

Digital Rights Litigation Guide

*Litigating digital rights and freedom of expression online in East, West
and Southern Africa*



Digital Rights Litigation Guide

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LIST OF ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
ACJHR	African Court of Justice and Human Rights
AU	African Union
EAC	East African Community
EACJ	East African Court of Justice
ECOWAS	Economic Community of West African States
ICT	Information and communications technology
NGO	Non-governmental organisation
OAU	Organization of African Unity
SADC	Southern African Development Community
UN	United Nations

CHAPTER 1: INTRODUCTION

I. Digital rights litigation in Africa

Digital rights are human rights. With the advent of the internet and exponential growth in access to the internet and other information and communications technologies (**ICTs**), digital rights have become indispensable to the way in which people around the world exercise and enjoy their fundamental rights. It is now firmly entrenched by both the African Commission on Human and Peoples' Rights¹ (**ACHPR**) and the United Nations² (**UN**) that the same rights that people have offline must also be protected online, in particular the right to freedom of expression.

Digital rights can therefore be defined as the rights that are implicated in the access to and use of the internet and other ICTs. The right to freedom of expression applies regardless of frontiers, through any media of one's choice.³ While it is clear that the right to freedom of expression and digital rights are intrinsically linked, there is an array of other rights that are also implicated, including the right to equality, education, freedom of assembly, and healthcare. The exercise of digital rights also enables access to a range of services, including online banking and trade, and plays a critical role in achieving both public and private accountability and transparency by realising the right of access to information.

Under international human rights law, each state has obligations to respect, protect and fulfil human rights. However, with the growth in access to the internet and other ICTs, there has also been an increase in states and other actors seeking to encroach on these rights, for instance through intentional network disruptions, the promulgation of cybercrimes and other repressive laws, and expansive digital surveillance operations without proper oversight. It has therefore been necessary for affected parties to turn to the courts to seek recourse where their rights have been violated.

Recourse can be sought both at the national and (sub-)regional level. 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. However, regional courts also have a crucial role to play, particularly where there are no available, effective remedies in the state in question, for instance owing to concerns of corruption, long delays, fair trial violations, or that the domestic law itself is in violation of the human rights law to which the state is bound.

Notably, the regional courts across the continent have handed down various important judgments regarding the right to freedom of expression that have had a profound impact on the enjoyment of the right at the domestic level, both for the claimants directly and for other affected parties more broadly. This includes at the regional level – the ACHPR and the African

¹ ACHPR, 'Resolution on the right to freedom of information and expression on the internet in Africa', ACHPR/Res.362(LIX), 4 November 2016 (accessible at <http://www.achpr.org/sessions/59th/resolutions/362/>).

² UN Human Rights Council, 'Resolution on the promotion, protection and enjoyment of human rights on the internet', A/HRC/32/L.20, 27 June 2016 at para 1 (accessible at: https://www.article19.org/data/files/Internet_Statement_Adopted.pdf).

³ Article 19(2) of the International Covenant on Civil and Political Rights (**ICCPR**).

Court on Human and Peoples' Rights (**African Court**) – and at the sub-regional level – the East African Court of Justice (**EACJ**) for the East African Community (**EAC**) and the ECOWAS Community Court of Justice (**ECOWAS Court**) for the Economic Community of West African States (**ECOWAS**). Some of the key judgments in this regard include:

- In *Zongo v Burkina Faso*⁴ (**Zongo**), a case involving the murder of members of the media in Burkina Faso, the African Court found that Burkina Faso had violated Articles 1 and 7 of the African Charter on Human and Peoples' Rights (**African Charter**) by failing 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. The African Court also held that Burkina Faso had violated Article 9 of the African Charter protecting freedom of expression because of its failure in the investigation and prosecution of the murderers of Norbert Zongo, which caused fear and worry in media circles.
- In *Konaté v Burkina Faso*⁵ (**Konaté**), a case involving the conviction of a journalist on a charge of criminal defamation, the African Court held that aspects of criminal defamation laws, particularly those imposing the sanction of imprisonment, violated Article 9 of the African Charter and other international human rights provisions recognising the right to freedom of expression.
- In *Burundi Journalists' Union v The Attorney General of the Republic of Burundi*⁶ (**Burundi Journalists' Union**), the EACJ accepted that it had jurisdiction over freedom of expression matters, and held that various provisions of the impugned law regulating the press, film and broadcasting sectors in Burundi violated the Treaty for the Establishment of the EAC (**EAC Treaty**) as it violated the right to a free press.
- In *Manneh v The Gambia*⁷ (**Manneh**), the ECOWAS Court found that the arbitrary, incommunicado detention and disappearance of a journalist violated the right to liberty; and the right to a fair hearing.
- In *Hydara Jr v the Gambia*⁸ (**Hydara**), the ECOWAS Court held that a 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 ECOWAS Court also held that a state will violate international and treaty obligations if it fails to protect media practitioners,

⁴ Application No. 013/2011 (2014) (accessible at: <http://en.african-court.org/images/Cases/Ruling%20on%20Reparation/Application%20No%20013-2011%20-%20Beneficiaries%20of%20late%20Norbert%20%20Zongo-Ruling%20on%20Reparation.PDF>).

⁵ Application No. 004/2013 (2014) (accessible at: <http://en.african-court.org/index.php/55-finalised-cases-details/857-app-no-004-2013-lohe-issa-konate-v-burkina-faso-details>).

⁶ Reference No. 7 of 2013 (2015) (accessible at: <http://eacj.org/?cases=burundi-journalists-union-vs-the-attorney-general-of-the-republic-of-burundi>).

⁷ ECW/CCJ/JUD/03/08 (2008) (accessible at: <http://www.chr.up.ac.za/index.php/browse-by-country/the-gambia/306-the-gambia-manneh-v-the-gambia-2008-ahrlr-ecowas-2008.html>).

⁸ ECW/CCJ/APP/30/11 (2014) (accessible at: <https://globalfreedomofexpression.columbia.edu/cases/hydara-v-gambia/>).

including those critical of the regime, as freedom of expression also includes freedom to criticise the government and its functionaries subject to limitations imposed by the law.⁹

- Most recently, in *Federation of African Journalists and Others v the Gambia*¹⁰ (***Federation of African Journalists***), the ECOWAS Court ordered the government to pay compensation to four journalists for violating their rights and subjecting them to torture, and further ordered the government to immediately repeal or amend its laws on criminal defamation, sedition and false news in line with its obligations under international law.

The freedom of expression jurisprudence from the regional courts are a promising indication of the future of digital rights litigation across the continent. While these are relatively nascent judicial bodies, they have repeatedly shown a willingness to uphold the right to freedom of expression and hold states to account for violations thereof. These progressive judgments of the regional courts are likely to have a significant impact on policy and jurisprudence at the domestic level.

II. A note about this manual

This manual is set out as follows:

- **Chapter 2** sets out the general principles of digital rights litigation, including tips and strategies that should be borne in mind when litigating such cases.
- **Chapters 3 to 7** examine the specific regional mechanisms across the continent: the ACHPR; the African Court; the EACJ; the ECOWAS Court; and the Tribunal of the Southern African Development Community (**SADC Tribunal**).
- **Chapter 8** proposes a ten-point checklist for litigants to consider when initiating and pursuing digital rights litigation.

This manual provides an overview of the key concepts and considerations in respect of digital rights litigation, with a particular focus on the regional bodies before which cases can be brought. When litigating, careful regard should still be had to the statutes, treaties and rules relevant to the court in question, as well as the most recent case law that may be of relevance. Further, for fuller discussions on topics covered in this manual, including on sub-regional litigation¹¹ and on digital rights and freedom of expression online, please have regard to the other manuals published by MLDI: <https://www.mediadefence.org/resources>.

⁹ *Id.*

¹⁰ Application No. ECW/CCJ/APP/36/15 (2018) (accessible at: <https://www.mediadefence.org/sites/default/files/blog/files/FAJ%20and%20Others%20v%20The%20Gambia%20Judgment.pdf>).

¹¹ See MLDI, 'MLDI manual on litigating freedom of expression cases in East Africa' (**MLDI Manual on Litigation in East Africa**) (accessible at: <https://www.mediadefence.org/resources/mldi-manual-litigating-freedom-expression-cases-east-africa>); and MLDI, 'Training Manual on Litigation and Freedom of Expression in West Africa' (**MLDI Manual on Litigation in West Africa**) (accessible at: <https://www.mediadefence.org/resources/training-manual-litigation-and-freedom-expression-west-africa>).

CHAPTER 2: GENERAL PRINCIPLES OF DIGITAL RIGHTS LITIGATION: TIPS AND STRATEGIES

I. Determining the objectives, strategy and forum of the litigation

It is prudent to identify the objectives and strategy of the litigation upfront to assist with guiding the decision-making. While this may evolve through the duration of the case, it is a useful point of departure both for the claimants and the legal representatives. This is all the more so when considering approaching regional judicial bodies, as it can assist with deciding whether or not this is a worthwhile avenue to pursue.

The rule of subsidiarity refers to the basic principle that international forums should only be used when domestic forums have failed to enforce human rights. Under international human rights law, each state has obligations to respect, protect and fulfil human rights. The primary obligation is therefore always on the state to ensure enjoyment of human rights and it is the domestic courts of each state that serve the primary function of enforcement of human rights. The role of international human rights forums is to ensure that states are complying with these obligations. It is for these reasons that international tribunals must always be considered as subsidiary to domestic proceedings.

In practical terms, this means that most cases for the enforcement of human rights should be brought at the domestic level first. The benefits of bringing a case at the domestic level are that:

- domestic courts are better placed to judge facts and interpret domestic laws; and
- it is 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 sensitive to political pressure.

A disadvantage of litigating at the domestic level is that the judgment in a case may not be as broadly influential as a judgment at the international or (sub-)regional level.

In instances where litigation at the domestic level is unsuccessful or no effective domestic remedy is available, cases may be brought before an international or regional forum, each of which have differing rules in respect of the principle of subsidiarity. The benefits of bringing a case at the international or (sub-)regional level are that:

- a judgment can be influential throughout the region and therefore can be used to advocate for change in various countries;
- a judgment can develop pressure on the government at the domestic, regional and international level to change domestic law; and
- concrete remedies for individual clients, such as damages can be obtained where domestic courts may have failed to enforce human rights.

However, it should also be noted that there are also clear disadvantages to taking a case to an international or (sub-)regional body:

- international and (sub-)regional forums often have a reputation of being less suitable to obtaining damages for individual clients as it is difficult to ensure that their decisions are actually enforced (although some countries are very quick to pay compensation when ordered to do so by international forums); and
- litigation before international and (sub-)regional forums can take a long time to complete and therefore be costly.

Prospective litigants should be made aware from the outset of the possible impact and challenges that may arise with litigation at the domestic or regional level. Regard should also be had to whether there are any adverse or unintended consequences that may arise from the litigation, as well as the potential risks in pursuing it. This may include, for instance, reprisals and acts of harassment being made against litigants. This should be discussed with prospective litigants in an open and frank manner to ensure that an informed decision can be made.

In the field of digital rights, an additional challenge is that regional courts have not as yet expressly pronounced on the extension of the right to freedom of expression to these scenarios. Prospective litigants should be aware that the issues being raised are novel and that some courts may be unwilling to engage. Identifying upfront the broader aims to the litigation, as well as the complimentary strategies, such as lobbying and advocacy, may help mitigate these risks.

II. Determining the parties to the litigation

Cases are usually brought by those who are directly affected by the relevant violation of their rights. However, under certain circumstances it may be preferable to involve a non-governmental organisation (**NGO**) in a representative capacity.

The different regional courts have different standing provisions in this regard. For instance, the ACHPR permits all NGOs to file communications, whilst the African Court limits this to NGOs that have observer status before the African Union (**AU**). In instances in which cases are filed by NGOs in a representative capacity, rather than directly by the victims themselves, the application should make clear what interest the NGO has in the matter in order to motivate for its standing before the court.

There are clear benefits to a case being filed by a NGO:

- the NGO may have a wider range of resources and experience that it can draw on to pursue the case;
- in instances where there may be fear of reprisals for instituting action against a state, NGOs may be better-placed to bear the brunt of such reprisals;
- NGOs may be better-placed to lobby and engage in advocacy campaigns, and able to reach a wider audience; and
- NGOs may have expert knowledge, including technical and technological knowledge pertinent to digital rights cases.

As has been seen in the freedom of expression litigation thus far, for instance in *Federation of African Journalists*, a combination of institutional and individual applicants can be an

effective strategy. This can both achieve the benefits mentioned above, whilst also ensuring that the individual rights violations are made apparent to the court.

III. Amici curiae

The role and importance of *amici curiae* has been repeatedly recognised in cases where courts are called upon to decide questions of public importance. *Amici curiae* can play an important role in providing context on the broader impact that the violation has had, as well as comparative experiences and decisions to the court, or offer technical expertise on digital matters to assist the court in understanding the concepts and mechanics that it is being asked to consider.

The ACHPR, the African Court, the EACJ and the ECOWAS Court have all previously allowed *amici curiae* to intervene, and each have their own procedure for such intervention:

- the ACHPR provides for *amici curiae* in Rule 99(16) of the Rules of Procedure of the ACHPR (**ACHPR Rules**);
- the African Court provides for *amici curiae* in Rule 28 of the Rules of Procedure of the African Court (**African Court Rules**);
- the EACJ provides for *amici curiae* in Rule 36 of the Rules of Procedure of the EACJ (**EACJ Rules**); and
- the Rules of Procedure of the ECOWAS Court (**ECOWAS Court Rules**) do not expressly refer to *amici curiae*, but the ECOWAS Court has permitted *amici curiae* to join proceedings in terms of the provisions relating to interveners contained in Chapter III of the ECOWAS Court Rules.

This is discussed in more detail below. *Amici curiae* should generally be neutral and have a demonstrated interest in a case. Submissions should focus on points of law and not replicate the submissions of the principal parties. *Amici curiae* submissions can include, for instance, providing comparative law input from key jurisdictions, international law standards relevant to the case, practical experience of the relevant NGO that can assist the court to understand the broader context or the implications of its judgment, or offer technical expertise relevant to the digital aspects of the case.

Factors to consider before deciding to intervene include the following:

- the importance of the case to the charitable objectives of the prospective *amici curiae* and the potential of the case to have a significant positive impact on their work;
- the work and experience of the prospective *amici curiae*, which should be relevant to the case at hand and demonstrate both their neutrality and their ability to add value;
- the submissions of the parties and what the *amici curiae* will be able to add to those, as it may be that other ways to participate in the proceedings – such as assisting one of the parties informally or providing evidence – are more suited to the relevant organisation and the overall strategic objectives of the case;
- whether an intervention by a coalition of *amici curiae* will be more effective than an intervention on behalf of one organisation, for instance because other organisations have more relevant experience domestically or internationally, or because there is a high degree

of interest in the case and submissions made by a coalition will avoid duplicating efforts or irritating the court;

- whether the intervention may have negative consequences for the case, for instance cause delays to the proceedings, the likelihood of such consequences, and ways to mitigate these risks; and
- the potential risk of a costs order and how to mitigate this.

Rules of court may differ on when *amici curiae* can intervene in a case. Where there is no guidance, *amici curiae* should apply for admission as early as possible in an effort to ensure minimal delays.

IV. Filing a case with the regional court

All cases filed before a regional court must meet both the formal and content requirements for 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, as well as any practice directions issued by the court.¹²

When choosing which forum to pursue, the accessibility of the court is a factor to consider. Usefully, the courts are increasingly becoming more willing to accept electronic filings, which assists with ease of filing documents. For international litigants, it may be advisable to engage a local legal representative at the seat of the court or a sub-registry to assist with delivering documents and following up where needed. MLDI can assist with finding a local legal representative if necessary.

When filing a case with the court, two of the fundamental procedural matters that will need to be dealt with relate to whether the court has jurisdiction over the case, and whether the case is admissible.

