therefore be an honest request for the African Commission to interpret the African Charter. One way of presenting this would be situations where there is a widespread human rights violation across a number of countries and the question is drafted to ask the African Commission what obligations State parties have to ensure enjoyment of human rights in such situations. Widespread harmful traditional practices may be a practical example of situations where the African Commission may give an advisory opinion that has direct bearing on the enjoyment of human rights.

2.7 Merits

Once a communication is declared admissible, the African Commission proceeds to consider substantive issues of the case. The complainant should respond with arguments on the merits within 60 days.⁹⁵ The respondent State party has a right of reply within 60 days after receiving the complainant's arguments on the merits.⁹⁶ The complainant then has 30 days to respond to the State's arguments.⁹⁷

It is not unusual for States to ignore communications and/or refuse to cooperate with the African Commission. In such a case, the African Commission should rely on the facts at its disposal to reach a final decision and "may resort to any appropriate method of investigation" to verify the facts.⁹⁸ However, the African Commission is not keen on making decisions by default and will usually fall over backwards to allow the State an opportunity to respond to claims. Even if they do not, you will still be expected to prove your claims on a balance of probabilities, so it is still important to file submissions and argue your case.

As stated above, under Article 46 of the Charter, the African Commission can use any appropriate method of investigation in addition to the evidence placed before it by the parties, such as a fact finding mission.⁹⁹ However, in practice, the African Commission will rely on documents filed on record and, in exceptional circumstances, on witness evidence brought before the African Commission.

A number of issues can affect the time taken to reach a decision, including the complexity of the case and the diligence of the complainant. Even though it takes an average of 18 months for a communication to be considered, this varies extensively between communications.

The African Commission was primarily established to enforce the African Charter, and therefore the primary source of law will be the African Charter. However, as seen in section 2.2 above, the African Charter itself incorporates all international human rights standards. This means that when arguing cases you can cite from international treaties, customary international law, declarations, general comments, and

⁹⁵ African Commission Rules of Procedure, *supra* note 5, Rule 108(1).

⁹⁶ *Id.*

⁹⁷ *Id.*, Rule 108(2).

⁹⁸ The African Charter, *supra* note 3, Article 46.

⁹⁹ *Id.*

comparative law and jurisprudence.

The African Commission has made a number of important decisions relating to the freedom of expression and has confirmed the importance of free speech and the media in a democracy:¹⁰⁰

“[F]reedom of expression is a basic human right, vital to an individual's personal development and political consciousness, and to his participation in the conduct of public affairs in his country. Individuals cannot participate fully and fairly in the functioning of societies if they must live in fear of being persecuted by state authorities for exercising their right to freedom of expression. The state must be required to uphold, protect and guarantee this right if it wants to engage in an honest and sincere commitment to democracy and good governance.”¹⁰¹

In one case, the African Commission had to deal with the situation where a member State forcibly closed a newspaper for refusing to register with a government controlled oversight body and the African Commission noted that:

“[T]he action of the State to stop the Complainants from publishing their newspapers, close their business premises and seize all their equipment cannot be supported by any genuine reasons. In a civilised and democratic society, respect for the rule of law is an obligation not only for the citizens but for the State and its agents as well. If the State considered the Complainants to be operating illegally, the logical and legal approach would have been to seek a court order to stop them. The State did not do that but decided to use force and in the process infringed on the rights of the Complainants.”¹⁰²

The African Commission will apply both binding international standards on freedom of expression and media rights, as well as soft law guarantees such as its own principles and guidelines. The Training Manual on International and Comparative Media and Freedom of Expression Law and the rights of the media will explain in more detail the various legal arguments that can be made to protect a free media.

The African Commission has an extensive jurisprudence on the full range of human rights, and if your case proceeds to the merits stage you are likely to receive a well-reasoned decision. There are leading cases on the obligation to prevent torture,¹⁰³ the requirements that military tribunals comply with fair trial standards,¹⁰⁴ the rights of

¹⁰⁰ *E.g.*, African Commission, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, Communications 140/94, 141/94 and 145/95 (1999).

¹⁰¹ African Commission, *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v. Zimbabwe*, Communication 284/03 (2009), par. 92.

¹⁰² *Id.*, par. 178.

¹⁰³ African Commission, *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, Communication 323/06 (2011).

¹⁰⁴ African Commission, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, Communication 218/98 (2001).

human rights activists,¹⁰⁵ and the rights of indigenous peoples.¹⁰⁶

Almost half the cases determined by the African Commission on the merits have involved the right to fair trial (Article 7 of the African Charter).¹⁰⁷ The African Commission has progressive and emphatic jurisprudence on the right to a fair trial, and these standards should be useful in your media cases (both at the regional level but also as persuasive jurisprudence at the domestic level). For example, in *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, the African Commission held that the banning of newspapers while they were suing the government for illegal attacks on their premises constituted a violation of the right to a fair trial.¹⁰⁸ The African Commission has recognised the following rights as falling within the right to a fair trial:

- the right of recourse to courts;¹⁰⁹
- the right to information upon arrest and the presumption of innocence;¹¹⁰
- the right to defence and to counsel;¹¹¹
- the right to be tried within a reasonable time;¹¹²
- the right to a public trial;¹¹³
- the right to equal treatment;¹¹⁴
- the right to appeal;¹¹⁵
- the right to legal assistance;¹¹⁶
- prohibition of *ex post facto* law;¹¹⁷ and

¹⁰⁵ African Commission, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan*, Communication 379/09 (2015).

¹⁰⁶ African Commission, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, Communication 276 / 03 (2009).

¹⁰⁷ Nsongurua J. Udombana, *The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa* (2006), Vol. 2 African Human Rights Law Journal, p. 298-332, 311.

¹⁰⁸ African Commission, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, Communications 140/94, 141/94-145/95 (1999), par. 43.

¹⁰⁹ African Commission, *Fair Trial Guidelines*, Principle C; African Commission, *Lawyers of Human Rights v. Swaziland*, Communication 251/02 (2005), par. 53.

¹¹⁰ African Commission, *Fair Trial Guidelines*, principle M (2), principle N (6)(e); African Commission, *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan*, Communications 48/90-50/91-52/91-89/93 (1999), par. 61.

¹¹¹ African Commission, *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi*, Communication 231/99 (2000), par. 30; African Commission, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, Communications 140/94-141/94-145/95 (1999), par. 32-33; African Commission, *William A. Courson v. Equatorial Guinea*, Communication 144/95 (1997), par. 22.

¹¹² African Commission, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, Communication 218/98 (2001), par. 43.

¹¹³ African Commission, *Media Rights Agenda v. Nigeria*, Communication 224/98 (2000), par. 51; African Commission, *Fair Trial Guidelines*, Principle A (3).

¹¹⁴ African Commission, *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi*, Communication 231/99 (2000), par. 29.

¹¹⁵ African Commission, *Kenneth Good v. Republic of Botswana*, Communication 313/05 (2010), par. 176.

¹¹⁶ African Commission, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, Communication 218/98 (2001), par. 30; African Court, *Mohamed Abubakari v. United Republic of Tanzania*, Application No. 007/2013 (2016), par. 49-50.

¹¹⁷ African Commission, *Sir Dawda K. Jawara v. The Gambia*, Communication 147/95-149/96 (2000), par. 62-63.

- the independence of the judiciary.¹¹⁸
-

Leading cases on fair trial include:

- *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan* (concerning the arbitrary arrests and detentions that took place following the coup of 30 July 1989 in Sudan. It was alleged that hundreds of prisoners were detained without trial or charge).¹¹⁹
- *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria* (concerning death penalties imposed by a Special Military Tribunal for an alleged coup plot to overthrow the Nigerian Military Government under Gen. Sani Abacha).¹²⁰
- *William A. Courson v. Equatorial Guinea* (concerning a conviction for an attempt to overthrow the government of Equatorial Guinea and high treason. The defendant was denied the right to consult with defence counsel and not permitted to examine the evidence against him).¹²¹
- *Sir Dawda K. Jawara v. The Gambia* (concerning the aftermath of the military coup of July 1994 in Gambia. The violations alleged included – arbitrary detention, and a violation of the prohibition on retroactivity).¹²²
- *Media Rights Agenda & Others v. Nigeria* (concerning alleged violations of arrest, detention, and the right to a fair and public hearing.)¹²³
- *Lawyers for Human Rights v. Swaziland* (concerning the decision to repeal the democratic Constitution of Swaziland, enacted in 1968, which was held to have breached Articles 1, 7, 10, 11, 13 and 26 of the African Charter).¹²⁴

2.8 Types of evidence accepted and burden of proof

During African Commission sessions, the parties can make written or oral presentations. Whilst Rule 88 of the African Commission's Rules of Procedure allows for oral hearings, the African Commission prefers deciding cases on the papers. It is only recommended to insist on an oral hearing if you have exceptional circumstances to argue or an argument to make that is new to the Commission.

If you do get an oral hearing, some States send representatives to contest allegations,

¹¹⁸ African Commission, *Fair Trial Guidelines*, principle A, principle Q; African Commission, *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan*, Communication 48/90-50/91-52/91-89/93 (1999), par. 68-69.

¹¹⁹ African Commission, *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan*, Communication 48/90-50/91-52/91-89/93 (1999).

¹²⁰ African Commission, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, Communication 218/98 (2001).

¹²¹ African Commission, *William A. Courson v. Equatorial Guinea*, Communication 144/95 (2000).

¹²² African Commission, *Sir Dawda K. Jawara v. The Gambia*, Communication 147/95-149/96 (2000).

¹²³ African Commission, *Media Rights Agenda v. Nigeria*, Communication 224/98 (2000).

¹²⁴ African Commission, *Lawyers for Human Rights v. Swaziland*, Communication 251/02 (2005).

while some do not. However, be ready to be grilled by individual Commissioners and prepare your evidence for the hearing on the basis that you will be arguing against a well-represented State.

Always ensure that the submission on the merits makes precise allegations of fact – at this point, it is important to substantiate the allegations made in the original complaint. Documents can (and should) be included to support these facts (e.g. affidavits, court judgments, expert opinions, medical statements, and flight records).

