



# **Advocacy before the African Human Rights System**

*A Manual for Attorneys and Advocates*



**Preventing and Remediating Human Rights  
Violations through the International Framework**



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Preventing and Remediating Human Rights Violations through the International Framework***



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## Acronyms and Phrases

1951 Refugee Convention	Convention Relating to the Status of Refugees
ACDHRS	African Centre for Democracy and Human Rights Studies
ACERWC, Child Rights Committee	African Committee of Experts on the Rights and Welfare of the Child
ACommHPR, African Commission	African Commission on Human and Peoples' Rights
AfCHPR, African Court	African Court on Human and Peoples' Rights
African Charter	African (Banjul) Charter on Human and Peoples' Rights
APAI Declaration	African Platform on Access to Information Declaration
ASEAN	Association of Southeast Asian Nations
AU	African Union
AU Assembly	Assembly of Heads of State and Government of the African Union
AU Commission	Commission of the African Union
AU Refugee Convention	African Union Convention Governing Specific Aspects of Refugee Problems in Africa
Charter on Democracy	African Charter on Democracy, Elections and Governance
Children's Charter	African Charter on the Rights and Welfare of the Child
COMESA	Common Market for Eastern and Southern Africa
COMESA Treaty	Treaty Establishing the Common Market for Eastern and Southern Africa
Constitutive Act	Constitutive Act of the African Union
EAC	East African Community
EAC Treaty	Treaty for the Establishment of the East African Community
EACJ	East African Court of Justice
ECCJ	Economic Community of West African States Community Court of Justice
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of East African States
EU	European Union
Freedom of Expression Declaration	Declaration of the Principles on Freedom of Expression in Africa
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
NGO	non-governmental organization

NHRI	national human rights institution
OAS	Organization of American States
OAU	Organization of African Unity
Paris Principles	United Nations Principles relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights
Protocol Establishing the African Court	Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights
Protocol on Democracy and Good Governance	ECOWAS Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security
Revised Treaty	Revised Treaty of the Economic Community of West African States
SADC	Southern African Development Community
SADC Treaty	Treaty of the Southern African Development Community
SADC Tribunal	Southern African Development Community Tribunal
Supplementary Protocol	ECOWAS Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of Said Protocol
Treaty of Lagos	Treaty of the Economic Community of West African States
Universal Declaration	Universal Declaration of Human Rights

## Introduction

As human beings, we are all entitled to enjoy the fundamental liberties and freedoms that allow us to live lives of dignity. These liberties and freedoms are our human rights, and they are recognized under international law. Primarily, country governments are responsible for respecting, protecting, and fulfilling human rights. Holding governments to their human rights obligations, and making these rights a reality, depends largely on the efforts of civil society, including human rights organizations and advocates.

Lawyers, other advocates, and individuals who have suffered human rights abuses can turn to human rights monitoring bodies when the government fails to uphold its obligations. At the United Nations and in three regions of the world (Africa, the Americas, and Europe), human rights monitoring bodies are empowered to: monitor how effectively governments (States) protect human rights in law and in practice, investigate human rights conditions, decide complaints concerning alleged human rights violations by the State, recommend or order government action to remedy or prevent violations, and promote greater understanding and implementation of human rights standards. In two other regions (the Middle East and Southeast Asia), human rights monitoring bodies with fewer functions, and less robust standards, have recently emerged.

In the countries of the African continent, several courts and monitoring bodies promote and protect individuals and groups' human rights. Two of the primary bodies, which are the focus of this manual, are the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights.

Region	Human Rights Body	Intergovernmental Organization	1 <sup>st</sup> Year	Individual Complaints	Number of States
Africa	African Commission on Human and Peoples' Rights	African Union	1987	(Yes)	54 (54)
	African Court on Human and Peoples' Rights	African Union	2006	(Yes)	30 (8)
Americas	Inter-American Commission on Human Rights	OAS	1960	(Yes)	35 (35)
	Inter-American Court of Human Rights	OAS	1979	(Yes)	20 (20)
Europe	European Court of Human Rights	Council of Europe	1959	(Yes)	47 (47)
	European Committee of Social Rights	Council of Europe	1998	(Yes)	43 (15)
Middle East	Arab Human Rights Committee	Arab League	2009	No	14
Southeast Asia	Intergovernmental Commission on Human Rights	ASEAN	2009	No	10

# INTRODUCTION

## About This Manual

This manual is intended to assist civil rights, social justice, and human rights advocates and attorneys in understanding and effectively engaging with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights. These two bodies bear principal responsibility for promoting and protecting human rights in Africa and are primary components of the continental "African human rights system."

This manual's purpose is to identify and explain the significant opportunities that the African human rights system provides for achieving greater recognition, protection, and enforcement of human rights. It is designed to give advocates access to a new set of tools and advocacy strategies to use in pursuit of accountability and redress for injustices and inequalities. This manual may also be of use to individuals and communities who have suffered, or fear, violations of their human rights, and to those studying regional mechanisms for human rights protection.

Effective engagement with the African human rights system requires individuals, or the advocates who represent them, to: understand the human rights obligations of a particular country, or "State;" be able to identify the judicial decisions and other statements that interpret those obligations; be familiar with the opportunities for advocacy; and recognize the potential outcomes, challenges, requirements, and potential pitfalls of those opportunities.

The subsequent chapters are intended to share a basic understanding of how human rights defenders who represent or advocate on behalf of victims of human rights abuses can use the African human rights mechanisms as a complementary advocacy forum where local efforts to change government policies or practices have proven ineffective or insufficient, or where domestic law is less protective of rights than the African human rights standards.

### Questions Addressed

- ✓ What is the African Commission on Human and Peoples' Rights?
- ✓ What is the African Court on Human and Peoples' Rights?
- ✓ What are their functions and activities?
- ✓ What are the opportunities for advocacy and engagement?
- ✓ How does one file a complaint concerning a human rights violation?
- ✓ What factors should be considered before engaging with the Commission or Court?
- ✓ How does one identify the relevant law and decisions?

## Organization of This Manual

- ***Overview of the African Human Rights System***

Chapter one explains the composition and functions of the African Union, describes the origins of the African human rights system, summarizes opportunities for advocacy, identifies the limitations on the mandates of the Commission and Court, and reviews the African human rights instruments and the rights they protect. This section of the manual also discusses the African Committee of Experts on the Rights and Welfare of the Child, as well as other regional courts that play a role in the protection of individuals' fundamental rights in Africa.

- ***The African Commission on Human and Peoples' Rights***

Chapter two describes in greater detail the composition and activities of the African Commission, including its various mechanisms for protecting and promoting human rights, which range from reviewing States' reports on their compliance, to visiting countries to requesting the State to address imminent risks to individuals' human rights. Other topics addressed include the Commission's sessions and its relationship with other African Union bodies.

- ***Engaging with the African Commission: Roles for Advocates***

Non-governmental organizations, national human rights institutions, and other actors can engage with the African Commission in a variety of ways, which are described in the third chapter. These advocacy opportunities include preparing alternative reports on a State's compliance with its human rights obligations, providing information to the Commission's "special mechanisms," participating in the Commission's sessions, and submitting (or supporting) complaints or requests for emergency protection.

- ***The African Commission's Complaints Procedure***

The African Commission receives and decides complaints alleging that a State has violated its human rights obligations in a specific instance. The requirements for submitting such complaints are the focus of the fourth chapter, along with specifics on the stages in which the Commission processes such communications. This chapter also addresses the requirements that apply to emergency protection ("provisional measures") requests and inter-State complaints. Finally, this section identifies some of the most widely cited and landmark decisions issued by the Commission concerning alleged violations.