A. Jurisdiction

The different courts across the region each have different jurisdiction. In sum, therefore, the following questions need to be asked:

- whether the court has jurisdiction over a case involving both the complainant and the respondent state (jurisdiction *ratione personae*);

¹² For an overview of the procedural steps to follow in filing a case before the regional courts, see: MLDI Manual on Litigation in West Africa at pp 33-34 for a procedural flow chart of the ACHPR; MLDI Manual on Litigation in West Africa at p 50 for a procedural flow chart of the African Court; MLDI Manual on Litigation in East Africa at p 60 for a procedural flow chart of the EACJ; and MLDI Manual on Litigation in West Africa at p 67 for a procedural flow chart of the ECOWAS Court.

The relevant legal instruments, including rules of procedure and practice directions, as well as recent judgments are typically available on the websites for these bodies, which can be accessed as follows:

- ACHPR: <http://www.achpr.org/>.
- African Court: <http://www.african-court.org/en/>.
- EACJ: <http://eacj.org/>.
- ECOWAS Court: <http://www.courtecowas.org/>.
- SADC Tribunal: <http://www.sadc.int/about-sadc/sadc-institutions/tribun/>.

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

Unlike the other courts, the EACJ does not have express human rights jurisdiction. However, it has held that it does have jurisdiction to hear cases relating to freedom of expression and the press, as this links to the principles of accountability, democracy and good governance that the member states are obliged to uphold.¹³

B. Admissibility

Once it is established that a court has jurisdiction over a case, the next question to consider is whether that case is admissible. Admissibility refers to 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 rely on strict admissibility rules to reduce the number of cases that they consider, given that they have limited funding and may be inundated with cases. This means that special care must be taken to ensure that all the requirements of admissibility are met before deciding to file a case.

Two particular considerations that bear highlighting are the exhaustion of local remedies, and the concept of ongoing violations in relation to the time period within which a claim is brought:

- ***Exhaustion of local remedies:*** Local remedies relate to 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. The onus is on the respondent state to establish that the remedies are available (the petitioner can pursue it without impediment); effective (it offers a reasonable prospect of success); and sufficient (it is capable of redressing the complaint).¹⁴ The exceptions to the rule of exhaustion of local remedies are those situations where local remedies are non-existent; are unduly and unreasonably prolonged; recourse to local remedies is made impossible; or from the face of the complaint there is “no justice” or there are no local remedies to exhaust.¹⁵ Notably, the EACJ and the ECOWAS Court do not require the exhaustion of local remedies, which potentially allows for it to be a speedier process than the others.

¹³ *Burundi Journalists' Union v The Attorney General of the Republic of Burundi*, *ibid* at para 15.

¹⁴ *Jawara v The Gambia*, Communication 147/95-149/96 (2000) at para 32. For a further discussion, see MLDI Manual on Litigation in West Africa at pp 20-22.

¹⁵ See MLDI Manual on Litigation in West Africa at pp 22-24.

- **Concept of ongoing violations:** In determining the time period in which a case must be brought, the African Court¹⁶ and the ECOWAS Court¹⁷ have recognised the concept of ongoing violations. In this regard, the ECOWAS Court has recently held that, having due regard to international best practices and the provisions of fundamental human rights enforcement procedures of most states, claims for the enforcement of human rights cannot be caught by statutes of limitation.¹⁸ However, the concept of ongoing violations has been expressly rejected by the EACJ, which has applied a strict time bar to the filing of cases.¹⁹

C. Establishing the merits of the case

Once the procedural matters have been addressed, it is then necessary to set out the merits of the case. Different courts have different sources of law that they apply. It is advisable to set out clearly the specific provisions of the African Charter and other binding legal instruments that are being relied upon to allege the violation. Other declarations and resolutions, particularly regional ones such as the Declaration of Principles on Freedom of Expression in Africa, will also be of persuasive value.

When citing case law, begin with the case law of the court in question and the other regional courts. The court should also be provided with other relevant case law from the highest courts in African states and other influential jurisdictions, and from the Inter-American and the European Courts. Guidance from UN bodies will also likely be of use to the court, such as General Comment 34 published by the UN Human Rights Committee on the right to freedom of opinion and expression contained in Article 19 of the ICCPR

The substantive aspects of digital rights cases are dealt with in the other MLDI manuals. It is important to ensure that the issues are clearly characterised and consistently framed. As mentioned above, regard should also be had to whether there are complex technical aspects pertaining to the litigation – for instance, technological matters that might need to be explained – and if so, how best to do this. Litigants should consider the possibility of filing expert evidence, reports or other relevant materials that the court can rely on.

A further aspect to consider in digital rights litigation is how best to make the extent and impact of the violation apparent to the court. This is sometimes a risk in digital rights cases, such as cases dealing with internet shutdowns or surveillance, where the harm appears relatively abstract to a court. While digital rights advocates are well-aware of the wide impact that such violations can have on a range of rights, this should be meticulously detailed for the court, which may not have the same prior knowledge. This links to the question of who the

¹⁶ *Urban Mkandawire v Malawi*, Application No. 003/2011 (2013) at para. 32 (accessible at: <http://www.african-court.org/en/index.php/55-finalised-cases-details/835-app-no-003-2011-urban-mkandawire-v-republic-of-malawi-details>).

¹⁷ *Federation of African Journalists*, *ibid* at p 22.

¹⁸ *Id* at p 21. The ECOWAS Court went on to state, at p 22, that even if there is a time bar that applies, “there is still another plank for the exclusion of the application of a statute of limitation. The rule is that where an injury is continuing, it will give rise to a cause of action *die in diem* (day in and out) and postpones the running of time”.

¹⁹ *Attorney General of Uganda and Another v Awadh and Others*, Appeal No. 2 of 2012 (2013) at para 31 (accessible at: <http://eacj.org/?cases=omar-awadh-and-6-others-vs-attorney-general-of-uganda>); *Attorney General of Kenya v Independent Medical Legal Unit*, Appeal No. 1 of 2011 (2013) (accessible at: <http://eacj.org/?cases=attorney-general-of-the-republic-of-kenya-vs-independent-medical-legal-unit-arising-from-appeal>).

parties to the litigation are, and who is best-placed to convey the harm suffered. An *amicus curiae* brief can be very helpful in this regard.

D. Remedies

Different forums provide different remedies. One of the first things that needs to be decided therefore is what remedies to seek, how important they are, and which forums can provide them. Remedies generally fall into two broad categories: mandatory orders – directing government to take certain defined steps, often within specified time frames; and supervisory orders – requiring government to report back to litigants and/or the court as to the steps taken in fulfilment of an order.

Remedies may include:

- a declaration of rights;
- compensation;
- changes to the law; or
- a structural interdict, in terms of which a court requires the state to report on its compliance with and implementation of decisions on a regular basis (something that the African Commission and the African Court are already ordering). This can also assist with the enforcement of the order.

Typically, a case will involve a mixture of these different remedies. It is advisable to be creative with remedies, and also ensure that they are carefully crafted to cover the full remit of the relief being sought.

As set out above, although some forums do not have mechanisms to enforce the decisions, there is nevertheless strategic advantage in a successful outcome. It should also be noted that some remedies are easier to achieve than others; for instance, payment of compensation is quicker to achieve than law reform. Although the overall success of the case may only be measured some time after the judgment, litigants should keep sight of the broader picture.

V. Useful ICT tools for litigation

It bears mention that there are a number of useful ICT strategies that can assist with litigation. For instance, there are ICT tools designed and developed to facilitate document-sharing and discovery in action proceedings.²⁰ Furthermore, where the litigation forms part of a broader advocacy strategy, ICT tools can be used to develop and promote the campaign, and reach a wider audience.²¹

²⁰ Different tools provide different functionality, and assessed and selected based on the needs of a particular case. Examples of tools that may be of use include: cloud storage platforms such as OneDrive and Dropbox; collaborative messaging applications designed for teams, such as Slack; organisational tools, such as Evernote; and e-discovery software, such as Concordance by LexisNexis or eDiscovery Point by Thomson Reuters.

²¹ This can include, for instance, messaging applications, such as WhatsApp; social media platforms to spread information, such as Twitter; tools to publish videos or live recordings from events, such as YouTube or Facebook Live; and websites for creating petitions online, such as Change.org or Avaaz.org.

There is a further aspect to consider: surveillance. As the cases before the regional courts are typically against the state, there is a risk of unwarranted government surveillance occurring in respect of litigants' digital communications. Digital security tools may be advisable to ensure that private communications remain secure.²² This can be necessary to ensure privilege with clients, to protect legal strategy, and to secure the safety of witnesses and victims.

VI. Complimentary strategies

Litigation can – and often should – be part of a broader advocacy strategy that can be pursued to achieve reform. In order to garner public support, litigation should be coupled with a public information campaign that explains the objective and strategy underlying the case, and the harm that it seeks to cure. Such a campaign should be designed to reach ordinary members of the public, and should not be cluttered with legal or technical jargon (unless this is explained in simple terms). This is not only helpful to gain support and sway public sentiment, but may also assist in obtaining information relevant to the case. The public information campaign should persist before, during and after the judgment to inform people of the outcome and assist them to vindicate their own rights in line with the outcome.

Advocacy can be done both domestically and through regional and international bodies such as the ACHPR and the UN. Regional and international advocacy may involve making statements, holding side events, or presenting shadow reports to the treaty-body mechanisms. It is usually not necessary for a single organisation to undertake all the tasks. Again, it may be beneficial to work with a coalition of organisations or partners in developing and implementing the strategy.

A 2014 publication on public interest litigation in South Africa highlights the important impact that advocacy and mobilisation campaigns have had on strategic constitutional cases in South Africa.²³ Two examples in this regard include:

- In respect of the litigation before the Constitutional Court over the availability of HIV and AIDS drugs, the Treatment Action Campaign (**TAC**) saw litigation as one facet of a much bigger political fight. For years before the litigation commenced, the TAC engaged in substantial mobilisation of its members and the broader public to put pressure on the government. This included building alliances with trade unions, churches and the media. As described about the strategy: “[The TAC] built a genuine social movement and showed how the Constitution, which represents the best ideals and values of our country, can be a powerful tool for holding government to those ideals and values. In some ways, the final judgement of the Constitutional Court was simply the conclusion of a battle that the TAC

²² This can include, for example, using a password manager, such as KeePass; and relying on encrypted messaging and email services, such as Telegram, Wire or OpenPGP. It is advisable to research whichever tools you're interested in beforehand to ensure that they provide both the functionality and levels of security that you require. For guidance on how to ensure more secure digital communications, see Electronic Frontier Foundation, 'Surveillance self-defence: Tips, tools and how-tos for safer online communications' (accessible at: <https://ssd.eff.org/en>).

²³ S. Budlender, G. Marcus & N. Ferreira, 'Public interest litigation and social change in South Africa: Strategies, tactics and lessons', October 2014 at pp 102-106 (accessible at: <https://www.atlanticphilanthropies.org/app/uploads/2015/12/Public-interest-litigation-and-social-change-in-South-Africa.pdf>).

had already won outside the courts, but with the skilful use of the courts as part of a broader struggle.”²⁴

- In respect of litigation regarding the provision of textbooks in schools, Section 27 – the responsible NGO that was leading the litigation – launched an extensive media campaign that put pressure on the government to act, relying on both social media and traditional media. This include releasing press statements, holding press conferences, writing opinion pieces and providing updates via social media. As described: “The political pressure resulted in government interventions beyond those sought in the litigation, including the appointment ... of a task team to investigate the causes of delayed deliveries.”²⁵

In sum, by combining litigation with other instruments for change – such as advocacy and lobbying – this can serve to increase the effectiveness of the litigation, inform the wider public about the issue being litigated in court, and improve implementation.²⁶ As has been noted:²⁷

“Social and structural change is a long-term battle. Different strategies are needed at different points in time to pursue the objective or ‘the cause’. Litigation is one tool that can be employed as part of those strategies, but ultimately, ‘the case’ is only one of many steps taken in the pursuit of a bigger cause. This realisation is crucial and also opens up many new potential avenues for identifying cases that can potentially support the pursuit of the cause. By building longer term alliances and partnerships that include a variety of skillsets (advocacy, litigation, policy, technical expertise) around an issue, you create a network where you can share information and find good options for litigation or even proactively create test cases. You also create a fertile landscape where efforts on one front can positively influence the others and vice versa.”

²⁴ *Id* at p 103.

²⁵ *Id*.

²⁶ N. Jansen Reventlow, ‘Connecting litigation with other efforts: Strategic litigation as a tool in the toolbox’, 19 February 2018 (accessible at: <https://digitalfreedomfund.org/connecting-litigation-with-other-efforts-strategic-litigation-as-a-tool-in-the-toolbox/>).

²⁷ *Id*.

CHAPTER 3: AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

I. Introduction

Article 3(h) of the Constitutive Act of the AU (**AU Constitutive Act**) stipulates that one of the objectives of the AU is to “[p]romote and protect human and peoples’ rights in accordance with the African Charter and other relevant human rights instruments”. The ACHPR is established in terms of Article 30 of the African Charter, with the mandate to protect promote human and peoples’ rights and ensure their protection in Africa, and to interpret the African Charter.

The ACHPR is a quasi-judicial body that is empowered to issue recommendations. While these recommendations are not binding, the ACHPR has maintained an impressive track-record of upholding the right to freedom of expression, both in its communications and through the development of soft law instruments.

The Secretariat of the ACHPR is based in The Gambia. The ACHPR consists of 11 members (or ‘commissioners’) elected by the AU Assembly from experts nominated by the states parties to the African Charter. The members are designated particular mandates and functions (such as freedom of expression and access to information), as well as particular states that they are responsible for monitoring.

The ACHPR holds two ordinary sessions annually, which varies from 10 to 15 days depending on needs and finance, and may also meet in extraordinary sessions if necessary. Extraordinary sessions are convened by the Chairperson of the ACHPR upon a request by the Chairperson of the AU Commission or a majority of members of the ACHPR. Sessions may be held in public or *in camera*. The ACHPR is required to submit a report of its activities during sessions and inter-sessions to the AU Assembly, and may not publish information about communications or protective missions until the report has been adopted by the Executive Council and the AU Assembly. The ACHPR also considers reports submitted by states – as well as shadow reports submitted by NGOs – on the states’ compliance with the African Charter.

With regard to communications, the ACHPR contains broad standing provisions: anyone is permitted to bring a complaint if they meet the admissibility requirements. This includes victims of abuses; persons acting on behalf of victims of abuses, with their consent (although the ACHPR may waive the consent requirement²⁸); and NGOs, regardless of whether or not they are registered in Africa or have observer status before the ACHPR or another AU body. Communications can be brought for the public good;²⁹ as a class or representative action; or on behalf of another person.

It is not necessary for cases to be submitted by lawyers, although legal representation can be useful. Rule 104 of ACHPR Rules states that “[t]he [ACHPR] 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.” This will only be facilitated where

²⁸ *Article 19 v Eritrea*, Communication 275/03 (2007) at para 65 (accessible at: <http://www.achpr.org/communications/decision/275.03/>).

²⁹ *Law Society of Zimbabwe and Others v Zimbabwe*, Communication 321/06 (2013) at para 58 (accessible at: <http://www.achpr.org/communications/decision/321.06/>).

the ACHPR is convinced that it is essential for the proper discharge of its duties; to ensure equality of the parties before it; and where the author of the communication has no sufficient means to meet all or part of the costs involved.

II. Seizure and admissibility

The first step in the process of taking a case to the ACHPR is to file a complaint (or ‘communication’). The ACHPR will seize itself of the communication if it is satisfied that the communication alleges a *prima facie* violation of the African Charter or it has been properly submitted in terms of Article 55 of the African Charter. The decision is taken by a simple majority of commissioners deciding that the ACHPR should be seized.³⁰ Once the ACHPR has decided to be seized with a particular matter, it will request the Secretariat to inform the complainant and the state concerned; this is the first stage at which the state party is notified of the communication.³¹

The initial procedural step of seizure is unique to the ACHPR and does not find application in the other regional bodies. Following its decision on seizure, the ACHPR will then proceed to consider whether the communication is admissible.