At this point, the onus of proof lies on the complainant to prove the case on a balance of probabilities (this is implicit in the decision of the African Commission in *Mohammed Abdullah Saleh Al-Asad v. The Republic of Djibouti*).¹²⁵ Where the State fails to contest an allegation of fact, the African Commission will take this as proven.¹²⁶

However, as the case will likely have been determined by the domestic courts, it is important to remember that the African Commission does not see itself as an arbiter of fact. It believes that this role is primarily played by the domestic courts. This does not mean that you cannot reopen factual matters, merely that to do so will be very difficult unless you can demonstrate bias or bad faith on the part of the local courts:

“[I]t is for the courts of State Parties and not for the [African] Commission to evaluate the facts in a particular case and unless it is shown that the courts’ evaluation of the facts were manifestly arbitrary or amounted to a denial of justice, the [African] Commission cannot substitute the decision of the courts with that of its own.”¹²⁷

2.9 Remedies: What remedies has the African Commission granted? What should you prioritise?

The African Commission’s final decisions are called recommendations, and they remain confidential until they are adopted by the Assembly of Heads of State of the AU at its annual meeting (Article 59 of the African Charter). The African Commission has been consistent in its approach to remedies recommending compensation, the repeal of decrees or legislation, the return of deportees, grants of citizenship, and reform of electoral laws. The African Commission will not grant remedies that have not been asked for, so it is crucial to ask for the most appropriate remedy.

¹²⁵ African Commission, *Mohammed Abdullah Saleh Al-Asad v. The Republic of Djibouti*, Communication 383/10 (2014), par. 141.

¹²⁶ See: African Commission, *Constitutional Rights Project v. Nigeria*, Communication 148/96 (1999), par. 14; African Commission, *Embga Mekongo Louis v. Cameroon*, Communication 59/91 (1995); ; African Commission, *Constitutional Rights Project (in respect of Akamu & Others) v. Nigeria*, Communication 60/91 (2000); African Commission, *Achuthan & Another (on behalf of Banda & Others) v. Malawi*, Communications 64/92, 68/92 and 78/92 (2000); African Commission, *Constitutional Rights Project (in respect of Lekwot & Others) v. Nigeria*, Communication 87/93 (2000); African Commission, *Civil Liberties Organisation (in respect of Bar Association) v. Nigeria*, Communication 87/93 (2000).

¹²⁷ African Commission, *Interights et al. (on behalf of Mariette Sonjaleen Bosch) v. Botswana*, Communication 240/01 (2003), par. 29.

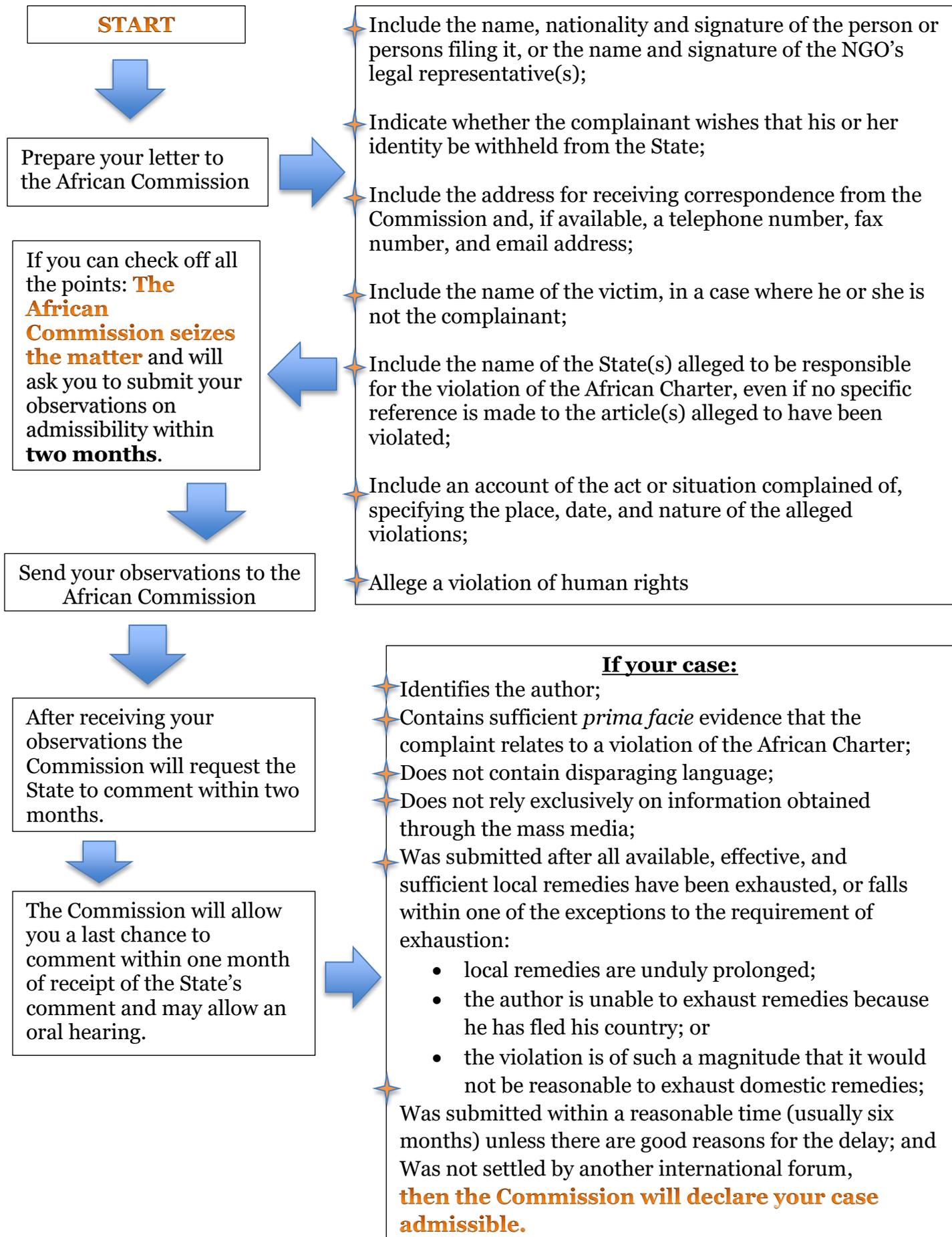
2.10 Enforcement

The African Commission is a quasi-judicial body, and final recommendations are therefore not legally binding (although the fact that they are adopted by the AU Assembly does provide some legal obligations on the State concerned). The enforcement of the African Commission's decisions depends entirely on the goodwill of the offending State, which can make enforcement very difficult. Nonetheless, the African Commission usually requires the State to inform it, within 180 days, of the measures taken to implement the recommendations. For States that are party to the Protocol establishing the African Court on Human and Peoples' Rights (the "Protocol"),¹²⁸ there is now the possibility that the African Commission will take cases to the African Court if the State concerned fails to abide by its recommendations.

¹²⁸ The OAU, *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, 10 June 1998: Ouagadougou, Burkina Faso, entered into force on 25 January 2004.

Procedural flow-chart

Process for bringing communications to the African Commission



NB. In this case, you may file a request to review the case if you can adduce new evidence that was not before the Commission when it made its decision. You may also take this step if new evidence makes your previous inadmissible claim, admissible.

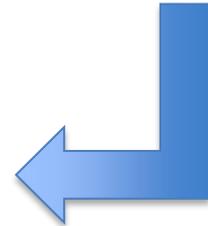
When your case is declared admissible the Commission will proceed to a determination of the merits and will consider whether your case proves a violation of the African Charter.



If **NO**

If **YES**

The Commission will forward its recommendations to the African Union for adoption after which it will forward its decisions to the parties.



If the State complies with the recommendation, **the matter ends there.**

If the State does NOT comply with the recommendations, is the State a party to the Protocol establishing the African Court?



If **NO**, the case ends there.

If **YES**, the African Commission may (if requested or on its own motion) bring your case before the African Court.

Chapter 3. African Court

In the 1990s, the transition to democracy in a number of countries across Africa marked a new emphasis on human rights and the rule of law. Partly building on the success (and responding to the failures) of the African Commission, civil society lobbied for the creation of an African Court, which would have the power to issue binding decisions and would therefore complement the protective role of the African Commission. Their efforts were successful, and the final text of the Protocol to establish the African Court was adopted by the Assembly of Heads of State and Government of the OAU in Ouagadougou, Burkina Faso, in June 1998. The jurisdiction of the African Court includes the interpretation and application of the African Charter, the Women's Protocol,¹²⁹ and relevant human rights instruments ratified by the Member States. Decisions of the African Court are legally binding, and this may lead to improved implementation by states.

Members of the African Union have agreed to a draft protocol of a merged African Court of Justice and Human Rights and have also recently adopted a new protocol that would give this merged court jurisdiction over crimes under international law such as genocide, crimes against humanity, war crimes, and enforced disappearances. However, neither of these protocols has come into force.

3.1 Jurisdiction

At the African Court there is an additional step to admissibility before it can consider the merits of a case. This is the question of jurisdiction, and it relates to whether the African Court has the right to hear and determine a case. Put differently, the question is whether the applicant has the right to access the African Court. Unlike the African Commission, the African Court allows very limited access. Article 5 of the Protocol establishing the African Court details which entities can take cases before the Court:

- the African Commission;
- States parties that were complainants or respondents to a complaint before the African Commission;
- State parties that have an interest in a case;
- African inter-governmental organisations; and
- NGOs with observer status at the African Commission and ordinary individuals – but only when the State party against which the complaint is lodged has made a declaration allowing individuals or NGOs direct access to the Court.¹³⁰ At the time of writing (August 2016), the following seven countries had made the declaration allowing for direct access: Benin, Burkina Faso, Mali, Malawi, Tanzania, Ghana, and Côte d'Ivoire. Rwanda had also previously submitted a declaration for direct access; however, in March of 2016, Rwanda withdrew its declaration for direct access and the impact this will have is still uncertain.

¹²⁹ African Commission, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, 2nd Session, 11 July 2003: Maputo, Mozambique.

¹³⁰ The African Court Protocol, *supra* note 128, Art. 34(6).

The African Court approaches access to the court by first asking whether it has jurisdiction. These considerations are set out in *Konaté v. Burkina Faso*:¹³¹

- *Ratione personae* – whether the court has jurisdiction over both the complainant and the respondent State. This may be:
 - if a case is brought by a State party to the Protocol, an African intergovernmental organisation, or the African Commission against any State party to the Protocol;
 - if a case is brought by an NGO or an individual against a State party that has made a declaration under article 34(6) of the Protocol allowing direct access; or
 - if a case is brought by an African organisation seeking an Advisory Opinion.
- *Ratione materiae* - whether the acts complained of violate the African Charter and other international human rights treaties ratified by the respondent State;
- *Ratione temporis* – whether the violation occurred after the State concerned had ratified the Protocol or the human rights treaty you claim it has violated. The African Court has expressly recognised that violations may be of a continuous nature – thus opening its jurisdiction to cases where violations began before the Protocol came into force for any State.¹³²
- *Ratione loci* – whether the violations occurred within the territory of a State party. (So far, no case has dealt with extraterritorial obligations).

The African Court will not have jurisdiction over cases brought by individuals and NGOs against countries that have not made a declaration under article 34(6).