- ***The African Court on Human and Peoples' Rights***

The African Court is empowered, in certain circumstances, to decide complaints against States for alleged human rights violations. Its composition, mandate, and sessions are the subject of the fifth chapter, which also addresses the challenges facing the Court, including the proposed African Court of Justice and Human Rights.

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- ***Advocacy before the African Court***

The sixth chapter details the opportunities for engagement with the African Court, including requesting advisory opinions, submitting complaints of human rights violations, and preparing *amicus curiae* briefs to guide the Court in pending cases. Much of the chapter focuses on the individual complaints process, including the requirements for complainants and how the Court processes cases. This section also summarizes the African Court's decisions and judgments, to date.

- ***Additional Resources and Information***

The seventh chapter identifies additional sources of information, guidance, and analysis that may be of interest to readers. These resources include links to the documents and information provided by the Commission and Court on their websites, handbooks and guides published by a variety of scholars and organizations, and useful websites for researching the African Court and Commission's decisions.

## Ensuring Effective Engagement

By engaging with the African human rights system – such as by presenting a complaint or submitting information on a State's human rights practices – advocates can raise awareness of a human rights problem and increase pressure for governmental action. Engagement with the African human rights bodies can also help create spaces for dialogue, negotiation, and reform.

However, while all social justice advocates should be aware of the avenues for raising awareness and promoting accountability and redress that are available at the regional level, readers of this manual should be aware that simply engaging with the African human rights system, alone, is frequently insufficient to bring about meaningful change. Rather, ensuring that interaction with the African Commission or Court has a positive and lasting impact on local enjoyment of human rights often requires continued, coordinated efforts to ensure awareness of the issue and maintain public and government support for reform or accountability.

## Minimizing Risk

In many countries, individuals and groups engaged in human rights advocacy, reporting, or education face significant risks. Their lives, livelihoods, and safety may be threatened by private individuals or by government actors. Their colleagues and families may also face such threats.

Having a plan in place to minimize risks before an advocacy strategy is put in place may be advisable. Such a plan could involve partnering with an organization that is based outside the country or that has an international profile and can help deflect or attract attention, as needed. The people or entity posing a threat to the advocate may be less likely to act violently or illegally if they know the world is watching. In other situations, increased attention may not be advisable, and measures may be taken to conceal the involvement or identity of a particular organization or advocate, such as through partnering with another organization that can make the relevant public statements or appearances.



## INTRODUCTION

A number of organizations and networks exist to provide support and protection to human rights defenders at risk. Their services include: advocacy and awareness-raising; implementing security measures; and relocating the advocate. Some programs and organizations offering representation or other support to human rights defenders who face prosecution, retaliation, or threats against their personal safety include: Amnesty International,<sup>1</sup> the East and Horn of Africa Human Rights Defenders Project,<sup>2</sup> Centre for Human Rights of the University of Pretoria,<sup>3</sup> Freedom House,<sup>4</sup> Front Line Defenders,<sup>5</sup> Human Rights First,<sup>6</sup> Institute for Human Rights and Development in Africa,<sup>7</sup> Pan-African Lawyers Union,<sup>8</sup> Peace Brigades International,<sup>9</sup> and the American Bar Association's Justice Defenders Program.<sup>10</sup>

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<sup>1</sup> See Amnesty International, Human Rights Defenders, <http://www.amnesty.org/en/human-rights-defenders>.

<sup>2</sup> See East and Horn of Africa Human Rights Defenders Project, Protection and Security Management Program, <http://www.defenddefenders.org/protection/>.

<sup>3</sup> See Centre for Human Rights, University of Pretoria, <http://www.chr.up.ac.za/>.

<sup>4</sup> See Freedom House, Emergency Assistance Programs, <http://www.freedomhouse.org/program/emergency-assistance-programs>.

<sup>5</sup> See Front Line Defenders, Front Line Emergency Support, <http://www.frontlinedefenders.org/emergency>.

<sup>6</sup> See Human Rights First, Human Rights Defenders, <http://www.humanrightsfirst.org/topics/human-rights-defenders>.

<sup>7</sup> See IHRDA, <http://www.ihrda.org/>.

<sup>8</sup> See Pan African Lawyers Union, <http://www.lawyersofafrica.org/>.

<sup>9</sup> See Peace Brigades International, People We Protect, <http://www.peacebrigades.org/people-we-protect/>.

<sup>10</sup> See American Bar Association, Justice Defenders Program, [http://www.americanbar.org/groups/human\\_rights/justice\\_defenders.html](http://www.americanbar.org/groups/human_rights/justice_defenders.html).

# CHAPTER ONE

## Overview of the African Human Rights System

The African human rights system includes the treaties, principles, and independent organs of the African Union (AU) that promote and protect human rights throughout the continent. The three primary organs of this system are the African Commission on Human and Peoples' Rights (African Commission),<sup>11</sup> the African Court on Human and Peoples' Rights (African Court),<sup>12</sup> and the African Committee of Experts on the Rights and Welfare of the Child (Child Rights Committee),<sup>13</sup> created under the auspices of the AU. While each body has a distinct mandate, both the African Commission and African Court can decide individual complaints against States, hold public hearings, and request immediate action by States when an individual or other subject of a pending complaint is at risk of irreparable harm. The Child Rights Committee receives and considers individual complaints of alleged violations of the African Charter on the Rights and Welfare of the Child.<sup>14</sup> Both the African Commission and Child Rights Committee also monitor the protection of human rights across the continent and States' implementation of their human rights obligations.

In addition, other regionally focused bodies are present on the continent whose mandates include protecting human rights. The first of these is the Economic Community of West African States (ECOWAS) Community Court of Justice. Initially empowered to interpret only the ECOWAS Treaty and decide contentious cases between ECOWAS Member States, the ECOWAS Community Court of Justice (ECCJ) recently experienced an expansion of its jurisdiction, enabling it to determine cases alleging human rights violations.<sup>15</sup>

The Southern African Development Community (SADC) Tribunal was also competent to hear individual complaints of alleged human rights violations until its suspension in 2010 following a series of judgments finding against the government of Zimbabwe. In 2012, a revised protocol signed by SADC Member States removed the human rights mandate of the Tribunal, along with its ability to decide individual complaints.<sup>16</sup>

The East African Court of Justice (EACJ), an organ of the East African Community (EAC), cannot decide individual complaints of alleged human rights violations; however, its establishing treaty lists

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<sup>11</sup> Throughout this text, the African Commission on Human and Peoples' Rights will be referred to as the "Commission" or the "African Commission." In footnotes, it will be referred to by the acronym "ACommHPR."

<sup>12</sup> Throughout this text, the African Court on Human and Peoples' Rights will be referred to as the "Court" or the "African Court." In footnotes, it will be referred to by the acronym "AfCHPR."

<sup>13</sup> Throughout this text, the African Committee of Experts on the Rights and Welfare of the Child will be referred to as the "Child Rights Committee." In footnotes, it will be referred to by the acronym "ACERWC."

<sup>14</sup> ACERWC, Home, <http://acerwc.org/>; African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999) OAU Doc. CAB/LEG/24.9/49 [hereinafter Children's Charter], available at <http://acerwc.org/the-african-charter-on-the-rights-and-welfare-of-the-child-acrwc/acrwc-charter-full-text/>.

<sup>15</sup> Community Court of Justice – ECOWAS, About Us, [http://www.courtecowas.org/site2012/index.php?option=com\\_content&view=article&id=2&Itemid=5](http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=2&Itemid=5).

<sup>16</sup> Southern African Development Community, SADC Tribunal, <http://www.sadc.int/about-sadc/sadc-institutions/tribun/>.

