



**Training Manual on
International and Comparative
Media and Freedom of
Expression Law**

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CHAPTER 1: INTRODUCTION

This module is designed to assist new litigants at the regional level in West 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 West African Community Court of Justice. It should be read in conjunction with the Training Manual on International and Comparative Media and Freedom of Expression Law¹ 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 West 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 ECOWAS Community Court of Justice (the "ECOWAS Community Court").

Each of these will have different rules to ensure the principle of subsidiarity (including limiting jurisdiction and imposing admissibility requirements). 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

¹ Media Legal Defence Initiative, *Training Manual on International and Comparative Media and Freedom of Expression Law*, Available at <https://www.mediadefence.org/sites/default/files/resources/files/MLDI.FoEManual.Version1.1.pdf>

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 criticism that international decisions are not enforced 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 ECOWAS Community Court) 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 (complaints²) with regard to the African Court and the ECOWAS Community Court, a case including all relevant materials can be sent directly to the Courts without first having to go through the seizure procedure.³

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

After a case has been initiated before an international forum, the first consideration for the forum is usually whether it can hear the case. 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 whether the forum:

² See: "Flow Charts" at p.33-34 below.

³ See: "Flow Charts" at p.50 and 67 below.

- 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.

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's mandate (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 after the violation occurred.

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 ECOWAS Community Court.

B. *Admissibility*

Admissibility is the process applied by international human rights forums to ensure that only cases that need international consideration are brought before them. 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 Union regional human rights system, Article 56 of the African Charter on Human and Peoples' Rights (the "African Charter")⁴ 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

⁴ 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.

Court and the ECOWAS Community Court, care must similarly be taken to argue the jurisdiction of the court. For example, the ECOWAS Community Court applies different jurisdiction and admissibility rules to the African Union Bodies, which has been explicitly recognised in its jurisprudence.⁵

1.8 Merits

“Merits” 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.

1.9 Remedies

Different forums provide different remedies. Therefore, one of the first things you need to decide 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 these? These are all things to consider before bringing a case to a regional or international forum.

⁵ ECOWAS, *Essien v. the Gambia*, ECW/CCJ/APP/05/05 (2005), para 24.

CHAPTER 2: AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (ACHPR)

2.1 Introduction

The Organisation of African Unity (the "OAU") was established at the height of the decolonisation 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. The ACHPR is established in terms of Article 30, with the mandate to protect and promote human and peoples' rights and ensure their protection in Africa, and to interpret the African Charter. 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 that 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).

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). It entered into force on 21 October 1986 and aims to reflect the “historical tradition and the values of African civilization.”⁶ 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-determination⁷ and to freely dispose of natural wealth;⁸
- equally protects both civil and political rights, as well as economic, social and cultural rights;⁹
- emphasises the duties of individuals towards the community and State;¹⁰ and
- gives people fleeing persecution the right to obtain asylum (and not just to seek it).¹¹

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 in the African 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);

⁶ The African Charter, *supra* note 4, Preamble.

⁷*Id.*, art. 20.

⁸*Id.*, art. 21.

⁹*Id.*, Preamble.

¹⁰*Id.*, art. 27.

¹¹*Id.*, art. 12.

- 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:

- the right to housing;¹² and
- the right to food.¹³

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 African Charter compare to international human rights treaties (such as the International Covenant on Civil and Political Rights (the “ICCPR”). Under the African Charter, a literal reading would imply that enjoyment of the protected rights could be made subject to domestic law which would allow States to make enjoyment of the rights 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.”¹⁴ 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.

¹² African Commission, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Communication 155/96 (2001), paras. 59-63.

¹³ African Commission, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Communication 155/96 (2001), para. 37.

¹⁴ The African Charter, *supra* note 4, art. 9(2).

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*¹⁵
- *Media Rights Agenda and Others v. Nigeria*¹⁶
- *Kenneth Good v. Republic of Botswana*¹⁷
- *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*¹⁸
- *Konaté v. Burkina Faso*¹⁹

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);²⁰
- the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003);²¹
- the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines) (2008);²² and
- the Guidelines and Principles on Economic, Social and Cultural Rights (2002) in the African Charter (adopted in 2011).²³

It is crucial to remember that you are not confined 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).

¹⁵ African Commission, *Sir Dawda K. Jawara v. the Gambia*, Communication 147/95-149/96 (2000).

¹⁶ African Commission, *Media Rights Agenda and Others v. Nigeria*, Communication 224/98 (2000).

¹⁷ African Commission, *Kenneth Good v. Republic of Botswana*, Communication 313/05 (2010).

¹⁸ African Commission, *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, Communication 323/06 (2013).

¹⁹ African Court, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014).

²⁰ African Commission, *Declaration of Principles on Freedom of Expression in Africa*, 32nd Session, 17 - 23 October 2002: Banjul, the Gambia.

²¹ 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).

²² 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.

²³ 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.

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
alleging a violation of the African Charter,
The African Commission will seize itself of the communication.

Anyone can bring a complaint, if they meet the admissibility requirements and the standing requirement set out below, 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 requirement.²⁴

Communications can also be brought:

- for the public good (*actio popularis*);²⁵
- as class or representative actions;²⁶ or
- on behalf of another person.

²⁴ African Commission, *Article 19 v. Eritrea*, Communication 275/03 (2007), para. 65.

²⁵ African Commission, *Law Society of Zimbabwe et al v. Zimbabwe*, Communication 321/06 (2013), para. 58.

²⁶ ACERWC, *Institute for human rights and development in Africa (IHRDA) and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v. the Government of Kenya*, Communication 002/2009 (2011)

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;
- Demonstration of 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.

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.** Therefore, it is advisable at this stage to set out your arguments on each of the requirements under Article 56 of the African Charter (see below).

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 [African] 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.”²⁷

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 African Commission:

- has adequate information and specificity concerning the victims;²⁸
- is in continuing communication with the author;²⁹
- knows the author’s identity and status;³⁰
- can be assured of their continued interest in the communication;³¹ and
- can request supplementary information if the case requires it.³²

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).³³ 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 provision of the African Charter has been violated.³⁴

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

²⁷ African Commission, *Samuel T. Muzerengwa and 110 Others v. Zimbabwe*, Communication 306/05 (2011), para. 56.

²⁸ African Commission, *Luke Munyandu Tembani and Benjamin John Freeth v. Angola and Thirteen Others*, Communication 409/12 (2014), para. 87.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ The African Charter, *supra* note 4, Article 56(2).

³⁴ See, for example, African Commission, *Mouvement des refugies Mauritaniens au Senegal v. Senegal*, Communication 162/97 (1997); and African Commission, *Southern Africa Human Rights NGO Network and Others v. Tanzania*, Communication 333/06 (20b).

- be brought in respect of violations that occurred after the State’s ratification of the African Charter (or that began before ratification and have continued after such ratification).³⁵

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 Union”.³⁶ 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.”³⁷

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”;³⁸
- “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;³⁹
- whether the language is “aimed at undermining the integrity and status of the institution and bring it into disrepute”.⁴⁰

See the following cases for an analysis of disparaging language:

*Ilesanmi v. Nigeria*⁴¹

*Ligue Camerounaise des Droits de l’Homme v. Cameroon*⁴²

*Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v. Zimbabwe*⁴³

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

³⁵ African Commission, *Kevin Mgwanga Gunme et al v. Cameroon*, Communication 266/03, para.71.

³⁶ The African Charter, *supra* note 4, Article 56(6).

³⁷ African Commission, *Ilesanmi v. Nigeria*, Communication 268/03 (2005), para. 39.

³⁸ African Commission, *Eyob B. Asemie v. the Kingdom of Lesotho*, Communication 435/12 (2015), para. 56.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ African Commission, *Ilesanmi v. Nigeria*, Communication 268/03 (2005).

⁴² African Commission, *Ligue Camerounaise des Droits de l’Homme v. Cameroon*, Communication 65/92 (1997).

⁴³ African Commission, *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v. Zimbabwe*, Communication 284/03 (2009).

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.”⁴⁴

One occasion when Article 56(3) was applied to hold a case inadmissible was in *Ligue Camerounaise des Droits de l’Homme v. Cameroon*, where the African Commission condemned the use of sentences 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.⁴⁵

While it is debatable whether the balance was properly struck in this 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 towards 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.”⁴⁶ The African Commission noted in *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.⁴⁷ This means that there must be some corroborating evidence that is not from the media, although the African Commission has made it clear that the amount of corroborating evidence required is not high.⁴⁸

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.”⁴⁹ 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.⁵⁰ In cases where the complainant has made generalised

⁴⁴ *Id.*, para. 91.

⁴⁵ African Commission, *Ligue Camerounaise des Droits de l’Homme v. Cameroon*, Communication 65/92 (1997), para. 13.

⁴⁶ The African Charter, *supra* note 4, Article 56(4).

⁴⁷ African Commission, *Sir Dawda K. Jawara v. the Gambia*, Communication 147/95-149/96 (2000), para. 24.

⁴⁸ *Id.*, paras. 26 and 27.

⁴⁹ The African Charter, *supra* note 4, Article 56(5).

⁵⁰ African Commission, *Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria*, Communication 388/07 (2010), par.65-66

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.

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.⁵¹ This requirement safeguards the role of domestic courts to decide the matter before it is brought to any international adjudicative body. However:

“[T]he 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.”⁵²

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.”⁵³

2.5 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

⁵¹ African Commission, *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Angola and Thirteen Others*, Communication 409/12 (2014), para. 96.

⁵² *Id.*, para. 99.

⁵³ African Commission, *Southern Africa Human Rights NGO Network and Others v. Tanzania*, Communication 333/06(2010), para. 64 (citations omitted).

remedy.

- A remedy is “available” if the petitioner can pursue it without impediment;⁵⁴
- A remedy is “effective” if it offers a reasonable prospect of success;⁵⁵ and
- A remedy is “sufficient” if it is capable of redressing the complaint.⁵⁶

A. *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.”⁵⁷

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*).⁵⁸ It will be interesting to see how this requirement will be developed by the African Court.

B. *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 ineffective:

“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.”⁵⁹

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

⁵⁴ African Commission, *Majuru v. Zimbabwe*, Communication 308/05 (2008), para. 79; African Commission, *Sir Dawda K. Jawara v. the Gambia*, Communication 147/95-149/96 (2000), para. 32.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ African Commission, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Communication 155/96 (2001), para. 37.

⁵⁸ *Id.*

⁵⁹ African Commission, *Chinhamo v. Zimbabwe*, Communication 307/05 (2007), para. 84.

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.”⁶⁰

One case where the African Commission held that local remedies would be ineffective is *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v. Zimbabwe*,⁶¹ 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.⁶²

C. 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.⁶³

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.⁶⁴ 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.⁶⁵ This would also appear to be the conclusion in *Dr. Farouk Mohamed Ibrahim (represented by REDRESS) v. Sudan*.⁶⁶

In the case against Sudan, the Court cited *Article 19 v. Eritrea*:

Whenever there is a crime that can be investigated and prosecuted by the State on its own initiative, the State has the obligation to move the criminal process forward to its ultimate conclusion. In such cases, one cannot demand that the Complainants, or the Victims or their family members assume the task of

⁶⁰ African Commission, *Article 19 v. Eritrea*, Communication 275/03 (2007), para. 67.

⁶¹ African Commission, *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa v. Zimbabwe*, Communication 294/04 (2009).

⁶² *Id.*, para. 54.

⁶³ African Commission, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/02 (2006), para. 70.

⁶⁴ *E.g.* European Court of Human Rights, *Assenov and Others v. Bulgaria*, Application No. 24760/94 (1998), para. 85-86.

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

⁶⁶ African Commission, *Dr. Farouk Mohamed Ibrahim (represented by REDRESS) v. Sudan*, Communication 386/10 (2013).

exhausting domestic remedies when it is up to the State to investigate the facts and bring the accused persons to court in accordance with both domestic and international fair trial standards.⁶⁷

2.6 Exceptions to the rule of exhaustion of domestic remedies

The primary strategy for taking cases to the African Commission 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;⁶⁸
- local remedies are unduly and unreasonably prolonged;⁶⁹
- recourse to local remedies is made impossible;⁷⁰
- it is impractical or undesirable for the complainant to seize the domestic courts in the case of each violation;⁷¹ or
- from the face of the complaint there is “no justice” or there are no local remedies to exhaust.⁷²

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.