“[T]he second sentence of Article 34(6) of the Protocol provides that [the Court] ‘shall not receive any petition under Article 5(3) involving a State party which has not made such a declaration’. The [...] objective of the aforementioned Article 34(6) is to prescribe the conditions under which the Court could hear such cases; that is to say, the requirement that a special declaration should be deposited by the concerned State Party, and to set forth the consequences of the absence of such a deposit by the State concerned.”¹³³

However, the African Court has in a number of cases referred such cases to the African Commission even though this procedure may be legally questionable.¹³⁴

¹³¹ African Court, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), par. 30-42.

¹³² African Court, *Urban Mkandawire v. Malawi*, Application No. 003/2011 (2013), par. 32.

¹³³ African Court, *Michelot Yogogombaye v. Republic of Senegal*, Application No. 001/2008 (2009), par. 39; see also African Court, *Baghdadi Ali Mahmoudi v. Tunisia*, Application No. 007/2012 (2012), par. 7-11.

¹³⁴ E.g., African Court, *Ekollo Moundi Alexandre v. Republic of Cameroon and Federal Republic of Nigeria*, Application No. 008/2011 (2011), par. 12; see also African Court, *Ekollo Moundi Alexandre v. Republic of Cameroon and Federal Republic of Nigeria*, Application No. 008/2011 (2011), dissenting opinion of Judge Fatsah Ougergouz, par. 36.

3.2 Admissibility

After the African Court has confirmed that it has jurisdiction, it will need to consider the wider questions regarding the admissibility of the case. The three main situations in which the African Court will have jurisdiction are the following:

- when the African Commission brings the case against a State that has ratified the Protocol;
- when an individual or an NGO takes a case directly against a State that has made a declaration under article 34(6) of the Protocol allowing direct access; or
- if a case is brought by an African organisation seeking an advisory opinion.

In each of these cases, different considerations will apply to the admissibility of the cases.

A. Cases brought through the African Commission

Experience from other regional mechanisms suggests that the primary way to engage the African Court will lie through the African Commission. The African Commission has the right to take cases in its name before the African Court against any State that has ratified the Protocol. In Rule 118 of its Rules of Procedure the African Commission has indicated that it will bring cases before the African Court in the following circumstances:

- if the African Commission “has taken a decision with respect to a communication ... and considers that the State has not complied or is unwilling to comply with its recommendations in respect of the communication within the [time limit] stated in Rule 112(2)”;
- if the African Commission “has made a request for Provisional Measures against a State Party[,] ... and considers that the State has not complied with the Provisional Measures requested”;
- if a situation constituting “one of serious or massive violations of human rights ... has come to its attention”; or
- if it deems it necessary to do so at any stage of a communication.

An example of the procedure under Rule 118 can be seen in the *African Commission on Human and Peoples’ Rights v. Great Socialist People’s Libyan Arab Jamahiriya* where, during the conflict in 2011, a number of NGOs brought a communication against Libya before the African Commission and asked for provisional measures.¹³⁵ The African Commission held that it was impossible to grant interim measures as these would be ignored by the Libyan government. However, they also held that the situation was one of serious or massive violations and they referred the case to the African Court, which proceeded immediately to grant provisional measures (which were never complied with). However, neither the African Commission nor the original NGOs followed up on the case (primarily because of a difficulty in gathering evidence during the conflict but also as a consequence of the change of government in Libya).

¹³⁵ African Court, *African Commission on Human and Peoples’ Rights v. Great Socialist People’s Libyan Arab Jamahiriya*, Application No. 004/2011 (2011).

B. Admissibility where States allow direct access

For cases against States that have made an Art 34(6) declaration, the admissibility questions will be very similar to those that have been applied by the African Commission. In addition, however, note that NGOs that do not have observer status before the African Commission will not be able to bring cases directly before the African Court (although individuals can often bring the same cases).¹³⁶

Admissibility is governed by Rule 40 of the Rules of Court¹³⁷ which sets out a cumulative test of seven requirements, and reflects the requirements under Article 56 of the African Charter. Each of these must be met for a case to be admissible. However, the trickiest issues, and the ones on which most cases are thrown out, are the exhaustion of local remedies and the requirement that cases be brought within a reasonable time. It is therefore crucial that you give particular attention to these issues. These considerations are set out in greater detail above under the section on the African Commission, but are summarised here:

- (i) Identity of the author: Rule 40(1) of Rules of Court requires that “applications to the Court shall ... disclose the identity of the Applicant notwithstanding the latter’s request for anonymity.” Thus, make sure that your communication includes 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).
- (ii) Compatibility: Rule 40(2) requires that applications to the African Court comply with the Constitutive Act of the African Union and the African Charter. This requires sufficient *prima facie* evidence that the complaint relates to a violation of the African Charter. The African Court has confirmed that there is no need to cite articles of the Charter. Although the Court’s primary role is to adjudicate violations of the African Charter, it is preferable that you cite which articles have been violated, it is not necessary to do so, as the Court has said that “where only national law or [the] constitution has been cited and relied upon in an application, the Court will look for corresponding articles in the Charter or any other human rights instrument, and base its decision thereon.”¹³⁸

However, the case must not merely be an appeal against a domestic decision. In *Ernest Mtingwi v. Malawi*, the African Court dismissed an appeal from the Malawi Supreme Court in a labour case on the basis

¹³⁶ African Court, *Association des Juristes d’Afrique pour la Bonne Gouvernance v. Republic of Cote d’Ivoire*, Application No. 006/2011 (2011), par. 5.

¹³⁷ African Court on Human and Peoples’ Rights, *Rules of the Court*, April 2010: Arusha, Tanzania, Rule 40.

¹³⁸ African Court, *Peter Joseph Chacha v. Tanzania*, Application No. 003/2012 (2014), par. 113; *see also* African Court, *Frank David Omary and Others v. The United Republic of Tanzania*, Application No. 001/2012 (2014), par. 74.

that they did not have jurisdiction (and no human rights issues had been argued).¹³⁹

- (iii) Disparaging language: Rule 40(3) requires that “applications to the Court shall ... not contain any disparaging or insulting language” Directed against the State concerned, its institutions or to the African Union.¹⁴⁰ The factors to consider will include:
- whether the language “is aimed at unlawfully and intentionally violating the dignity, reputation or integrity of a judicial officer or body”;¹⁴¹
 - “whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence” on the administration of justice;¹⁴²
 - whether the language is “aimed at undermining the integrity and status of the institution and bring it into disrepute”;¹⁴³
 - whether there is a sufficient balance between respect for the institutions and the freedom of expression implying that the requirement not to use disparaging language will no longer be applied strictly.¹⁴⁴
- (iv) Mass media: Rule 40(4) requires that the communication should “not be based exclusively on news disseminated through the mass media.”¹⁴⁵ The African Commission noted in *Sir Dawda K. Jawara v. The Gambia* that the section excludes cases that are based “exclusively” on news disseminated through the mass media, without more information.¹⁴⁶ This means that there must be some corroborating evidence, although the African Commission has made it clear that the amount of corroborating evidence required is not high.¹⁴⁷
- (v) Local remedies: Article 56(5) requires that “communications be sent to the Commission only after exhausting local remedies, creates a similar condition for the Court if any, unless it is obvious that this procedure is

¹³⁹ African Court, *Ernest Mtingwi v. Malawi*, Application No. 001/2013 (2013), par. 15.

¹⁴⁰ African Court Rules of the Court, *supra* note 137, Rule 40(3); *see also*: The African Charter, *supra* note 3, Article 56(3) (describing the disparaging language admissibility requirement for communications submitted to the Commission).

¹⁴¹ African Commission, *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa v. Zimbabwe*, Communication 293/04 (2008), par. 51; African Commission, *Eyob B. Asemie v. the Kingdom of Lesotho*, Communication 435/12 (2015), par. 56 (quoting African Commission, *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa v. Zimbabwe*, Communication 293/04 (2008), par. 51).

¹⁴² African Commission, *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa v. Zimbabwe*, Communication 293/04 (2008), par. 51.

¹⁴³ *Id.*

¹⁴⁴ *Id.*, par. 52.

¹⁴⁵ African Court Rules of the Court, *supra* note 137, Rule 40(4); *see also*: The African Charter, *supra* note 3, Article 56(4).

¹⁴⁶ African Commission, *Sir Dawda K. Jawara v. The Gambia*, Communication 147/95-149/96 (2000), par. 24-27.

¹⁴⁷ *Id.*

unduly prolonged.”¹⁴⁸ Rule 40(5) As with communications before the African Commission, this will be the most relevant consideration. Before bringing a dispute to the Court, the applicant must have utilised all the legal or judicial avenues or forums available domestically to resolve the matter. “Local remedies” are any judicial/ legal mechanisms put in place at the domestic level to ensure the effective settlement of disputes.

This generally means that the case must have been brought to the highest appellate court for a decision (in different systems, this may be the Supreme Court or the Court of Cassation). It usually does not matter that the applicant knew that the case would be unsuccessful – a case must still be appealed throughout the system.

Any local remedies must be “available, effective, and sufficient”

The onus is on the respondent State to demonstrate that there exist local remedies that are available, effective, and sufficient and, if it meets that burden, the applicant has the onus to show why in that particular case they were not required to exhaust that remedy.

Exceptions: The primary strategy for taking cases to the African Court should be to ensure that all domestic remedies are exhausted – however, there are certain circumstances where it is not necessary to exhaust domestic remedies.

Exceptions to the rule of exhaustion of domestic remedies include those situations where:

- local remedies are non-existent;
- local remedies are unduly and unreasonably prolonged;
- recourse to local remedies is made impossible;
- it is impractical or undesirable for the applicant to seize the domestic courts in the case of each violation; or
- from the face of the application, there is no justice or there are no local remedies to exhaust.