In order for a communication to be admissible, it must comply with the seven formal requirements contained in Article 56 of the African Charter. This is essential in order for the communication to proceed to have the merits considered. Notably, only an initial (or *prima facie*) evidentiary burden needs to be met at this stage. As explained by the ACHPR in *Muzerengwa and Others v Zimbabwe*:³²

“[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.”

Article 56 of the African Charter requires the following:

- ***Identity of the author:*** Communications must “[i]ndicate their authors, even if the latter requests anonymity,” and as such should include your name and address and, if you are not the victim yourself, your relationship with the victim, including on what grounds you represent the victim. This seeks to ensure that the ACHPR has adequate information and specificity concerning the victims; is in continuing communication with the author; knows the author’s identity and status; can be assured of their continued interest in the communication; and can request supplementary information if the case requires it.³³

³⁰ Article 55(2) of the African Charter.

³¹ ACHPR, ‘Information sheet no. 3: Communication procedure’ at p 4 (accessible at: http://www.achpr.org/files/pages/communications/procedure/achpr_communication_procedure_eng.pdf).

³² Communication 306/05 (2011) at para 56 (accessible at: <http://www.achpr.org/communications/decision/306.05/>).

³³ *Tem bani and Another v Angola and Others*, Communication 409/12 at para 87 (accessible at: http://www.achpr.org/communications/decision/409.12_/).

- **Compatibility:** Article 56(2) requires that the communication be compatible with either the African Charter or the Constitutive Act of the Organization of African Unity (now the AU). It is sufficient for Article 56(2) to provide *prima facie* evidence that a violation occurred, without it even being necessary to indicate which provision of the African Charter is being relied upon. It should also be indicated that the communication is filed against a state party to the African Charter, and that the violation either occurred or continued after the state party's ratification.³⁴
- **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 [AU]”. The ACHPR has explained that:³⁵

“[D]isparaging 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.”

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; 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; and whether the language is aimed at undermining the integrity and status of the institution and bring it into disrepute.³⁶

Importantly, the ACHPR has emphasised that Article 56(3) should not be used to violate the right to freedom of expression contained in Article 9(2) of the African Charter.³⁷

- **Mass media:** Article 56(4) provides that the communication should not be “based exclusively on news disseminated through the mass media.” The ACHPR has made clear that although there must be some corroborating evidence that is not from the media, the amount of corroborating evidence required is not high.³⁸

³⁴ *Gumme and Others v Cameroon*, Communication 266/03 (2009) at para 71 (accessible at: <http://www.achpr.org/communications/decision/266.03/>).

³⁵ *Ilesanmi v Nigeria*, Communication 268/03 (2005) at para 39 (accessible at: <http://www.achpr.org/communications/decision/268.03/>).

³⁶ *Asemie v Kingdom of Lesotho*, Communication 435/12 (2015) at para 56 (accessible at: <http://www.achpr.org/communications/decision/435.12/>).

³⁷ *Zimbabwe Lawyers for Human Rights and Another v Zimbabwe*, Communication 284/03 (2009) at para 91 (accessible at: <http://www.achpr.org/communications/decision/284.03/>). The ACHPR stated that:

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

³⁸ *Jawara v The Gambia*, Communication 147/95-149/96 (2000) at para 24 (accessible at: <http://www.achpr.org/communications/decision/147.95-149.96/>).

- **Local remedies:** As mentioned above, 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”.³⁹ By way of recap, local remedies refer to any judicial or legal mechanisms put in place at the domestic level to ensure the effective settlement of disputes. The onus rests on the respondent state to establish that the local remedies are available, effective and sufficient.⁴⁰ It is not necessary to exhaust local remedies where local remedies are non-existent; unduly or unreasonably prolonged; recourse to local remedies is made impossible; it is impractical or undesirable for the complainant to seize the domestic courts in the case of each violation; or from the face of the complaint, there is no justice or no local remedies to exhaust.
- **Reasonable time:** Article 56(6) provides that communications received by the ACHPR will only be considered if they “are submitted within a reasonable period from the time local remedies are exhausted”. This has also been mentioned above. While the ACHPR will treat every case on its own merits depending on the reasons given for the delay, it is advisable to submit a communication as soon as possible, and preferably within six months from the exhaustion of domestic remedies.⁴¹ A compelling explanation should be provided for any delay beyond six months. As explained in *Chinhamo v Zimbabwe*:⁴²

“The 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 [ACHPR] were to adopt the practice of other regional bodies to consider six months as the reasonable period to submit complaints, given the circumstance in which the Complainant finds himself, that is, in another country, it would be prudent, for the sake of fairness and justice, to consider a ten months period as reasonable.”

The ACHPR has further clarified that a reasonable time runs from either 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.⁴³

- **Ne bis in idem:** Article 56(7) states that the ACHPR does not deal with matters “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 [African] Charter.” This means that communications that have been finalised by another international mechanism similar to the ACHPR are inadmissible. The ACHPR will, however, consider communications that have been discussed by non-judicial or adjudicatory international bodies.⁴⁴ This codifies the *ne bis in idem* rule – which ensures that no state may be sued or condemned more than once for the same alleged human rights

³⁹ See, also, article 50 of the African Charter.

⁴⁰ *Majuru v Zimbabwe*, Communication 308/05 (2008) at para 79 (accessible at: <http://www.achpr.org/communications/decision/308.05/>); *Jawara v The Gambia*, Communication 147/95-149/96 (2000) at para 32 (accessible at: <http://www.achpr.org/communications/decision/147.95-149.96/>).

⁴¹ In *Majuru v Zimbabwe*, *ibid* at para 109, the ACHPR stated that the six-month rule “[s]eems to be the usual standard”.

⁴² Communication 307/05 (2007) at para 89.

⁴³ *Tembani and Another v Angola and Others*, *ibid* at para 107.

⁴⁴ *Bakweri Land Claims Committee v Cameroon*, Communication 260/02 (2004) at para 53 (accessible at: <http://www.achpr.org/communications/decision/260.02/>).

violations –and seeks to uphold and recognise the res judicata status of decisions issued by international and regional tribunals and/or bodies.⁴⁵

Where the ACHPR has ruled a communication to be inadmissible, Rule 107 of the ACHPR Rules of Procedure provides for the possible review of such a decision where new evidence relating to admissibility has arisen. While it is rare for the ACHPR to change its mind, it may nevertheless be worthwhile to persuade the ACHPR to set its admissibility decision aside where there is new information.

III. Advisory opinions

One way of getting the ACHPR 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. A request for an advisory opinion cannot be in respect of a contentious case; rather, it should be an honest request for the ACHPR to interpret the African Charter. For instance, 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 ACHPR to consider what obligations state parties have to ensure enjoyment of human rights in such situations.

IV. What to expect when pursuing a matter before the ACHPR?

Once a communication is declared admissible, the ACHPR proceeds to consider the substantive issues of the case. The complainant will be given 60 days within which to present its arguments on the merits, whereafter the respondent state has 60 days to respond.⁴⁶ The complainant then has 30 days to reply to the state's arguments.⁴⁷ Rule 113 of the ACHPR Rules of Procedure allows for the ACHPR to grant an extension for any filing deadline, but this is limited to a maximum period of one month, and only one extension per party may be granted for any given submission.

In practice, proceedings often take much longer due to the ACHPR's limited resources, the fact that it only considers communications during its sessions and often defers consideration of a communication to the next session, and the prospect of extensions for filing deadlines being granted.

The African Charter is the primary source of law applied by the ACHPR. However, the African Charter makes clear that the ACHPR is to consider a wide range of sources of law, both binding and non-binding. Article 60 of the African Charter provides for the sources of law that the African Commission is required to take into consideration. It provides as follows:

“The [ACHPR] shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on Human and Peoples' Rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted

⁴⁵ *Id.*

⁴⁶ Rule 108(1) of the ACHPR Rules of Procedure.

⁴⁷ Rule 108(2) of the ACHPR Rules of Procedure.

by the United Nations and by African countries in the field of Human and Peoples' Rights, as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the Parties to the present [African] Charter are members.”

The African Charter further provides, in Article 61, for the sources of law that must also be taken into consideration by the ACHPR as subsidiary measures to determine the principles of law. Article 61 states as follows:

“The [ACHPR] shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by Member States of the Organisation of African Unity, African practices consistent with international norms on Human and Peoples' Rights, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine.”

The complainant is required to establish a case on a balance of probabilities. Where a state fails to contest an allegation of fact, the ACHPR will take this as proven. However, the ACHPR generally does not consider itself to be an arbiter of fact – a role it sees to be played primarily by the domestic courts – and will likely only reopen factual matters where it is possible to demonstrate bias or bad faith on the part of the domestic courts. In *Interights and Others v Botswana*, the ACHPR stated that:⁴⁸

“[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 [ACHPR] cannot substitute the decision of the courts with that of its own.”

Submissions on the merits should make precise allegations of fact, and allegations made in the original complaint should be substantiated through documents, such as affidavits, court judgments, expert opinions, medical statements and flight records.

Article 46 of the African Charter provides that “[t]he ACHPR may resort to any appropriate method of investigation; it may hear from the Secretary-General if the Organization of African Unity or any other person capable of enlightening it”. This may be useful for the ACHPR to rely on particularly where states are uncooperative or ignore communications. However, in practice, the ACHPR has been reluctant to make decisions by default, and even where states have not responded to the communication, complainants are still expected to prove claims on a balance of probabilities. The ACHPR has also been reluctant to look beyond the documents filed on record, although it will have regard to witness evidence in exceptional circumstances.

Although Rule 88 of the ACHPR Rules allows for oral hearings, the ACHPR prefers deciding matters on the papers. It is advisable to only insist on an oral hearing if there are exceptional circumstances to argue or an argument to make that is new to the ACHPR.

⁴⁸ Communication 240/01 (2003) at para 29 (accessible at: <http://www.achpr.org/communications/decision/240.01/>).

If an oral hearing does take place, some states send representatives to contest allegations, while some do not. It is advisable though to be thoroughly prepared to respond to questions from the commissioners hearing the matter and to prepare the evidence on the basis that the state will be well-represented.

V. Amicus curiae

Rule 99(16) of the ACHPR Rules provides for the ACHPR to receive *amici curiae* briefs on communication. Further, authors of *amici curiae* briefs, or their representatives, may be permitted to address the ACHPR during the oral proceedings if the ACHPR considers it necessary.

VI. Interim measures

The ACHPR is empowered to grant provisional measures in terms of Rule 98 of the ACHPR Rules. This can be either at the initiative of the ACHPR or on request by a party to the communication, at any time between the receipt of a communication and the determination being made on the merits. Such measures are aimed at preventing irreparable harm to the victims of the alleged violation as urgently as the situation demands.⁴⁹

If the ACHPR is not in session at the time that a request for provisional measures is received, the Chairperson (or Vice-Chairperson in the absence of the Chairperson) is empowered to take the decision on behalf of the ACHPR, and must inform the other members accordingly.⁵⁰ Rule 98(3) provides that the ACHPR shall request the state party concerned to report back on the implementation of the provisional measures within 15 days.

The ACHPR Rules make clear that the granting of provisional measures does not constitute a prejudgment on the merits of the communication.⁵¹

VII. Remedies

The ACHPR's final decisions remain confidential until they are adopted by the Assembly of Heads of State of the AU at its annual meeting.⁵² The ACHPR has, in the past, recommended remedies relating to compensation, the repeal of decrees or legislation, the return of deportees, grants of citizenship, and reform of electoral laws. The ACHPR has also been willing to read rights into the African Charter and grant relief on the basis of those rights.⁵³

⁴⁹ Rule 98(1) of the ACHPR Rules.

⁵⁰ Rule 98(2) of the ACHPR Rules.

⁵¹ Rule 98(5) of the ACHPR Rules.

⁵² Article 59 of the African Charter.

⁵³ *Id* at para 60. In this regard, the African Commission stated that:

“Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the [African] Charter a right to shelter or housing which the Nigerian Government has apparently violated.”

The ACHPR will not grant remedies that have not been asked for, and as such it is imperative to frame the remedy sought clearly and carefully, ensure that all aspects of the necessary relief are contained in the prayers, and that the most appropriate remedy is sought.

VIII. Enforcement

As set out above, the ACHPR's decisions are not 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 ACHPR's decisions depends entirely on the goodwill of the offending state, which can make enforcement very difficult. Nonetheless, the ACHPR usually requires the state to inform it, within 180 days, of the measures taken to implement the recommendations.

As has been noted by the ACHPR:⁵⁴

“The [ACHPR] has not laid down procedure to supervise the implementation of its recommendations. However, the Secretariat does send letters of reminders to States that have been found to have violated provisions of the Charter calling upon them to honour their obligations under article 1 of the Charter "... to recognise the rights, duties and freedoms enshrined in this Charter and ... adopt legislative and other measures to give effect to them". The first letters are sent immediately after the adoption of the Commission's Annual Activity Report by the OAU Assembly of Heads of State and Government and subsequent letters are sent as often as necessary. The major problem however is that of enforcement. There is no mechanism that can compel States to abide by these recommendations. Much remains on the good will of the States.”

For states that are party to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (**the African Court Protocol**), there is also the possibility that the ACHPR will take cases to the African Court if the state concerned fails to abide by its recommendations. In this regard, Rule 118(1) of the ACHPR Rules provides that if the ACHPR has taken a decision with respect to a communication and has considered that the state has either not complied or is unwilling to comply with its recommendations within the prescribed time period, the ACHPR may submit the communication to the African Court pursuant to Article 5(1)(a) of the African Court Protocol and inform the parties accordingly. This is similarly the case in respect of a request for provisional measures that the ACHPR has made against a state party, where the state has not complied.⁵⁵

⁵⁴ ACHPR, 'Information sheet no. 3: Communication procedure', *ibid* at p 9.

⁵⁵ Rule 118(2) of the ACHPR Rules.

CHAPTER 4: AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

I. Introduction

The African Court is a continental court established by African countries to ensure the protection of human and peoples' rights in Africa. It complements and reinforces the functions of the ACHPR. The African Court is based in Arusha, Tanzania.

The African Court was established by virtue of Article 1 of the African Court Protocol, which came into force on 25 January 2004.⁵⁶ Only eight of the 30 States Parties to the African Court Protocol had made the declaration recognizing the competence of the Court to receive cases from NGOs and individuals. The eight states are: Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Malawi, Tanzania and Tunisia.⁵⁷

Unlike the ACHPR, the African Court has relatively narrow standing provisions. Article 5 of the African Court Protocol stipulates which entities can submit cases to the African Court:

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

In terms of representation, Rule 28 of the African Court Rules provides that “[e]very party to a case shall be entitled to be represented or to be assisted by legal counsel and/or by any other person of the party’s choice.”

The relationship between the African Court and the African Commission is complementary in nature. This is stipulated clearly in Article 2 of the African Court Protocol,⁵⁸ and sets the position that there is no hierarchy between the two bodies. The African Court’s mandate is to

⁵⁶ The final text of the African Court Protocol was adopted by the Heads of State and Government of the OAU. Members of the AU have agreed to a draft protocol of a merged African Court of Justice and Human Rights (**ACJHR**) 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.

⁵⁷ The 30 States which have ratified the Protocol are: Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Côte d'Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda.

⁵⁸ Article 2 of the African Court Protocol states as follows:

“The [African] Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the [African Commission] ... conferred upon it by the [African Charter] ...”

See, also, Rule 29 of the African Court Rules.

complement and reinforce the functions of the ACHPR in promoting and protecting human and peoples' rights, freedoms and duties in AU member states.⁵⁹ In terms of its judicial authority, the African Court makes binding decisions, whilst the ACHPR makes recommendations.

II. Jurisdiction

The African Court approaches access to the court by first asking whether it has jurisdiction. This is different to the African Commission. The African Court's jurisdiction is contained in Article 3 of the African Court Protocol, which provides as follows:

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

The jurisdiction of the African Court is further provided for in Rule 26 of the African Court Rules, which provides as follows:

“Pursuant to the [African Court] Protocol, the [African] Court shall have jurisdiction:
(a) to deal with all cases and all disputes submitted to it concerning interpretation and application of the [African] Charter, the [African Court] Protocol and any other relevant human rights instrument ratified by the States concerned;
b) to render an advisory opinion on any legal matter relating to the [African] Charter or any other relevant human rights instruments, provided that the subject of the opinion is not related to a matter being examined by the [ACHPR];
c) to promote amicable settlement in cases pending before it in accordance with the provisions of the [African] Charter;
d) to interpret a judgment rendered by itself; and
e) to review its own judgment in light of new evidence in conformity with Rule 67 of these Rules.”
(2) In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.”