# OVERVIEW OF THE AFRICAN HUMAN RIGHTS SYSTEM

fundamental guiding principles that include the recognition, promotion, and protection of human rights.<sup>17</sup>

The Common Market for Eastern and Southern Africa (COMESA), a regional economic community, is equipped with its Court of Justice, which settles disputes arising under the COMESA Treaty between its Member States, the Secretary General, individuals, and corporations. Similar to the EACJ, the COMESA Court of Justice lacks jurisdiction to hear individual complaints of human rights violations, but is nevertheless guided by the COMESA Treaty, which recognizes the human and peoples' rights identified in the African Charter on Human and Peoples' Rights.<sup>18</sup>

## The African Union

The African Union is a continental union of States organized to promote democracy, rule of law, human rights, peace, and security in Africa.<sup>19</sup> It was established in 2000 through the Constitutive Act of the African Union (Constitutive Act) and replaced the Organization of African Unity (OAU).<sup>20</sup> Headquartered in Addis Ababa, Ethiopia, the AU envisions “an integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in [the] global arena.”<sup>21</sup> Accordingly, the objectives and principles, as set forth in articles 3 and 4 of the Constitutive Act, include achieving unity and solidarity among African States as well as encouraging respect for human rights.<sup>22</sup>

The Constitutive Act establishes the main organs of the AU. The “supreme organ of the Union” is the Assembly of Heads of State and Government (AU Assembly). The AU Assembly monitors the implementation of the policies and decisions of the Union and ensures compliance with them by all Member States. The AU Assembly can also impose sanctions on Member States that fail to comply with AU decisions, by such means as denying communication pathways with other Member States and taking other political or economic measures.<sup>23</sup>

### African Union

- 55 Member States
- continental union of African States
- established in 2000
- governed by the Constitutive Act of the African Union

<sup>17</sup> East African Court of Justice, Jurisdiction, [http://eacj.org/?page\\_id=27](http://eacj.org/?page_id=27); Treaty for the Establishment of the East African Community (adopted 30 November 1999, entered into force 7 July 2000), 2144 UNTS 255, art. 6(d), available at [http://eacj.org/?page\\_id=33](http://eacj.org/?page_id=33).

<sup>18</sup> Common Market for Eastern and Southern Africa, About COMESA, <http://about.comesa.int/>; Treaty Establishing the Common Market for Eastern and Southern Africa (adopted 5 November 1993, entered into force 8 December 1994), 2314 UNTS 265, art. 6(e), available at [http://www.comesa.int/index.php?option=com\\_content&view=article&id=1337&Itemid=100](http://www.comesa.int/index.php?option=com_content&view=article&id=1337&Itemid=100).

<sup>19</sup> See Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001), 2158 UNTS 3, OAU Doc. CAB/LEG/23.15, art. 2 [hereinafter Constitutive Act of the AU], available at <http://www.achpr.org/instruments/au-constitutive-act/>. Morocco is not a member of the AU, having withdrawn from the OAU in 1984 following the OAU's grant of membership to the Sahrawi Arab Democratic Republic.

<sup>20</sup> See Constitutive Act of the AU.

<sup>21</sup> African Union, Vision and Mission, <http://www.au.int/en/about/vision>; African Union, AU in a Nutshell, <http://www.au.int/en/about/nutshell>.

<sup>22</sup> See Constitutive Act of the AU, arts. 3-4.

<sup>23</sup> *Id.* at arts. 6(2), 9(1)(e), 23(2).

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Other AU organs include the Commission of the Union (AU Commission), which serves as the Secretariat of the AU,<sup>24</sup> and the Executive Council, which makes decisions on policies that are of common interest to the AU Member States.<sup>25</sup>

As of February 2017, 55 independent African States belong to the AU. They are: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cape Verde, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, the Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sahrawi Arab Democratic Republic, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, South Sudan, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe.

## The African Commission on Human and Peoples' Rights

Established by Article 30 of the African (Banjul) Charter on Human and Peoples' Rights (African Charter) and headquartered in Banjul, the Gambia, the African Commission on Human and Peoples' Rights is one of the main independent institutions of the AU. The OAU created the African Commission in 1981 with its unanimous adoption of the African Charter by the OAU Heads of State and Government in Nairobi, Kenya. The African Charter later came into force on October 21, 1986. The African Commission came into being on November 2, 1987 when it was officially inaugurated in Addis Ababa, Ethiopia; its members had been elected the previous July by the 23<sup>rd</sup> OAU Assembly of Heads of State and Government. The African Charter and the African Commission's Rules of Procedure govern its operations and processes.<sup>26</sup>

The AU Assembly elects by secret ballot the 11 Commissioners that make up the African Commission.<sup>27</sup> States parties to the African Charter may nominate candidates, but the Commissioners serve in their individual capacity and not as representatives of any State.<sup>28</sup> The members of the Commission serve six-year terms and there is no limit to the number of times they may be reelected.

The African Commission holds at least two ordinary sessions a year, with each session lasting from 10 to 15 days.<sup>29</sup> The Chairperson of the African Commission may also convene extraordinary sessions at the request of a majority of Commissioners or of the Chairperson of the AU Commission.<sup>30</sup>

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<sup>24</sup> *Id.* at art. 20(1).

<sup>25</sup> *Id.* at art. 10; African Union, AU in a Nutshell, *supra* note 21; African Union, Executive Council, <http://www.au.int/en/organs/council>.

<sup>26</sup> ACommHPR, History, <http://www.achpr.org/about/history/>.

<sup>27</sup> African Charter, art. 33.

<sup>28</sup> *Id.* at arts. 31(2), 33.

<sup>29</sup> ACommHPR, Rules of Procedure, Rule 26; ACommHPR, About Sessions, <http://www.achpr.org/sessions/about>.

<sup>30</sup> ACommHPR, Rules of Procedure, Rule 27.

# OVERVIEW OF THE AFRICAN HUMAN RIGHTS SYSTEM

The African Commission is responsible for promoting and protecting human and peoples' rights in Africa.<sup>31</sup> The substantive rights monitored by the African Commission can be found in the Constitutive Act of the African Union, the African Charter, and a number of other regional human rights treaties.<sup>32</sup> The African Commission's work is focused in four main areas: interpretation of the African Charter, promoting human rights, protecting human rights, and carrying out other tasks assigned to it by the AU Assembly.<sup>33</sup>

The first focus area of the African Commission is the interpretation of the African Charter. The African Commission interprets the African Charter upon request by a State, the AU, or an organization recognized by the AU.<sup>34</sup>

The second focus area of the African Commission is to promote human rights.<sup>35</sup> The African Commission promotes human rights in part through the establishment of special mechanisms. Special rapporteurs, committees, and working groups are all types of special mechanisms. Each has a specific mandate and terms of reference for carrying out its human rights monitoring work. Special mechanisms are required to present reports on their activities to the African Commission.<sup>36</sup>

The third focus area of the African Commission is to protect human rights.<sup>37</sup> The African Commission protects human rights in a number of ways. First, and perhaps most importantly, it operates an individual complaints system. It also monitors compliance with the African Charter by examining State reports. Lastly, it conducts fact-finding missions in Member States to monitor human rights conditions in those territories.

As part of the individual complaints system, the African Commission hears communications submitted by States, individuals, and non-governmental organizations (NGOs) on alleged human rights abuses.<sup>38</sup> In cases where the alleged victim faces an urgent threat of harm, the Commission may also issue provisional measures.<sup>39</sup> Provisional measures are requests issued to the State by the Commission while litigation is still pending, usually in situations where there is an immediate threat of irreparable harm. If

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<sup>31</sup> African (Banjul) Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986), OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58, arts. 30 and 45 [hereinafter African Charter], *available at* <http://www.achpr.org/instruments/achpr>.

<sup>32</sup> *See id.* at arts. 60, 61.