While there have not yet been enough cases before the African Court to determine strong differences in approach, the following cases are good examples of how the African Court will apply the rules developed by the African Commission:

- In *Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher Mtikila v. The United Republic of Tanzania*, the African Court held that local remedies that need exhausting will

¹⁴⁸ African Court Rules of the Court, *supra* note 137, Rule 40(5); *see also* The African Charter, *supra* note 3, Article 56(5).

generally be judicial remedies and do not include parliamentary or administrative remedies, stating that, “in principle, the remedies envisaged in Article 6(2) of the Protocol read together with Article 56(5) of the Charter are primarily judicial remedies as they are the ones that meet the criteria of availability, effectiveness and sufficiency that has been elaborated in jurisprudence”;¹⁴⁹

- In *Norbert Zongo v. Burkina Faso*, the African Court confirmed that where local remedies are unduly prolonged they do not need to be exhausted;¹⁵⁰
- In *Konaté v. Burkina Faso*, the African Court expressly applied the African Commission’s test of whether local remedies were available, effective and sufficient, holding that an appeal that did not allow the applicant to challenge the content of a law criminalising defamation as violating freedom of expression could not be held to be an effective or sufficient remedy;¹⁵¹
- In *Peter Joseph Chacha v. The United Republic of Tanzania*, the majority of the African Court confirmed that it will apply the same rules on exhaustion of local remedies as the African Commission. In this case, the majority of the African Court held both that failure to appeal a decision to the highest appellate court made the case inadmissible, as well as that general inadequacies in the legal system are not enough to make remedies unavailable. This decision was made despite extensive flaws in the domestic system that made it impossible for an unrepresented detainee to have his case heard (a point that is well made by the dissenting decisions in the case);¹⁵²
- In *Frank David Omary and others v. The United Republic of Tanzania*, the African Court held that local judicial remedies had not been exhausted as the case had not been brought before the Court of Appeal on its merits and that any delay in the finalisation of the case was caused by internal disagreements between the applicants themselves.¹⁵³

- (vi) Reasonable time: Article 56(6) of the Charter states that, “[C]ommunications ... received by the Commission, shall be considered if they ... [a]re submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter.” Rule 40(6) creates a similar condition for the Court. This requirement has been difficult to apply since there is no clear interpretation of a “reasonable period” in the African Charter. However, it is now advisable to submit cases as soon as possible;

¹⁴⁹ African Court, *Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher Mtikila v. The United Republic of Tanzania*, Application Nos. 009/2011 and 011/2011, (2013) par. 82.1.

¹⁵⁰ African Court, *Norbert Zongo v. Burkina Faso*, Application No. 013/2011 (2014), par. 88.

¹⁵¹ African Court, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), par. 113-114.

¹⁵² African Court, *Peter Joseph Chacha v. The United Republic of Tanzania*, Application No. 003/2012 (2014), par. 142-145; see also *id.*, Dissenting Opinion.

¹⁵³ African Court, *Frank David Omary and Others v. The United Republic of Tanzania*, Application No. 001/2012 (2014), par. 137.

preferably within six months of exhaustion of domestic remedies. If you fail to do so, you need to give compelling factual and contextual reasons why you failed to do so.

The African Court in *Peter Joseph Chacha v. The United Republic of Tanzania* confirmed that there is no set period after the exhaustion of domestic remedies within which to file a case with the African Court (again following the example of the African Commission that each case will be dealt with on its merits).¹⁵⁴ However, the African Court may be more lenient with the application of this rule. For instance, in *Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher Mtikila v. The United Republic of Tanzania*, the African Court held that a year was not an inordinate delay as the applicants were entitled to wait to see whether Parliament would change the law to cure the violation of the Charter.¹⁵⁵

(vii) *Ne bis in idem*: Article 56(7) states that the Commission does “not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the [OAU] or the provisions of the present Charter.” Rule 40(7) creates similar condition for Court. This means that communications that have been finalised by some other international mechanism similar to the African Commission are inadmissible.¹⁵⁶ The African Commission has held that:

- This provision codifies “the *non bis in idem* rule which ensures that no State may be sued or condemned more than once for the same alleged human rights violations,” and “seeks to uphold and recognise the *res judicata* status-of decisions issued by international and regional tribunals and/or bodies.”¹⁵⁷
- The matter in contention, which must relate to the same facts and parties, needs to have been “*settled*” – it must no longer be under consideration under an international dispute-settlement procedure.¹⁵⁸
- The decision must have been by “any other international adjudication mechanism, with a human rights mandate” and not a political entity.¹⁵⁹

¹⁵⁴African Court, *Peter Joseph Chacha v. The United Republic of Tanzania*, Application No. 003/2012 (2014), par. 155.

¹⁵⁵ African Court, *Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher Mtikila v. The United Republic of Tanzania*, Application Nos. 009/2011 and 011/2011, (2013), par. 83.

¹⁵⁶ *E.g.*, African Commission, *Amnesty International v. Tunisia*, Communication No. 69/92 (1993).

¹⁵⁷ African Commission, *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana*, Communication No. 277/2003 (2013), par. 110 (internal citations omitted).

¹⁵⁸ *Id.*, par. 110-111; African Commission, *Bob Ngozi Njoku v. Egypt*, Communication No. 40/90 (1997), par. 55-56.

¹⁵⁹ African Commission, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Communication 279/03-296/05 (2009), par. 104.

C. Advisory Opinions

Another way in which the African Court may receive cases is through the advisory opinions procedure. According to the Protocol, “any African organization recognized by the OAU [now the AU]” can seek an advisory opinion of the African Court.¹⁶⁰ According to Rule 68(1) of the African Court’s Rules of Procedure, requests may be filed by:

- Member States;¹⁶¹
- the AU;¹⁶²
- an organ of the AU;¹⁶³ or
- an African organization recognized by the AU.¹⁶⁴

However, like the African Commission, advisory opinions must only be sought for the interpretation of the law (the African Charter or other international human rights instrument) and should not be an attempt to bring a case against a State. If an advisory opinion is sought it must set out:

- the provisions of the Charter or of any other international human rights instrument in respect of which the advisory opinion is sought;
- the circumstances giving rise to the request; and
- the names and addresses of the representatives of the entities making the request.

In addition, the subject matter of the request for an advisory opinion shall not relate to an application pending before the African Commission. A number of requests for advisory opinions have been made by NGOs, but so far only one request for an advisory opinion has been successful (filed by the African Committee of Experts on the Rights and Welfare of the Child),¹⁶⁵ and the jurisprudence is still developing. In the request for an advisory opinion filed by the African Committee of Experts on the Rights and Welfare of the Child, the African Court was asked to give an opinion on:

- a) “Whether the Committee has standing to request an advisory opinion under Article 4(1) of the Protocol”;¹⁶⁶
- b) Whether the Committee is an “African Intergovernmental Organisation” under Article 5(1)(e) of the Protocol, meaning that it can submit cases to the African Court;¹⁶⁷
- c) “Whether Article 5(1)(e) should be interpreted in line with the mandates of the African Court and the Committee”;¹⁶⁸ and

¹⁶⁰ The African Court Protocol, *supra* note 128, Art. 4.

¹⁶¹ African Court Rules of the Court, *supra* note 137, Rule 68(1).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ African Court, *The African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples’ Rights*, Request No. 002/2013 (2014).

¹⁶⁶ *Id.*, par. 8.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

- d) “Whether the standing of the Committee before the Court under Article 5(1)(e) of the Protocol is in line with the object and purpose of the Protocol.”¹⁶⁹

The Court found that “even though there has not been any formal decision of the [African] Union to the effect that the Committee shall be an organ of the [African] Union, the policy organs of the AU have treated the Committee as an organ of the [African] Union.”¹⁷⁰ Therefore, the Court concluded that the Committee “has standing to request an advisory opinion under Article 4(1)” of the Protocol of the Court.¹⁷¹ However, the Court did not find the Committee to be an “African Intergovernmental Organisation” within the meaning of Article 5(1)(e) of the Protocol.¹⁷² With regard to issues (c) and (d), the Court found it “highly desirable that the Committee is given direct access to the Court.”¹⁷³ However, the African Court noted that Article 5 of the Protocol prescribed who may access the African Court. In this regard, the Court stated that “it is a well-known principle of law that where a treaty sets out an exhaustive list, this cannot be interpreted to include an entity that is not listed, even if it has the same attributes.”¹⁷⁴ Accordingly, the Court did not find that the Committee had direct access to the African Court.

The following are other examples of the requests for advisory opinions that have been made so far:

- In Request No. 001/2012 by the Socio-Economic Rights and Accountability Project (SERAP), the African Court was asked, *inter alia*, to give an opinion on whether extreme and widespread poverty in Nigeria violated the prohibition of discrimination, and whether poverty could constitute “other status” in the definition of discrimination in the African Charter. The African Court held, without explanation, that the request did not meet the requirements of Rule 68.¹⁷⁵
- In Request No. 002/2012 by the Pan African Lawyers’ Union (“PALU”) and Southern African Litigation Centre, the applicants requested an opinion on whether the decision by the Southern African Development Community (“SADC”) to suspend the SADC Tribunal violated the African Charter and other international human rights standards. However, the same case was pending before the African Commission, and the African Court therefore refused to consider the request.¹⁷⁶
- In Request No. 001/2011, the Coalition on the International Criminal Court, Legal Defence & Assistance Project, Civil Resource Development & Documentation Center and Women Advocates Documentation Center requested an opinion on “[w]hether the Treaty obligation of an African state

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*, par. 56.

¹⁷¹ *Id.*, par. 100.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*, par. 98.

¹⁷⁵ African Court, *The Socio-Economic Rights and Accountability Project (“SERAP”), Request No. 001/2012* (rejected 15 March 2013).

¹⁷⁶ African Court, *The Pan African Lawyers’ Union (“PALU”) and Southern African Litigation Centre, Request No. 002/2012* (rejected 15 March 2013).

party to the Rome Statute of the ICC to cooperate with the Court is superior to the obligation of that state to comply with AU resolution calling for non-cooperation of its members with the ICC.”¹⁷⁷ If the answer to this inquiry is in the affirmative, the second question asks “whether all African State Parties to the ICC have overriding legal obligation above all other legal or diplomatic obligations arising from resolutions or decisions of the African Union to arrest and surrender President Omar Al Bashir any time he enters into the territory of any of the African State Parties to ICC.”¹⁷⁸ This request is still pending and the decision of the African Court may give further guidance to the use of the advisory opinion procedure.¹⁷⁹

3.3 Representation before the African Court

According to Rule 28 of the African Court Rules of Court, “[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.”¹⁸⁰

3.4 Merits

It is important to remember that the African Court will approach evidence through the lens of a judicial body and will therefore apply stricter evidentiary rules.¹⁸¹ The early jurisprudence from the African Court is promising for the right to freedom of expression, as well as the rights of journalists and the media:

- In *Norbert Zongo v. Burkina Faso*, the African Court found that Burkina Faso had violated Articles 1 and 7 of the African Charter because it had “failed to expeditiously and efficiently identify, apprehend and try the assassins of the investigative journalist Norbert Zongo [and his companions]” and therefore had violated “the rights of the Applicants’ cause to be heard by competent national courts.”¹⁸² The Court acknowledged that the “failure to identify and apprehend Norbert Zongo’s assassins could potentially cause fear and anxiety in media circles,”¹⁸³ but was not enough to show that media had not been able to exercise their right to freedom of expression. The Court ultimately found that Burkino Faso violated Article 9(2).
- In *Konaté v. Burkina Faso*, the African Court held that aspects of criminal defamation laws, particularly those imposing the sanction of imprisonment, violated Article 9 and other international human rights provisions recognising the right to freedom of expression.¹⁸⁴

3.5 Amicus curiae

The African Court will accept *amicus curiae* submissions from interested NGOs. Rule

¹⁷⁷ African Court, *The Coalition on the International Criminal Court, Legal Defence & Assistance Project, Civil Resource Development & Documentation Center and Women Advocates Documentation Center*, Request No. 001/2014, par. 5 (pending).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ African Court Rules of the Court, *supra* note 137, Rule 28.