The African Court therefore exercises its jurisdiction as follows:⁶⁰

- ***Ratione personae***: The African Court must have jurisdiction over both the complainant and the respondent state. This only arises if the case is brought by an entity contemplated in Article 5 of the African Court Protocol, or by an African organisation seeking an advisory opinion.

⁵⁹ African Court, 'Frequently asked questions', (accessible at: <http://en.african-court.org/index.php/faqs/frequent-questions>).

⁶⁰ See MLDI Manual on Litigation in West Africa at p 36.

- ***Ratione materiae***: This requires the African Court to consider whether the acts complained of violate the African Charter and other international human rights treaties ratified by the respondent state.
- ***Ratione temporis***: This requires the African Court to consider whether the violation occurred after the state concerned had ratified the African Court Protocol or the human rights treaty that it is claimed to have violated. Importantly, the African Court has expressly recognised that violations may be of a continuous nature, which opens its jurisdiction to cases where violations began before the African Court Protocol came into force for any state.⁶¹
- ***Ratione loci***: This requires the African Court to consider whether the violations occurred within the territory of a state party.

This is, for instance clearly set out in *Konaté*, as discussed above.⁶²

It should be noted that, before the African Court, NGOs are only permitted to file a complaint if they have observer status. The African Court has also made clear that it has no jurisdiction over cases brought by individuals and NGOs against states that have not made a declaration under Article 34(6) of the African Court Protocol allowing for such access. In this regard, it has stated as follows:⁶³

“[T]he second sentence of Article 34(6) of the [African Court] Protocol provides that [the African 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 [African] 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.”

Where the African Court has held that it does not have jurisdiction, particularly in respect of complaints brought against states that have not entered a declaration in terms of Article 34(6) of the African Court Protocol, the practice developed by the African Court has been to refer such matters to the African Commission.⁶⁴

⁶¹ *Urban Mkandawire v Malawi*, Application No. 003/2011 (2013) at para 32 (accessible at: <http://www.african-court.org/en/index.php/55-finalised-cases-details/835-app-no-003-2011-urban-mkandawire-v-republic-of-malawi-details>).

⁶² *Konaté*, *ibid* at paras 30-40.

⁶³ *Yogogombaye v Republic of Senegal*, Application No. 001/2008 (2009) at para. 39 (accessible at: <http://www.african-court.org/en/index.php/55-finalised-cases-details/832-app-no-001-2008-michelot-yogogombaye-v-republic-of-senegal-details>); *Mahmoudi v Tunisia*, Application No. 007/2012 (2012) at paras 7-11 (accessible at: <http://www.african-court.org/en/index.php/55-finalised-cases-details/853-app-no-007-2012-baghdadi-ali-mahmoudi-v-republic-of-tunisia-details>).

⁶⁴ *Alexandre v Republic of Cameroon and Another*, Application No. 008/2011 (2011) at para 12 (accessible at: <http://www.african-court.org/en/index.php/55-finalised-cases-details/840-app-no-008-2011-ekollo-m-alexandre-v-republic-of-cameroon-and-federal-republic-of-nigeria-details>). Concerns have been raised about the legal permissibility of this approach by the African Court: see, for instance, the dissenting opinion of Judge Ouguergouz in *Alexandre v Republic of Cameroon and Another* at para 36.

III. Admissibility

Once the African Court has confirmed that it has jurisdiction, the next procedural hurdle is that of admissibility. There are different admissibility requirements depending on whether the case is brought by the ACHPR, an individual or NGO, or by an African organisation seeking an advisory opinion.

A. Cases brought by the ACHPR

The ACHPR has the right to take cases to the African Court in its own name against any state that has ratified the African Court Protocol. Rule 118 of the ACHPR Rules of Procedure provides that the African Court has indicated that it will bring cases before the African Court in the following circumstances:

- if the ACHPR 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 set out in Rule 112(2);
- if the ACHPR 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 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.

B. Cases brought by an individual or NGO

Where states have made a declaration in terms of Article 34(6) of the African Court Protocol, the questions of admissibility are very similar to those applied by the ACHPR, as set out above. Rule 40 of the African Court Rules mirrors the seven requirements for admissibility contained in Article 56 of the African Charter, and must all be met in order for a case to be deemed admissible. In this regard, three of these requirements deserve particular mention in light of the African Court's pronouncements on them: compatibility (Rule 40(2) of the African Court Rules); local remedies (Rule 40(5) of the African Court Rules); and reasonable time (Rule 40(6) of the African Court Rules).

- **Compatibility:** Rule 40(2) requires that applications to the African Court comply with the Constitutive Act of the AU and the African Charter. This requires sufficient *prima facie* evidence that the complaint relates to a violation of the African Charter. Although it is preferable to cite which articles of the African Charter are alleged to have been violated, the African Court has confirmed that it is not necessary to do so. As stated by the African Court, “where only national law or [the] Constitution has been cited and relied upon in an application, the [African] Court will look for corresponding articles in the [African] Charter or any other human rights instrument, and base its decision thereon”.⁶⁵ However, the case

⁶⁵ *Chacha v Tanzania*, Application No. 003/2012 (2014) at paras 114-115 (accessible at: <http://www.african-court.org/en/index.php/55-finalised-cases-details/850-app-no-003-2012-peter-joseph-chacha-v-united-republic-of-tanzania-details>); *Omary and Others v United Republic of Tanzania*, Application No. 001/2012 (2014) at para 74 (accessible at: <http://www.african-court.org/en/index.php/55-finalised-cases-details/848-app-no-001-2012-frank-david-omary-and-others-v-united-republic-of-tanzania-details>).

must not merely be an appeal against a domestic decision that does not raise genuine human rights issues.⁶⁶

- **Local remedies:** As with the ACHPR, this is arguably the most pertinent and challenging consideration in determining admissibility. Rule 40(5) of the African Court Rules requires that before bringing a dispute to the African Court, the applicant must have utilised all the legal or judicial avenues or forums available domestically to resolve the matter. This generally means that the case must have been brought to the highest appellate court for a decision, and it is usually expected that the case be progressed through the entire court system, even if the applicant is firmly of the view that the case will be unsuccessful before the domestic courts.

As with the ACHPR, the onus rests 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 bears the onus to show what in that particular case they were not required to exhaust that remedy. Also as with the ACHPR, the exceptions to the rule of exhaustion of local remedies apply 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.

Although there have not been enough cases before the African Court to determine a clear approach, the following cases are useful in understanding how the African Court has thus far applied the rules developed by the ACHPR:⁶⁷

- In *Tanganyika Law Society v Tanzania (Tanganyika Law Society)*, it was held that local remedies will generally be judicial remedies, and do not include parliamentary or administrative remedies.⁶⁸
- In *Zongo*, the African Court confirmed that, where local remedies are unduly prolonged, they do not need to be exhausted.⁶⁹
- In *Konaté*, the African Court accepted and applied the ACHPR's test of whether local remedies were available, effective and sufficient.⁷⁰

⁶⁶ *Mtingwi v Malawi*, Application No. 001/2013 (2013) at para 15 (accessible at: <http://www.african-court.org/en/index.php/55-finalised-cases-details/854-app-no-001-2013-ernest-francis-mtingwi-v-republic-of-malawi-details>).

⁶⁷ MLDI Manual on Litigation in West Africa at pp 41-42.

⁶⁸ Application Nos. 009/2011 and 011/2011, (2011) at para 82 (accessible at: <http://www.african-court.org/en/index.php/55-finalised-cases-details/844-app-nos-009-011-2011-tanganyika-law-society-and-legal-and-human-rights-centre-and-reverend-christopher-r-mtikila-v-united-republic-of-tanzania-details>). The African Court stated that “in principle, the remedies envisaged in Article 6(2) of the [African Court] Protocol read together with Article 56(5) of the [African] 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”.

⁶⁹ *Ibid* at para 55.

⁷⁰ *Ibid* at para 113.

- In *Chacha v Tanzania (Chacha)*, the majority of the African Court confirmed that it will apply the same rules on exhaustion of local remedies as the ACHPR.⁷¹
- In *Omary v United Republic of Tanzania*, the African Court held that local remedies would not be considered exhausted in circumstances where the case had not been brought before the domestic court of appeal on its merits, and in circumstances where the delays in the finalisation of the case were owing to internal disagreements between the applicants themselves.⁷²
- **Reasonable time:** Rule 40(6) of the African Court Rules provides that a case must be filed within a reasonable time from the date of local remedies being exhausted, or from the date set by the African Court as being the commencement of the time limit within which it shall be seized with the matter. In *Chacha*, the African Court confirmed that there is no set period after the exhaustion of domestic remedies within which to file a case with the African Court, thereby following the example of the ACHPR that each case will be decided on its merits.⁷³ While there is no specific time limit imposed, it is advisable to submit cases as soon as possible – preferably within six months of exhaustion of domestic remedies – or to provide compelling factual and contextual reasons why it was not possible to do so. In *Tanganyika Law Society*, for example, the African Court held that one 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 African Charter.⁷⁴

C. Cases brought by an African organisation for an advisory opinion

Article 4 of the African Court Protocol provides that any member state of the AU, the AU itself or any of its organs, or any African organisation recognised by the AU may request the African Court to provide an opinion on any legal matter relating to the African Charter or any other relevant human rights instruments. This is subject to the proviso that an advisory opinion cannot be requested on a matter being examined by the ACHPR.⁷⁵ As with the ACHPR, advisory opinions should only be sought for the interpretation of the law, and not as an attempt to bring a case against a state.

To date, the African Court has been strict in its interpretation of the standing requirements, although jurisprudence on this is still developing.⁷⁶ In particular, the African Court has so far only been included to allow NGOs 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 ACHPR.

IV. Advisory opinions

Further with respect to advisory opinions, where a party does have the requisite standing to make such a request, Rule 68(1) of the African Court Rules requires that the request for an

⁷¹ *Ibid* at paras 142-145.

⁷² *Ibid* at para 137.

⁷³ *Ibid* at para 155.

⁷⁴ *Ibid* at para 83.

⁷⁵ Article 4 of the African Court Protocol; Rule 68(3) of the African Court Rules.

⁷⁶ For further discussion, see MLDI Manual on Litigation in West Africa at pp 43-44.

advisory opinion must be on legal matters, and must state with precision the specific questions on which the opinion of the African Court is sought. In terms of Rule 68(2), the request must specify the following: the provisions of the African Charter or of any other international human rights instrument in respect of which the advisory opinion is being sought; the circumstances giving rise to the request; and the names and addresses of the representatives of the entities making the request.

On receipt of a request for an advisory opinion, the Registrar of the African Court will transmit the request to member states, the ACHPR and any other interested party.⁷⁷ The African Court may receive written submissions from states parties and other interested entities,⁷⁸ and after considering the written submissions may decide whether or not to hold oral proceedings.⁷⁹ The delivery of an advisory opinion by the African Court will take place in open court, although it may decide otherwise.⁸⁰

V. What to expect when litigating a case before the African Court?

It is trite that careful regard should be had to the African Court Protocol and the African Court Rules to ensure that there is compliance with the necessary procedure. Further, the African Court has published Practice Directions as a guide to litigants.⁸¹

All written filings and communications must be challenged through the Registrar of the African Court.⁸² The Practice Directions of the African Court stipulate the format, content and style with which filings must comply.⁸³ Notably, an application may be filed by registered post, delivered by hand or sent via email (provided that the original is subsequently submitted to the Registrar of the African Court).⁸⁴ Practically, the African Court's willingness to accept filings by email this significantly eases the burden of filing before the African Court, particularly in instances where parties are not based at the seat of the Court: the filings can be sent via email to the Registrar of the African Court – who then distributes the filings to the other parties – and the originals can be sent thereafter to the Registrar by registered mail.

The Practice Directions provide that 30 days prior to the hearing, the applicant and respondent may file heads of argument not exceeding five pages,⁸⁵ and submit the following: name of legal representative(s); contact details for each legal representative; a paragraph of the nature of the matter and relief sought; a list of authorities used and copies of judgments to be relied upon; and the language to be used in presenting arguments.⁸⁶

⁷⁷ Rule 69 of the African Court Rules.

⁷⁸ Rule 70 of the African Court Rules.

⁷⁹ Rule 71 of the African Court Rules.

⁸⁰ Rule 73(1) of the African Court Rules.

⁸¹ Practice Directions of the African Court, October 2012 (**Practice Directions**) (accessible at: <http://www.african-court.org/en/images/Practice%20Directions/Practice%20Directions%20to%20Guide%20Potential%20Litigants%20En.pdf>).

⁸² Section 9 of the Practice Directions.

⁸³ Sections 12-21 of the Practice Directions.

⁸⁴ Section 24 of the Practice Directions.

⁸⁵ Section 29 of the Practice Directions.

⁸⁶ Section 28 of the Practice Directions.

The ordinary sessions of the African Court are held in March, June, September and December annually, or at any other period as it may deem fit; it may also hold extraordinary sessions.⁸⁷ As a general principle, the African Court conducts its proceedings in public and cases are heard in open court, although it is permitted to hold proceedings *in camera* if it is of the opinion that it would be in the interest of public morality, safety or public order to do so.⁸⁸

The hearing is conducted by the Presiding Judge, who prescribes the order in which the representatives of the parties are heard.⁸⁹ As the African Court live streams and makes recordings of its hearings publicly available, prospective litigants may consider viewing such recordings beforehand to get a general sense of the way in which the African Court operates and engages with litigants.

The representatives are required to introduce themselves to the Presiding Judge at least 30 minutes before the commencement of the hearing, and attend a pre-hearing meeting between the Presiding Judge and the other legal representatives.⁹⁰ A judge of the African Court is referred to as “Honourable Justice”, and the bench is referred to as “the Court”.⁹¹

The African Court consists of eleven judges, although seven judges hearing a matter is sufficient for there to be quorum. Rule 47(1) of the African Court Rules provides that the Presiding Judge or any Judge may put questions to the representatives of the parties.⁹² In practice, each of the main parties is allocated time to make argument on admissibility and the merits (usually 45 minutes), whereafter each judge has the opportunity to question the legal representatives. The legal representatives are then given the opportunity to prepare overnight, and return the next day to respond to the questions posed and reply to the other side’s arguments.⁹³

Rule 47(1) of the African Court Rules also provides that where there are witnesses, experts, and other persons appearing before the African Court, the judges are permitted to ask them any questions relating to the matter. Further, the representatives of the parties are entitled to examine, cross-examine and re-examine the witnesses, experts and other persons who appear before the African Court, as the case may be.⁹⁴

With regard to evidence, Article 26(1) of the African Court Protocol provides that the African Court “shall hear submissions by all the parties and if deemed necessary, hold an enquiry”. The African Court may receive written and oral evidence, including expert testimony, in order to make its decision.⁹⁵ The African Court, as a judicial body, is likely to apply stricter evidentiary rules than the ACHPR. Further, Rule 45 of the African Court Rules provides as follows:

⁸⁷ Section 5 of the Practice Directions.

⁸⁸ Article 8 of the African Court Protocol; Rule 43 of the African Court Rules.

⁸⁹ Rule 44 of the African Court Rules.

⁹⁰ Sections 5-6 of the Practice Directions.

⁹¹ Section 8 of the Practice Directions.

⁹² Rule 47(2) of the African Court Rules.

⁹³ This, for instance, was the procedure followed during the hearing of *Konaté*, *ibid.*

⁹⁴ Rule 47(2) of the African Court Rules.

⁹⁵ Article 26(2) of the African Court Protocol.