<sup>33</sup> ACommHPR, History, *supra* note 26.

<sup>34</sup> African Charter, art. 45(3).

<sup>35</sup> *See* African Charter, art. 45(1).

<sup>36</sup> ACommHPR, Special Mechanisms, <http://www.achpr.org/mechanisms/>.

<sup>37</sup> *See* African Charter, art. 45(2).

<sup>38</sup> *See id.* at art. 55(2). *See also* ACommHPR, *Information Sheet No. 2: Guidelines for the Submission of Communications*, 2 [hereinafter ACommHPR, *Information Sheet No. 2*], *available at* <http://www.achpr.org/communications/guidelines/>; *see generally* ACommHPR, *Communications Procedure*, <http://www.achpr.org/communications/procedure>. The Commission may also receive and consider inter-State communications with the primary goal of achieving an amicable settlement between the States parties.

<sup>39</sup> Rules of Procedure of the African Commission on Human and Peoples' Rights (approved by the Commission at its 2nd Ordinary Session, held from 2-13 February, 1988, and modified at its 18th Ordinary Session, held from 2-11 October, 1995, and its 47th Ordinary Session, held from 12-26 May, 2010), Rule 98(1) [hereinafter ACommHPR, *Rules of Procedure*], *available at* [http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules\\_of\\_procedure\\_2010\\_en.pdf](http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf).

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the Commission ultimately determines that a violation of human or peoples' rights has occurred, it will issue recommendations to the State on ways to take remedial action.<sup>40</sup>

The African Commission also monitors State compliance with the Charter by examining periodic State reports. Under Article 62 of the African Charter, Member States must report every two years on the steps they have taken to implement the African Charter.<sup>41</sup> The Commission considers these reports during its ordinary sessions. Following consideration of the reports, the Commission issues Concluding Observations that contain recommendations for the State to achieve further compliance with the Charter.<sup>42</sup>

Lastly, the Commission carries out fact-finding and promotional missions to Member States to monitor human rights conditions.<sup>43</sup> The purpose of these fact-finding missions is to investigate allegations of "massive and serious human rights violations."<sup>44</sup> Promotional missions are intended to make government officials and the local population aware of the Charter and to encourage AU Member States to strengthen their domestic human rights systems.<sup>45</sup>

## Goals in Bringing Complaints before the African Commission

- obtain **justice and reparations** for victims of human rights violations
- reform or support the **legal system** and the **rule of law**
- accumulate a **body of decisions** that pinpoint the weaknesses in a country's policies or practices
- build **momentum** for accountability and redress
- **change the dynamics** in a country; a positive ruling, even without effective implementation by a State, is still a measure of reparation in and of itself
- where full implementation is not possible due to the current political or practical situation, at least provide a **strong foundation for advocacy** to implement after a change in conditions
- favorable decisions that are not implemented immediately, if at all, can still be used in submissions to the United Nations to **jumpstart dialogue** with governments. They can also **create space for lawyers** practicing within the country and bring the **attention** of a wider population to a given issue.

<sup>40</sup> *Id.* at Rule 92; ACommHPR, Communications Procedure, *supra* note 38.

<sup>41</sup> African Charter, art. 62.

<sup>42</sup> ACommHPR, Rules of Procedure, Rule 77(1); African Union, State Reports and Concluding Observations, <http://www.achpr.org/states/reports-and-concluding-observations/>; *see, e.g.*, ACommHPR, *Concluding Observations and Recommendations on the First Combined Periodic Report of the Republic of Togo* (adopted at the Commission's 31st Ordinary Session, held from 2-16 May 2002), paras. 21-28, *available at* [http://www.achpr.org/files/sessions/31st/conc-obs/2nd-1991-2001/achpr31\\_conc\\_staterep1\\_togo\\_2002\\_eng.pdf](http://www.achpr.org/files/sessions/31st/conc-obs/2nd-1991-2001/achpr31_conc_staterep1_togo_2002_eng.pdf).

<sup>43</sup> African Charter, art. 45(1)(a).

<sup>44</sup> ACommHPR, History, *supra* note 26.

<sup>45</sup> *Id.*; *see, e.g.*, ACommHPR, *Report of Promotion Mission to Nigeria, 14-18 September 2009* (adopted by the Commission at its 47th Ordinary Session, held from 12-26 May 2010), *available at* <http://www.achpr.org/states/nigeria/missions/promo-2009/>.



# OVERVIEW OF THE AFRICAN HUMAN RIGHTS SYSTEM

## The African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights is the judicial organ of the African system for the protection of human rights. The African Court sits in Arusha, Tanzania and is an autonomous body of the AU. The African Court was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (Protocol Establishing the African Court, or Protocol).<sup>46</sup> Adopted in 1998, the Protocol came into force in 2004 after ratification by 15 States.<sup>47</sup> The Court began operations in 2006, following the election of its first judges, and began considering cases in 2008.

The African Court is counterpart to the African Commission, with the Rules of Court requiring collaboration between the two bodies on areas of common concern.<sup>48</sup>

Similar to the Commission, there are 11 judges at the African Court.<sup>49</sup> Judges must be nationals of a Member State of the African Union, and are elected in their individual capacities, not as representatives of the State.<sup>50</sup> States parties to the Protocol propose candidates, who are then elected by secret ballot by the AU Assembly.<sup>51</sup> The Protocol directs the Assembly to ensure diversity on the African Court, in terms of the geographic region, legal tradition, and gender to which the judges each belong.<sup>52</sup> The judges serve six-year terms, and may be reelected once.<sup>53</sup>

The Court holds four ordinary sessions a year, with each session lasting 15 days. The President of the Court may also convene extraordinary sessions upon his or her own initiative or at the request of a majority of the Members of the Court.<sup>54</sup>

The African Court has two types of jurisdiction: advisory and contentious. Advisory jurisdiction involves the Court issuing an opinion on specific legal questions that relate to the African Charter or any other

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<sup>46</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 9 June 1998, entered into force 25 January 2004), OAU/LEG/EXP/AFCHPR/PROT (III), art. 2 [hereinafter Protocol Establishing the African Court], available at <http://www.achpr.org/instruments/court-establishment/>.

<sup>47</sup> African Union, *List of Countries which Have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* (15 June 2017) [hereinafter African Union, *2016 List of Countries*], available at [https://au.int/sites/default/files/treaties/7778-sl-protocol\\_to\\_the\\_african\\_charter\\_on\\_human\\_and\\_peoplesrights\\_on\\_the\\_estab.pdf](https://au.int/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf).

<sup>48</sup> AfCHPR, Rules of Court of the African Court on Human and Peoples' Rights (approved by the Court after joint meetings with the Commission in July 2009, October 2009, and April 2010, for entry into force on 2 June 2010), Rules 29(1)-(2) [hereinafter AfCHPR, Rules of Court], available at [http://www.african-court.org/en/images/Basic%20Documents/Final\\_Rules\\_of\\_Court\\_for\\_Publication\\_after\\_Harmonization\\_-\\_Final\\_\\_English\\_7\\_sept\\_1\\_.pdf](http://www.african-court.org/en/images/Basic%20Documents/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf).

<sup>49</sup> Protocol Establishing the African Court, art. 11(1).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at arts. 12(1), 14(1).

<sup>52</sup> *Id.* at art. 14(2), 14(3).

<sup>53</sup> *Id.* at art. 15(1).

<sup>54</sup> AfCHPR, Rules of Court, Rules 14(1), 15(1).