⁶⁷ African Commission, *Article 19 v. Eritrea*, Communication 275/03 (2007), para. 72. Although in this case the criminal charges that the state was failing to investigate were against the complainants (who were held incommunicado in the meantime) the African Commission appears to have applied the principle equally to situations in which the human rights violation is criminal in nature and the state has received notice of the criminal act.

⁶⁸ African Commission, *Luke Munyandu Tembani and Benjamin John Freeth v. Angola and Thirteen Others*, Communication 409/12 (2014), para. 99.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*, para. 100.

⁷² *Id.*, para. 99.

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.”⁷³

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. 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.”⁷⁴

However, the burden of proof that it is impossible to exhaust domestic remedies because the complainant has fled the country out of such fear has been held to be quite strict, as stated in the case *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.”⁷⁵

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

⁷³ African Commission, *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa v. Zimbabwe*, Communication 293/04 (2006), para. 61.

⁷⁴ African Commission, *Sir Dawda K. Jawara v. the Gambia*, Communication 147/95-149/96 (2000), para. 35.

⁷⁵ African Commission, *Majuru v. Zimbabwe*, Communication 308/05 (2008), para. 100; African Commission, *Chinhamo v. Zimbabwe*, Communication 307/05 (2007), para. 84.

are so serious that it is impractical to try to bring the case before local courts.⁷⁶

D. Reasonable time

Article 56(6) of the African Charter⁷⁷ 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”.⁷⁸ This requirement has been difficult to apply 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 12⁷⁹ or even 15 years⁸⁰ 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.⁸¹ The African Commission treats every case on its own merit depending **on the reasons given for delay.**⁸²

- 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”⁸³ 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.”⁸⁴

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.

⁷⁶ African Commission, *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. DRC*, Communication 25/89-47/90-56/91-100/93 (1995), para. 37.

⁷⁷ The African Charter, *supra* note 4, Article 56(6).

⁷⁸ It is also important to remember that throughout the proceedings communications must be submitted within a reasonable time. See *Id.*

⁷⁹ African Commission, *Embga Mekongo Louis v. Cameroon*, Communication 59/91 (1995).

⁸⁰ African Commission, *John Modise v. Botswana*, Communication 97/93 (2000).

⁸¹ African Commission, *Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Center for the Protection of Human Rights) v. Kenya*, Communication 375/09 (2011), para. 59.

⁸² *Id.*

⁸³ African Commission, *Michael Majuru v. Zimbabwe* (2008), Communication 308/05, para. 109.

⁸⁴ African Commission, *Darfur Relief and Documentation Centre v. Sudan*, Communication 310/05 (2009), para. 79; African Commission, *Southern Africa Human Rights NGO Network and Others v. Tanzania*, Communication 333/06(2010), para. 71; African Commission, *Darfur Relief and Documentation Centre v. Sudan*, Communication 310/05 (2009), para. 79.

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

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.”⁸⁵
- *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.⁸⁶
- *Obert Chingamo v. Zimbabwe*: the communication was submitted to the African Commission 10 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 6 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.”⁸⁷
- *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.⁸⁸

E. *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.”⁸⁹ This means that communications that have been finalised by some other international mechanism(s) similar to the African Commission are inadmissible.⁹⁰ The African

⁸⁵ African Commission, *Majuru v. Zimbabwe*, Communication 308/05 (2008), para. 110.

⁸⁶ African Commission, *Darfur Relief and Documentation Centre v. Sudan*, Communication 310/05 (2009), paras. 78, 80.

⁸⁷ African Commission, *Chingamo v. Zimbabwe*, Communication 307/05 (2007), para. 89.

⁸⁸ African Commission, *Luke Munyandu Tembani and Benjamin John Freeth v. Angola and Thirteen Others*, Communication 409/12 (2014), para. 107.

⁸⁹ The African Charter, *supra* note 4, Article 56 (7).

⁹⁰ *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.⁹¹

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.⁹²
- 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.⁹³ 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.⁹⁴
- The decision must have been by “any [other] international adjudication mechanism, with a human rights mandate” and not a political entity.⁹⁵

2.6 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.

2.7 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.⁹⁶ While a request for such an advisory opinion needs to be brought by an African organisation recognised by the AU, in practice this means that any African registered NGO with

⁹¹ African Commission, *Bakweri Land Claims Committee v. Cameroon*, Communication 260/02 (2004), para. 53

⁹² *Id.*, para. 52.

⁹³ African Commission, *Luke Munyandu Tembani and Benjamin John Freeth v. Angola and Thirteen Others*, Communication 409/12 (2014), para. 112.

⁹⁴ African Commission, *Mpaka Nsusu Andre Alphonse v. DRC* Communication, Communication 15/88 (1988), paras. 2 and 3.

⁹⁵ African Commission, *Luke Munyandu Tembani and Benjamin John Freeth v. Angola and Thirteen Others*, Communication 409/12 (2014), para. 112.

⁹⁶ African Commission, *Advisory Opinion of the African Commission on human and peoples' Rights on the UN Declaration on the rights of indigenous peoples*, 41st session, 16-30 May 2007: Accra, Ghana.

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.

2.8 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 “[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.”⁹⁷ 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.”⁹⁸

2.9 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.⁹⁹ The respondent State party has a right of reply within 60 days after receiving the complainant’s arguments on the merits.¹⁰⁰ The complainant then has 30 days to respond to the State’s arguments.¹⁰¹

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.¹⁰² 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

⁹⁹ African Commission Rules of Procedure, *supra* note 5, Rule 108(1).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*, Rule 108(2).

¹⁰² The African Charter, *supra* note 4, Article 46.

parties, such as a fact finding mission.¹⁰³ 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 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:¹⁰⁴

“[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.”¹⁰⁵

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.”¹⁰⁶

¹⁰³ *Id.*

¹⁰⁴ *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).

¹⁰⁵ African Commission, *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v. Zimbabwe*, Communication 284/03 (2009), para. 92.

¹⁰⁶ *Id.*, para. 178.

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 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,¹⁰⁷ and the requirements that military tribunals comply with fair trial standards,¹⁰⁸ the rights of human rights activists,¹⁰⁹ and the rights of indigenous peoples.¹¹⁰

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).¹¹¹ 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 and 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.¹¹² The African Commission has recognised the following rights as falling within the right to a fair trial:

- the right of recourse to courts;¹¹³
- the right to information upon arrest and the presumption of innocence;¹¹⁴
- the right to defence and to counsel;¹¹⁵
- the right to be tried within a reasonable time;¹¹⁶

¹⁰⁷ African Commission, *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, Communication 323/06 (2011).

¹⁰⁸ African Commission, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, Communication 218/98 (2001).

¹⁰⁹ African Commission, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan*, Communication 379/09 (2015).

¹¹⁰ African Commission, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication 276/03 (2009).

¹¹¹ 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.

¹¹² African Commission, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, Communications 140/94, 141/94 and 145/95 (1999), para. 43.

¹¹³ African Commission, *Fair Trial Guidelines*, Principle C; African Commission, *Lawyers for Human Rights v. Swaziland*, Communication 251/02 (2005), para. 53.

¹¹⁴ 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 and 89/93 (1999), para. 61.

¹¹⁵ African Commission, *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi*, Communication 231/99 (2000), para. 30; African Commission, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, Communications 140/94, 141/94 and 145/95 (1999), para. 32-33; African Commission, *Courson v. Equatorial Guinea*, Communication 144/95 (1997), para. 22.

¹¹⁶ African Commission, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, Communication 218/98 (2001), para. 43.

- the right to a public trial;¹¹⁷
- the right to equal treatment;¹¹⁸
- the right to appeal;¹¹⁹
- the right to legal assistance;¹²⁰
- prohibition of *ex post facto* law;¹²¹ and
- the independence of the judiciary.¹²²

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).¹²³
- *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).¹²⁴
- *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).¹²⁵
- *Sir Dawda K. Jawara v. the Gambia* (concerning the aftermath of the military coup of July 1994 in the Gambia. The violations alleged included arbitrary detention and a violation of the prohibition on retroactivity).¹²⁶
- *Media Rights Agenda & Others v. Nigeria* (concerning alleged violations of arrest, detention, and the right to a fair and public hearing).¹²⁷
- *Lawyers for Human Rights v. Swaziland* (concerning the decision to repeal the democratic Constitution of Swaziland, enacted in 1968, which was held to have

¹¹⁷ African Commission, *Media Rights Agenda and Others v. Nigeria*, Communication 224/98 (2000), para. 51; African Commission, *Fair Trial Guidelines*, Principle A(3).

¹¹⁸ African Commission, *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi*, Communication 231/99 (2000), para. 29.

¹¹⁹ African Commission, *Kenneth Good v. Republic of Botswana*, Communication 313/05 (2010), para. 176.

¹²⁰ African Commission, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, Communication 218/98 (2001), para. 30; African Court, *Mohamed Abubakari v. United Republic of Tanzania*, Application No. 007/2013 (2016), para. 49-50.

¹²¹ African Commission, *Sir Dawda K. Jawara v. the Gambia*, Communication 147/95-149/96 (2000), para. 62-63.

¹²² 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*, Communications 48/90, 50/91, 52/91 and 89/93 (1999), paras. 68 and 69.

¹²³ 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).

¹²⁴ African Commission, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, Communication 218/98 (2001).

¹²⁵ African Commission, *Courson v. Equatorial Guinea*, Communication 144/95 (2000).

¹²⁶ African Commission, *Sir Dawda K. Jawara v. the Gambia*, Communication 147/95-149/96 (2000).

¹²⁷ African Commission, *Media Rights Agenda and Others v. Nigeria*, Communication 224/98 (2000).

breached Articles 1, 7, 10, 11, 13 and 26 of the African Charter).¹²⁸

2.10 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, 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*).¹²⁹ Where the State fails to contest an allegation of fact, the African Commission will take this as proven.¹³⁰

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 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.”¹³¹

¹²⁸ African Commission, *Samuel T. Muzerengwa and 110 Others (represented by Zimbabwe Lawyers for Human Rights) v. Swaziland*, Communication 251/02 (2005).

¹²⁹ African Commission, *Mohammed Abdullah Saleh Al-Asad v. The Republic of Djibouti*, Communication 383/10 (2014), para. 141.

¹³⁰ See: African Commission, *Constitutional Rights Project v. Nigeria*, Communication 148/96 (1999), para. 14; African Commission, *Embga Mekongo Louis v. Cameroon*, Communication 59/91 (1995); African Commission, *Constitutional Rights Project v. Nigeria*, Communication 60/91 (2000); African Commission, *Achuthan & Another v. Malawi*, Communications 64/92, 68/92 and 78/92 (2000); African Commission, *Constitutional Rights Project v. Nigeria*, Communication 87/93 (2000); African Commission, *Civil Liberties Organisation v. Nigeria*, Communication 87/93 (2000).

¹³¹ African Commission, *Interights et al. v. Botswana*, Communication 240/01 (2003), para. 29.

2.11 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.