“(1) The [African] Court may, of its own accord, or at the request of a party, or the representatives of the [ACHPR], where applicable, obtain any evidence which in its opinion may provide clarification of the facts of a case. The [African] Court may, *inter alia*, decide to hear as a witness or expert or in any other capacity any person whose evidence, assertions or statements it deems likely to assist it in carrying out its task.
(2) The [African] Court may ask any person or institution of its choice to obtain information, express an opinion or submit a report to it on any specific point.
(3) The [African] Court may, at any time during the proceedings, assign one or more of its Members to conduct an enquiry, carry out a visit to the scene or take evidence in any other manner.”

This provision is relevant to digital rights litigants who may seek to file expert evidence relating to the technical or technological aspects of the case in question.

In terms of the sources of law that the African Court will consider in reaching its decision, Article 7 of the African Court Protocol provides that the African Court “shall apply the provisions of the [African] Charter and any other relevant human rights instruments ratified by the States concerned”. This does not, however, mean that the African Court will not consider other key sources of law. As mentioned, it is always advisable to support a case with, for instance, the Declaration of Principles on Freedom of Expression in Africa, jurisprudence from the ACHPR, the African Court itself and other regional courts; and international standards and case law that may be relevant.

The Registrar of the African Court is responsible for making a verbatim recording of every hearing.⁹⁶ This recording is sent to the representatives of the parties, who are allowed to make corrections provided that this does not affect the substance of what was said.⁹⁷ Once corrected, the verbatim record will be signed by the President and the Registrar, and constitutes a true reflection of the proceedings.⁹⁸ The proceedings are also recorded and stored in the archives of the African Court.⁹⁹

Article 28(1) of the African Court Protocol stipulates that the African Court will render its judgment within 90 days of having completed its deliberations. Parties will be notified of when the judgment is expected to be handed down, and judgments are read in open court.¹⁰⁰ The decision is made by a majority of the members of the panel, with the presiding judge having a casting vote in the event of a tie.¹⁰¹ Any member of the panel that heard the case may deliver a separate or dissenting opinion.¹⁰² With regard to judgments on reparations, the African Court

⁹⁶ Rule 48(1) of the African Court Rules. The verbatim recording includes the composition of the African Court at the hearing; list of the persons appearing before the African Court; text of statements made, questions put, and answers given; text of any decision delivered by the Court during the hearing.

⁹⁷ Rule 48(2) of the African Court Rules.

⁹⁸ Rule 48(3) of the African Court Rules.

⁹⁹ Rule 49 of the African Court Rules.

¹⁰⁰ Article 28(5) of the African Court Protocol.

¹⁰¹ Rule 60(3)-(4) of the African Court Rules.

¹⁰² Rule 60(5) of the African Court Rules.

may either include this in the judgment on the merits, or in a separate decision if the circumstances require.¹⁰³

VI. Amicus curiae

As mentioned, Rule 45(1) of the African Court Rules provides that the African Court may decide to hear “as a witness or expert or in any other capacity any person whose evidence, assertions or statements it deems likely to assist it in carrying out its task”. This has become a popular mechanism, and there have already been a number of successful *amici curiae* applications filed by NGOs.¹⁰⁴ The African Court is also empowered in terms of Rule 45(2) to ask any person or institution to obtain information, express an opinion or submit a report to it at any point.

The procedure for making a request to act as *amicus curiae* is contained in the Practice Directions of the African Court.¹⁰⁵ An individual or organisation wishing to act as *amicus curiae* must submit a request to the African Court, specifying the contribution that they would like to make with regard to the matter.¹⁰⁶ If the African Court decides to grant the request, the person or organisation making the request will be notified by the Registrar and invited to make submissions and provided with all pleadings.¹⁰⁷ The Practice Directions make clear that the decision on whether or not to grant a request to act as *amicus curiae* is at the discretion of the African Court.¹⁰⁸

In addition to providing written submissions, *amici curiae* may also be invited to make oral submissions at the hearing of the matter.¹⁰⁹

VII. Interim measures

Article 27(2) of the African Court Protocol provides that “[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the [African] Court shall adopt such provisional measures it deems necessary.” 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.¹¹⁰ As the African Court only sits during the sessions, it may be more difficult to persuade the judges to grant interim measures where the request comes at a time outside of those sessions. However, in cases of extreme urgency, the President of the African Court is empowered convene an extraordinary session to decide on measures to be taken.¹¹¹

¹⁰³ Rule 63 of the African Court Rules.

¹⁰⁴ For instance, in *Konaté*, *ibid* at para 20, an *amicus curiae* brief was submitted by 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.

¹⁰⁵ Sections 42-47 of the Practice Directions.

¹⁰⁶ Section 42 of the Practice Directions.

¹⁰⁷ Section 44 of the Practice Directions.

¹⁰⁸ Section 47 of the Practice Directions.

¹⁰⁹ This was done, for instance, in *Konaté*, *ibid*.

¹¹⁰ Rule 51(1) of the African Court Rules.

¹¹¹ Rule 51(2) of the African Court Rules.

The procedure for making a request for interim measures is contained in the Practice Directions.¹¹² Any request for interim measures must state the reasons, and must specify in detail the extreme gravity and urgency, as well as the irreparable harm that is likely to be caused.¹¹³ The request must be accompanied by all supporting documents that could substantiate the applicant's allegations, including any relevant domestic court or other decisions.¹¹⁴ The Practice Directions provide that requests for interim measures must be filed within a reasonable time.¹¹⁵

The African Court has, for instance, exercised its power to grant interim remedies in the following cases:

- In *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya*, a number of NGOs brought a communication before the ACHPR against Libya, asking for provisional measures during the conflict in 2011. The ACHPR held that it was impossible to grant interim measures as these would be ignored by the Libyan government, but agreed that the situation was one of serious or massive violations and thus referred the case to the African Court. The African Court immediately granted interim measures;¹¹⁶ although this was never complied with by Libya, it does nevertheless show a willingness on the part of the African Court to exercise this power in appropriate circumstances.
- In *Konaté*, the applicant requested the immediate release of an imprisoned journalist as a provisional measure, or, alternatively adequate medical care. The African 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".¹¹⁷ A consideration of this question would therefore "adversely affect consideration of the substantive case."¹¹⁸ Concerning the request for adequate medical care, the African Court noted that "the situation in which the applicant finds himself appears to be a situation that can cause irreparable harm".¹¹⁹ The African Court therefore stated that the Applicant was entitled to all necessary medical care and accordingly ordered provisional measures.¹²⁰

¹¹² Sections 48-53 of the Practice Directions.

¹¹³ Section 49 of the Practice Directions.

¹¹⁴ Section 51 of the Practice Directions.

¹¹⁵ Section 53 of the Practice Directions.

¹¹⁶ *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 (accessible at: <http://en.african-court.org/index.php/judges/55-finalised-cases-details/836-app-no-004-2011-african-commission-on-human-and-peoples-rights-v-great-socialist-people-s-libyan-arab-jamahiriya-details>).

¹¹⁷ *Ibid*, Order of Provisional Measures at para 6.

¹¹⁸ *Id* at para 19.

¹¹⁹ *Id* at para 22.

¹²⁰ *Id*.

VIII. Remedies

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

- In *Zongo*, the African Court ordered Burkina Faso to re-open the investigation into the murder of the deceased; pay damages to the victims' families; take measures to prevent the recurrence of such violations; and report back to the African Court within six months of the implemented judgment.¹²¹
- In *Konaté*, the African Court ordered Burkina Faso to amend its legislation on defamation by repealing custodial sentences for acts of defamation 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 African Charter and other international instruments.¹²² In respect of the applicant, the African Court noted that the state was “required to make full reparation for the damage it has caused” to both the applicant and his family. The African Court therefore ordered the state to expunge the applicant’s judicial records, including criminal convictions; pay an amount of damages and expenses; and submit a report to the African Court on the implementation of the decision within six months.¹²³

IX. Review of judgments

In terms of Article 28(3) of the African Court Protocol and Rule 67 of the African Court Rules, a party may seek a review of a decision of the African Court. This is only possible in circumstances where new evidence is discovered after the decision has been made, and as such this power of review will likely only be resorted to in limited circumstances. An application for review must be filed within six months after the party acquired knowledge of the new evidence.¹²⁴ If the African Court so instructs, the Registrar will then transmit a copy of the application to the other parties concerned and invite them to submit written observations.¹²⁵ An application for review does not stay the execution of a judgment, unless the African Court decides otherwise.¹²⁶

X. Enforcement

Article 30 of the African Court Protocol provides that “[t]he State Parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution”.

¹²¹ *Ibid*, Ruling on Reparations.

¹²² *Ibid* at para 176.

¹²³ *Id*, Judgment on Reparations at paras 9, 16 and 60.

¹²⁴ Rule 67(1) of the African Court Rules.

¹²⁵ Rule 67(3) of the African Court Rules.

¹²⁶ Rule 67(5) of the African Court Rules.

CHAPTER 5: EAST AFRICAN COURT OF JUSTICE

I. Introduction

The EACJ is one of the organs of the East African Community (EAC), and is established under Article 9 of the Treaty for the Establishment of the EAC (**EAC Treaty**). The work of the EACJ is further governed by the EACJ Rules. The major responsibility of the EACJ is to ensure adherence to law in the interpretations and application of, and compliance with, the EAC Treaty. It is a judicial body that serves the partner states of the EAC: Burundi; Kenya; Rwanda; South Sudan; United Republic of Tanzania; and Uganda.¹²⁷

Following the revival of the EAC in November 1999, the EACJ replaced the defunct East African Court of Appeal, and became operational in November 2001. It holds different composition and jurisdiction from its predecessor; in particular, the EACJ is an international court, whilst the East African Court of Appeal only handled appeals from national courts.

The seat of the EACJ is currently in Arusha, although this remains the temporary seat until the permanent seat is decided. The EACJ is empowered to conduct its activities at a place other than at the seat if it considers it desirable to do so, including the hearing of cases.¹²⁸ This is aimed at improving the accessibility of the EACJ and bringing it nearer to those who may be located far away from its seat. As a matter of practice, whenever a case involves parties from the same country outside of the seat, the EACJ holds the hearing and delivers judgment in the capital of that partner state.¹²⁹ The high courts of the partner states serve as sub-registries, in an effort to make the EACJ more accessible and improve efficiency.

Any legal or natural person who is resident in a partner state has standing to refer a determination to the EACJ.¹³⁰ In this regard, the EACJ has explained as follows:¹³¹

“[P]rior to submitting a Reference before the Court, any person must meet the following conditions:

- a) Be a legal or natural person; and
- b) Be resident of an EAC Partner State; and
- c) Be challenging the legality of any Act, regulation, directive, decision, and action of the said Partner State or an institution of the Community.”

Article 37 of the EAC Treaty provides that every party may be represented by an advocate entitled to appear before a superior court of any of the partner states. According to Rule 17(1) of the EACJ Rules, a party to any proceedings in the EACJ Court may appear in person or by an agent and may be represented by an advocate.

¹²⁷ EAC, ‘EAC partner states’ (accessible at: <https://www.eac.int/eac-partner-states>).

¹²⁸ Rule 6 of the EACJ Rules.

¹²⁹ Dr J.E. Ruhangisa (Registrar of the EACJ), ‘The East African Court of Justice: Ten years of operation’, November 2011 at p 4 (accessible at: <http://eacj.org/wp-content/uploads/2013/09/EACJ-Ten-Years-of-Operation.pdf>).

¹³⁰ Article 30(1) of the EACJ Rules.

¹³¹ *Magezi v The Attorney General of the Republic of Uganda*, Reference No. 5 of 2013 (2014) at para 27 (accessible at: <http://eacj.org/?cases=godfrey-magezi-vs-the-attorney-general-of-the-republic-of-uganda>).

II. Human rights cases before the EACJ

A particular consideration to bear in mind when litigating cases before the EACJ is that it does not have formal or express jurisdiction over human rights cases.¹³² However, the EACJ has shown a consistent approach of being willing to expand its human rights mandate within the remit of the EAC Treaty.¹³³ In this regard, the EACJ will not ignore human rights violations, provided that the conduct also violates other principles protected under the EAC Treaty.

Accordingly, most human rights cases before the EACJ will be brought and determined by the EACJ as violations of the principles of good governance and the rule of law under Articles 6(d) and 7(2) of the EAC Treaty. In this regard, Article 6(d) of the EAC Treaty provides as follows:

“Fundamental principles of the Community

The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:

...

(c) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the [African Charter]”.

Furthermore, Article 7(2) of the EAC provides that:

“Operational principles of the Community

...

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

In terms of Article 8(1)(c) of the EAC Treaty, partner states undertake to abstain from any measures likely to jeopardise the achievement of the objectives of the EAC Treaty.

In *Katabazi and Others v Secretary General of EAC and Another*, the East African Court summarised the position as follows:¹³⁴

“Article 7 spells out the operational principles of the Community which govern the practical achievement of the objectives of the Community in Sub-Article (1) and seals that with the undertaking by the Partner States in no uncertain terms of Sub-Article (2): The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights. Finally, under

¹³² See Article 27(2) of the EAC Treaty.

¹³³ For examples of cases in which the EACJ has dealt with human rights cases as violations of the EAC Treaty, see MLDI Manual on Litigation in East Africa at p 53.

¹³⁴ *Katabazi and Others v Secretary General of EAC and Another*, Reference No. 1 of 2007 (2007) p 16 (accessible at: <http://eacj.org/?cases=james-katabazi-and-21-other-vs-secretary-general-of-the-east-african-community-and-attorney-general-of-the-republic-of-uganda>).

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

As the EACJ put it in *East Africa Law Society v The Attorney General of the Republic of Burundi*: “[T]he Treaty provisions alleged to have been violated have, through Burundi’s voluntary entry into the Treaty, been crystallized into actionable obligations, now stipulated in among others, Articles 6(d) and 7(2) of the Treaty, breach of any of which by the Republic of Burundi (1st Respondent) would give rise to infringement of the Treaty.”¹³⁵

In *Burundi Journalists’ Union*, the EACJ held that violations of freedom of were justiciable as violations of the EAC Treaty. The EACJ reasoned that “there is no doubt that freedom of the press and freedom of expression are essential components of democracy.”¹³⁶ The EACJ further noted that “under Articles 6(d) and 7(2), democracy must of necessity include adherence to press freedom”¹³⁷ and a “free press goes hand in hand with the principles of accountability and transparency which are also entrenched in Articles 6(d) and 7(2)”. Accordingly, the EACJ has accepted that violations of freedom of expression and of the press are justiciable as violations of the EAC Treaty.

In freedom of expression cases – and particularly cases involving journalists and members of the media – there is therefore a clear argument to be made that such cases trigger the principles of democracy, the rule of law, accountability, transparency, social justice, and so on. This will arguably similarly extend to digital rights cases. As is apparent from the above, the EACJ has been receptive to this approach, and has been willing to expand its human rights mandate within the remit of the EAC Treaty. Importantly, it should still be argued that the violations complained of are not pure human rights violations, and to align the case and the relief sought closely with the provisions of the EAC Treaty.

III. Jurisdiction

The jurisdiction of the East African Court is set out in Articles 27 and 30 of the EAC Treaty. Article 27 states as follows:

“(1) The Court shall initially have jurisdiction over the interpretation and application of this Treaty: Provided that the Court’s jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.

¹³⁵ *East Africa Law Society v The Attorney General of the Republic of Burundi*, Reference No. 1 of 2014 (2015) at para 53 (accessible at: <http://eacj.org/?cases=east-africa-law-society-vs-the-attorney-general-of-the-republic-of-burundi>).

¹³⁶ *Burundi Journalists’ Union v The Attorney General of the Republic of Burundi*, Reference No. 7 of 2013 (2015) (accessible at: <http://eacj.org/?cases=burundi-journalists-union-vs-the-attorney-general-of-the-republic-of-burundi>).

¹³⁷ *Id* at para 82.

(2) The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction.”

Article 30 states further that:

“(1) Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.

(2) The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be.

(3) The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State.”