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“relevant” human rights instrument. The African Court issues advisory opinions as long as the issue is not already being considered by the African Commission.<sup>55</sup>

The Court’s contentious jurisdiction enables it to decide legal disputes submitted to it by opposing parties. Similar to the African Commission, the African Court hears disputes concerning alleged human rights violations. If the Court finds that human rights violations have taken place, it will issue orders to the State to remedy the violation. These orders may include the payment of fair compensation or reparation. In addition to final orders, the Court may adopt provisional measures at the request of the Commission, a party to a case, or on its own initiative.<sup>56</sup> Provisional measures are reserved for cases of “extreme gravity and urgency, and when necessary to avoid irreparable harm to persons.”<sup>57</sup>

One difference between the African Court and the African Commission, however, is that the African Court does not accept communications directly from individuals or NGOs unless the State has specifically accepted the Court’s jurisdiction to hear such cases. Instead, the primary entities able to submit cases to the Court are the Commission itself, States parties to the Protocol, and African intergovernmental organizations.<sup>58</sup> Individuals and NGOs that have observer status before the African Commission may submit cases if the State concerned has made a declaration under Article 34(6) of the Protocol accepting the Court’s competence.<sup>59</sup> As of April 2017, only eight countries have made this declaration and have not withdrawn from it, thereby limiting NGOs’ and individuals’ access to the Court to a great degree.<sup>60</sup>

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<sup>55</sup> Protocol Establishing the African Court, art. 4(1).

<sup>56</sup> *Id.* at arts. 27(1)-(2); AfCHPR, Rules of the Court, Rule 51(1).

<sup>57</sup> Protocol Establishing the African Court, art 27(2).

<sup>58</sup> *Id.* at art. 5.

<sup>59</sup> *Id.* at arts. 5(3), 34(6); see also AfCHPR, *Amir Adam Timan v. Sudan*, App. No. 005/2012, Judgment of 30 March 2012, available at <http://www.african-court.org/en/index.php/55-finalised-cases-details/852-app-no-005-2012-amir-adam-timan-v-the-republic-of-the-sudan-details>; George Mukundi Wachira, *African Court on Human and Peoples’ Rights: Ten Years on and Still No Justice*, MINORITY RIGHTS GROUP INTERNATIONAL, 20-21 (24 September 2008), available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=48e4763c2>; compare Protocol Establishing the African Court, arts. 5(3), 34(6), with American Convention on Human Rights “Pact of San José, Costa Rica” (adopted 22 November 1969, entered into force 18 July 1978), 1144 UNTS 123, OASTS No. 36, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25, art. 61(1), and Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 1 November 1950, entered into force 3 September 1953, amended by Protocols Nos. 3, 5, 8, and 11, which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998, respectively), 213 UNTS 222, art. 34 (indicating that restrictions on individual access to regional human rights courts is not unique to the African system. While the European Court of Human Rights does permit individuals access, the Inter-American Court of Human Rights permits access only to States and the Inter-American Commission on Human Rights.).

<sup>60</sup> African Union, *2016 List of Countries*, *supra* note 47; *Tunisia Allows Individuals and NGOs Direct Access to African Court*, INTERNATIONAL JUSTICE RESOURCE CENTER, Apr. 26, 2017, <http://www.ijrcenter.org/2017/04/26/tunisia-allows-individuals-and-ngos-direct-access-to-african-court/>. The States that have made the 34(6) declaration are: Benin, Burkina Faso, Côte d’Ivoire, Ghana, Malawi, Mali, Tanzania, and Tunisia. Note, however, that Rwanda had made the declaration, but formally withdrew from the African Court’s jurisdiction over individual and group complaints. See *Rwanda Withdraws Access to African Court for Individuals and NGOs*, INTERNATIONAL JUSTICE RESOURCE CENTER, Mar. 14, 2016, <http://www.ijrcenter.org/2016/03/14/rwanda-withdraws-access-to-african-court-for-individuals-and-ngos/>.

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Another key difference between the African Court and the African Commission is that the African Court's judgments are binding on States.<sup>61</sup> Pursuant to Article 30 of the Protocol Establishing the African Court, States parties agree to comply with the Court's judgments in any case to which they are a party. In contentious cases, a State party found to have violated the Charter or other relevant human rights treaty may be required to pay compensation or make reparations to the victim.<sup>62</sup>

When deciding either a contentious case or an advisory opinion, the Court may interpret and apply the African Charter as well as any other relevant regional or international human rights instrument ratified by the State concerned.<sup>63</sup> The Court refers to these sources of law and may also "draw inspiration" from other international human rights instruments, including those of the United Nations, and "take into consideration" other regional and international norms.<sup>64</sup>

## Opportunities for Advocacy

There are a great deal of advocacy opportunities within the African human rights system, and particularly before the African Commission and Court. A brief description of some of the avenues for advocacy before the Commission and Court follows below.

### African Commission on Human and Peoples' Rights

Individuals and NGOs wishing to advocate before the African Commission may do so in a number of ways. First, they may participate in the periodic State reporting process. Under Article 62 of the African Charter, Member States must report every two years on the steps they have taken to implement the African Charter. The African Commission encourages States to consult with national civil society during the State report drafting process.<sup>65</sup>

In addition to consulting with States during its reporting process, institutions, organizations, or any other interested party may also submit their own information on the human rights situation in the State concerned to the Secretary of the Commission. These reports are typically called shadow reports. NGOs may submit shadow reports to the Commission regardless of whether a civil society organization has been granted observer status.<sup>66</sup> The submission of shadow reports is a way for NGOs to present information that is alternative to the information provided to the Commission by the State.

Another powerful form of advocacy before the African Commission is the submission of communications. Advocates may submit a communication to the Commission for consideration regarding an alleged

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<sup>61</sup> Protocol Establishing the African Court, art. 30; *see also*, AfCHPR, Rules of Court, Rule 61(5).

<sup>62</sup> Protocol Establishing the African Court, arts. 27(1), 30.

<sup>63</sup> *Id.* at art. 7.

<sup>64</sup> Protocol Establishing the African Court, art. 7; African Charter, arts. 60, 61.

<sup>65</sup> *Id.* at art. 62; *see, e.g.*, ACommHPR, *Concluding Observations and Recommendations on the First Periodic Report of the Republic of South Africa* (adopted at the Commission's 38th Ordinary Session, held from 21 November – 5 December 2005), para. 19, *available at* [http://www.achpr.org/files/sessions/38th/conc-obs/1st-1999-2001/achpr38\\_conc\\_staterep1\\_southafrica\\_2005\\_eng.pdf](http://www.achpr.org/files/sessions/38th/conc-obs/1st-1999-2001/achpr38_conc_staterep1_southafrica_2005_eng.pdf).

<sup>66</sup> ACommHPR, Rules of Procedure, Rule 74.

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human rights violation.<sup>67</sup> If the African Commission determines that one or more violations have taken place, it may issue recommendations to the State to make reparations.

A fourth form of advocacy is participation at Commission sessions. NGOs may attend these sessions, and NGOs that have been granted observer status with the Commission may participate in these sessions.<sup>68</sup> Organizations with observer status may present issues for inclusion in a session agenda, and all civil society actors may pursue opportunities to influence where and how the Commission focuses its attention by meeting with Commissioners and with representatives of States, national human rights institutions, and other stakeholders.

NGOs may also participate in the NGO Forum, a forum organized by the African Centre for Democracy and Human Rights Studies. This pre-session forum is designed to assess the human rights situation in Africa, develop strategies for NGOs, and adopt resolutions to propose to the African Commission. Though not a formal part of the Commission, the NGO Forum and the Commission have developed a close working relationship that includes Commission members attending Forum sessions and the Forum submitting its resolutions to the Commission.<sup>69</sup>

## African Court on Human and Peoples' Rights

At the African Court, various opportunities for advocacy exist as well. One such opportunity is that NGOs with observer status at the African Union can reach the Court through its advisory jurisdiction. The Protocol Establishing the African Court allows “any African organization recognized by the OAU” to request an advisory opinion. This provision entitles NGOs with observer status before the African Union to make requests for advisory opinions.<sup>70</sup> While not binding on States, advisory opinions can have

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<sup>67</sup> African Charter, art. 55; *see also* ACommHPR, Information Sheet No. 2, *supra* note 38, at 5.