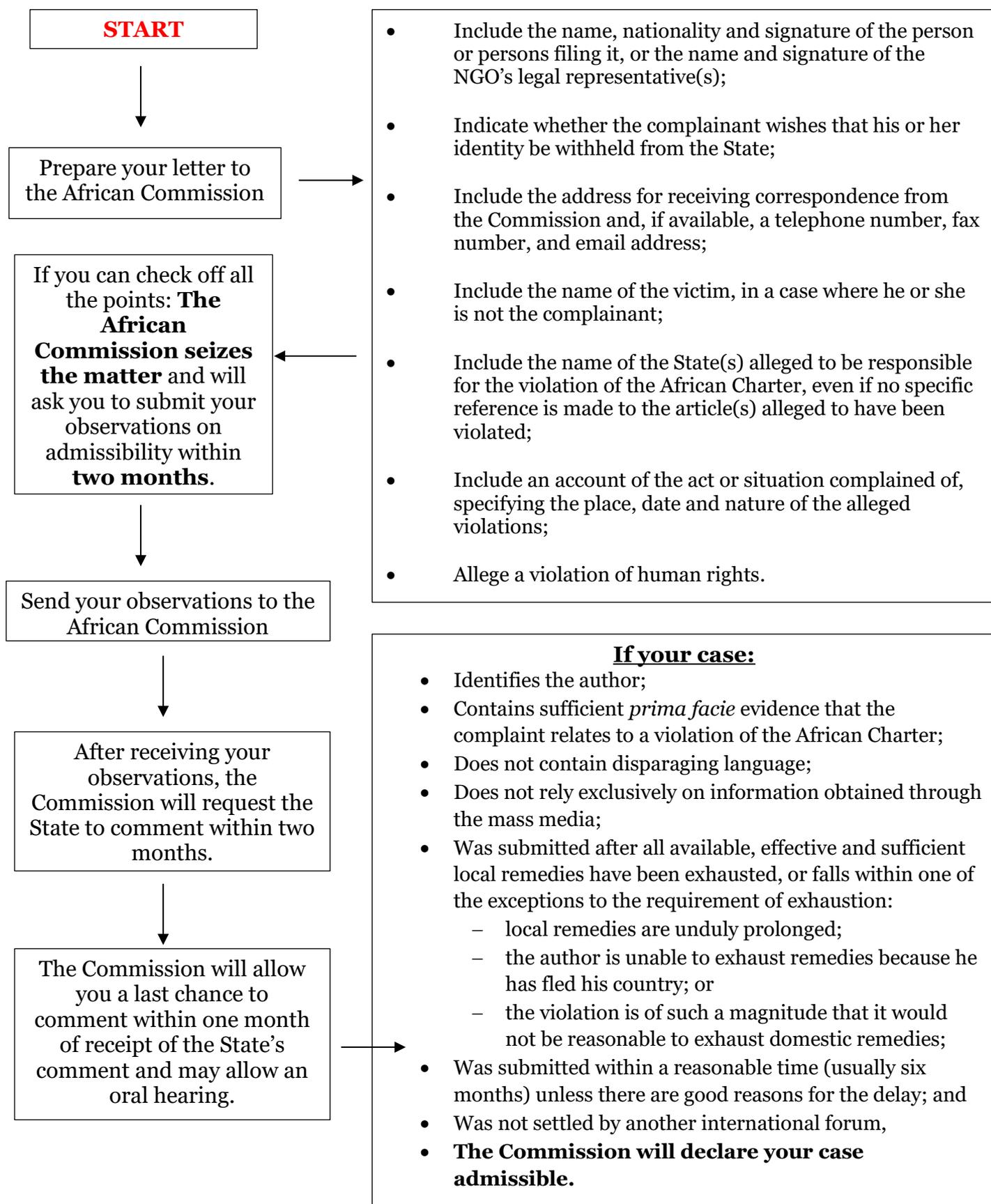
2.12 Enforcement

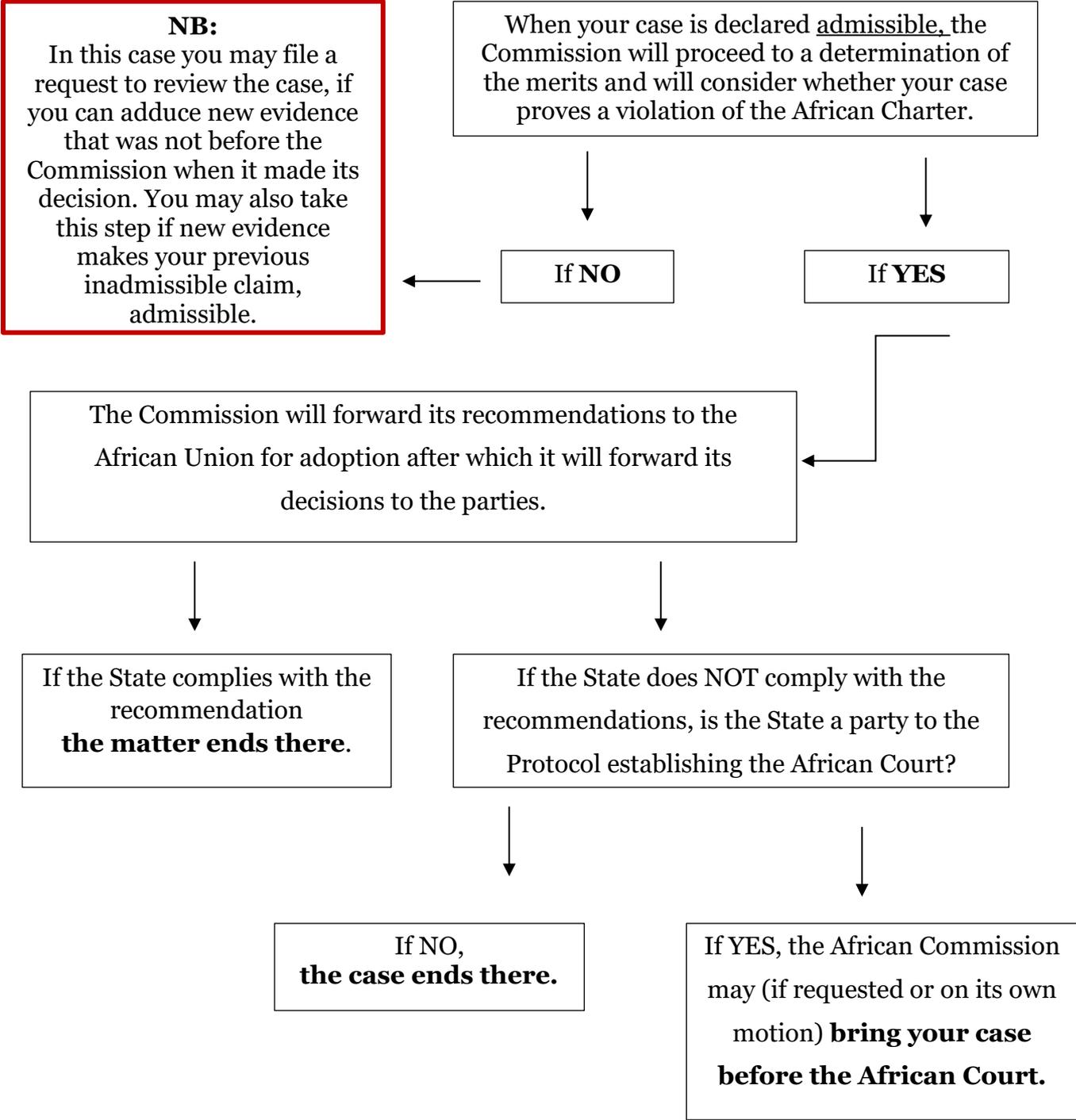
The African Commission is a quasi-judicial body and final recommendations are therefore not legally binding (although the fact that they are adopted by the AU Assembly does provide some legal obligations on the State concerned). The enforcement of the African Commission's decisions depends entirely on 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"),¹³² 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 (see 3.2A below).

¹³² 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





Chapter 3: African Court on Human and Peoples' Rights

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,¹³³ 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.¹³⁴ At the time of writing (August 2018), the following eight countries had made the declaration allowing for direct access: Benin, Burkina Faso, Mali, Malawi, Tanzania, Ghana, Republic of Tunisia, and Côte d'Ivoire. Rwanda had also previously submitted a declaration for direct access; however, in March of

¹³³ 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.

¹³⁴ The African Court Protocol, Art. 34(6).

2016, Rwanda withdrew its declaration for direct access and the impact this will have is still uncertain.

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*:¹³⁵

- *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.¹³⁶
- *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.”¹³⁷

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.¹³⁸

¹³⁵ African Court, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), para. 30-40.

¹³⁶ African Court, *Urban Mkandawire v. Malawi*, Application No. 003/2011 (2013), para. 32.

¹³⁷ African Court, *Michelot Yogogombaye v. Republic of Senegal*, Application No. 001/2008 (2009), para. 39; African Court, *Baghdadi Ali Mahmoudi v. Tunisia*, Application No. 007/2012 (2012), para. 7-11 [emphasis added].

¹³⁸ E.g.: African Court, *Ekollo M. Alexandre v. Republic of Cameroon and Federal Republic of Nigeria*, Application No. 008/2011 (2011), para. 12; African Court, *Ekollo Moundi Alexandre v. Republic of Cameroon and Federal Republic of Nigeria*, Application No. 008/2011 (2011), dissenting opinion of Judge Fatsah Ouguergouz, para. 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.¹³⁹ 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

¹³⁹ African Court, *African Commission on Human and Peoples’ Rights v. the Great Socialist People’s Libyan Arab Jamahiriya*, Application No. 004/2011 (2011).

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).

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).¹⁴⁰

Admissibility is governed by Rule 40 of the Rules of Court,¹⁴¹ 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.”¹⁴²

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

¹⁴⁰ African Court, *Association des Juristes d’Afrique pour la Bonne Gouvernance v. Republic of Cote d’Ivoire*, Application No. 006/2011 (2011), para. 5.

¹⁴¹ African Court on Human and Peoples’ Rights, *Rules of the Court*, April 2010: Arusha, Tanzania, Rule 40.

¹⁴² African Court, *Chacha v. Tanzania*, Application No. 003/2012 (2014), para. 114-115; African Court, *Frank David Omary and Others v. The United Republic of Tanzania*, Application No. 001/2012 (2014), para. 74.

Malawi Supreme Court in a labour case on the basis that they did not have jurisdiction (and no human rights issues had been argued).¹⁴³

- (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.¹⁴⁴ 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”;¹⁴⁵
 - “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;¹⁴⁶
 - whether the language is “aimed at undermining the integrity and status of the institution and bring it into disrepute”;¹⁴⁷
 - 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.¹⁴⁸
- (iv) Mass media: Rule 40(4) requires that the communication should “not be based exclusively on news disseminated through the mass media.”¹⁴⁹ The African Commission noted in *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.¹⁵⁰ 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.¹⁵¹
- (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 unduly prolonged.”¹⁵² As with communications before the African Commission, this will

¹⁴³ African Court, *Ernest Mtingwi v. Malawi*, Application No. 001/2013 (2013), para. 15.

¹⁴⁴ African Court Rules of Court, *supra* note 144, Rule 40(3); *see also*: The African Charter, *supra* note 4, Article 56(3) (describing the disparaging language admissibility requirement for communications submitted to the Commission).

¹⁴⁵ 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), para. 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), para. 51).

¹⁴⁶ African Commission, *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa v. Zimbabwe*, Communication 293/04 (2008), para. 51.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*, para. 52.

¹⁴⁹ African Court Rules of Court, *supra* note 144, Rule 40(4); *see also*: The African Charter, *supra* note 4, Article 56(4).

¹⁵⁰ African Commission, *Sir Dawda K. Jawara v. the Gambia*, Communication 147/95-149/96 (2000), para. 24-27.

¹⁵¹ *Id.*

¹⁵² African Court Rules of Court, *supra* note 144, Rule 40(5); *see also* The African Charter, *supra* note 4, Article 56(5).

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 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”,¹⁵³

- In *Norbert Zongo v. Burkina Faso*, the African Court confirmed that where local remedies are unduly prolonged they do not need to be exhausted;¹⁵⁴
- 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;¹⁵⁵
- In *Peter Joseph Chacha v. 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);¹⁵⁶
- 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.¹⁵⁷

- (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; 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.

¹⁵³ 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, (2011), para. 82.

¹⁵⁴ African Court, *Norbert Zongo v. Burkina Faso*, Application No. 013/11 (2014), para. 55.

¹⁵⁵ African Court, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), para. 113.

¹⁵⁶ African Court, *Peter Joseph Chacha v. Tanzania*, Application No. 003/2012 (2014), paras. 142 to 145; see also *id.*, Dissenting Opinion.

¹⁵⁷ African Court, *Frank David Omary and Others v. The United Republic of Tanzania*, Application No. 001/2012 (2014), para. 137.