The EACJ therefore exercises its jurisdiction as follows:

- ***Ratione personae***: In accordance with Article 30(1) of the EAC Treaty, any natural or legal resident in the EAC may bring a case to the EACJ.
- ***Ratione temporis***: Cases will fall within the temporal jurisdiction of the EACJ if they occurred subsequent to the EAC Treaty coming into force for the state against whom the complaint is made. A strict application of the two-months rule and the refusal by the EACJ to recognise continuing violations of the EAC Treaty indicate that time limits will be applied strictly.¹³⁸
- ***Ratione materiae***: Article 30(1) of the EAC Treaty authorises legal and natural persons, resident in a state party to the EAC Treaty, to bring a complaint (that is, to make a reference) to the EACJ on whether an act or omission of a state party is an infringement of the EAC Treaty. The human rights jurisdiction of the EACJ has been dealt with above.

The EACJ has also confirmed that it does not hold appellate jurisdiction over decisions made by domestic courts, making it necessary to ensure that the case does not appear to be an appeal against the decision of the local courts.¹³⁹

¹³⁸ *Mjawasi and Others v The Attorney General of Kenya*, Reference No. 2 of 2010 (2011) at pp. 8-14 (accessible at: <http://eacj.org/?cases=emmanuel-mwakisha-mjawasi-748-others-vs-the-attorney-general-of-the-republic-of-kenya>).

¹³⁹ *Sibalu v Secretary General of the EAC and Others*, Reference No. 1 of 2010 (2010) (accessible at: <http://eacj.org/?cases=hon-sitenda-sebalu-vs-the-secretary-general-of-the-east-african-community>).

IV. Admissibility

Although the EACJ 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:

- **Local remedies:** Notably, there is no requirement that an applicant must first exhaust local remedies before approaching the EACJ.¹⁴⁰ This is based on the argument that the EACJ has primacy in interpreting the EAC Treaty (which is an overt rejection of the subsidiarity principle).¹⁴¹ The EACJ has held that this jurisdiction is not voluntary, and that once an applicant can show an alleged violation of the EAC Treaty, the EACJ must exercise jurisdiction. However, on the flip side, where it does not have jurisdiction it has held that:¹⁴²

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

- **Two-month rule:** Article 30(2) of the EAC Treaty requires that references should be filed with the EACJ within two months of the violation of which the applicant complains. This is a particularly tight timeframe, and compliance is often very difficult. In two cases, the EACJ has held that it will not give any leeway on this requirement and that there is no provision in the EAC Treaty to recognise the concept of continuing violations.¹⁴³

V. Preliminary rulings and advisory opinions

¹⁴⁰ Article 33 of the EAC Treaty states that:

“(1) Except where jurisdiction is conferred on the Court by this Treaty, disputes to which the Community is a party shall not on that ground alone, be excluded from the jurisdiction of the national courts of the Partner States.

(2) Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter.”

¹⁴¹ *Rugumba v Attorney General of Rwanda*, Appeal No.1 of 2012 (2012) at para 39 (accessible at: <http://eacj.org/?cases=plaxeda-rugumba-vs-the-secretary-general-of-the-eac>).

¹⁴² *Democratic Party v Secretary General and the Attorneys General of the Republics of Uganda, Kenya, Rwanda and Burundi*, EACJ Reference No. 2 of 2012 (2013) at paras 30-31 (accessible at: <http://eacj.org/?cases=democratic-party-vs-the-secretary-general-east-african-community-and-the-attorney-general-of-the-republic-of-uganda-and-the-attorney-general-of-the-republic-of-kenya-and-the-attorney-general-of-the-r>).

¹⁴³ *Attorney General of Uganda and Another v Awadh and Others*, Appeal No. 2 of 2012 (2013) at para 31 (accessible at: (<http://eacj.org/?cases=omar-awadh-and-6-others-vs-attorney-general-of-uganda>); *Attorney General of Kenya v Independent Medical Legal Unit*, Appeal No. 1 of 2011 (2013) (accessible at: <http://eacj.org/?cases=attorney-general-of-the-republic-of-kenya-vs-independent-medical-legal-unit-arising-from-appeal>).

Article 34 of the EAC Treaty provides for a national court or tribunal of a partner state to request a preliminary ruling from the EACJ on the interpretation or application of the provisions of the EAC Treaty, or the validity of the regulations, directives, decisions or actions of the EAC. This should be done in circumstances where the national court considers it necessary to obtain the preliminary ruling in order for it to give its judgment. The national court must specify the question raised and the issues to be determined.¹⁴⁴

Article 36 of the EAC Treaty also provides for requests for advisory opinions to be made on questions of law arising from the EAC Treaty.¹⁴⁵ Only the Summit, the Council or a partner state contemplated under the EAC Treaty may request an advisory opinion.¹⁴⁶

VI. What to expect when litigating before the EACJ?

The EACJ includes a First Instance Division and an Appellate Division.¹⁴⁷ The procedure for filing and having cases heard at the EACJ mirrors the procedure at the domestic level in common law countries to a much greater extent than procedures at the ACHPR, in that the case is first made on the papers, allowing the respondent to make preliminary objections on the law, before the trial process during which the Court makes decisions on facts based on the evidence. The official language of the EACJ is English.¹⁴⁸

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

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

Article 37 of the EAC Treaty provides that every party may be represented by an advocate entitled to appear before a superior court of any of the partner states. According to Rule 17(1) of the EACJ Rules, a party to any proceedings in the EACJ Court may appear in person or by an agent and may be represented by an advocate. A corporation or company may either appear

¹⁴⁴ Rule 76(2) of the EACJ Rules.

¹⁴⁵ Article 36(1) of the EAC Treaty.

¹⁴⁶ *Id.*

¹⁴⁷ Article 23(2) of the EAC Treaty. Rule 23(3) provides that: “The First Instance Division shall have jurisdiction to hear and determine, at first instance, subject to a right of appeal to the Appellate Division under Article 35A, any matter before the Court in accordance with this Treaty.”

¹⁴⁸ Article 46 of the EAC Treaty.

by its director, manager or secretary, who is appointed by resolution under the seal of the corporation or the company, or may be represented by an advocate.¹⁴⁹ The advocate for a party is required to file with the Registrar of the EACJ a certificate that he or she is entitled to appear before a superior court of a partner state.¹⁵⁰ A representative of a party other than an advocate is required to file with the Registrar proof of his or her appointment as such representative.¹⁵¹

The EACJ will primarily apply and interpret the EAC Treaty. However, it will also refer to human rights instruments such as the African Charter, jurisprudence of the ACHPR or the African Court, or interpretative guidelines such as the Declaration of Principles on Freedom of Expression in Africa where these can be read to interpret the principles of the rule of law, democracy and good governance. Indeed, even within the limitations of arguing cases within the four corners of the EAC Treaty and avoiding express human rights arguments, it is evident that the East African Court will be persuaded by human rights jurisprudence. In *Burundi Journalists' Union v Attorney General of the Republic of Burundi*, the EACJ applied jurisprudence of the European Court of Human Rights.¹⁵² It is required that copies of judgments and books that will be relied on during the hearing be provided to the Registrar and the other parties prior to the hearing.¹⁵³

XI. Amicus curiae

Rule 36 of the EACJ Rules makes provision for the admission of *amici curiae*. The application must be made by notice of motion, and provide the following information: a description of the parties; the name and address of the *amicus curiae*; a description of the claim or reference; the order in respect of which the *amicus curiae* is applying for leave to intervene; and a statement of the *amicus curiae*'s interest in the result of the case.¹⁵⁴

The applicant for admission as *amicus curiae* is required to serve the application on all parties, who then have 30 days within which to respond.¹⁵⁵ If the EACJ is satisfied that the application is justified, the *amicus curiae* will have the opportunity to submit a statement of intervention in line with the timeframes prescribed by the EACJ.¹⁵⁶

The EACJ has noted that it has a wide discretion to ask for assistance of *amici curiae* if it considers that the interests of justice would be served.¹⁵⁷ This discretion, it held, “must be exercised in a judicious manner based on the facts placed before the Court and not on extraneous matters which, if looked at objectively, would cause injustice to one party”.¹⁵⁸ In

¹⁴⁹ Rule 17(3) of the EACJ Rules.

¹⁵⁰ Rule 17 (5) of the EACJ Rules.

¹⁵¹ Rule 17(6) of the EACJ Rules.

¹⁵² *Ibid* at para 108.

¹⁵³ Rule 67 of the EACJ Rules.

¹⁵⁴ Rule 36(1)-(2) of the EACJ Rules.

¹⁵⁵ Rule 30(3) of the EACJ Rules.

¹⁵⁶ Rule 30(4) of the EACJ Rules.

¹⁵⁷ *Burundi Journalists' Union v The Attorney General of the Republic of Burundi*, *ibid*, Judgment on Admission of Amici Curiae (2014) at para 12 (accessible at: <http://eacj.org/wp-content/uploads/2014/08/RULING-IN-APPLICATION-NO-2-OF-2014-Final-REVISED-3.pdf>).

¹⁵⁸ *Id* at para 13.

describing the test for admission as *amicus curiae*, the EACJ referred to jurisprudence of the South African Constitutional Court, which stipulates three requirements to be met: the *amicus curiae* must have an interest in the proceedings; its submissions must be relevant to the proceedings; and it must raise new contentions which may be useful to the court.¹⁵⁹

The EACJ has not always been willing to admit *amici curiae*. In *Human Rights Awareness Forum v Attorney General for the Republic of Uganda*,¹⁶⁰ a case concerning Uganda's Anti-Homosexuality Act, the EACJ rejected two separate applications for admission. With regard to the first aspirant *amicus curiae* – Uhai Eashri – the organisation was one that advocated for promoted sexual rights. The EACJ rejected the Uhai Eashri's application, stating that:¹⁶¹

“[I]t is manifestly apparent that the spirit and letter of [the Anti-Homosexuality Act] run contrary to the objectives of [Uhai Eashri]. It follows, then, that it would be illogical to attribute neutrality to the [Uhai Eashri], or expect cogent, objective and impartial assistance from it on the matter before this Court in the Reference. In our considered view, a party that seeks to be enjoined as *amicus curiae* has a duty to demonstrate its neutrality and objectivity on the subject matter it seeks to address the court on ... Perhaps more importantly, the participation of such a demonstrably non-neutral party as *amicus curiae* in the Reference would be a dereliction of this Court's duty to exercise its discretionary powers judiciously and not in a manner that would cause injustice to one party.”

The EACJ went on to draw a distinction between an *amicus curiae* and an intervener: “an intervener ... while not having *locus standi* in a matter, does have a partisan interest therein, and an *amicus curiae* ... has an interest in providing objective, cogent assistance to courts to engender the advancement of legal jurisprudence on a given subject”.¹⁶² With regard to the second aspirant *amicus curiae* – Health Development Initiative: Rwanda – the EACJ rejected the application on the basis that as a Rwandan organisation focused on Rwanda, it failed to demonstrate an interest in the outcome of a case regarding a Ugandan law.¹⁶³

The approach of the EACJ in this matter, if rigidly applied, could pose significant challenges for the admission of *amici curiae*. Fortunately, there have been other cases in which the EACJ has been more willing to admit *amici curiae*. For instance, in *Burundi Journalists' Union*, the EACJ admitted eight NGOs as *amici curiae*, although they were limited to filing written submissions only.¹⁶⁴ The NGOs comprised a mix of both regional and international organisations with the promotion of freedom of expression as part of their mandate. It is apparent from the judgment that the EACJ placed significant reliance on the submissions made by the *amici curiae*, and is a good example of the EACJ being willing to engage meaningfully with submissions made by *amici curiae*.

¹⁵⁹ *Id* at para 15.

¹⁶⁰ Application Nos 20-21 (2014), Judgment on Admission of Amici Curiae (accessible at: <http://eacj.org/wp-content/uploads/2015/02/Application-No.-20-21-of-2014.pdf>).

¹⁶¹ *Id* at para 31.

¹⁶² *Id* at para 32.

¹⁶³ *Id* at para 20.

¹⁶⁴ *Ibid* at paras 5 and 8.

In considering the involvement of *amici curiae*, it should also be noted that a procedural difficulty with the admission of *amici curiae* is that a decision to admit can be appealed by an aggrieved party who opposes such admission. This can cause delays in the hearing of the matter. As such, the benefit that the *amici curiae* can bring to the matter should be considered against the possible delay that may be occasioned. To the extent possible, *amici curiae* should apply for admission as early as possible; while this will not necessarily reduce delays, it can assist with trying to avoid them.

VII. Appeals and review of judgments

The EAC Treaty provides for both appeals and review of judgments. Appeals are dealt with in Article 35A of the EAC Treaty, which allows appeals of decisions of the First Instance Division to the Appeals Division on the following issues: on points of law; on jurisdiction; and to review procedural irregularities. Although this procedure appears limited, as it excludes appeals on determination of the facts, it is much more extensive than the limited review procedures allowed by the ACHPR and the African Court. The EACJ therefore provides an important opportunity for decisions to be challenged on appeal.

The EACJ also allows for the review of a judgment, in similar terms to the ACHPR and the African Court, only in circumstances where it is based upon the discovery of some fact which, by its nature, might have had a decisive influence on the judgment if it had been known to the EACJ at the time that the judgment was given.¹⁶⁵ Rule 35(3) provides further the fact in question “was unknown to both the Court and the party making the application, and which could not, with reasonable diligence, have been discovered by the party”. Rule 35(3) also allows for a review in circumstances where the fact was unknown on account of some mistake, fraud or error on the face of the record, or because an injustice has been done.

VIII. Interim orders

Article 39 of the EAC Treaty empowers the EACJ to make any interim orders or issue any directions that it considers necessary or desirable. Such interim orders or directions have the same effect as decisions of the EACJ for the duration of the period. This includes, for instance, the granting of an interim interdict.

In terms of Rule 73 of the EACJ Rules, an application for an interim order or direction must be supported by an affidavit.¹⁶⁶ The EACJ may grant an *ex parte* interim order if it is satisfied that it is just to do so, and will fix a date within 30 days for the hearing of the application before all relevant parties.¹⁶⁷ The EACJ may discharge, vary or set aside an interim order on sufficient cause shown.¹⁶⁸ A person who disobeys or breaches any terms of an interim order can be cited for contempt of court.¹⁶⁹

¹⁶⁵ Article 35(3) of the EAC Treaty.

¹⁶⁶ Rule 73(1) of the EACJ Rules.

¹⁶⁷ Rule 73(2) of the EACJ Rules. In terms of Rule 73(3) of the EACJ Rules, an *ex parte* order will only be granted once and will not be extended.

¹⁶⁸ Rule 74(4) of the EACJ Rules.

¹⁶⁹ Rule 74(5) of the EACJ Rules.

IX. Remedies

All orders of the EACJ must clearly specify the relief granted or other determination of the case.¹⁷⁰ However, the EACJ has been relatively conservative in its use of remedies. For instance, in *Burundi Journalists' Union*, the EACJ held that it had no authority to order a partner state to amend its legislation, and instead issued a declaratory order that the legislation violated the EAC Treaty.¹⁷¹ While the EACJ still ordered the Republic of Burundi to comply with the order, this indicates that the EACJ may primarily rely on declarations of violations of the EAC Treaty.

X. Enforcement

Article 44 of the EAC Treaty deals with the execution of judgments. It provides, amongst other things, that the rules of civil procedure applicable in the state in question will govern the execution of a judgment of the EACJ that imposes a pecuniary obligation.

This is provided for further in Rule 74 of the EACJ Rules, which states that a party who wishes to execute an order of the EACJ must make an application in accordance with Form 9 of the Second Schedule to the EACJ Rules.¹⁷² Although the EAC Treaty and EACJ Rules contain express provisions for the enforcement of judgments, this is still dependant on the courts of the domestic states. As explained by the Registrar of the EACJ in 2011:¹⁷³

“Like any other International Court, the East African Court of Justice due to lack of execution machinery of its own, relies on the procedure obtaining in the country where the Court decree/order is to be executed. This is more so where a judgment of the Court imposes a pecuniary obligation on a person. Execution of such judgment of the Court will be governed by the rules of civil procedure in the Partner State in which execution is to take place. What the Court does through Registrar is to append the order for execution to the authentically verified judgment of the Court. Thereafter the party in whose favour execution is to take place may proceed to execute the judgment, normally after lodging it with respective High Court.”