<sup>68</sup> ACommHPR, Rules of Procedure, Rule 68(2); *see, e.g.*, ACommHPR, *Resolution on the Criteria for Granting and Enjoying Observer status to Non-Governmental Organizations Working in the Field of Human and Peoples' Rights*, Resolution No. 33/1999 (adopted at the Commission's 25th Ordinary Session, held from 26 April – 5 May 1999), Ch. II, *available at* <http://www.achpr.org/sessions/25th/resolutions/33/>.

<sup>69</sup> International Federation for Human Rights, *Practical Guide: NGOs and the African Commission for Human and Peoples' Rights*, 10 [hereinafter FIDH, *Practical Guide for NGOs*], *available at* <http://www.fidh.org/IMG/pdf/cadhmanuelen.pdf>. *See, e.g.*, African Centre for Democracy and Human Rights Studies, Summary Report of the NGOs Forum preceding the 51st Ordinary Session of the African Commission on Human and Peoples' Rights and 25th African Human Rights Book Fair: 14-16 April 2012 [hereinafter ACDHRS, *Summary Report of the NGOs Forum*], *available at* <http://acdhrs.org/2012/04/summary-report-of-the-ngos-forum-preceding-the-51th-ordinary-session-of-the-african-commission-on-human-and-peoples-rights-and-25th-african-human-rights-book-fair-14-16-april-2012/>.

<sup>70</sup> Protocol Establishing the African Court, art. 4(1); *see, e.g.*, AfCHPR, *Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project*, App. No. 001/2013, Order of 26 May 2017, *available at* [http://www.african-court.org/en/images/Cases/Advisory%20Opinion/Advisory%20Opinions/Request%20for%20Advisory%20Opinion%20No.001-2013-Socio-%20Economic%20Rights%20and%20Accountability%20Project%20\(SERAP\)%20ENGLISH%20\(2\).pdf](http://www.african-court.org/en/images/Cases/Advisory%20Opinion/Advisory%20Opinions/Request%20for%20Advisory%20Opinion%20No.001-2013-Socio-%20Economic%20Rights%20and%20Accountability%20Project%20(SERAP)%20ENGLISH%20(2).pdf). *See generally* AfCHPR, *Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project*, App. No. 001/2013, Order of 26 May 2017 (Rafâa Ben Achour, J., separate opinion), *available at* [http://www.african-court.org/en/images/Cases/Dissenting-Separate%20Opinions/Separate\\_Opinion\\_of\\_Judge\\_Rafa%C3%A2\\_Ben\\_Achour-\\_Adv\\_opinions-\\_SERAP.pdf](http://www.african-court.org/en/images/Cases/Dissenting-Separate%20Opinions/Separate_Opinion_of_Judge_Rafa%C3%A2_Ben_Achour-_Adv_opinions-_SERAP.pdf).

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“profound persuasive force and international repercussions.”<sup>71</sup> Moreover, since advisory opinions are interpretations of international law rather than judgments on an individual case, they apply equally to all States parties.

A second opportunity lies in the Court’s individual complaints process. With some restrictions, NGOs and individuals can submit applications directly to the Court and, in this way, take advantage of the Court’s binding jurisdiction if they obtain a favorable judgment. One restriction on access to the Court is that only NGOs with observer status before the Commission may submit applications; NGOs without observer status may not. Another, rather significant, restriction is that individuals and qualifying NGOs may only submit applications directly to the Court if the relevant State party has made a declaration under Article 34(6) of the Protocol Establishing the Court allowing the Court to receive them.<sup>72</sup> If the relevant State has not made the declaration, NGOs with observer status and individuals cannot submit applications to the Court.

A third opportunity for advocacy is the ability of parties before the Court to seek provisional measures. Provisional measures are requests issued to States to prevent irreparable harm to the alleged victim while a case is still pending. When provisional measures are complied with, they have the potential to prevent or end the violation of human rights. Unfortunately, a State’s failure to comply with provisional measures is unlikely to result in any serious repercussions for the State.<sup>73</sup> The Court reports non-compliance with its provisional measures in an annual report to the AU Assembly and may make recommendations and invite follow-up information from the parties, but there is little else that can be done beyond what the State volunteers to do.<sup>74</sup>

One final opportunity is for advocates to present information or arguments to the Court by submitting an *amicus curiae* brief. *Amicus curiae* (“friend of the court”) briefs are submissions by individuals or organizations that do not represent or advise either side in a case, but who offer information or new arguments directly to the Court in order to assist it in analyzing a particular issue and reaching a decision. Such briefs can be used to explain the legal arguments supporting a specific outcome, draw the Court’s attention to relevant jurisprudence from other bodies, provide statistical or contextual information, or argue that the facts constitute an additional violation that has not been alleged by the parties. Submitting *amicus curiae* briefs to the African Court is an effective way to present new facts and original arguments to the Court, as well as to draw attention to the possible broad legal reach the Court’s decision may have.

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<sup>71</sup> Frans Viljoen, *A Human Rights Court for Africa and Africans*, 30(1) BROOK. J. INT’L L. 1, 52 (2004).

<sup>72</sup> Protocol Establishing the African Court, arts. 5(3) and 34(6); see also AfCHPR, *Michelot Yogogombaye v. Senegal*, App. No. 001/2008, Judgment of 15 December 2009, available 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>.

<sup>73</sup> Constitutive Act of the AU, arts. 7, 23(2); Protocol Establishing the African Court, arts. 27(2), 31; see also Anna Dolidze, *African Court on Human and Peoples’ Rights – Response to the Situation in Libya*, 15(20) AM. SOC’Y INT’L LAW INSIGHTS (2011), <http://www.asil.org/insights/volume/15/issue/20/african-court-human-and-peoples%E2%80%99-rights-%E2%80%93-response-situation-libya>.

<sup>74</sup> AfCHPR, Rules of Court, Rules 51(4)-(5).

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## Limitations on the System's Mandate

The African Commission and African Court both face a number of challenges. At the Commission, one such challenge concerns the sufficiency of the resources made available to the Secretariat. Since the Commission relies on the Secretariat to assist the Chairperson, the Bureau, and the other Commissioners; to keep and organize the Commission's records; and to submit to the Chairperson and the Commissioners every item the Commission considers, among other duties, the Commission's effectiveness heavily depends on the effectiveness of the Secretariat.<sup>75</sup> If resources for the Secretariat are insufficient, then the Commission's efficacy is greatly affected.

Civil society's unawareness of and inexperience with the African Charter, the Commission's jurisprudence, and the individual complaints process is another challenge. Additionally, States often do not comply with the African Commission's recommendations so that, even where victims obtain a favorable judgment, they do not receive the remedy awarded to them. This fact could be a deterring factor for those individuals and NGOs who are familiar with the work of the Commission.<sup>76</sup>

### Challenges to Litigation before the African Commission

- delays
- lack of timely responses from States or the Commission
- communication with the Commission is most reliable in person
- lack of funding to appear in person before the Commission
- litigation can sometimes lead to retaliatory threats against the lives and safety of victims and their advocates

State compliance with reporting requirements also remains an issue. Even when States do submit their reports, they often do not engage adequately, or at all, with NGOs and civil society during the drafting process.<sup>77</sup>

Many challenges face the African Court, as well. Similar to the Commission, an overall lack of awareness of the Court and its jurisprudence diminishes the number of viable applications it receives. Lack of knowledge about who may access the Court, when and how to do so, and the level of involvement required to successfully litigate a case has contributed to a high number of submissions of applications that the Court simply lacks jurisdiction to hear. In 2012, for example, the majority of applications to the Court were directed at States that were not party to the Protocol Establishing the Court or had not made a declaration under Article 34(6) of the Protocol to allow individuals and NGOs with observer status to bring claims.<sup>78</sup>

<sup>75</sup> ACommHPR, Rules of Procedure, Rules 18(a), (c), (e), (j); International Service for Human Rights, *African Commission on Human and Peoples' Rights*, 1 HUM. RTS. MONITOR Q. 44, 44 (2013) [hereinafter ISHR, *African Commission*], available at <http://www.ishr.ch/sites/default/files/article/files/achrp.pdf>.