¹⁸¹ See above on arguing merits before the African Commission.

¹⁸² African Court, *Norbert Zongo v. Burkina Faso*, Application No. 013/2011 (2014), par. 184, 198.

¹⁸³ *Id.*, par. 186.

¹⁸⁴ African Court, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), par. 176.

45(1) of the Rules of Court provides that “[t]he Court may, *inter alia*, decide to hear [...] in any other capacity [other than a witness or an expert], any person whose evidence, assertions or statements it deems likely to assist it in carrying out its task”. Though the procedure regarding *amicus curiae* briefs is not clearly set out in the African Court’s Rules of Court, practice shows that they have been filed successfully.¹⁸⁵

There have been a number of applications filed by NGOs to submit briefs, suggesting that this is a popular mechanism to submit legal arguments to the African Court. For example:

- The Centre for Human Rights, Comité Pour la Protection des Journalistes, Media Institute of Southern Africa, Pan African Human Rights Defenders Network, Pan African Lawyers’ Union, Pen International and National Pen Centres (Pen Malawi, Pen Algeria, Pen Nigeria, Pen Sierra Leone, and Pen South Africa), Southern Africa Litigation Centre, and World Association of Newspapers and News Publishers submitted an *amicus curiae* brief in *Konaté v. Burkina Faso*.¹⁸⁶
- PALU submitted an *amicus curiae* brief granted in *African Commission on Human and Peoples’ Rights v. the Great Socialist Libyan People’s Arab Jamahiriya*.¹⁸⁷

3.6 Interim Measures

The African Court has extensive powers to grant interim measures under article 27(2) of the Protocol, “[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures it deems necessary.” These may be granted in the interest of the parties or in the interests of justice and at the request of a party, the Commission or on its own accord.

In the *African Commission on Human and Peoples’ Rights v. Great Socialist People’s Libyan Arab Jamahiriya* case, a number of NGOs brought a communication, during the conflict in 2011, against Libya before the African Commission and asked for provisional measures. The African Commission held that it was impossible to grant interim measures as these would be ignored by the Libyan government. However, they also held that the situation was one of serious or massive violations and they referred the case to the African Court, which proceeded immediately to grant interim measures (which were never complied with).¹⁸⁸ This is thus an example of the situations in which the African Court is likely to grant interim measures (and the difficulties in enforcing them).

¹⁸⁵ See PALU’s application for filing an *amicus curiae* brief, African Court, *African Commission on Human and Peoples’ Rights v. Great Socialist People’s Libyan Arab Jamahiriya*, Application No. 004/2011 (2013). The request to participate as *amicus curiae* was granted but never materialised as the case was struck out.

¹⁸⁶ African Court, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), par. 20.

¹⁸⁷ African Court, *African Commission on Human and Peoples’ Rights v. Great Socialist People’s Libyan Arab Jamahiriya*, Application No. 004/2011 (2013). The request to participate as *amicus curiae* was granted but never materialised as the case was struck out.

¹⁸⁸ African Court, *African Commission on Human and Peoples’ Rights v. Great Socialist People’s Libyan Arab Jamahiriya*, Application No. 004/2011 (2013), Order of Provisional Measures.

In *Konaté v. Burkina Faso*, the applicant requested the immediate release of an imprisoned journalist as a provisional measure, or, alternatively adequate medical care.¹⁸⁹ The Court found that granting an immediate release corresponded “in substance to one of the reliefs sought in the substantive case, namely that the punishment of imprisonment is in essence a violation of the right to freedom of expression.”¹⁹⁰ A consideration of this question would therefore “adversely affect consideration of the substantive case.”¹⁹¹ Concerning the request for adequate medical care, the Court noted that “the situation in which the Applicant finds himself appears to be a situation that can cause irreparable harm.”¹⁹² The Court therefore stated that the Applicant was entitled to all necessary medical care and accordingly ordered provisional measures.¹⁹³

3.7 Remedies

The African Court is likely to grant more effective remedies than the African Commission because it is established as a fully judicial body. The African Court will order specific amounts of damages, give supervisory interdicts (requiring the State party to report on the implementation of the remedy), and require positive action to guarantee non-repetition. Thus, in *Norbert Zongo v. Burkina Faso*, the African Court ordered Burkina Faso to:

- re-open the investigation into the murder of the four deceased;¹⁹⁴
- pay damages to the victims’ families;¹⁹⁵
- take measures to prevent further recurrence of such violations;¹⁹⁶ and
- report back to the Court within six months on the implementation of the judgment.¹⁹⁷

In *Konaté v. Burkina Faso*, the Court unanimously ordered Burkina Faso to amend its legislation on defamation by:

- “repealing custodial sentences for acts of defamation”;¹⁹⁸ and
- “adapting its legislation to ensure that other sanctions for defamation meet the test of necessity and proportionality, in accordance with its obligations under the Charter and other international instruments.”¹⁹⁹

In its reparation decision in *Konaté v. Burkino Faso*, the Applicant requested that the African Court order Burkino Faso to:

¹⁸⁹ African Court, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), Order of Provisional Measures, par. 6.

¹⁹⁰ *Id.*, par. 19.

¹⁹¹ *Id.*

¹⁹² *Id.*, par. 22.

¹⁹³ *Id.*

¹⁹⁴ African Court, *Norbert Zongo v. Burkina Faso*, Application No. 013/2011 (2015), Ruling on Reparations.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ African Court, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), par. 176.

¹⁹⁹ *Id.*

- set aside his conviction;
- order the State to pay damages, fines, and costs;
- award 154,123,000 CFA Francs to him for pecuniary damages; and
- award non-pecuniary damages totaling \$35,000 USD.²⁰⁰

The African Court, in citing its previous judgment, noted that the State is “required to make full reparation for the damage it has caused” to both the applicant and his family.²⁰¹ In evaluating the claims of both the applicant and Burkino Faso, the court ordered the State to expunge the applicant’s judicial records, including criminal convictions; ordered the State to pay a total of 35,108,000 CFA francs for damages and expenses; and required the state to submit a report to the Court on the implementation of this decision within six months.²⁰²

3.8 Review of judgments

Under Rule 67 of the African Court’s Rules of Court and Article 28(3) of the Protocol, you may ask for a review of a decision that you do not agree with. However, you can only do this if you discover new evidence that you did not have at the point that the decision was made. This means that the power of review will only be resorted to in limited circumstances.

3.9 Sources of law

When bringing a case to the African Court, you can use different sources of law to argue your case. Firstly, you should refer to the provisions in the African Charter that have been violated. Secondly, the Rules of Court set out more formal requirements in relation to the proceedings. Thirdly, you can refer to the Declaration of Principles on Freedom of Expression in Africa. Fourthly, it is always a good idea to support your arguments with references to jurisprudence of the African Commission and African Court. Lastly, you may consider including references to international standards.

3.10 Advantages/disadvantages of the system

The African Court is the premier human rights mechanism in Africa. Its decisions are binding and enforceable, and the Court will apply both the African Charter and other international human rights law. Due to its judicial nature, the decisions that are handed down from the African Court are usually more reasoned than the African Commission’s decisions.

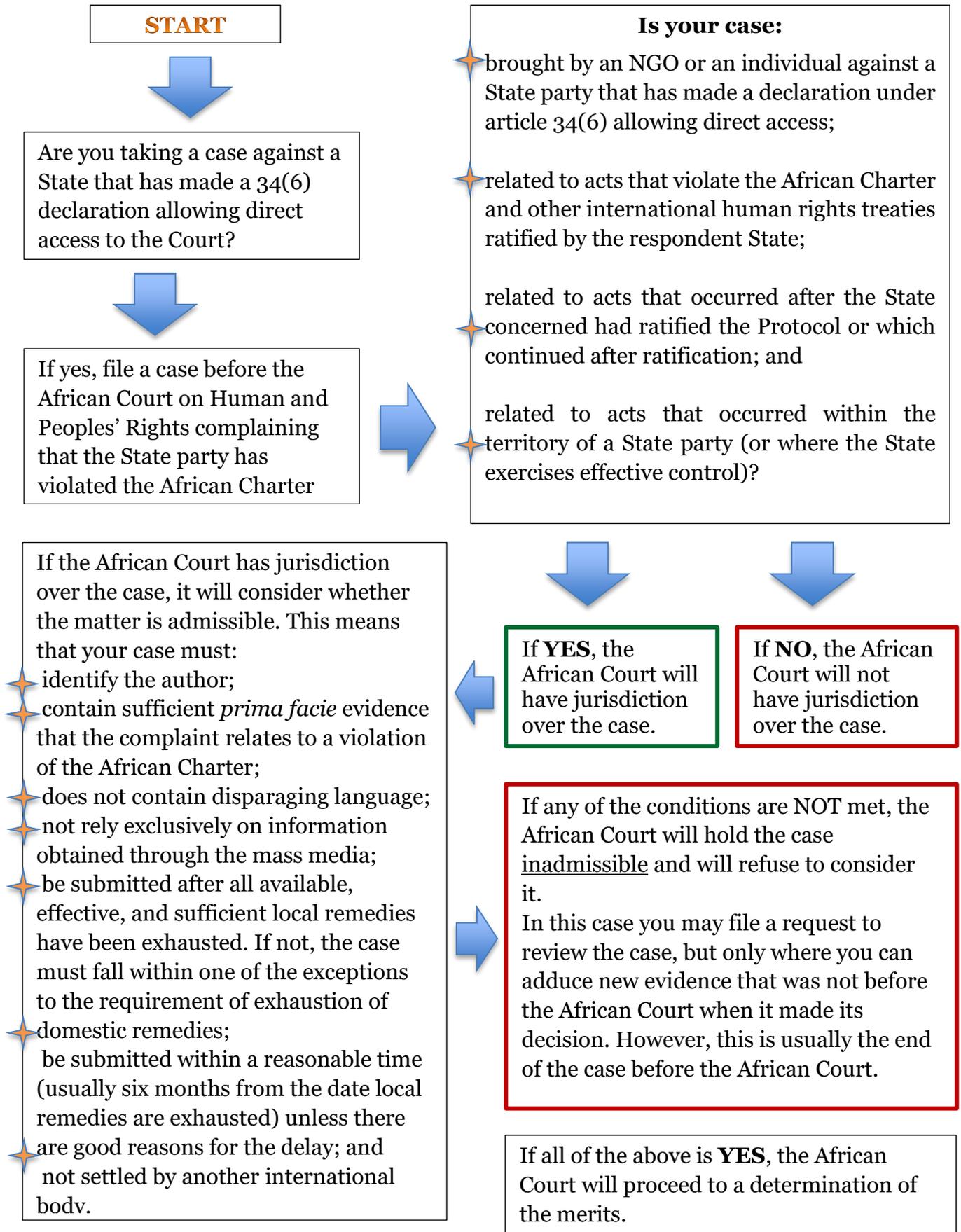
²⁰⁰ African Court, *Konaté v. Burkino Faso*, Judgment on Reparations, par. 9 (2016).