¹⁷⁰ Rule 69(2) of the EACJ Rules.

¹⁷¹ *Ibid* at para 121.

¹⁷² Rule 74(1) of the EACJ Rules.

¹⁷³ Dr D.E. Ruhangisa (Registrar of the EACJ), *ibid* at pp 6-7.

CHAPTER 6: ECOWAS COMMUNITY COURT OF JUSTICE

I. Introduction

The ECOWAS Court was created pursuant to Articles 6 and 15 of the Revised Treaty of the ECOWAS (**ECOWAS Revised Treaty**).¹⁷⁴ The mandate of the ECOWAS Court is to ensure the observance of law and of the principles of equity and to ensure the proper interpretation and application of the provisions of the ECOWAS Revised Treaty and all other subsidiary legal instruments adopted by ECOWAS.

Notably, Article 66 of the ECOWAS Revised Treaty provides as follows:

“The Press

- (1) In order to involve more closely the citizens of the Community in the regional integration process, Member States agree to cooperate in the area of information.
- (2) To this end they undertake as follows:
 - (a) to maintain within their borders, and between one another, freedom of access for professionals of the communication industry and for information sources;
 - (b) to facilitate exchange of information between their press organs; to promote and foster effective dissemination of information within the Community;
 - (c) to ensure respect for the rights of journalists;
 - (d) to take measures to encourage investment capital, both public and private, in the communication industries in Member States;
 - (e) to modernize the media by introducing training facilities for new information techniques; and
 - (f) to promote and encourage dissemination of information in indigenous languages, strengthening cooperation between national press agencies and developing linkages between them.”

The ECOWAS Court serves as a sub-regional court in respect of the ECOWAS economic community. The ECOWAS member states are Benin, Burkina Faso, Cape Verde, Cote d’Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Sierra Leone, Senegal and Togo.¹⁷⁵ Access to the ECOWAS Court is open to the following:

- All member states and the ECOWAS Commission, for actions brought for failure by member states to fulfil their obligations;
- Member states, the Council of Ministers and the ECOWAS Commission, for determination of the legality of an action in relation to any ECOWAS text;
- Individuals and corporate bodies, for any act of ECOWAS which violates the rights of such individuals or corporate bodies;

¹⁷⁴ The Organisational framework, functioning mechanism, powers, and procedure applicable before the ECOWAS Court are set out in Protocol A/P1/7/91 of 6 July 1991, Supplementary Protocol A/SP.1/01/05 of 19 January 2005, Supplementary Protocol A/SP.2/06/06 of 14 June 2006, Regulation of 3 June 2002, and Supplementary Regulation C/REG.2/06/06 of 13 June 2006.

¹⁷⁵ ECOWAS, ‘Basic information’ (accessible at: <http://www.ecowas.int/about-ecowas/basic-information/>).

- Staff of any of the ECOWAS institutions;
- Persons who are victims of human rights violation occurring in any member state;
- National courts or parties to a case, when such national courts or parties request that the ECOWAS Court interprets, on preliminary grounds, the meaning of any legal instrument of the ECOWAS;
- The Authority of Heads of State and Government, when bringing cases before the ECOWAS Court on issues other than those cited above.

II. Jurisdiction

The jurisdiction of the ECOWAS Court is contained in the Protocol on the Community Court of Justice (**the ECOWAS Protocol**) as amended by Supplementary Protocol (**the ECOWAS Supplementary Protocol**). The ECOWAS 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 ECOWAS Protocol, as amended by the ECOWAS 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 ECOWAS Protocol, as amended, states that access to the ECOWAS Court is open to “[i]ndividuals on application for relief for violation of their human rights.” The ECOWAS Court exercises its jurisdiction as follows:

- ***Ratione personae***: Any individual alleging a violation of human rights committed in any member state may bring a case before the ECOWAS Court. In order to have standing, a plaintiff’s rights need to be directly affected. However, in *Habré v Senegal*, the ECOWAS Court accepted that a persons could be victims if they could potentially be prosecuted under the terms of the impugned criminal law even if they were not at that point being prosecuted or convicted.¹⁷⁶

The ECOWAS Court has also accepted a number of cases where the plaintiffs are organisations acting on behalf of a group of people whose rights have been violated. In *SERAP v Republic of Nigeria*, the ECOWAS Court held than a 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

¹⁷⁶ ECW/CCJ/JUD/06/10 (2010) (accessible at: http://www.chr.up.ac.za/images/files/documents/africancases/institution/ecowas/ecowas_ruling_habre_trial.pdf).

entire communities.¹⁷⁷ The ECOWAS Court has also allowed *actio popularis* cases, thereby allowing citizens to challenge a breach of a public right in court.¹⁷⁸

In *Federation of African Journalists*, the ECOWAS Court rejected the preliminary objection raised that the Federation of African Journalists did not have standing to bring the case. In this regard, it highlighted its previous stance to adopt a more flexible approach to standing to allow persons not directly affected by the alleged violation to have access to the ECOWAS Court to seek justice on behalf of the actual victim.¹⁷⁹

In general, 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.

In respect of corporations, however, the ECOWAS Court has taken the approach that while corporate bodies may not bring human rights actions, they could bring a case alleging a violation of the right to a fair hearing (under the ECOWAS Court's inherent jurisdiction).¹⁸⁰ While corporations cannot claim access to the ECOWAS Court in terms of Article 10(d) of the ECOWAS Protocol, it is possible for corporations to bring a claim under Article 10(c) thereof.¹⁸¹ This is a narrower ground of access, and may be relevance to, for instance, media houses, telecommunications companies or internet service providers seeking to bring a case against the state.

In respect of defendants, the general position is that only ECOWAS member states and institutions can be sued before the ECOWAS Court. However, in *David v Uwechue*, the ECOWAS 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 Court.¹⁸² 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 human rights.

¹⁷⁷ *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) (accessible at: http://www1.chr.up.ac.za/images/files/documents/africancases/institution/ecowas/ecowas_court_justice_ruling_serap_fg_ubec.pdf).

¹⁷⁸ For a discussion of the application of the *actio popularis* doctrine by the ECOWAS Court, see MLDI Manual on Litigation in West Africa at pp 52-53.

¹⁷⁹ *Federation of African Journalists*, *ibid* at p 17. It went further to explain, at p 19, that: "Indeed some violations can as in this case be considered as done against the corporaton of journalists, and not against one person, thus the 'victim' is the whole profession because the injury can be regarded as affecting all the members of that profession".

¹⁸⁰ *Ocean King v Senegal*, ECW/CCJ/APP/05/08 (2011) (accessible at: http://www.chr.up.ac.za/images/files/documents/africancases/institution/ecowas/ecowas_ruling_habre_trial.pdf); http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2011/OCEAN_KING_NIG_LTD_v_R_EPUBLIC_OF_SENEGAL.pdf). See, also, MLDI Manual on Litigation in West Africa at pp 51-52.

¹⁸¹ Article 10(c) of the ECOWAS Protocol states provides for access by "[i]ndividuals and corporate bodies in proceedings from the determination of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies".

¹⁸² ECW/CCJ/APP/04/09 (2011) (accessible at: http://www1.chr.up.ac.za/images/files/documents/africancases/institution/ecowas/ecowas_david_uwechue_2011.pdf).

- ***Ratione temporis***: Cases will fall within the temporal jurisdiction of the ECOWAS Court if they occurred subsequent to the coming into force of the Supplementary Protocol. In *Federation of African Journalists*, the ECOWAS Court considered whether Article 9 of the Supplementary Protocol imposes a time bar on cases. After comparing the English and French versions of Article 9(3), as well as what the ECOWAS Court described as international best practice and the provisions of the fundamental human rights enforcement procedures of most states, the ECOWAS Court concluded that claims for the enforcement of human rights cannot be barred by statutes of limitation.¹⁸³

The ECOWAS 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 incurium* on this point.¹⁸⁴ 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”.¹⁸⁵

The ECOWAS Court also took note of the concept of continuing violations. In this regard, it stated that: “[A]ssuming 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 give rise to a cause of action *die in diem* (day in and out) and postpones the running of time”.¹⁸⁶

- ***Ratione materiae***: Article 9(4) of the ECOWAS Protocol grants the ECOWAS Court jurisdiction over all human rights violations that occur in the jurisdiction of members of ECOWAS. However, it does not define the rights to be applied by the ECOWAS Court. Article 4(g) of the ECOWAS Revised Treaty 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 ECOWAS Revised Treaty also includes protections for human rights, such as the rights of the press and of journalists in Article 66, mentioned above. This is complimented by article 1(h) of the ECOWAS Protocol on Democracy and Good Governance¹⁸⁷ 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 ECOWAS.

The ECOWAS Community Court of Justice has confirmed that it does not hold appellate jurisdiction over decisions made by domestic courts, and cannot adjudicate on decisions

¹⁸³ *Federation of African Journalists*, *ibid* at p 21.

¹⁸⁴ *Id* at p 22.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ A/SP1/12/01.

made by the domestic courts of member states.¹⁸⁸ This does not, however, mean that it will not adjudicate on human rights violations which have contemporaneously been considered, or even facilitated or ordered, by domestic courts. In this regard, the ECOWAS Court has stated that there is a thin divide between not reviewing a decision as such, but nevertheless hearing the matters that flow from such a decision that raise allegations of human rights being violated.¹⁸⁹

III. Admissibility

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

A. Requirements in the ECOWAS Protocol and *res judicata*

Under Article 10(d) of the ECOWAS Protocol, an individual can access the ECOWAS Court provided that:

- The party is not anonymous. There is no opportunity for a claimant before the ECOWAS Court to seek anonymity, and their name must be included.
- The application is not pending before another international court for adjudication. This substantive bar is that of *lis pendens*. In *Essien v The Gambia*, the ECOWAS Court reiterated that “the bar to bringing action to this Court must be those cases of *lis pendens* in another international court for adjudication.”¹⁹⁰

The ECOWAS 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*, the government argued that the ECOWAS Court could not examine the case due to the fact that the High Court of Abuja had already decided the case and awarded damages, and as such the doctrine of *res judicata* applied.¹⁹¹ The ECOWAS 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.

B. Exhaustion of domestic remedies

It is clear from the case law of the ECOWAS Court that exhaustion of local remedies is not a requirement for filing a case before the court. In *Essien v The Gambia*, the ECOWAS Court held that Article 50 of the African Charter refers only to an obligation to exhaust domestic remedies before cases are brought before the ACHPR, and not to cases before the ECOWAS

¹⁸⁸ *Alade v Federal Republic of Nigeria* ECW/CCJ/APP/5/11 (2012).

¹⁸⁹ *Id* at para 35.

¹⁹⁰ ECW/CCJ/APP/12/11 (2012) at para 26 (accessible at: <http://www.chr.up.ac.za/index.php/browse-by-subject/305-the-gambia-essien-v-the-republic-of-the-gambia-and-another-2007-ahrlr-131-ecowas-2007-.html>).

¹⁹¹ ECW/CCJ/APP/13/11 (2012) at para 13 (accessible at: http://www.courtecowas.org/site2012/pdf_files/decisions/rulings/2012/ALIYU_TASHEKU_V_FEDERAL_REPUBLIC_OF_NIGERIA.pdf).

Court.¹⁹² In other words, while the ECOWAS Court will apply the substantive rights in the African Charter, it will not apply any of the procedural provisions.¹⁹³

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.¹⁹⁴

D. Cases must not be appeals from decisions of national courts

As indicated above, the ECOWAS Court does not hold appellate jurisdiction over decisions made by domestic courts, so it is important to ensure that the case does not appear to be an appeal against the decision of the local courts. 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.

IV. Advisory opinions

According to Article 10 of the ECOWAS Protocol, as read with Article 96 of the ECOWAS Court Rules of Procedure, the Authority, Council, one or more member states, or the Executive Secretary, and any other institution of ECOWAS, may request an advisory opinion by serving a formal notice on the Chief Registrar. The request must indicate the question that should be answered in the opinion, and all relevant documents that may be of use to the ECOWAS Court to assist it in preparing the opinion.

It should be noted that this is a very restricted procedure, as essentially only states parties and organs of ECOWAS can seek advisory opinions. The provisions referred to above do not expressly contemplate individuals or NGOs seeking advisory opinions from the ECOWAS Court.

V. What to expect when litigating before the ECOWAS Court?

As with the EACJ, the procedure for filing and having cases heard at the ECOWAS Court mirrors the procedure at the domestic level in common law countries to a much greater extent than procedures at the ACHPR, 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. The procedure is guided by the ECOWAS Court Rules and the Instructions to the Chief Registrar and Practice Directions¹⁹⁵ (**ECOWAS Court Practice Directions**).

An application to the ECOWAS Court must be made in accordance with Article 11 of the ECOWAS Protocol, as read with Article 33 of the ECOWAS Court Rules. The application must include the name and address of the applicant; the designation of the party against whom the

¹⁹² ECW/CCJ/APP/12/11 (2012) at (accessible at: <http://www.chr.up.ac.za/index.php/browse-by-subject/305-the-gambia-essien-v-the-republic-of-the-gambia-and-another-2007-ahr1r-131-ecowas-2007-.html>).

¹⁹³ *Alade v Federal Republic of Nigeria*, *ibid* at para 31.

¹⁹⁴ *Federation of African Journalists*, *ibid* at p 22.

¹⁹⁵ Accessible at: http://www.courtecowas.org/site2012/pdf_files/registrar_english_correct.pdf.

application is made; the subject-matter of the proceedings and a summary of the pleas in law on which the application is based; the form of order sought by the applicant; and, where appropriate, the nature of any evidence offered in support.

The application must be a maximum of 15 pages long.¹⁹⁶ The applicant must also give an address of service, either in the place where the ECOWAS Court has its seat, or alternatively indicate that the lawyer or agent agrees that service is to be effected by telefax or other technical means of communication. This would allow you to use an email address for service of pleadings. Under Rule 35 of the ECOWAS Court Rules, the defendant must file a defence within one month after the application has been served. The defence must state the name and address of the defendant; the arguments of fact and law relied on; the form of order sought by the defendant; and the nature of any evidence offered by him.

Once the application and the defence have been filed, the applicant can file a reply within one month, after which the defendant may file a rejoinder within one month thereafter. It is important to remember that these time limits can be waived by the ECOWAS Court on application, if good reasons for the delays are given.

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

Once the Judge Rapporteur makes a preliminary report, the ECOWAS Court may proceed as it sees fit, after hearing the parties. This may include, for instance, making the following orders:

- the personal appearance of the parties;
- a request for information and production of documents;
- oral testimony;
- the commissioning of an expert's report; and
- an inspection of the place or thing in question.

In practice, this means that if an applicant wishes the ECOWAS Court to use any of these means of investigation, this should be expressly requested. This applies to, for instance, a request to make oral submissions, to call witnesses to provide oral evidence, an inspection, or for an expert's report. An application may also be made to have the hearing in the country where the violation is alleged to have happened.

The ECOWAS Court has held that the main source for human rights law and obligations would be the African Charter, although it 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*, the ECOWAS Court stated that:¹⁹⁷

¹⁹⁶ Section 9(2) of the ECOWAS Court Practice Directions.

¹⁹⁷ *Ibid* at paras 24-25.

“All 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.”

The ECOWAS Court has also held that while it is not bound by international courts, it can still draw lessons from their judgments, and they will therefore have persuasive value.¹⁹⁸

VI. Amicus curiae

Although the ECOWAS Protocol and the ECOWAS Court Rules of Procedure are silent on *amicus curiae* briefs, these have in the past been submitted to, and accepted by, the ECOWAS Court. Rules regarding interventions are mainly provided in Chapter III of the ECOWAS Court Rules of Procedure, which mention “interveners”, but fails to provide a definition of this concept. With a lack of specific rules, it is suggested that a party interested in being admitted as *amicus curiae* should follow the rules applicable to interveners before the ECOWAS Court. It appears from previous *amici curiae* briefs filed that the same approach should be adopted as with the other courts, in particular to set out the interest of the aspirant party and the relevance of the submissions.