<sup>76</sup> ISHR, *African Commission on Human and Peoples' Rights*, *supra* note 75, at 44; ACommHPR, Communications Procedure, *supra* note 38.

<sup>77</sup> Association for Justice, Peace and Democracy, Conectas Human Rights & International Service for Human Rights, *Road Map for Civil Society Engagement*, 10, 16 (2011) [hereinafter ISHR et al., *Road Map for Civil Society Engagement*], available at [http://www.ishr.ch/sites/default/files/article/files/roadmap\\_english.pdf](http://www.ishr.ch/sites/default/files/article/files/roadmap_english.pdf).

<sup>78</sup> Justice Sophia A.B. Akuffo, *Report of the African Court on Human and Peoples' Rights on the Relevant Aspects Regarding the Judiciary in the Protection of Human Rights in Africa* (presented at the 1st Summit of Constitutional, Regional and Supreme Court Justices, held 8-9 November 2012), 6, 8, available at <http://en.african->



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A final major challenge is that the Court's jurisdiction is quite limited. Only 30 out of 55 AU Member States have ratified the Protocol Establishing the African Court.<sup>79</sup> An even lower number of States have accepted the Court's competence under Article 34(6), allowing individuals and NGOs direct access to the Court; only nine States have made declarations to this effect as of April 2017, and eight of those declarations are still in effect.<sup>80</sup> Rwanda announced its intention to withdraw from the African Court's jurisdiction in February 2016 and formally withdrew the following month.<sup>81</sup> This low number of ratifications and declarations seriously restricts the Court's jurisdiction over AU Member States.

## The African Human Rights Instruments

At the continental level, the human rights obligations of African States arise primarily from the African Charter on Human and Peoples' Rights. The African Charter is the principal treaty of the African human rights system. The African Charter was adopted in 1981, and it entered into force in 1986.<sup>82</sup> Along with the Constitutive Act, it is the most widely ratified instrument within the African system, having been formally accepted by 54 AU Member States.<sup>83</sup> As of June 2017, Morocco, which recently joined the AU, has not ratified the African Charter.<sup>84</sup>

Pursuant to the African Charter, States must guarantee the rights to: dignity; life; liberty; personal integrity; non-discrimination; equal protection; fair trial; freedom of conscience; freedom of expression; freedom of association; freedom of assembly; freedom of movement; freedom from slavery and slave trade; freedom from torture or cruel,

### African Charter on Human and Peoples' Rights

- 54 Member States
- most widely ratified instrument within the African system
- established the African Commission on Human and Peoples' Rights
- includes civil, political, economic, social, and cultural rights, as well as peoples' rights and individual duties

inhuman, or degrading treatment or punishment; participation in government; property; work; health;

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[court.org/images/Other%20Reports/Report\\_of\\_the\\_African\\_Court\\_on\\_Human\\_and\\_Peoples\\_Rights\\_in\\_the\\_Protection\\_of\\_Human\\_Rights\\_in\\_Africa\\_final.pdf](http://court.org/images/Other%20Reports/Report_of_the_African_Court_on_Human_and_Peoples_Rights_in_the_Protection_of_Human_Rights_in_Africa_final.pdf).

<sup>79</sup> African Union, *2016 List of Countries*, *supra* note 47. These States are: Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Comoros, Congo, Côte d'Ivoire, Gabon, the Gambia, Ghana, Kenya, Lesotho, Libya, Malawi, Mali, Mauritania, Mauritius, Mozambique, Niger, Nigeria, Rwanda, Sahrawi Arab Democratic Republic, Senegal, South Africa, Tanzania, Togo, Tunisia, and Uganda.

<sup>80</sup> African Union, *2016 List of Countries*, *supra* note 47; *Tunisia*, INTERNATIONAL JUSTICE RESOURCE CENTER, *supra* note 60.

<sup>81</sup> *See Rwanda*, INTERNATIONAL JUSTICE RESOURCE CENTER, *supra* note 60.

<sup>82</sup> ACommHPR, Legal Instruments, <http://www.achpr.org/instruments/>.

<sup>83</sup> African Union, *List of Countries which Have Signed, Ratified/Acceded to the African Charter on Human and Peoples' Rights* (3 June 2016) [hereinafter *List of Charter Parties*], available at [https://au.int/sites/default/files/treaties/7770-sl-african\\_charter\\_on\\_human\\_and\\_peoples\\_rights\\_2.pdf](https://au.int/sites/default/files/treaties/7770-sl-african_charter_on_human_and_peoples_rights_2.pdf).

<sup>84</sup> *See id.*; *Following Three Decades of Isolation, Morocco Rejoins African Union*, INTERNATIONAL JUSTICE RESOURCE CENTER, Feb. 6, 2017, <http://www.ijrcenter.org/2017/02/06/following-three-decades-of-isolation-morocco-rejoins-african-union/>.

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education; family; self-determination; equality; free disposal of wealth and natural resources; national and international security and peace; general satisfactory environment; and economic, social, and cultural development. In articles 60 and 61, the Charter directs the African Commission to refer to any existing human rights norms, including those set out in the Universal Declaration of Human Rights and United Nations treaties, in interpreting Member States' legal obligations.<sup>85</sup>

The African Charter is unique among human rights instruments in part for its inclusion of collective rights ("peoples' rights"), as well as individual rights.<sup>86</sup> The Charter protects economic, social, and cultural rights such as the rights of the family and the right to health, as well as civil and political rights like freedom of expression and fair trial guarantees. The African Charter also emphasizes the duties individuals owe to others. Article 27(1), for example, provides that individuals have duties towards their families, society, the State, other legally recognized communities, and the international community. The Preamble to the African Charter explains that the enjoyment of rights and freedoms "implies the performance of duties on the part of everyone."<sup>87</sup> The Charter permits States parties to limit enjoyment of some rights enshrined in its text when necessary to protect national security, public welfare, or other individuals' rights.<sup>88</sup>

Other treaties that are central to the African human rights system are the Constitutive Act of the African Union, and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.

AU Member States have also adopted a number of specialized treaties dealing with specific issues, such as the rights of refugees and the rights of women. These specialized conventions, charters, and protocols include the following:

- Protocol to the African Charter on Human and Peoples' Rights on the Rights of **Women** in Africa
- African Charter on the Rights and Welfare of the **Child**
- OAU Convention Governing the Specific Aspects of **Refugee** Problems in Africa
- African Charter on **Democracy, Elections and Governance**

Each of these treaties is discussed in detail below. Additional African Union treaties relevant to human rights protection include the African Union Convention for the Protection and Assistance of Internally Displaced Persons and the African Charter on Values and Principles of Public Service and Administration.

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<sup>85</sup> See African Charter, arts. 60, 61.