The African Court in *Peter Joseph Chacha v. 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).¹⁵⁸ 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.¹⁵⁹

(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.¹⁶⁰ 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.”¹⁶¹
- 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.¹⁶²
- The decision must have been by “any other international adjudication mechanism, with a human rights mandate” and not a political entity.¹⁶³

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.¹⁶⁴ According to Rule 68(1) of the African Court’s Rules of Procedure, requests may be filed by:

¹⁵⁸ African Court, *Chacha v. Tanzania*, Application No. 003/2012 (2014), para. 155.

¹⁵⁹ African Court, *Tanganyika Law Society and The Legal and Human Rights Centre*, Application Nos. 009/2011, (2011), para. 83.

¹⁶⁰ E.g. African Commission, *Amnesty International v. Tunisia*, Communication No. 69/92 (1994).

¹⁶¹ African Commission, *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana*, Communication No. 277/2003 (2011), para. 110.

¹⁶² *Id.*, para. 111; African Commission, *Bob Ngozi Njoku v. Egypt*, Communication No. 40/90 (1997), para. 56.

¹⁶³ African Commission, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Communication No. 279/03-296/05 (2009), para. 105.

¹⁶⁴ The African Court Protocol, *supra* note 110, Art. 4.

- Member States;¹⁶⁵
- the AU;¹⁶⁶
- an organ of the AU;¹⁶⁷ or
- an African organization recognized by the AU.¹⁶⁸

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 the African Court has been very strict in its interpretation of the standing requirements (for example NGOs will only be allowed standing when they have observer status granted by the AU and not when the status is granted by an organ of the AU, such as the African Commission) although 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,¹⁶⁹ 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”;¹⁷⁰
- 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;¹⁷¹
- c. “Whether Article 5(1)(e) should be interpreted in line with the mandates of the African Court and the Committee”;¹⁷² and
- 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.”¹⁷³

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,

¹⁶⁵ African Court Rules of Court, *supra* note 144, Rule 68(1).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ 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).

¹⁷⁰ *Id.*, para. 8.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

the policy organs of the AU have treated the Committee as an organ of the [African] Union”.¹⁷⁴ Therefore, the Court conclude that the Committee “has standing to request an advisory opinion under Article 4(1)” of the Protocol of the Court.¹⁷⁵ 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.¹⁷⁶ With regard to issues(c) and (d), the Court found it “highly desirable that the Committee is given direct access to the Court”.¹⁷⁷ 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”.¹⁷⁸ 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), in which 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 68.¹⁷⁹
- 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.¹⁸⁰
- In Request No. 001/2011, the Coalition on the International Criminal Court, Legal Defence & Assistance Project, Civil Resource Development & Documentation Centre and Women Advocates Documentation Centre requested an opinion on “[w]hether the Treaty obligation of an African State 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.¹⁸¹ If the answer to this inquiry is in the affirmative, the second questions asks “whether all African State parties to the

¹⁷⁴ *Id.*, para. 56.

¹⁷⁵ *Id.*, para. 100.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*, para. 98.

¹⁷⁹ African Court, *The Socio-Economic Rights and Accountability Project (SERAP)*, Request No. 001/2012 (rejected 15 March 2013).

¹⁸⁰ African Court, *The Pan African Lawyers’ Union (“PALU”) and Southern African Litigation Centre*, Request No. 002/2012, rejected 15 March 2013.

¹⁸¹ African Court, *The Coalition on the International Criminal Court, Legal Defence & Assistance Project, Civil Resource Development & Documentation Centre and Women Advocates Documentation Centre*, Request No. 001/2014, para. 5 (pending).

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".¹⁸² This request is still pending and the decision of the African Court may give further guidance to the use of the advisory opinion procedure.¹⁸³ This request was dismissed on 5 June 2015 on the basis that it did not comply with Rule 68 of the Rules of Court because it raised issues of general public international law rather than human rights and did not point to any articles under the African Charter. An attempt to relist the application was delisted on procedural grounds (although Judge Ouguergouz delivered a compelling dissent on both the substance and procedural questions).

- On 26 May 2017, the African Court dismissed another application brought by SERAP.¹⁸⁴ The organisation sought the Court's opinion on the question of whether 'extreme, systemic and widespread poverty is a violation of certain provisions of the African Charter', and highlighted Article 2 (the right to freedom from discrimination on grounds including 'any other status'); Article 19 (the right to equal protection of rights); Article 21 (the right of states to dispose of natural resources 'in the exclusive interest of the people'); and Article 22 (the right of peoples to development, and the duty on states to ensure the same). However the Court refused to hear the case because SERAP does not have observer status before the AU (even though it does have observer status before the African Commission, which is an organ of the AU). The court held that only organisations that had complied with the African Union's "Criteria for Granting Observer Status and for a System of Accreditation within the African Union" would be able to seek an advisory opinion. The Court made the same decision on 18 September 2017 in rejecting an application for an advisory opinion requested by the Centre for Human Rights and four others.¹⁸⁵

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."¹⁸⁶

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.¹⁸⁷ The early

¹⁸² *Id.*

¹⁸³ 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, pending.

¹⁸⁴ African Court, *Advisory Opinion on the Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project (SERAP)*, Application No. App 001/2013 (2017).

¹⁸⁵ African Court, *Advisory Opinion: Request for Advisory Opinion by the Centre for Human Rights, University of Pretoria; Federation of Women Lawyers, Kenya; Women's Legal Centre; Women's Research and Documentation Centre; and Zimbabwe Woman's Lawyers Association*, Application No. 001/2016 (2017).

¹⁸⁶ African Court Rules of Court, *supra* note 144, Rule 28.

¹⁸⁷ See above on arguing merits before the African Commission.

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 7 and 1 of the African Charter because it had “failed to act with due diligence in seeking, trying and judging the assassins of Norbert Zongo and his companions” and therefore had violated “the rights of the Applicants to be heard by competent national courts”.¹⁸⁸ The Court also held that Burkina Faso had violated Article 9 of the African Charter protecting freedom of expression because its “failure [...] in the investigation and prosecution of the murderers of Norbert Zongo, caused fear and worry in media circles.”¹⁸⁹
- 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.¹⁹⁰

3.5 Amicus curiae

The African Court will accept *amicus curiae* submissions from interested NGOs. Rule 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.¹⁹¹

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*.¹⁹²
- PALU submitted an *amicus curiae* brief granted in *African Commission on Human and Peoples’ Rights v. the Great Socialist Libyan People’s Arab*

¹⁸⁸ African Court, *Norbert Zongo v. Burkina Faso*, Application No. 013/2011 (2014), paras. 184, 198 [unofficial translation of French Judgment].

¹⁸⁹ *Id.*, para. 203 [unofficial translation of French Judgment].

¹⁹⁰ African Court, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), para. 176.

¹⁹¹ See: PALU’s application for filing an *amicus curiae* brief, African Court, *African Commission on Human and Peoples’ Rights v. the Great Socialist Libyan People’s 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.

¹⁹² African Court, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), para. 20.

Jamahiriya.¹⁹³

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).¹⁹⁴ 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).

In *Konaté v. Burkina Faso*, the applicant requested the immediate release of an imprisoned journalist as a provisional measure, or, alternatively adequate medical care.¹⁹⁵ 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”.¹⁹⁶ A consideration of this question would therefore “adversely affect consideration of the substantive case.”¹⁹⁷ 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”.¹⁹⁸ The Court therefore stated that the Applicant was entitled to all necessary medical care and accordingly ordered provisional measures.¹⁹⁹

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

¹⁹³ African Court, *African Commission on Human and Peoples’ Rights v. the 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.

¹⁹⁴ African Court, *African Commission on Human and Peoples’ Rights v. the Great Socialist People’s Libyan Arab Jamahiriya*, Application No. 004/2011 (2013), Order of Provisional Measures.

¹⁹⁵ African Court, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), Order of Provisional Measures, para. 6.

¹⁹⁶ *Id.*, para. 19.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*, para. 22.

¹⁹⁹ *Id.*

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;²⁰⁰
- pay damages to the victims' families;²⁰¹
- take measures to prevent further recurrence of such violations;²⁰² and
- report back to the Court within six months on the implementation of the judgment.²⁰³

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”;²⁰⁴ 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.”²⁰⁵

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

- 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.²⁰⁶

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.²⁰⁷ In evaluating the claims of both the applicant and Burkina 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.²⁰⁸

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

²⁰⁰ African Court, *Norbert Zongo v. Burkina Faso*, Application No. 013/11 (2015), Ruling on Reparations.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ African Court, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014), para. 176.

²⁰⁵ *Id.*

²⁰⁶ African Court, *Konaté v. Burkina Faso*, Judgment on Reparations, para. 9 (2016).

²⁰⁷ *Id.*, para. 16.

²⁰⁸ *Id.*, para. 60.

decision was made. This means that the power of review will only be resorted to in limited circumstances.

3.9 Sources of law

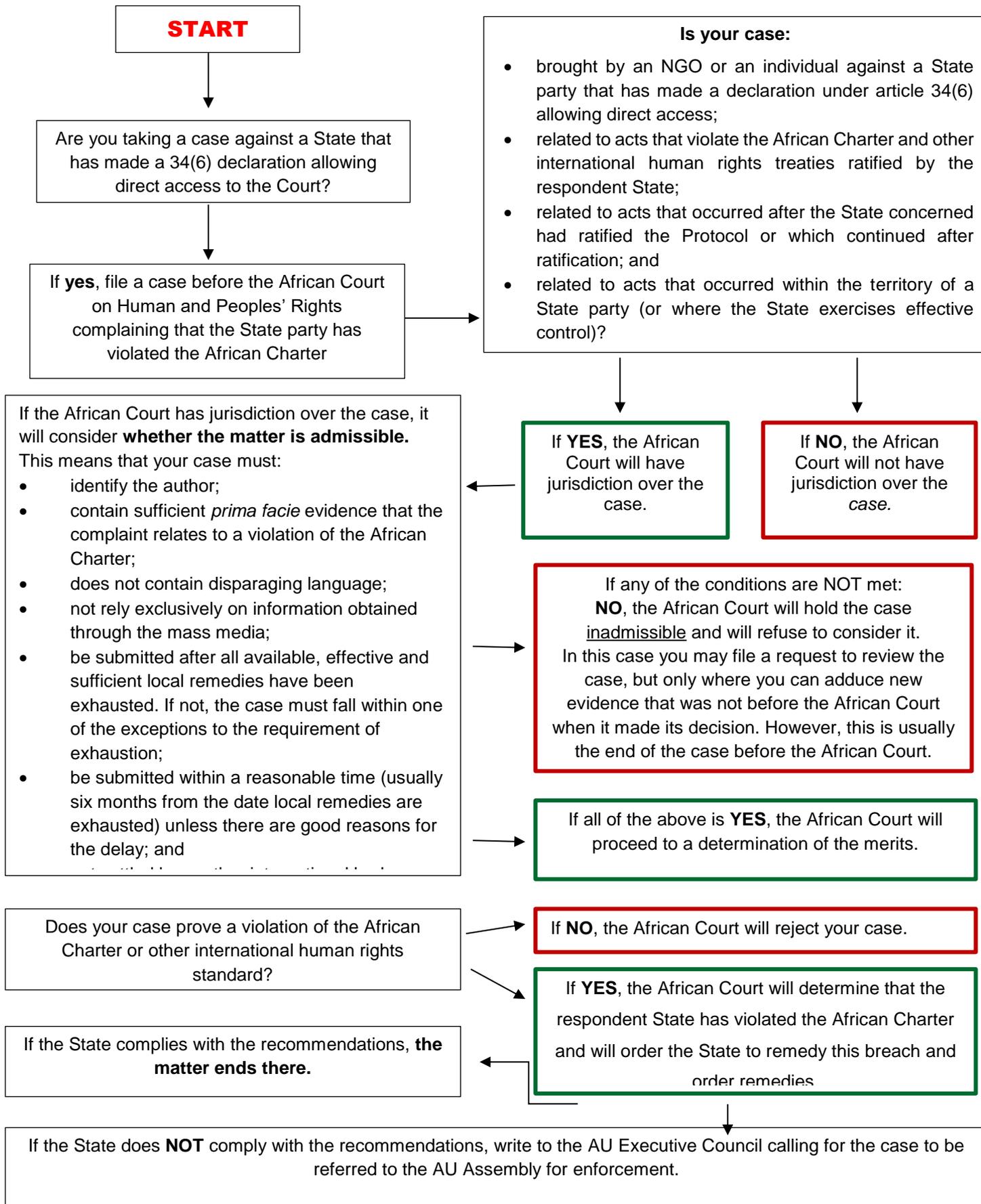
When bringing a case to the African Court you can use different sources of law to argue your case. Firstly, you should refer to the provisions in the African Charter that have been violated. Secondly, the Rules of Court set out more formal requirements in relation to the proceedings. Thirdly, you can 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.