The Rules of Procedure provide that an intervener in a case must be represented.¹⁹⁹ An intervener must submit a request to be permitted to intervene by way of a written application.²⁰⁰ 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.²⁰¹ The ECOWAS 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.²⁰²

Amicus briefs were submitted by Amnesty International in at least two cases before the Court: in *SERAP v Nigeria*, and in *Gomez and Others v The Gambia*.²⁰³ regarding the death penalty. In *Federation of African Journalists*, a number of third party interveners, including the international NGO Redress, the UN Special Rapporteur on Torture and a coalition of eight

¹⁹⁸ *Manneh v The Gambia, ibid.*

¹⁹⁹ Rule 89 of the ECOWAS Court Rules of Procedure, read with Article 12 of the ECOWAS Protocol.

²⁰⁰ Rule 89 of the ECOWAS Court Rules of Procedure.

²⁰¹ Rule 89 of the ECOWAS Court Rules of Procedure, read with Rule 13(3) of the ECOWAS Rules of Procedure regarding the notice.

²⁰² Rule 89 of the ECOWAS Court Rules of Procedure.

²⁰³ 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).

NGOs, were allowed to submit *amici* briefs in the case.²⁰⁴ As noted in the judgment, the aspirant *amici curiae* brought their applications pursuant to the inherent jurisdiction of the ECOWAS Court and Rule 89 of the ECOWAS Court Rules.²⁰⁵ The ECOWAS Court further thanked the *amici curiae* in the judgment, noting that the submissions assisted the ECOWAS Court in reaching an informed decision.²⁰⁶

Notwithstanding the abovementioned admission, the involvement of *amici curiae* still remains relatively rare in comparison to other courts. Reasons for this might include the lack of clear procedure, or it being a process less utilised in civil law countries.²⁰⁷ The approach of applying by way of the intervention procedure has repeatedly been acceptable to the ECOWAS Court thus far.

VII. Review of judgments

There is no appeal structure within the ECOWAS 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 Article 25(1) of the ECOWAS Protocol, which provides that an application for revision of a decision may be made only when it is based on the discovery of a new fact that could be a decisive factor. The cause of this fact being unknown at the time of the judgment should not be 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 Court. The procedure is set out in Rules 91 and 92 of the ECOWAS Court Rules of Procedure.

VIII. Remedies

The ECOWAS Community Court has offered the normal remedies that would be available at the domestic level in ECOWAS countries. The remedies in this regard include damages, declarations, mandatory orders, the release of detainees, and declarations that state conduct has been or is unlawful. 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 to consider the remedies carefully and ensure that both the legal and factual bases for the request have been established for the ECOWAS Court. Indeed, the ECOWAS Court has given some extremely wide-ranging remedies. For example:

- In *Congrès pour la Démocratie et le Progrès (CDP) and Others v Burkina Faso*, in which the ECOWAS Community Court declared that the Electoral Code of Burkina Faso was a

²⁰⁴ See, for example, the submissions filed by Redress in *Federation of African Journalists*, *ibid* (accessible at: <http://www.redress.org/international-jurisdictions/the-federation-of-african-journalists-and-others-v-the-republic-of-the-gambia>).

²⁰⁵ *Federation of African Journalists*, *ibid* at pp 8-9.

²⁰⁶ *Id* at p 62.

²⁰⁷ See F. Viljoen & A.K. Adebé, 'Amicus curiae participation before regional human rights bodies in Africa' 2014 *Journal of African Law* 22 at 38-40 (accessible at: https://repository.up.ac.za/bitstream/handle/2263/40965/Viljoen_Amicus_2014.pdf;sequence=3).

violation of the right to free participation in elections, the ECOWAS Court ordered Burkina Faso to remove all obstacles to participation in the election.²⁰⁸

- In *Manneh*, the ECOWAS 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, having regard to the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights, 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.”²⁰⁹ Nonetheless, the Court considered an award of general damages to be justified in this particular case. This is interpreted as meaning that while compensation may be awarded, the object of such an award must not be punitive.²¹⁰

IX. Enforcement

The decisions issued by the ECOWAS Court are binding, and member states are required to enforce the judgment. Article 22(3) of the ECOWAS Revised Treaty provides that member states and institutions of ECOWAS must immediately take all necessary measures to ensure execution of the decision. Execution may be effected through the domestic courts in the ECOWAS member state, and Rule 67 provides that any costs incurred in executing a judgment or order of the ECOWAS Court must be refunded by the opposite party.

²⁰⁸ ECW/CCJ/JUG/16/15 (2015) (accessible at: http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2015/Aff_CDP_c_1_Etat_du_Burkina.pdf).

²⁰⁹ *Ibid* at paras 36 and 39.

²¹⁰ *Id* at para 43.

CHAPTER 7: SADC TRIBUNAL

I. How the SADC Tribunal was rendered defunct

The SADC Tribunal was established under the terms of the Treaty of the Southern African Development Community (**SADC Treaty**), and the composition, powers, functions and procedures of the SADC Tribunal are set out in the Protocol Pertaining to the Tribunal (**SADC Tribunal Protocol**). The SADC Tribunal was established in August 2005, with its seat in Windhoek, Namibia. Its stated purpose is to ensure adherence to, and the proper interpretation of, the provisions of the SADC Treaty and subsidiary instruments. The SADC member states are Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

However, the SADC Tribunal has effectively been rendered defunct owing to an effort to limit its jurisdiction and preclude individuals from being able to file cases before it. As described on the website of the SADC Tribunal:²¹¹

“After several judgements ruling against the Zimbabwean government, the Tribunal was *de facto* suspended at the 2010 SADC Summit. On 17 August 2012 in Maputo, Mozambique, the SADC Summit addressed the issue of the suspended SADC Tribunal. The SADC Summit resolved that a new Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States.”

The factual matrix leading to the suspension of the SADC Tribunal has recently been canvassed in the South African High Court decision of *Law Society of South Africa and Others v President of the Republic of South Africa and Others*²¹² (**Law Society v President of RSA**). As set out therein, the process of suspension of the SADC Tribunal dates back to a meeting of Heads of State and Government in 2010, when an item was presented concerning the non-compliance with decisions of the Tribunal. According to the minutes of the meeting, it was reflected that, in particular, Zimbabwe’s failure to comply with decisions of the Tribunal was discussed, and it was resolved that the Committee of Ministers of Justice and Attorneys-General would hold a meeting on the legal issues regarding Zimbabwe, and would further review the roles, responsibilities and terms of reference of the Tribunal.

Pending the report to be prepared by the Ministers of Justice and Attorneys-General, the SADC Summit decided that members of the SADC Tribunal would not be reappointed on expiry of their terms in office, and that no new cases would be entertained. It was further decided that the consideration of Zimbabwe’s failure to comply with the SADC Tribunal’s rulings would be deferred under after the completion of the report. The effect of the decision to suspend the appointment of members meant that the SADC Tribunal could no longer function, and was taken despite the appointment of members being mandatory.

²¹¹ Accessible at: <http://www.sadc.int/about-sadc/sadc-institutions/tribun/>.

²¹² High Court of South Africa (Gauteng High Court, Pretoria), Case No. 20392/15 (2018) (accessible at: <http://www.saflii.org/za/cases/ZAGPPHC/2018/4.pdf>).

At a further meeting of Heads of State in May 2011, it was noted that the Committee of Ministers of Justice and Attorneys-General had finalised their study, and confirmed the validity of the First Protocol and Rules of Procedure, as well as that the Tribunal was properly constituted. It was nevertheless then decided that no members of the Tribunal would be reappointed, including those whose terms had expired in 2010 or those whose terms would be expiring later in 2011.

In 2014, the revised Protocol of the SADC Tribunal (**the 2014 Protocol**) was concluded. In terms of Article 33 of the 2014 Protocol, individuals are precluded from lodging disputes before the Tribunal; instead, only member states are permitted to lodge disputes.

The applicants in the matter specifically challenged two decisions that were taken by the South African government: (i) the decision in May 2011, when the President decided to support the resolution in effect suspending the operation of the SADC Tribunal; and (ii) the decision in August 2014, when the President signed the 2014 Protocol. The applicants argued that the combined effect of South Africa's participation in these decisions was to impermissibly suspend South Africa's obligations under international law.

The High Court agreed with the applicants that the decisions taken in effect suspended the activities of the Tribunal by imposing a moratorium on its activities, and interfered with vested rights. The High Court held that the President's signature to the 2014 Protocol was unlawful and unconstitutional, and therefore liable to be set aside. This was equally so in respect of the President's participation in suspending the SADC Tribunal. As stated by the High Court: "The Tribunal and its jurisdiction lie at the heart of the SADC Treaty and fulfil one of its main purposes. Its emasculation by way of its de facto suspension was therefore similarly in conflict with the [SADC Treaty] and South Africa's constitutional obligations".²¹³

The High Court went on to hold that the President's signature of the 2014 Protocol could not be connected to the promotion of democracy, human rights and the rule of law, which were entrenched in the SADC Treaty. In this regard, the High Court described the irrationality of the President's signature as "self-evident", summarising the position as follows:²¹⁴

"Having regard to the facts, it is clear that the irrationality of the signature is self-evident. Instead of supporting the Tribunal, as the [SADC Treaty] envisages, and at the instance of the violator of the Tribunal's orders (the Zimbabwe Government), the Tribunal's jurisdiction was simply signed away, contrary to the advice of the Ministers of Justice and Attorneys-General, contrary to the recommendation of the independent expert appointed to conduct a review on the Tribunal, without consultation and approval of the South African Parliament, in ignorance of the fact that the [SADC Treaty] and the First Protocol had become part of our domestic law, without consulting any of the affected persons whose complaints had been upheld by the Tribunal, and where no alternative had been provided to such litigants who had obtained vested rights before the Tribunal."

²¹³ *Id* at para 67.

²¹⁴ *Id* at para 69.

According to the High Court, the 2014 Protocol severely undermined the SADC Tribunal and detracted from SADC's own stature and institutional accountability, and violated the SADC Treaty itself. Accordingly, the High Court declared that the President's participation in suspending the SADC Tribunal and the subsequent signing of the 2014 Protocol was unlawful, irrational and thus unconstitutional. The order has now been referred to the South African Constitutional Court for confirmation in accordance with section 172(2)(a) of the Constitution of the Republic of South African, 1996.

II. Where to next for the SADC Tribunal?

The 2014 Protocol has not yet entered into force yet, as it does not presently have the requisite number of signatures. According to the High Court decision on *Law Society v President of RSA*, South Africa remains bound by the SADC Treaty and the SADC Tribunal Protocol – and remains so bound until it seeks approval from Parliament to withdraw. The effect of this decision is that as far as South Africa is concerned (and pending confirmation from the Constitutional Court), South Africa still recognises the jurisdiction of the SADC Tribunal as contained in Articles 14 and 15 of the SADC Tribunal Protocol. According to Article 15 of the SADC Tribunal Protocol, the scope of jurisdiction of the SADC Tribunal lies over disputes between natural or legal persons and states. In terms of the Rules of the Tribunal, which were added as an addendum to the SADC Tribunal Protocol, an applicant is defined as a person, member state or institution that has submitted an application to the Tribunal.

However, notwithstanding the insufficient number of signatures and the judgment in *Law Society v President of the RSA*, the practical effect of the suspension and the moratorium imposed has rendered the operations of the SADC Tribunal defunct. It remains unclear what steps, if any, are to be taken to revive the SADC Tribunal in any form at this stage. While there are various efforts underway aimed at its revival, the disappointing position at the time of writing is that the SADC Tribunal does not offer recourse to victims seeking to vindicate their rights.

CHAPTER 8: TEN-POINT CHECKLIST FOR DIGITAL RIGHTS LITIGATION

As mentioned above, before deciding to litigate a case, careful regard should be had to the potential risks involved, including the possibility of reprisals against the claimants. It is important to have a frank discussion to weigh up the negative consequences that may arise against the potentially positive outcomes.

In the event that it is decided to pursue litigation, the checklist below can be a useful tool to potentially assist litigants with planning. However, it should be borne in mind that every case must be decided on its own merits, and there is no golden formula for successful litigation, particularly in the realm of digital rights where both the law and technology are constantly evolving. The complexities are exacerbated when litigating before regional courts, as each court has its own particular procedure and requirements. Careful and strategic planning is therefore indispensable.

CHECKLIST

(i) Standing	Determine whether the applicant has standing to bring the intended matter. For instance, are there any applicable restrictions on whether an individual or NGO can file a case; or is there any requirement that the NGO have observer status?
(ii) Jurisdiction	Determine the jurisdiction of the court under consideration, and whether the matter falls within the required scope. For instance, does the court have jurisdiction over the respondent state; and did the violation occur (or continue, if the court recognises ongoing violations) after the ratification of the relevant legal instrument?
(iii) Admissibility	Determine whether the case meets the test for admissibility required by the court. For instance, does the court require local remedies to be exhausted; if so, has this either been done or is there an appropriate explanation for why it has not?
(iv) Representation	Determine whether there are any restrictions legal counsel appearing before the court. For instance, does the court require that the counsel have the right to practise law in one of the member states? International lawyers could consider partnering with local lawyers to combine international and domestic expertise.
(v) Procedural requirements	Determine the particular procedural requirements of the court, and ensure that these are complied with. For instance, what are the requirements for service and filing; and what are the time periods for filings? It may

	be advisable to have a correspondent law firm at the seat of the court or where there is a sub-registry that can assist with ensuring that the procedural requirements are met timeously.
(vi) Terminology	Digital rights litigation may involve complex terminology and concepts, particularly relating to the technology, that may be unfamiliar to members of the court. Consider how this can best be explained to the judges and other relevant parties to ensure that there is clarity and a proper understanding of the meaning and import of the terms being used. <i>Amici curiae</i> can play a useful explanatory role in this regard.
(vii) Amici curiae	Consider the potential for <i>amici curiae</i> to be admitted, and whether the aspirant organisations under consideration meet the threshold requirements for admission. The advantages of the aspirant <i>amici curiae</i> being admitted should be weighed against the possible delay that the application for admission may cause, and the likelihood of that delay arising.
(viii) Interim relief	Determine whether there are any interim measures that should be sought from the court pending the final outcome of the case, the threshold applied by the court for granting interim measures, and what the court's approach to this has been in previous cases.
(ix) Final relief	Ensure that the final relief sought from the court is carefully phrased with sufficient particularity, and covers the full ambit of relief available from the court. Consider the types of relief that the court is empowered to grant or has granted in previous cases, including damages, amendments to legislation, and structural interdicts.
(x) Enforcement	Determine what mechanisms there are to enforce a decision against a non-compliant state, and the recourse that may be available to a successful litigant in ensuring implementation of the judgment.

GLOSSARY OF KEY TERMS

Admissibility	The suitability of the case for hearing on the merits.
Amicus curiae	A ‘friend of the court’, that is not a party to the litigation but is permitted by the court to join the proceedings to advise it in respect of a question of law or other issue that affects the case in question.
Cause of action	The reason or facts that entitle a person to sue or bring a case to court.
Ex parte application	An application made by one party alone, without the other parties to the case being present.
Jurisdiction	The power of the court or tribunal to hear a case.
Local remedies (or domestic remedies)	Any judicial or legal mechanisms put in place at the domestic level to ensure the effective settlement of disputes.
Non bis in idem	A legal doctrine that provides that no legal action can be instituted twice for the same cause of action.
Prima facie evidence	Evidence that is sufficient, on the face of it, to establish a fact or raise a presumption unless it is disproved or rebutted.
Res judicata	A legal doctrine that provides that once a case is finally decided, the litigant parties are precluded from raising the same issue again, usually unless material new evidence has become available after the final determination of the matter.
Seizure	The formal process by which the ACHPR accepts communications.
Standing (or locus standi)	The right or capacity to bring an action, to be heard or to appear in court or tribunal on a case before it.
Subsidiarity	The basic principle that international forums should only be used when domestic forums have failed to enforce human rights.