²⁰¹ *Id.*, par. 16.

²⁰² *Id.*, par. 60.

Procedural flow-chart

Process for bringing Applications to the African Court



Does your case prove a violation of the African Charter or other international human rights standard?



If **NO**, the African Court will reject your case.



If **YES**, the African Court will determine whether the respondent State has violated the African Charter and will order the State to remedy this breach.



If the State complies with the recommendations, **the matter ends there.**



If the State does **NOT** comply with the recommendations, write to the AU Executive Council calling for the case to be referred to the AU Assembly for enforcement.

Chapter 4: East African Court of Justice

4.1 Jurisdiction

Access to the East African Court is determined primarily by an application of the jurisdiction requirements set out in the East African Treaty (the “Treaty”). The jurisdiction of the East African Court is set out in Articles 27 and 30 of the 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:

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.

[...]

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.”

The East African Court has summarised the jurisdictional requirements as follows:²⁰³

“Any plain reading of the aforementioned Article underscores that prior to submitting a Reference before the Court, any person must meet the following conditions:

- a) *Be a legal or natural person; and*
- b) *Be resident of an EAC Partner State; and*

²⁰³ See East African Court, *Godfrey Magezi v. The Attorney General of the Republic of Uganda*, Reference No. 5 of 2013 (2015), par. 27.

c) *Is challenging the legality of any Act, regulation, directive, decision, and action of the said Partner State or an institution of the Community.*”

A. Jurisdiction *ratione personae*

According to Act 30(1) of the Treaty, any person (or company) resident in the East African Community may bring a case to the East African Court.

B. Jurisdiction *ratione temporis*

Cases will fall within the temporal jurisdiction of the East African Court if they occurred subsequent to the Treaty coming into force for the State against whom the complaint is made. A strict application of the two months rule (see below) and the refusal by the East African Court to recognise continuing violations of the Treaty indicate that time limits will be applied strictly.²⁰⁴

C. Jurisdiction *ratione materiae*

Article 30(1) of the Treaty authorises legal and natural persons, resident in a State party to the Treaty, to bring a complaint (i.e. make a Reference) to the Court on whether an act or omission of a State Party is an infringement of the Treaty. While Article 27 appears to expressly exclude human rights jurisdiction, the East African Court has expressly said that where it is called on to interpret the Treaty, it will not refrain from doing so merely because doing so would involve determining violations of human rights, provided the conduct also violates other principles protected under the Treaty. In *James Katabazi and 21 Others v. Secretary General of EAC and Attorney General of the Republic of Uganda*, the East African Court held that:²⁰⁵

“Article 7 spells out the operational principles of the Community which govern the practical achievement of the objectives of the Community in Sub-Article (1) and seals that with the undertaking by the Partner States in no uncertain terms of Sub-Article (2):

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.

Finally, under Article 8(1)(c) the Partner States undertake, among other things: Abstain from any measures likely to jeopardise the achievement of those objectives or the implementation of the provisions of this Treaty. While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegation of human rights violation.”

²⁰⁴ East African Court, *Attorney General of the Republic of Kenya v. Independent Medical Legal Unit*, Appeal No. 1 of 2011 (2012), p. 17.

²⁰⁵ East African Court, *James Katabazi and 21 Others v. Secretary General of EAC and Attorney General of the Republic of Uganda*, Reference No. 1 of 2007 (2007), p. 16 (emphasis in original).

As the Court put it in *East Africa Law Society v. The Attorney General of the Republic of Burundi*, “the Treaty provisions alleged to have been violated have, through Burundi’s voluntary entry into the Treaty, been crystallized into actionable obligations, now stipulated in among others, Articles 6(d) and 7(2) of the Treaty, breach of any of which by the Republic of Burundi (1st Respondent) would give rise to infringement of the Treaty. It is that alleged infringement which, through interpretation of the Treaty under ... Article 27(1) of the Treaty constitutes the cause of action [...]”²⁰⁶

In *Burundi Journalists’ Union v. The Attorney General of the Republic of Burundi*, the Court held that violations of freedom of expression and of the press were justiciable as violations of the East African Treaty. The Court reasoned that “there is no doubt that freedom of the press and freedom of expression are essential components of democracy.”²⁰⁷ The Court further noted that “under Articles 6(d) and 7(2), the principles of democracy must of necessity include adherence to press freedom”²⁰⁸ and a “free press goes hand in hand with the principles of accountability and transparency which are also entrenched in Articles 6(d) and 7(2).”²⁰⁹ Accordingly, the obligation to abide by the right to freedom of expression was within the justiciable principles under the Articles 6(d) and 7(2) of the Treaty.

The Court re-iterated its reasoning in *The Managing Editor, Mseto v. The Attorney General of the United Republic of Tanzania*, in which it affirmed that Articles 6(d) and 7(2) of the Treaty, considered alongside Article 9(1) and (2) of the African Charter, “clearly indicate that the rights of freedom of expression” and “press freedom cumulating from the freedom of expression” “are guaranteed, but only within the strictures and/or confines of the law”.²¹⁰ Similarly in *Media Council of Tanzania v The Attorney General of the United Republic of Tanzania*, the Court confirmed that “freedom of opinion and freedom of the media are at the core of the fundamental and operational principles set out in Articles 6 and 7 of the Treaty”.²¹¹

Since the East African Court does not formally hold a human rights jurisdiction, most human rights cases will be brought and determined by the Court as violations of the principles of good governance and the rule of law under Articles 6(d) and 7(2) of the Treaty. It is therefore imperative to argue that the violations complained of are not pure human rights violations.

²⁰⁶ East African Court, *East Africa Law Society v. The Attorney General of the Republic of Burundi*, Reference No. 1 of 2014 (2015), par. 53.

²⁰⁷ East African Court, *Burundi Journalists’ Union v. The Attorney General of the Republic of Burundi*, Reference No. 7 of 2013 (2015), par. 75.

²⁰⁸ *Id.*, par. 82.

²⁰⁹ *Id.*, par. 83.

²¹⁰ East African Court, *The Managing Editor, Mseto v. The Attorney General of the United Republic of Tanzania*, Reference No. 7 of 2016 (2018), par. 46.

²¹¹ East African Court, *Media Council of Tanzania v The Attorney General of the United Republic of Tanzania*, Reference No. 2 of 2017 (2019), par 61.

Human Rights cases as violations of the Treaty:

- *Samuel Mukira Mohochi v. The Attorney General of the Republic of Uganda* (the denial of entry into Uganda followed by detention, removal, and return of the applicant to Kenya were found unlawful).²¹²
- *James Katabazi and 21 others v. The Secretary General of the East African Community and Attorney General of the Republic of Uganda* (the invasion of court premises by armed security agents of Uganda and the subsequent re-arrest and incarceration of 16 Ugandan prisoners despite the existence of a lawful court order from the Ugandan High Court, granting bail to 14 of the prisoners, constituted a violation of the Treaty).²¹³
- *The Attorney General of the Republic of Kenya v. Independent Medical Unit* (the case concerned the killings at Mount Elgon. The Court held that it had a “duty to interpret the Treaty” and the matter fell within its jurisdiction).²¹⁴
- *Mary Ariviza and Okotch Mondoh v. Attorney General of the Republic of Kenya and Secretary General of the East African Community* (the conduct and process of a referendum as well as the promulgation of a new Constitution in the Republic of Kenya fell under the jurisdiction of the Court).²¹⁵
- *Sitenda Sebalu v. Secretary General of the East African Community et al.* (the failure to extend the jurisdiction of the Court pursuant to Article 27 violated the Applicant’s legitimate expectations that the matter be expedited and contravened the principles of good governance stipulated in Article 6 of the Treaty).²¹⁶

The East African Court has also confirmed that it does not hold appellate jurisdiction over decisions made by domestic courts, so you must make sure that your case does not appear to be an appeal against the decision of the local courts.²¹⁷

4.2 Bringing a case

The East African Court includes a First Instance Division, where your case will be heard and an Appeals Division (see below). The procedure for filing and having cases heard at the East African Court mirrors the procedure at the domestic level in common law countries to a much greater extent than procedures at the African Commission. The case is first made on the papers, allowing the respondent to make preliminary objections on the law before the trial process, during which the Court makes decisions on facts based on the evidence. A Reference by a partner State, the Secretary

²¹² East African Court, *Samuel Mukira Mohochi v. The Attorney General of the Republic of Uganda*, Reference No. 5 of 2011 (2013).

²¹³ East African Court, *James Katabazi and 21 Others v. Secretary General of EAC and Attorney General of the Republic of Uganda*, Reference No. 1 of 2007 (2007).

²¹⁴ East African Court, *The Attorney General of the Republic of Kenya v. Independent Medical Unit*, Appeal No. 1 of 2011 (2012).

²¹⁵ East African Court, *Mary Ariviza and Okotch Mondoh v. Attorney General of the Republic of Kenya and Secretary General of the East African Community*, Reference No. 7 of 2010 (2011).

²¹⁶ East African Court, *Honorable Sitenda Sebalu v Secretary General of the EAC, Attorney General of the Republic of Uganda, Honorable Sam K. Njuba, and the Electoral Commission of Uganda*, Reference No. 1 of 2010 (2011).

²¹⁷ *Id.*, p. 21.

General, or a legal or natural person is instituted by lodging a statement of reference in the Court which should include:

- the name, designation, address and (where applicable) residence of the applicant;
- the designation, name, address and (where applicable) residence of the respondent;
- the subject-matter of the reference and a summary of the points of law on which the application is based;
- where appropriate, the nature of any evidence offered in support;
- where applicable, the order sought by the applicant;
- where the reference seeks the annulment of an Act, regulation, directive, decision, or action, the application shall be accompanied by documentary evidence of the same; and
- where the reference is made by a body corporate, the application shall be accompanied by documentary evidence of its existence in law.