PROCEDURAL FLOW-CHART

Process for Bringing Applications to the African Court



CHAPTER 4: THE ECOWAS COMMUNITY COURT OF JUSTICE

4.1 Jurisdiction

Access to the ECOWAS Community Court is determined primarily by an application of the jurisdiction requirements set out in the Protocol on the Community Court of Justice as amended by Supplementary Protocol (the Supplementary Protocol). The Supplementary Protocol, which formally granted the court jurisdiction over violations of human rights, was agreed in January 2005. A number of cases have since considered human rights issues.

Article 9(4) of the Protocol on the Community Court, as amended by the Supplementary Protocol, formally recognises that;

The [ECOWAS Community Court] has jurisdiction to determine cases of violation of human rights that occur in any Member State.

Article 10(d) of the Protocol, as amended, states that access to the Court is open to “[i]ndividuals on application for relief for violation of their human rights.” To access the Court, individuals need to submit an application which is i) not anonymous, and ii) not made whilst the same matter has been instituted before another international court for adjudication.²⁰⁹

A. *Jurisdiction ratione personae*

Applicants/Plaintiffs: Any individual alleging a violation of human rights committed in any member state may bring a case before the ECOWAS Community Court.

The Court has held that a correct reading of Article 10 (d) of the amended protocol means that corporate bodies *cannot* claim violation of their human rights before the court. The Court held in *Starcrest Investment Ltd v. President ECOWAS Commission*²¹⁰ that no corporate body may bring human rights cases before the Court. On the other hand, see also *Ocean King v. Senegal*,²¹¹ where the Court held that although the plaintiff could not, as a corporate body, bring a human rights action, it *could* (under the Court’s inherent jurisdiction) bring a case alleging a violation of the right to a fair hearing. While this decision is not compelling (in the very same decision the Court emphasises that jurisdiction is a matter of statute) it does demonstrate that the Court may be prepared to push the jurisdictional boundaries in the right cases. Unfortunately, it will not always be clear which rights the Court will consider fundamental, non-human rights and therefore it is preferable that cases be brought in the name of individuals or by NGOs in a representative capacity. In another case, the Court has held that corporate entities (which would include all artificial persons such

²⁰⁹ See Article 10 (d)(i) and (ii) of the amended Protocol.

²¹⁰ ECOWAS, *Starcrest Investment Ltd v. President ECOWAS Commission*, ECW/CCJ/APP/01/08 (2011).

²¹¹ ECOWAS, *Ocean King v. Senegal*, ECW/CCJ/APP/05/08 (2011).

as partnerships and media companies) can bring cases alleging violations of human rights. In *Ugokwe v. Nigeria*,²¹² the ECOWAS Community Court stated that;

“The combined effect of the provisions indicates that any violation of human rights in any Member State may be brought by individuals or corporate bodies before the Court for adjudication.”²¹³

However, it would appear that the better reading of the Protocol is that corporations may not bring a human rights case under Article 10 (d), although they can bring cases either under 10 (c) or under the court’s inherent jurisdiction. In *Starcrest Investment Ltd v. President ECOWAS Commission*²¹⁴ the Court held that unlike Article 10 (d), which only grants access to individuals to remedy violations of their rights, Article 10 (c) grants access to the Court to both corporate bodies and individuals (see also *Ocean King v. Senegal*²¹⁵). This means that while corporations cannot claim access to the Court to complain of violations of their human rights by States under Article 10 (d) they may complain (as may individuals) of violations of rights committed by community officials (which is a much more limited cause of action and does not on the face of it include human rights).

Victims: The ECOWAS Community Court has held that the Plaintiff’s rights need to be directly affected to have standing before the ECOWAS Community Court. However, in the case of *Habre v. Senegal*²¹⁶ the Court followed the European Court jurisprudence (see for example *Dudgeon v. United Kingdom*²¹⁷ cited therein) by holding that a person could be a victim of human rights protection if he could potentially be prosecuted under the terms of the criminal law even if he were not at that point being prosecuted or convicted. Such a situation will be considered as directly affecting the applicant’s interests.

Representative cases: The ECOWAS Community Court has accepted a number of cases where the Plaintiffs are, in fact, organisations acting on behalf of a group of people whose human rights have been violated. For example, in *SERAP v. Republic of Nigeria* the organisation alleged that the defendants had violated the rights to health, adequate standard of living, and to economic and social development of the people of Niger Delta because of severe environmental pollution.²¹⁸ The ECOWAS Community Court held that an NGO duly constituted according to national law of any ECOWAS Member State, and enjoying observer status before ECOWAS institutions, may make complaints against human rights violations in cases where the victim is not a single individual but a large group of individuals or even entire communities. SERAP could, therefore, petition the Court.²¹⁹ See also *SERAP v. Universal Basic Education*

²¹² *Ugokwe v. Nigeria*, ECOWAS ECW/CCJ/JUD/03/057 (2005).

²¹³ *Id.*, at paras. 27 and 28.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ ECOWAS, *Habre v. Senegal*, ECW/CCJ/JUD/06/10 (2010).

²¹⁷ ECtHR, *Dudgeon v. UK*, Series A, No. 45 (1981).

²¹⁸ ECOWAS, *SERAP v. Republic of Nigeria*, ECW/CCJ/JUD/18/12 (2012), para. 4

²¹⁹ ECOWAS, *The Registered Trustees of the Socio-economic Rights & Accountability Project (SERAP) v. President of the Federal Republic of Nigeria & ORS*, ECW/CCJ/APP/08/09 (2009).

Commission, where the court expressly allowed *actio popularis* cases.²²⁰ The *actio popularis* doctrine was developed under Roman law in order to allow any citizen to challenge a breach of public right in Court. This doctrine developed as a way of ensuring that the restrictive approach to the issue of standing would not prevent public spirited individuals from challenging a breach of a public right in Court. In *SERAP v. Universal Basic Education Commission*, the court held these would be admissible as;²²¹

““The doctrine ‘Actio Popularis’ was developed under Roman law in order to allow any citizen to challenge a breach of public right in Court. This doctrine developed as a way of ensuring that the restrictive approach to the issue of standing would not prevent public spirited individuals from challenging a breach of a public right in Court ... in public interest litigation, the plaintiff need not show that he has suffered any personal injury or has a special interest that needs to be protected to have standing. Plaintiff must establish that there is a public right which is worthy of protection which has been allegedly breached and that the matter in question is judiciable.”

In *Hydara v. the Gambia*, standing was granted to the NGO “International Federation of Journalists- Africa” in a case concerning the murder of a journalist.²²² This is the African chapter of the International Federation of Journalists. However – see limits to the standing *actio popularis* in *Adewole v. President of ECOWAS Commission and 3 Ors*²²³ and *Center for Democracy and Development v. Niger*.²²⁴ In the latter case, two organisations claimed violations of Articles 9, 10, 11 and 13 of the African Charter because the President of Niger remained in power through illegal means, namely by organizing an illegal constitutional referendum; and that the President violently repressed the demonstrations against his regime. The Court decided that the claim was inadmissible as the organizations had not been directly affected as victims, and could not show that they represented victims. It may be important in deciding who is named as Applicant in your case that the Court considered it important that the Applicants were neither citizens nor residents of Niger and could not be classified as victims.

In summary, when a case is brought in a representative or *actio popularis* capacity it is advisable that the case be filed by an NGO registered in the country complained against and preferably by one that can show that it has a direct interest or mandate in protecting the rights concerned.

²²⁰ ECOWAS, *Registered Trustees of the Socio-economic Rights & Accountability Project (SERAP) v. The Federal Republic of Nigeria and Another*, ECW/CCJ/APP/0808 (2009), para. 31.

²²¹ ECOWAS, *Registered Trustees of the Socio-economic Rights & Accountability Project (SERAP) v. The Federal Republic of Nigeria and Another*, ECW/CCJ/APP/0808 (2009), paras. 31-33.

²²² ECOWAS, *Hydara and Others v. the Gambia*, ECW/CCJ/APP/30/11 (2014).

²²³ ECOWAS, *Adewole v. President of ECOWAS Commission and 3 Ors*, ECW/CCJ/APP/11/10 (2012).

²²⁴ ECOWAS, *Centre for Democracy and Development & Another v. President Mamadou Tandja & Another*, ECW/CCJ/ APP/ 07/09 (2011).

Defendants: Cases may be brought against the member states of ECOWAS; which are Benin, Burkina Faso, Capo Verde, Cote D'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and TOGO. In *Peter David v. Ambassador Ralph Uwechue*,²²⁵ *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. The President of the Federal Republic of Nigeria*,²²⁶ and *Tandja v. Djibo and Another*,²²⁷ the ECOWAS Community Court ruled that only ECOWAS member states and community institutions can be sued before it. In *Uwechue and SERAP*, the Court held that, in the event of a dispute between individuals, it is only when there is no appropriate and effective national forum for seeking redress against individuals that the victim can bring an action before the ECOWAS Community Court, in such cases the Application will not be against the individual, but against an ECOWAS member state for failure to ensure protection and respect for the human rights.

B. *Jurisdiction ratione temporis*

Cases will fall within the temporal jurisdiction of the ECOWAS Community Court if they occurred subsequent to the coming into force of the Supplementary Protocol. The Court of Justice has already held that the human rights jurisdiction of the court is not retroactive to a point before the supplementary protocol came into effect.²²⁸

In *Federation of African Journalists*, the ECOWAS Court considered whether Article 9 of the Supplementary Protocol imposes a tiny bar on cases. The ECOWAS Court concluded, after considering and describing international best practice and the provisions of the fundamental human rights enforcement procedures of most states, that claims for the enforcement of human rights cannot be barred by statutes of limitation.²²⁹

The Court went further, overruling its previous decisions that actions in human rights cases must be brought within three years of the cause of action arising, on the basis that those cases were decided *per incuriam* on this point.²³⁰ As stated by the ECOWAS Court, “in actions for the enforcement of fundamental rights against [M]ember States, the Court finds that the statute of limitation does not apply”.²³¹

The ECOWAS Court also took note of the concept of continuing violations. In this regard, it stated that: “[Assuming but not conceding that Article 9(3) subsists as to deny the existence of a right of action, there is still another plank for the exclusion of the application of statute of limitation. The rule is that where an injury is continuing, it will

²²⁵ ECOWAS, *David v. Ambassador Ralph Uwechue*, ECW/CCJ/RUL/03/10 (2013).

²²⁶ ECOWAS, *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. The President of the Federal Republic of Nigeria*, ECW/CCJ/APP/07/10 (2009).

²²⁷ ECOWAS, *Tandja v. Djibo and Another*, ECW/CCJ/05/10 (2010).

²²⁸ ECOWAS, *Chief Frank Ukor v. Rachad Laleye*, ECW/CCJ/APP/01/04 (2005).2005. See also ECOWAS, *SERAP v. Nigeria*, ECW/CCJ/APP/08/09 (2012).

²²⁹ ECOWAS, *FAJ v. the Gambia*, ECW/CCJ/APP/ 36/15 (2018).

²³⁰ *Id.*

²³¹ *Id.*

give rise to a cause of action *die in diem* (day in and out) and postpones the running of time”.²³²

C. *Jurisdiction ratione materiae*

Article 9(4) of the Protocol on the Community Court of Justice, as amended by the Supplementary Protocol, grants the Court of Justice jurisdiction over all human rights violations that occur in the jurisdiction of members of the Community. However, it does not define the rights to be applied by the Court. Article 4(g) of the Revised Treaty of ECOWAS pledges States parties to the “recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and People’s Rights.” The Revised Treaty of ECOWAS also includes protections for human rights such as the rights of the press and of journalists in Article 66, although this protection is not always express (see provisions for example on the economic and social condition of women in article 63). This is complemented by Article 1(h) of the ECOWAS Protocol on Democracy and Good Governance (A/SP1/12/01), which states that;

“The rights set out in the African Charter on Human and People’s Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States.”

Therefore, the ECOWAS Community Court will have jurisdiction *ratione materiae* over all violations of human rights (as defined in international human rights law) committed within the Community. As noted above, in *Ugokwe v. Nigeria*,²³³ the ECOWAS Community Court of Justice confirmed that;²³⁴

“The combined effect of the provisions indicates that any violation of human rights in any Member State may be brought by individuals or corporate bodies before the Court for adjudication.”

The ECOWAS Community Court of Justice has 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.²³⁵ In *Alade v. Federal Republic of Nigeria*,²³⁶ the Court reiterated that it is not an appellate court.. However, this does not mean that it will not adjudicate on human rights violations which have contemporaneously been considered, or even facilitated or ordered, by domestic courts. The ECOWAS Community Court clarified that “there is a thin divide of not reviewing the decision but hearing the matters that flow from the decisions which allegedly pose the question of violations of human rights particularly

²³² *Id.*

²³³ ECOWAS, *Ugokwe v. Nigeria*, ECW/CCJ/APP/02/05 (2005).

²³⁴ *Id.*, at paras. 27 and 28.

²³⁵ In *Id.*, the Court refused to hear the application as it would involve hearing an appeal against the decision of the national court of a member state. The court held that there is an integrated Community legal order rather than one of a vertical nature. In this case the petitioner had specifically asked for the decision of the Nigerian Appeal’s Court to be overturned, which meant that it was easy for the Court to treat this as an illegitimate appeal from the Nigerian Appeal’s Court.

²³⁶ ECOWAS, *Alade v. Nigeria*, ECW/CCJ/APP/5/11 (2012).

in this case where upon a holding charge the applicant/plaintiff is detained with no trial would be said to be different from the order itself.”²³⁷

A sample of Human Rights cases decided by the ECOWAS Community Court of Justice:

- *SERAP v. Nigeria*, (finding that education is a human right).²³⁸
- *Manneh v. the Gambia*, (finding that the arbitrary, incommunicado detention and disappearance of a journalist violated the right to liberty; and the right to a fair hearing. The Court held that “[h]olding a person for over a year without trial will be an unreasonable period unless proper and distinct justification is provided.”²³⁹)
- *Musa Saidu Khan v. the Gambia*²⁴⁰ (finding that the detention and ill-treatment of the editor of The Independent, a newspaper in the Gambia, which had published names of alleged coup plotters violated the rights to freedom from torture, liberty and fair trial.)
- *Deyda Hydara Jr v. the Gambia*²⁴¹ (finding that the failure to investigate the killing of Mr. Deyda Hydara, a journalist and co-founder of The Point Newspaper in the Gambia was a violation of the positive obligation to investigate and prosecute arising from the right to life. The Court also held that a State will violate international and treaty obligations if it “fails to protect media practitioners including those critical of the regime. For freedom of expression also includes freedom to criticize the government and its functionaries subject to limitations imposed by the domestic laws.”)
- *Hadijatou Mani Koraou v. Niger*,²⁴² (finding that Niger was responsible under both international and national law for human rights violations against the Applicant arising from her slavery due to their tolerance, to the practice.)
- *Habre v. Senegal*,²⁴³ (finding that the former President of Chad could be tried in an ad hoc internationalised court in Senegal but not by a Senegalese court applying retroactive domestication of international crimes committed in Chad because it would violate the prohibition of non-retroactive penal law.”)
- *Dorothy Njemanze & 3 Others v. Nigeria*²⁴⁴ (finding that the arrest, assault and ill treatment of women on the allegation that they were “prostitutes” violated their rights to be free from cruel, inhuman or degrading treatment and also constituted gender-based discrimination.)
- *Simone Ehivet et Michel Gbagbo v. Côte d’Ivoire*²⁴⁵ (finding that the arrest and detention of Michel Gbagbo without charge constituted a violation of his right under Article 6 of the African Charter; the right to movement and choice of residence under Article 12 of the ICCPR and Article 12 of the African Charter, the right to family under Article 18(1) of the African Charter, and the right to an effective remedy under Article 7(1) of the African Charter.)

²³⁷ *Id.*, para. 35.

²³⁸ ECOWAS, *SERAP v. Nigeria*, ECW/CCJ/APP/08/09 (2009).

²³⁹ ECOWAS, *Manneh v. the Gambia*, ECW/CCJ/JUD/03/08 (2008), para. 22.

²⁴⁰ ECOWAS, *Saidu Khan v. the Gambia*, ECW/CCJ/APP/11/07 (2010).

²⁴¹ ECOWAS, *Deyda Hydara Jr v. the Gambia*, ECW/CCJ/APP/30/11 (2014).

²⁴² ECOWAS, *Hadijatou Mani Koraou v. Niger*, ECW/CCJ/JUD/06/08 (2008).

²⁴³ ECOWAS, *Habre v. Senegal*, ECW/CCJ/JUD/06/10 (2010).

²⁴⁴ ECOWAS, *Dorothy Njemanze & 3 Others v. Nigeria*, ECW/CJ/APP/17/14 (2017).

²⁴⁵ ECOWAS, *Simone Ehivet et Michel Gbagbo v. Côte d’Ivoire*, ECW/CCJ/JUD/03/13 (2013).

4.2 Bringing a case

The procedure for filing and having cases heard at the ECOWAS Community Court mirrors the procedure at the domestic level in common law countries to a much greater extent than procedures at the African Commission, in that the case is first made on the papers, allowing the respondent to set out a defence to the claim or preliminary objections on the law, before the trial process during which the Court makes decisions on facts based on the evidence.

An Application to the ECOWAS Community Court is made in accordance with Article 11 of the Protocol as read with Article 33 of the Rules of Procedure and must include:

- a. the name and address of the Applicant;
- b. the designation of the party against whom the Application is made;
- c. the subject-matter of the proceedings and a summary of the pleas in law on which the Application is based;
- d. the form of order sought by the Applicant; and
- e. where appropriate, the nature of any evidence offered in support.

The application must be a maximum of 15 pages long, with A4 paper and font size 12.²⁴⁶ The Applicant must also give an address of service “in the place where the Court has its seat” or alternatively state that the lawyer or agent agrees that service is to be effected on him by telefax or other technical means of communication. This would allow you to use an email address for service of pleadings. Under Article 35 of the Rules of Procedure, the defendant must file a defence within one month (unless the Court extends this on Application) after service on him of the Application. The Defence must state:

- a. the name and address of the defendant;
- b. The arguments of fact and law relied on;
- c. the form of order sought by the defendant; and
- d. the nature of any evidence offered by him.

Once the Application and the Defence are filed, the Applicant can file a Reply within one month after which the defendant may file a Rejoinder within one month. It is important to remember that these time limits can be waived by the ECOWAS Community Court on application, if good reasons for the delays are given.

Once the submissions have been filed, a Judge assigned to the case (called the Judge Rapporteur) will make a preliminary report on the case. Applications may also be made for an oral hearing in accordance with Article 40 Rules of Procedure – these must be within a month of communication to the parties that the written process has been completed.

Once the Judge Rapporteur makes a preliminary report, the ECOWAS Community Court may proceed as it sees fit, after hearing the parties, to order:

²⁴⁶ ECOWAS, *Instructions to the Chief Registrar and Practice Directions* (2012), Article 9(2).

- a. The personal appearance of the parties;
- b. A request for information and production of documents;
- c. Oral testimony;
- d. The commissioning of an expert's report; and
- e. An inspection of the place or thing in question.

In practice, from an Applicant's perspective, this means if you wish the ECOWAS Community Court to use any of these means of investigation you should request it. This applies not only to oral hearings but also, for example and where you feel this would be necessary, to the hearing of oral evidence (where you have a witness whose evidence is important to the case), an inspection, or expert's report. An application may also be made to have the hearing in the country where the violation is alleged to have happened.²⁴⁷

4.3 Admissibility

Although the ECOWAS Community 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. *Requirements in the Protocol and Res Judicata*

Under Article 10(d) of the Protocol an individual can access the Court provided that the party is

- i. Not anonymous and
- ii. The Application is not pending before another International Court for adjudication.

The first requirement is self-evident and there is no opportunity for the Applicant to claim anonymity and must include their name.

The substantive bar in Article 10 is that of *lis pendens*. In *Essien v. the Gambia*,²⁴⁸ the Court reiterated that;

“... the bar to bringing action to this Court must be those cases of *lis pendens* in another international court for adjudication.”²⁴⁹

Article 10(d)(ii) states that applications cannot be made that are in relation to the same matter as has been instituted before “another international court for adjudication”. This means that you must name the person bringing the claim and you cannot bring a case before the court that is being heard by another *international* (which should be interpreted to include any supranational) tribunal or court, such as the African Commission on Human and Peoples Rights, the African Court on Human and Peoples' Rights, the African Committee of Experts on the Rights and Welfare of the Child, or

²⁴⁷ ECOWAS, *Hadijatou Mani Koraou v. Niger*, ECW/CCJ/APP/08/08 (2008).

²⁴⁸ ECOWAS, *Essien v. the Gambia*, ECW/CCJ/APP/12/11 (2012).

²⁴⁹ *Id.*, para. 26.

United Nations treaty bodies. In *Yovo v. Togo Telecom*,²⁵⁰ the Court relied on Article 10(d)(ii) of the Additional Protocol to decline jurisdiction due to *res judicata*. The complaint had already been instituted before the *Cour Commune de Justice d'Arbitrage de l'OHDA*. There was no explanation given by the Court as to what would constitute “adjudication before an international court” for the purposes of this provision.

The Court has also held that it cannot hear a matter that had already been determined on the merits by domestic courts. In *Tasheku v. Federal Republic of Nigeria*,²⁵¹ the Federal Republic of Nigeria also argued that the Court could not examine this case by the force of *res judicata*. The High Court of Abuja had already decided the case and awarded damages. The Application dealt with a human rights violation, notably of Articles 4, 5, 6 and 12 of the African Charter. The Court held that a plea of *res judicata* can only succeed when it is established that the Application brought before it is *essentially the same* as another one already satisfactorily decided upon before a competent domestic court. See also *Umar v. The Federal Republic of Nigeria*.²⁵²

B. *Exhaustion of domestic remedies*

It is clear from the case law from the ECOWAS Community Court that exhaustion of local remedies is not a requirement for filing a case before the court. In *Prof. Moses Essien v. the Gambia*,²⁵³ the defendants relied on Article 50 of the ACHPR, which requires exhaustion of local remedies. The Court held that Article 50 refers only to an obligation to exhaust domestic remedies before cases are brought before the African Commission on Human and Peoples’ Rights and not cases brought under the amended Protocol of the ECOWAS Community Court of Justice. Another way to look at this is that while the ECOWAS Community Court of Justice will apply the substantive rights in the Charter and other international human rights law,²⁵⁴ they will not apply any of the procedural provisions. Thus the Court has held that:

“...access to this Court is not subject to exhaustion of local remedies as envisaged by the customary international law on the point.”²⁵⁵

C. *Time period for filing cases*

As set out above, the ECOWAS Court held in *Federation of African Journalists* that there is no time bar in actions for the enforcement of fundamental rights.²⁵⁶ The Court held that the arrest and detention of the four journalists amounted to violations of their right to freedom of expression, liberty and freedom of movement. Two of the journalists were also subjected to torture which was inflicted whilst in the custody of the National Intelligence Agency following their arrests. Moreover, the Court found that the

²⁵⁰ ECOWAS, *Yovo & 31 Others v. Societe Togo Telecom*, ECW/CCJ/APP/08/11 (2012).

²⁵¹ ECOWAS, *Tasheku v. Federal Republic of Nigeria*, ECW/CCJ/APP/13/11 (2012).