Within 45 days of being served with a notification of the Reference, the respondent should file a statement of response after which the applicant has 45 days to file a reply. Within 45 days, the respondent may then file a rejoinder (neither the reply nor rejoinder should repeat earlier arguments). There will then be a scheduling conference to determine when the case will be set down for oral hearing. At the oral hearing, both parties can call and examine witnesses.

4.3 Admissibility

Although the East African Court does not apply the same admissibility criteria applied by the African Commission and the African Court, there are a few very important considerations to take into account.

A. Exhaustion of domestic remedies

The East African Court has held that there is no requirement that an applicant must exhaust local remedies before approaching the East African Court, and they have based this on the argument that the East African Court has primacy in interpreting the Treaty (which is an overt rejection of the subsidiarity principle).²¹⁸

Indeed, the East African Court has held that this jurisdiction is not voluntary, and that once an applicant can show an alleged violation of the Treaty, the East African Court must exercise jurisdiction. On the flip side, where there is no jurisdiction it cannot become involved:

“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 because once a party has invoked certain relevant

²¹⁸ East African Court, *Plaxeda Rugumba vs. The Secretary General of the EAC and the Attorney General of the Republic of Rwanda*, Appeal No.1 of 2012 (2012), par. 39; East African Court, *Burundi Journalists' Union v. The Attorney General of the Republic of Burundi*, Reference No. 7 of 2013 (2015), par. 41-44.

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.”²¹⁹

B. Two-month rule

The Treaty requires that References should be filed with the East African Court within two months of the violation complained of, which is an extremely difficult requirement to comply with. In two cases, the East African Court has held that it will not give any leeway on this requirement and that there is no provision in the Treaty that covers the concept of continuing violations of the Treaty (holding that this is a human rights concept and is therefore not applicable to interpretation of the Treaty).²²⁰

4.4 Representation before the East African Court of Justice

The rules concerning representation before the East African Court are stated in Rule 17 of the Court’s Rules of Procedure.²²¹

According to Rule 17(1), “[a] party to any proceedings in the Court may appear in person or by an agent and may be represented by an advocate.” “A corporation or company may either appear by its director, manager or secretary, who is appointed by resolution under the seal of the corporation or the company, or may be represented by an advocate.”²²² “The advocate for a party shall file with the Registrar a certificate that he or she is entitled to appear before a superior court of a Partner State.”²²³ “A representative of a party other than an advocate shall for purposes of this Rule file with the Registrar proof of his or her appointment as such representative.”²²⁴ In case of the death of a party “during the continuance of the proceedings, the legal representative shall take over the proceedings.”²²⁵

4.5 Merits

All cases must relate to the interpretation of the East African Treaty. While the Treaty expressly excludes human rights jurisdiction, the East African Court has held that Article 7(2) of the Treaty requires that the Court judge actions of member States against the principles of good governance, which include democracy and the rule of law.

²¹⁹ East African Court, *Democratic Party v. The Secretary General of the East African Community & 4 Others*, Reference No. 2 of 2012 (2013), par. 30-31.

²²⁰ East African Court, *Attorney General of Uganda v. Omar Awadh and Six Others*, Appeal No. 2 of 2012 (2013), par. 31; East African Court, *Attorney General of the Republic of Kenya and Four Others v. Independent Medical Legal Unit*, Appeal No. 1 of 2011 (2012), pp. 15-16.

²²¹ East African Court of Justice, *Rules of Procedure*, Gazette No. 7, 11 April 2013, Rule 17: Arusha, Tanzania.

²²² *Id.*, Rule 17 (3).

²²³ *Id.*, Rule 17 (5).

²²⁴ *Id.*, Rule 17 (6).

²²⁵ *Id.*, Rule 17 (7).

Article 7(2) states that:

“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”.

The approach of the Court is explained in *James Katabazi and 21 others v. The Secretary General of the East African Community and Attorney General of the Republic of Uganda*. There, the Court stated that while it “will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegations of human rights violations.”²²⁶

Thus merits arguments must be made on the basis that the human rights violation(s) complained of violate the principles of good governance, democracy, rule of law, or social justice.²²⁷ In *James Katabazi and 21 others v. Secretary General of the East African Community and Attorney General of the Republic of Uganda*, the Ugandan security services had (i) re-arrested the 22 complainants immediately after the High Court had ordered their release on bail, and (ii) surrounded the court in a show of the strength of Uganda.²²⁸ This is the classic example of a situation in which human rights concerns are covered by the principle of the rule of law.

However, in practice, this does not preclude the East African Court from hearing media freedom cases. As seen above in *Burundi Journalists Union v. The Attorney General of the Republic of Burundi*, the East African Court held that violations of the freedom of expression and of the press were justiciable as violations of the Treaty, *inter alia*, holding that “a government should not determine what ideas or information should be in the market place.”²²⁹

Similarly, in *The Managing Editor, Mseto v The Attorney General of the United Republic of Tanzania*, the East African Court held that a restriction on press freedom violated the “principles of good governance, and rule of law which include accountability, transparency and promotion and protection of democracy”,²³⁰ and more specifically that the principles of the Treaty “certainly demand that proscription of newspapers should be done lawfully and not whimsically or flippantly”.²³¹

In practice, therefore many human rights cases will likely be justiciable before the East African Court, as long as the violations are expressed as violations of the principles of

²²⁶ East African Court, *James Katabazi and 21 Others v. Secretary General of the East African Community and Attorney General of the Republic of Uganda*, Reference No. 1 of 2007 (2007), p. 16.

²²⁷ East African Treaty, *supra* note 4, Articles 6(d) and 7(2).

²²⁸ East African Court, *James Katabazi and 21 Others v. Secretary General of the East African Community and Attorney General of the Republic of Uganda*, Reference No. 1 of 2007 (2007).

²²⁹ East African Court, *Burundi Journalists’ Union v. The Attorney General of the Republic of Burundi*, Reference No. 7 of 2013 (2015), par. 98.

²³⁰ East African Court, *The Managing Editor, Mseto v. The Attorney General of the United Republic of Tanzania*, Reference No. 7 of 2016 (2018), par. 69.

²³¹ *Id.*, par 55.

good governance, democracy, rule of law, or social justice. Indeed, even within the limitations of arguing cases within the four corners of the Treaty and avoiding express human rights arguments, it is evident that the East African Court will be persuaded by human rights jurisprudence. In *Burundi Journalists' Union v. The Attorney General of the Republic of Burundi*, the Court applied jurisprudence of the European Court of Human Rights:²³²

“On this issue [of the protection of sources], we are of the same mind as the (European Court of Human Rights) in *Goodwin vs. UK* ... where it was stated as follows:

‘Protection of journalistic sources is one of the basic conditions for press freedom [...]. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.’²³³

In *Media Council of Tanzania v The Attorney General of the United Republic of Tanzania*, the East African Court cited jurisprudence of the Inter-American Court of Human Rights in determining, inter alia, that provisions creating the offence of criminal defamation violated principles of free expression.²³⁴ The Court also drew on analysis of the UN Human Rights Committee, in particular General Comment 34.²³⁵

On freedom of expression and the rights of the media, the *Burundi Journalists Union* case was important for its recognition of the importance of free press and the freedom of expression for democratic good governance, the condemnation of government control over the content of publication by the media, and the need to protect journalistic sources. Similarly, the *Media Council of Tanzania* case was significant for its condemnation of provisions relating to criminal defamation, sedition and false news for unduly inhibiting freedom of expression and freedom of the press.

The Managing Editor, Mseto v. The Attorney General of the United Republic of Tanzania was significant in establishing that even where a domestic provision may be prima facie in accordance with the right to freedom of expression under a Constitution,²³⁶ a decision made pursuant to that provision will not be lawful if it unjustifiably restricts freedom of expression and freedom of the press.²³⁷ Thus the

²³² *Id.*, par. 108 (emphasis removed).

²³³ See also *The Managing Editor, Mseto v. The Attorney General of the United Republic of Tanzania*, in which the East Africa Court made reference to the judgment of the African Commission on Human and Peoples' Rights in *Constitutional Rights Project v. Nigeria*, specifically its freedom of expression analysis: Reference No. 7 of 2016 (2018), par. 54 (emphasis removed).

²³⁴ East African Court, *Media Council of Tanzania v The Attorney General of the United Republic of Tanzania*, Reference No. 2 of 2017 (2019), par 85.

²³⁵ East African Court, *Media Council of Tanzania v The Attorney General of the United Republic of Tanzania*, Reference No. 2 of 2017 (2019), par 79.

²³⁶ See the Court's commentary at par 53.

²³⁷ East African Court, *The Managing Editor, Mseto v. The Attorney General of the United Republic of Tanzania*, Reference No. 7 of 2016 (2018), par. 54.

East African Court considered that an order requiring a publication to cease amounted to a restriction of the right to freedom of expression that was “unlawful, disproportionate and did not serve any legitimate or lawful purpose”.²³⁸

However, the absence of human rights expertise and jurisdiction was perhaps evident in *Burdundi Journalists Union*, in which the East African Court was satisfied both with an accreditation scheme that allowed a state-mandated body to effectively determine who could practice as a journalist (which allows the state to control who qualifies as a member of the press), and a right to correction for public officials that gives them an advantage over ordinary people.

In *Media Council of Tanzania v The Attorney General of the United Republic of Tanzania* the East African Court again failed to find anything inherently objectionable in a system of accrediting journalists.²³⁹ However notably, the Court held that the definition of “journalist” used within the scheme was too broad to provide sufficient clarity to allow individuals to foresee what activities they are forbidden from performing without accreditation. In doing so, the Court acknowledged the inherent difficulties of defining the term:

‘[T]he term “journalist” is difficult to define with precision. This was recognised by the UN Human Rights Committee in its General Comment 34: “journalism” is a function shared by a wide range of actors, including professional full time reporters and analysts, as well as others, who engage in forms of self-publication in print, on the internet or elsewhere.’²⁴⁰

4.6 Appeal

According to Article 35A of the East African Treaty, the East African Court allows for appeals of decisions of the First Instance Division to the Appeals Division:

- on points of law;
- on jurisdiction; and
- to review procedural irregularities.²⁴¹

Although this procedure appears limited, as it excludes appeals on determination of the facts, it is much more extensive than the limited review procedures allowed by the African Commission and the African Court. The East African Court therefore provides an important opportunity for decisions to be challenged on appeal.

²³⁸ *Id.*, par. 69.

²³⁹ East African Court, *Media Council of Tanzania v The Attorney General of the United Republic of Tanzania*, Reference No. 2 of 2017 (2019), par 77.

²⁴⁰ East African Court, *Media Council of Tanzania v The Attorney General of the United Republic of Tanzania*, Reference No. 2 of 2017 (2019), par 79.