²⁵² ECOWAS, *Umar v. The Federal Republic of Nigeria*, ECW/CCJ/APP/12/11 (2012).

²⁵³ ECOWAS, *Essien v. the Gambia*, ECW/CCJ/APP/12/11 (2012).

²⁵⁴ See, for example, ECOWAS, *Alade v. Federal Republic of Nigeria*, ECW/CCJ/JUD/10/12 (2012).

²⁵⁵ *Id.*, para. 31.

²⁵⁶ ECOWAS, *FAJ v. the Gambia*, No. ECW/CJJ/JUD/04/18 (2018).

journalists' forced exile from The Gambia amounted to "continuing harm", which amounted to a violation of Articles 6, 9 and 12(2) of the African Charter. This decision previously overturned the interpretation of Article 9(3) of the Supplementary Protocol which required any action by or against a Community Institution or any member of the Community to be statute barred after three years from the date when the right of action arose.

D. Cases must not be appeals from a decision of a national court

As explained above, the ECOWAS Community Court 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.²⁵⁷ In *Alade v. Federal Republic of Nigeria*,²⁵⁸ the Court reiterated that it is not an appellate court. Thus, it cannot adjudicate upon decisions made by the domestic courts of Member States. However, this does not mean that it will not adjudicate on human rights violations which have contemporaneously been considered, or even facilitated or ordered, by domestic courts. The ECOWAS Community Court clarified that "there is a thin divide of not reviewing the decision but hearing the matters that flow from the decisions which allegedly pose the question of violations of human rights particularly in this case where upon a holding charge the applicant/plaintiff is detained with no trial would be said to be different from the order itself."

E. The Court cannot hear cases in Abstrato

In the case of *Hadijatou Mani Koraou v. Niger*,²⁵⁹ the ECOWAS Community Court held that it could not hear a challenge to laws *in abstrato*, i.e. in theory without a practical application, and that the Applicant would need to demonstrate that her rights were affected by the legislation. This principle was confirmed in *Habre v. Senegal*,²⁶⁰ although in that case the Court held that the legislation had been expressly introduced to allow Senegal to bring Habre to trial and therefore this was not a case *in abstrato* but related to his rights under the African Charter and international law not to be subjected to a trial based on retroactive criminal law.

4.4 Representation before the ECOWAS Community Court of Justice

The rules concerning representation before the ECOWAS Community Court of Justice are set out in article 12 of the Protocol establishing the ECOWAS Community Court of Justice as follows;

Each party to a dispute shall be represented before the Court by one or more agents nominated by the party concerned for this purpose. The agents may, where necessary, request the assistance of one or more Advocates or

²⁵⁷ In ECOWAS, *Ugokwe v. Nigeria*, ECW/CCJ/APP/02/05 (2005), the Court refused to hear the application as it would involve hearing an appeal against the decision of the national court of a member state. The court held that there is an integrated Community legal order rather than one of a vertical nature. In this case the petitioner had specifically asked for the decision of the Nigerian Appeal's Court to be overturned, which meant that it was easy for the Court to treat this as an illegitimate appeal from the Nigerian Appeal's Court.

²⁵⁸ ECOWAS, *Alade v. Federal Republic of Nigeria*, ECW/CCJ/APP/05/11 (2011).

²⁵⁹ ECOWAS, *Hadijatou Mani Koraou v. Niger*, ECW/CCJ/JUD/06/08 (2008).

²⁶⁰ ECOWAS, *Habre v. Senegal*, ECW/CCJ/JUD/06/10 (2010).

Counsels who are recognized by the laws and regulations of the Member States as being empowered to appear in Court in their area of jurisdiction.

According to Article 12 of the Protocol, as read with Article 28 (1) of the Rules of Procedure a party to any proceedings before the Court may be represented by an agent, adviser, or advocate. Agents must be authorised by a formal document signed by the party, while the advocate for a party shall file with the registrar a certificate that he or she is entitled to appear before a Court of a Member State.²⁶¹

4.5 Merits

The Court has jurisdiction over all violations of human rights protected under international law. The Applicant must therefore prove a violation of international human rights law and particularly the rights protected by the African Charter on Human and Peoples' Rights. In *SERAP v. UBEC (Preliminary Objections)*,²⁶² it was argued by the defendants that the ECOWAS Community Court did not have subject matter jurisdiction as this case concerned national laws. However, the ECOWAS Community Court found the subject matter to be violation of the right to education, human dignity, and the right of the peoples to their wealth and natural resources, as well as the right of peoples to economic and social development. The Court held that the defendants failed to acknowledge that Article 9(4) of the Supplementary Protocol clearly gives the ECOWAS Community Court jurisdiction to adjudicate on applications concerning the violation of human rights that occur in Member States. The violation of human rights was the thrust of the plaintiff's suit, the fact that the rights are domesticated in municipal law will not oust the ECOWAS Community Court of its jurisdiction. An argument was also raised that as the case concerned a policy matter it was non-justiciable. The ECOWAS Community Court again reaffirmed that it was empowered to apply the provisions of the African Charter on Human and Peoples' Rights, including the provision guaranteeing the right to education.

The Applicant will need to prove their allegations on the balance of probabilities, and simple denial by the Defendants will not be sufficient. In *Musa Saikyhan v. the Gambia*,²⁶³ the ECOWAS Community Court confirmed that the plaintiff assumes the entire evidential burden in the case. However, as the case is civil in nature, "the burden that the plaintiff assumes is one of a proof by preponderance of probability or sometimes called reasonable probability."²⁶⁴ In this case (in which the Defendant State simply denied all the allegations) the ECOWAS Community Court has held that "[h]aving regard the detailed narration of events and their consistency it is difficult to say that the plaintiff was just framing a story."²⁶⁵ The plaintiff's evidence was consistent and credible and stood largely uncontroverted so it was accepted by the ECOWAS Community Court that he was arrested and detained by security agents. Much of the evidence given by the defendants was unrealistic. The plaintiff was also able to reach the level of proof required in relation to his evidence of torture, and the personal injuries sustained.

²⁶¹ *Rules of Procedure, Article 28 (3)*.

²⁶² ECOWAS, *SERAP v. The Universal Basic Education Commission*, ECW/CCJ/APP/0808 (2009).

²⁶³ *Supra*, 239.

²⁶⁴ *Id.*, para. 28.

²⁶⁵ *Id.*, para. 33.

Although the ECOWAS Community Court has jurisdiction to determine cases of violation of human rights that occur in Member States, cases must be backed up by indications of evidence which enable the ECOWAS Community Court to find that such violation has occurred, in case it would prefer to order sanctions. The onus of constituting and demonstrating evidence is upon the litigating parties. The Court held that the evidence must be convincing in order to establish a link with the alleged facts.²⁶⁶ As explained above there are a number of ways in which evidence can be placed before the court, including through:

- a. The personal appearance of the parties;
- b. The production of documents;
- c. Oral testimony of witnesses;
- d. The commissioning of an expert's report; and
- e. An inspection of the place or thing in question.

4.6 Amicus Briefs

Although the Protocol and the Rules of Procedure are silent on amicus curiae briefs, these have, on occasion, been submitted to the ECOWAS Community Court²⁶⁷ and have been accepted by the ECOWAS Community Court.²⁶⁸ Rules regarding interventions are mainly provided in Chapter III of the Rules of Procedure, which mention “interveners”, but does not provide a definition of this concept. With a lack of specific rules for amicus curiae, interested amicus curiae should follow the rules applicable to interveners before the ECOWAS Community Court.

The Rules of Procedure provide that an intervener in a case must be represented.²⁶⁹ An intervener can submit by way of a written application a request to be permitted to intervene.²⁷⁰ The application to intervene must be made within six weeks of the publication of the notice that is given of every case in the Official Journal of the Community.²⁷¹ The ECOWAS Community Court may consider an application to intervene made after expiry of the six-week period but before the decision to open the oral procedure. If the President allows the intervention at such a late stage, the intervener may submit his observations during the oral procedure, if that procedure takes place.²⁷²

²⁶⁶ ECOWAS, *Garba v. Benin*, ECW/CCJ/APP/03/09 (2010).

²⁶⁷ See, for example, Amnesty International, *Amicus Curiae Brief to the Community Court of Justice of the Economic Community of West African States (ECOWAS)*, ECW/CCJ/APP/10/10 (2010).

²⁶⁸ Online reports from SERAP, one of the plaintiffs in *Okari & Ors v. Republic of Nigeria*, suggests that the brief by Amnesty International was accepted by the court: Adetokunbo Mumunibu, *Bundu Shooting: ECOWAS Court Rejects FG, Rivers' Attempts to Block Request to Call Victims to Testify* (May 16, 2012), accessed at <http://saharareporters.com/2012/05/16/bundu-shooting-ecowas-court-rejects-fg-rivers%E2%80%99-attempts-block-request-call-victims>. As the judgments on these cases are not freely available online, it is difficult to determine how much weight was placed on the briefs in each individual case.

²⁶⁹ Art. 89 of the Rules of Procedure. See also Article 12 of the Protocol.

²⁷⁰ Art. 89 of the Rules of Procedure.

²⁷¹ Art. 89 of the Rules of Procedure. See also Art. 13(6) of the Rules of Procedure regarding the notice.

²⁷² Art. 89 of the Rules of Procedure.

Amicus briefs were submitted by Amnesty International in at least three cases before the Court:

- Amnesty intervened in the case of *SERAP et al v. Nigeria* regarding the use of lethal force against protesters and the case of *Gomez et al v. the Gambia* regarding the death penalty.²⁷³
- In the case of the *Federation of African Journalists and Ors v. the Gambia*,²⁷⁴ a number of third party interveners, including the international NGO Redress, the UN Special Rapporteur on Torture and a coalition of 8 NGOs, were allowed to submit amicus briefs in the case.
- In *FAJ v. the Gambia*,²⁷⁵ Amnesty International, the Canadian Journalist for Freedom of Expression, Reporters without Borders and Right to know campaign South Africa were permitted to submit an *amicus curiae* brief.

4.6 Appeal and review

There is no appeal structure within the ECOWAS Community Court and there is generally no appeal from a decision of the ECOWAS Community Court. However, in certain circumstances the parties may seek a review of the decisions of the court. These circumstances are limited by the Protocol as follows:

Article 25: Application for Revision

1. An application for revision for a decision may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the decision was given, unknown to the Court and also to the party claiming revision, provided always that such ignorance was not due to negligence.

A review or revision can therefore only be sought on the basis of new information that was not available to a party and which evidence would be decisive in the decision of the ECOWAS Community Court. This is very similar to the provisions in the African Commission's rules of procedure and case law from this tribunal can be used to inform your applications for revision. The procedure is set out in Articles 91 and 92 of the Rules of Procedure. See application of these principles in *Peter David v. Uwechue*, in which the Court refused to reconsider its decision on costs given against an Applicant who had unsuccessfully tried to sue an individual before the ECOWAS Community Court because there were no new facts alleged in the application for a review of the costs order. The restrictive rules on reviews are very similar to the provisions in the African Commission's rules of procedure and case law from the African Commission and may be used to inform your applications for revision. The procedure is set out in Articles 91 and 92 of the Rules of Procedure.

²⁷³ See Amnesty International, *Amicus Curiae Brief to the Community Court of Justice of the Economic Community of West African States (ECOWAS)*, ECW/CCJ/APP/18/12 (2013). and Amnesty International, *Amicus Curiae Brief to the Community Court of Justice of the Economic Community of West African States (ECOWAS)*, ECW/CCJ/APP/10/10 (2010).

²⁷⁴ See, for example, Redress, *The Federation of African Journalists and Others v. the Gambia* (19 May 2016), Available at <http://www.redress.org/international-jurisdictions/the-federation-of-african-journalists-and-others-v-the-republic-of-the-gambia>.

²⁷⁵ ECOWAS, *FAJ v. the Gambia*, No. ECW/CJJ/JUD/04/18 (2018).

4.7 Remedies

The ECOWAS Community Court has offered the normal remedies that would be available at the domestic level in ECOWAS countries, such as damages, declarations, and mandatory orders. The Court has ordered the release of detainees,²⁷⁶ or declared previous conduct by the State unlawful.²⁷⁷ It has also consistently awarded damages. Like many courts, the remedies will vary from a declaration of rights to compensation and will depend on what remedies are requested and justified by the parties. It is therefore essential that you consider remedies carefully and ensure that both the legal and factual bases for the request have been established for the ECOWAS Community Court.

Indeed the Court has given some extremely wide ranging remedies. For example, in the case of *Congrès pour la Démocratie et le Progrès (CDP) and Others v. Burkina Faso*,²⁷⁸ where the ECOWAS Community Court declared that the Electoral Code of Burkina Faso (as amended) was a violation of the right to free participation in elections, the ECOWAS Community Court ordered Burkina Faso to “remove all obstacles to participation in the amendment.” Similarly, in *FAJ v. the Gambia*, the Court ordered the Gambia to “immediately repeal and/or amend” its criminal laws on libel, sedition and false news in line with its obligations under international law.²⁷⁹ The State was also ordered to pay 6 million Gambian Dalasi in total to the Applicants as damages for the violations of their rights.²⁸⁰

In *Manneh v. the Gambia*,²⁸¹ the court considered whether the plaintiff was entitled to damages. Special damages could not be awarded because the plaintiff failed to plead and prove any ground under which the amount claimed ought to have been awarded. The Court noted that neither the ECtHR nor the IACtHR had awarded punitive damages for human rights abuses.²⁸² In fact, the Court held that it was “clear that the object of human rights instruments is the termination of human rights abuses and in cases where the abuse has already taken place, restoration of the rights in question. Compensation is awarded in order to ensure ‘just satisfaction’ and no more.”²⁸³ Nonetheless, the Court considered an award of general damages to be justified in this particular case. In *Musa Saïdykhan v. the Gambia*, the Court interpreted the case of *Manneh v. the Gambia* as stating that compensation may be awarded but the object of such an award must not be punitive.²⁸⁴

In *Wing Commander Danladi Angulu Kwasu v. Nigeria*, the ECOWAS Community Court ordered Nigeria to pay \$75,000 in compensation to the applicant for the “arbitrary

²⁷⁶ ECOWAS, *Sambo Dasuki v. Nigeria*, ECW/CCJ/APP/01/16 (2016) and ECOWAS, *Alade v. the Federal Republic of Nigeria*, ECW/CCJ/APP/05/11 (2011).

²⁷⁷ ECOWAS, *Musa Saïdykhan v. the Gambia*, ECW/CCJ/APP/11/07 (2010).

²⁷⁸ ECOWAS, *Congrès pour la Démocratie et le Progrès (CDP) and Others v. Burkina Faso*, ECW/CCJ/JUG/16/15 (2015).

²⁷⁹ ECOWAS, *FAJ v. the Gambia*, ECW/CCJ/APP/ 36/15 (2018), p. 61.

²⁸⁰ *Id.*

²⁸¹ ECOWAS, *Manneh v. the Gambia*, ECW/CCI/APP/04/07 (2008).

²⁸² *Id.*, para. 36.

²⁸³ *Id.*, para. 39.

²⁸⁴ ECOWAS, *Manneh v. the Gambia*, ECW/CCI/APP/04/07 (2008), para. 43.

and unlawful deprivation of the right to life” of the son who drowned during an exercise for the Nigerian Defence Academy.²⁸⁵

4.8 Advisory Opinions

According to Article 10 of the Protocol, as read with Article 96 of the Rules of Procedure, the Authority, Council, one or more Member States, or the Executive Secretary, and any other institution of the Community may request for an advisory opinion by serving a formal notice on the Chief Registrar. The request must:

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

However, please note that this is a very restricted procedure as essentially only states parties and organs of the Community itself can seek advisory opinions.

4.9 Sources of law

In *Ugokwe v. Nigeria*,²⁸⁶ the Court held that the main source for human rights law and obligations would be the African Charter. However, the Court will consider both the African Charter and general international human rights treaties, especially those ratified by the defendant state. In *Alade v. Federal Republic of Nigeria*,²⁸⁷ the Court came to the conclusion that;²⁸⁸

“[a]ll these provisions on rights of persons in the African Charter on Human and Peoples Rights therein are rights applicable under Article 9(4) of the Protocol of the Court as amended. The rights in the said African Charter are not the only rights that the violation of same will fall under Article 9(4) of the Protocol [...] Those UN Conventions and Charter on Human Rights acceded to by Member States of ECOWAS are recognizable rights that the violation of which would fall within the ambit of Article 9(4) of the Protocol [...] just to mention a few.”

In *Manneh v. the Gambia*, the ECOWAS Community Court held that it was not bound by international courts but could still draw lessons from their judgments. They will, thus, have persuasive authority before the ECOWAS Community Court.

4.10 Advantages/disadvantages of the system

The ECOWAS Community Court of Justice has many positive elements. For a regional court it is very fast in giving decisions, it issues binding legal judgments which the ECOWAS Member States are required to enforce, and the legal regime it applies is closely linked to the legal systems of most of its member States. It does not apply an exhaustion of domestic remedies and the time bar for bringing cases is longer than that in the African regional system; for example one should normally bring a communication within six months to the African Commission (see above). In essence,

²⁸⁵ ECOWAS, *Wing Commander Danladi Angulu Kwasu v. Nigeria*, ECW/CCJ/APP/24/15 (2017).

²⁸⁶ ECOWAS, *Ugokwe v. Nigeria*, ECW/CCJ/APP/02/05 (2005).

²⁸⁷ ECOWAS, *Alade v. Federal Republic of Nigeria*, ECW/CCJ/APP/05/11 (2011).

²⁸⁸ *Id.*, paras. 24 and 25.

this means that there is a lower bar on access to the court, and this can be seen in its popularity in the ECOWAS region for human rights cases.

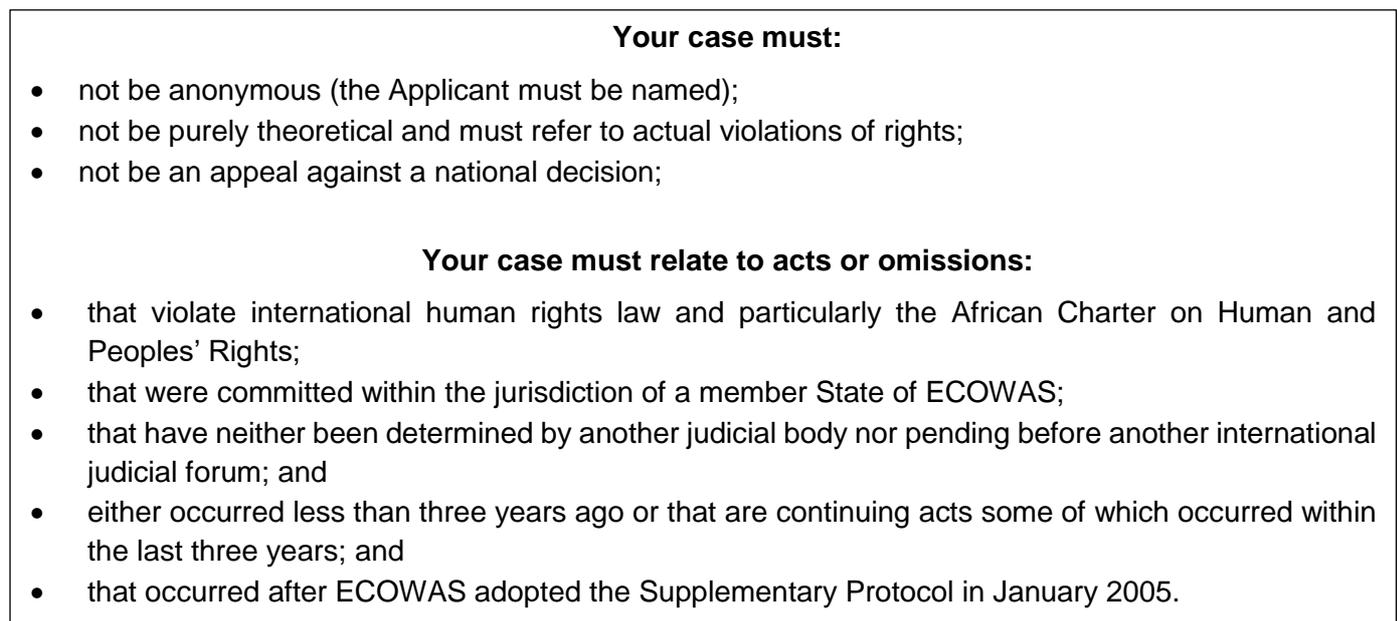
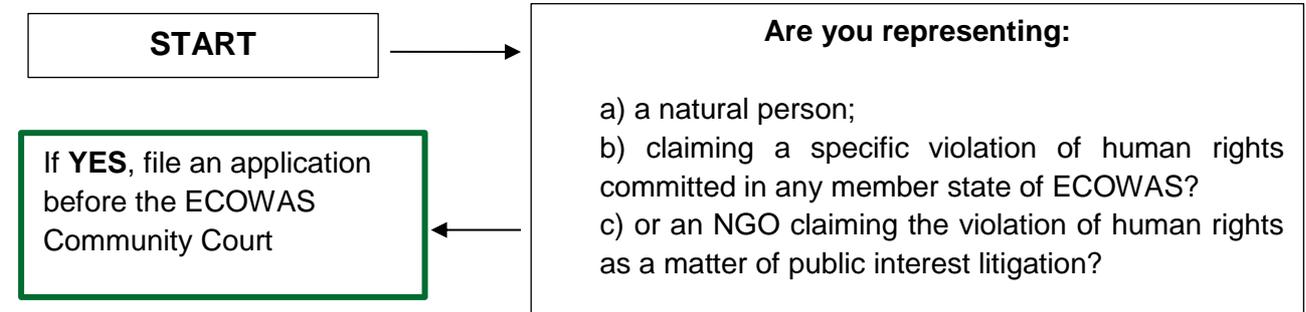
In a region where domestic cases may take many years to be finalised, the speed with which decisions are made is an important positive of the ECOWAS Community Court. The ECOWAS Community Court also has an extensive mandate to determine human rights cases. The ECOWAS Community Court has adopted the African Charter as its basic human rights document and as a result will apply the very wide definition of human rights contained in the African Charter. The Protocols establishing the court give the ECOWAS Community Court jurisdiction to issue binding court decisions on all member states. This allows the ECOWAS Community Court to make binding decisions on a wide range of human rights violations in the West African region.

However, the system is not perfect: there is no appeals process, and the review or revision process is extremely onerous. The court is still young and some areas of its jurisprudence are still developing, and therefore can be confusing (for example, it is not clear when a corporate body will be allowed to bring an application to protect its fundamental rights). The Court is not a dedicated human rights court and therefore it has made some human rights decisions that have not always met international standards (for example, in *Hadijatou Mani v. Niger*, the ECOWAS Community Court refused to hold the State accountable for the violence and discrimination perpetrated against the victim, despite its clear failure to take reasonable steps to prevent and protect individuals, including the victim, from violence and discrimination).²⁸⁹

²⁸⁹ ECOWAS, *Hadijatou Mani Koraou v. Niger*, ECW/CCJ/APP/08/08 (2008).

PROCEDURAL FLOW-CHART

Process for Bringing Applications to the ECOWAS Community Court



If **YES**, the ECOWAS Community Court will have jurisdiction over the case and will proceed to a determination on the merits. The Court will then consider whether your case proves a violation of internationally protected human rights.

If **NO**, the ECOWAS Community Court will not have jurisdiction over the case.

If **NO**, the ECOWAS Community Court of Justice will reject your case.

If **YES**, the ECOWAS Community Court of Justice will determine that **the respondent state has violated the applicant's human rights** and will order the state to remedy this breach and order remedies.

Appeal

A review or revision can only be sought on the basis of new information that was not available to a party and which evidence would be decisive in the decision of the court.

CHAPTER 5: CONCLUSION

There are three different options to take cases before regional forums in West 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 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 authoritative human rights determinations.

For individuals living in countries such as Burkina Faso 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 African 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 West Africa, the ECOWAS Community 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.

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