²⁴¹ East African Community, the Treaty, Article 35A.

4.7 Remedies

In *Burundi Journalists' Union v. The Attorney General of the Republic of Burundi*, the East African Court held that it had no authority to order a partner State to amend its legislation and instead issued a declaratory order that the legislation violated the Treaty and directed the Partner State to comply with the decision.²⁴² In *Media Council of Tanzania v The Attorney General of the United Republic of Tanzania*, the Court also issued a declaratory order that the legislation violated the Treaty and directed the Partner State to comply with the decision.

In *The Managing Editor, Mseto v. The Attorney General of the United Republic of Tanzania*, the East African Court ordered a Minister to annul an order banning a newspaper for three years and resumption of its publication.²⁴³ The Court reasoned that the Minister's unlawful action "must be followed by an order taking the parties to the *status quo ante*."²⁴⁴ In that case, the East African Court declined to consider the legality of the provision under which the impugned order had been made, that legislation having already been repealed while proceedings were ongoing before the Court.²⁴⁵

While *Burundi Journalists' Union* and *Media Council of Tanzania* indicate that the East African Court is conservative in its use of remedies, *The Managing Editor, Mseto* indicates that the Court may choose to exercise its power to annul unlawful Ministerial orders.

4.8 Advisory Opinion

According to Article 36 of the East African Treaty, a request for an advisory opinion must be lodged in the Appeals Division. The request must:

- contain a statement of the question upon which an opinion is required; and
- be accompanied by all relevant documents.

As with the African Commission and the African Court, advisory opinions must be requests for interpretation of the law.²⁴⁶

4.9 Sources of law

The East African Court will primarily apply and interpret the Treaty. However, it will also refer to human rights instruments such as the African Charter, jurisprudence of the African Commission or the African Court, or interpretative guidelines, such as the Declaration of Principles on Freedom of Expression in Africa (where these can be read to interpret the principles of the rule of law, democracy, and good governance).

²⁴²East African Court, *Burundi Journalists' Union v. The Attorney General of the Republic of Burundi*, Reference No. 7 of 2013 (2015), par. 84-85, 121.

²⁴³ East African Court, *The Managing Editor, Mseto v. The Attorney General of the United Republic of Tanzania*, Reference No. 7 of 2016 (2018), par. 74.

²⁴⁴ *Id.*, par. 70.

²⁴⁵ *Id.*, par. 22.

²⁴⁶ East African Community, the Treaty, Article 36(1).

4.10 Advantages/disadvantages of the system

The East African Court has many positive elements. For a regional court, it is very fast in giving decisions, it issues binding legal judgments which the Community of East African States is required to enforce, and the legal regime it applies is closely linked to the legal systems of most of its member States (particularly Kenya, Uganda, and Tanzania).

However, as the Court expressly does not have human rights jurisdiction, it has to rely on an often creative interpretation of the concepts of good governance, democracy, and the rule of law to allow it to consider human rights cases. There is therefore an over-emphasis on the rule of law and on legal procedures and the rights available at the domestic level without the opportunity to infuse these rules with human rights values. Thus, for example, in *East Africa Law Society v. The Attorney General of the Republic of Burundi*, the violation was a failure to comply with domestic law.²⁴⁷ Where a violation of international law complies with domestic law, the Court may be less progressive. Further, at times it appears that the East African Court will apply a very functional definition of the rule of law like it did in *Godfrey Magezi v. The Attorney General of the Republic of Uganda*:

“It is our understanding that the rule of law, democracy and good governance are the major features of a civilized society and as such, the rule of law provides the general framework for good governance. Rule of law implies that every citizen is subject to the law including the lawmakers.”²⁴⁸

The absence of explicit human rights jurisdiction on occasion leads to unfortunate decisions, and States are allowed to escape censure for some of the most serious violations on what appear to be technicalities.²⁴⁹ For example, the East African Court refused to adjudicate on rendition and illegal detention because the violations were not complained of within two months of the first arrest, even though the illegality continued at the date of the Reference and proceedings:²⁵⁰

“The Respondents laboured valiantly to avail to us all the abundant jurisprudence of the European Human Rights Court, the Inter-American Court, the African Commission and others, that recognize the principle of ‘continuing violations.’ While this jurisprudence is perfect for its particular circumstances, it is all about Human Rights violations, governed by particular Conventions on Human Rights. Furthermore, the background to that jurisprudence concerns criminal matters, whose prosecution does not in, most cases, have a prescription of time limit. In the instant case, the Respondents’ cause of action was clearly the alleged infringement of Partner States’ Treaty obligations – a matter which lies outside

²⁴⁷ East African Court, *East Africa Law Society v. The Attorney General of the Republic of Burundi*, Reference No. 1 of 2014 (2015).

²⁴⁸ East African Court, *Godfrey Magezi v. The Attorney General of the Republic of Uganda*, Reference No. 5 of 2013 (2015), par. 72.

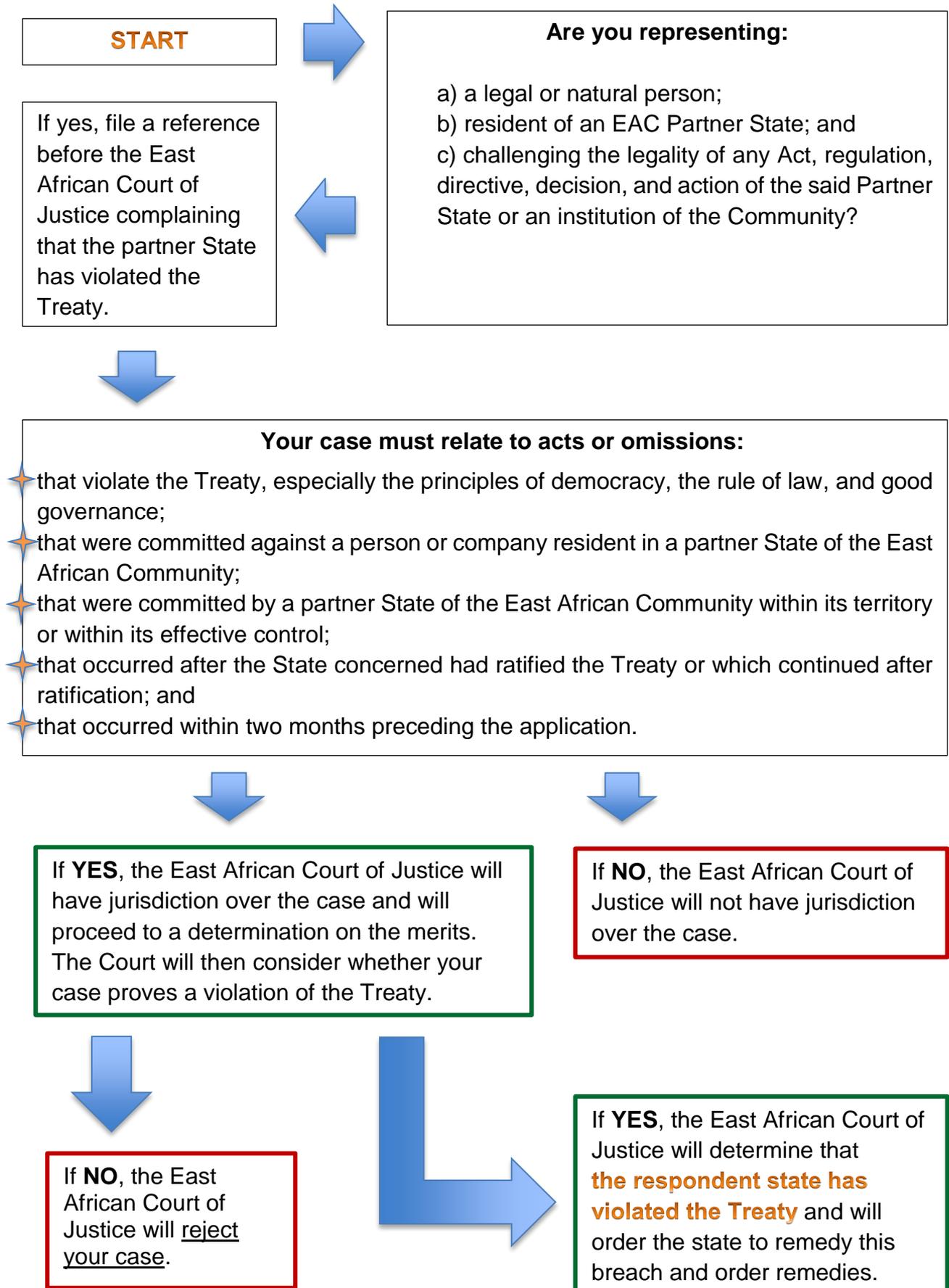
²⁴⁹ In May 2005, the Council of Ministers issued a *Draft Protocol to Operationalise the Extended Jurisdiction of the East African Court of Justice*; however, the protocol has not yet been signed by partner States.

²⁵⁰ East African Court, *Attorney General of the Republic of Uganda and Attorney General of the Republic of Kenya v. Omar Awadh and Six Others*, Appeal No. 2 of 2012 (2013), par. 55.

the province of human rights and the realm of criminal law.”

Procedural flow-chart

Process for bringing References to the East African Court of Justice



Appeal

- ✦ If you lose the case at the First Instance Division you may appeal to the Appeals Division, which will reconsider the jurisdictional, legal and procedural questions and confirm, alter or overturn the original decision.
- ✦ If the State loses the case it may also appeal to the Appeals Division.

Chapter 5: Conclusion

There are three different options to take cases before regional forums in East Africa. Each of these has advantages and disadvantages. The choice of forum will depend on a number of things including the overall strategy, jurisdiction over the alleged violations, the need for substantive human rights jurisdiction for some cases, the importance of particular remedies, and the possibility of enforcing the decisions.

The African Commission retains the most extensive human rights experience and expertise on the African continent. In countries that have not allowed direct access to the African Court, communications before the African Commission may be the only way to get an authoritative human rights determination.

For individuals living in countries such as Tanzania, which allow individual access to the African Court, this should be considered the premium forum for the consideration of human rights cases. Decisions of the African Court are binding and enforceable, and the Court has already shown that it is eager to push the boundaries (for example in the granting of interim measures).

However, for most individuals living in countries in East Africa, the East African Court will be the easiest forum to approach. It does not require the exhaustion of domestic or local remedies and is likely to provide a quick resolution of cases. Unfortunately, the East African Court does not have express human rights jurisdiction and this limits the nature of cases that can be brought to those that might engage good governance, the rule of law, democracy and social justice.

The module above is an introduction to the various regional forums available to you in East Africa – good luck in bringing your case and always remember litigation is only part of a larger strategy for social change!