<sup>86</sup> *Id.* at art. 19 (stating, "All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another."); see also ACommHPR, *Malawi African Association et al. v. Mauritania*, Communication Nos. 54/1991, 61/1991, 96/1993, 98/1993, 164/1997, 196/1997, 210/1998 (joined), 27th Ordinary Session, 11 May 2000, para. 142 (condemning discriminatory practices against black ethnic groups in Mauritania), available at [http://www.achpr.org/files/sessions/27th/comunications/54.91-61.91-96.93-98.93-164.97\\_196.97-210.98/achpr27\\_54.91\\_61.91\\_96.93\\_98.93\\_164.97\\_196.97\\_210.98\\_eng.pdf](http://www.achpr.org/files/sessions/27th/comunications/54.91-61.91-96.93-98.93-164.97_196.97-210.98/achpr27_54.91_61.91_96.93_98.93_164.97_196.97_210.98_eng.pdf).

<sup>87</sup> African Charter, preamble, arts. 27-29.

<sup>88</sup> See *id.* at arts. 8, 11, 12(2), 27(2).

# OVERVIEW OF THE AFRICAN HUMAN RIGHTS SYSTEM

## Rights Protected by the African Charter

<u>RIGHT</u>	<u>ARTICLE</u>
Non-discrimination	2
Equality and equal protection	3
Right to life and personal integrity	4
Prohibition of slavery, slave trade, torture, and cruel, inhuman or degrading punishment and treatment	5
Right to liberty and security of the person	6
Right to fair trial	7(1)
Non-retroactive application of criminal law and punishments	7(2)
Freedom of conscience and religion	8
Right to receive information	9(1)
Freedom of expression and dissemination of opinions	9(2)
Freedom of association	10
Freedom of assembly	11
Freedom of movement	12(1)
Right to seek asylum	12(3)
Prohibition of mass expulsion of non-nationals	12(5)
Freedom to participate in government	13(1)
Right to equal access to public service and public property	13(2)-(3)
Right to property	14
Right to work	15
Right to health	16
Right to education and cultural life	17
Right to family	18
Equality of peoples	19
Right to self-determination	20
Freedom to dispose of wealth and natural resources	21
Right to economic, social, and cultural development	22
Right to national and international peace and security	23
Right to a general satisfactory environment	24
Judicial independence	26

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## Constitutive Act of the African Union

The Constitutive Act of the African Union was adopted in 2000 and entered into force the following year.<sup>89</sup> All AU Member States have ratified or acceded to the Act.<sup>90</sup>

Articles 3 and 4 of the Constitutive Act lay out the objectives and guiding principles of the AU. One of the principal objectives of the AU is to promote peace and security throughout the continent. The States parties to the Constitutive Act also commit themselves to encouraging international cooperation, with a view to protecting the human rights enshrined in the African Charter and the Universal Declaration of Human Rights (Universal Declaration).<sup>91</sup> Further, the Act requires AU to adhere to a list of principles related to preventing conflict and atrocities and promoting equality, democracy, and the rule of law.<sup>92</sup> For example, Article 4(o) recognizes the “sanctity of human life” and condemns impunity.

### Constitutive Act of the African Union

- 55 States parties
- describes AU’s guiding principles and objectives
- defines functions and powers of the AU

The Constitutive Act defines the functions and powers of the organs of the AU and lays out the day-to-day details of the AU’s functioning, such as the location of its headquarters and the languages in which it works. Article 29 sets forth the requirements for admission to the AU: upon notification to the Chairman of the Commission of the Union of the State’s intent to accede to the Constitutive Act, AU Member States vote on whether to admit the prospective State. A favorable vote by a simple majority of Member States is necessary to join the AU.<sup>93</sup>

## Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights

The Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights was adopted in 1998 and entered into force in 2004.<sup>94</sup> The Protocol

<sup>89</sup> Constitutive Act of the AU.

<sup>90</sup> African Union, *List of Countries which Have Signed, Ratified/Acceded to the Constitutive Act of the African Union* (1 April 2016), [https://au.int/sites/default/files/treaties/7758-sl-constitutive\\_act\\_of\\_the\\_african\\_union\\_2.pdf](https://au.int/sites/default/files/treaties/7758-sl-constitutive_act_of_the_african_union_2.pdf); see also Voice of America, *South Sudan Becomes African Union’s 54th Member* (27 July 2011, 8:00 PM), <http://www.voanews.com/content/south-sudan-becomes-african-unions-54th-member-126320433/158563.html>. Article 29 of the Constitutive Act of the AU explains the process for admission to the AU: an African State seeking admission must notify the Chairperson of the AU Commission of its intention to accede to the Constitutive Act. The Chairperson then sends copies of the State’s notification to the other Member States. If a simple majority of States vote in favor of admitting the State, then the State becomes a Member of the AU.

<sup>91</sup> Constitutive Act of the AU, arts. 3-4; Universal Declaration of Human Rights (adopted 10 December 1948), UNGA Res. 217A (III), UN Doc. A/RES/217(III), available at <http://www.un.org/en/documents/udhr/>.

<sup>92</sup> Constitutive Act of the AU, art. 4.

<sup>93</sup> Constitutive Act of the AU, arts. 5, 24, 25, 29(1)-(2).

<sup>94</sup> ACommHPR, *Legal Instruments*, *supra* note 82.

# OVERVIEW OF THE AFRICAN HUMAN RIGHTS SYSTEM

established the African Court on Human and Peoples' Rights and defined its organization, jurisdiction, and functioning.<sup>95</sup> There are currently 30 States parties to the Protocol.<sup>96</sup>

The AU adopted the Protocol Establishing the African Court because it was “[f]irmly convinced that the attainment of the objectives of the African Charter on Human and Peoples' Rights requires the establishment of an African Court on Human and Peoples' Rights to complement and reinforce the functions of the African Commission.”<sup>97</sup> Thus, the AU has woven together the respective mandates of the Commission and Court in order to achieve this complementary relationship. The Commission may submit certain communications to the Court, and the Court may transfer cases to the Commission. The Commission's broader mandate of protection and promotion complements the narrower jurisdiction of the Court, which is limited to deciding complaints. However, the Court may reinforce the Commission's authority by issuing binding judgments when States fail to comply with the Commission's decisions regarding complaints or provisional measures. Moreover, the two bodies are required to meet at least once annually.<sup>98</sup>

## Protocol Establishing the African Court

- 30 States parties
- established the African Court on Human and Peoples' Rights
- sources of law include the African Charter and any other relevant human rights instrument that the State concerned has ratified

A unique aspect of the Protocol Establishing the Court is that it enables the Court to receive applications from a limited number of parties: only the Commission, States that have been a respondent or a petitioner before the Commission, States whose citizen is a victim of a human rights violation, and African intergovernmental organizations can appear before the Court. The rules of procedure of both the African Commission and the Child Rights Committee clarify the circumstances in which those bodies may refer cases to the Court.<sup>99</sup>

If a State party to the Protocol makes a further declaration under articles 34(6) and 5(3), then individuals and NGOs with observer status before the Commission can also appear before the Court. To date, eight States have agreed to allow individuals and NGOs to submit complaints against them to the African Court.<sup>100</sup>

The Protocol also contains an expansive provision on the Court's sources of law. According to Article 7, the Court may apply not only the provisions of the African Charter, but also “any other relevant human rights Instrument...ratified by the States concerned.”<sup>101</sup> This provision gives the Court freedom to interpret human rights instruments from the African human rights system and beyond.

<sup>95</sup> Protocol Establishing the African Court, art. 1.

<sup>96</sup> African Union, *2016 List of Countries*, *supra* note 47.

<sup>97</sup> Protocol Establishing the African Court, Preamble.

<sup>98</sup> See ACHPR, *Relationship between the Court and the Commission*, <http://www.achpr.org/about/achpr-afchpr/>.

<sup>99</sup> See, e.g., ACommHPR Rules of Procedure, Rules 84(2), 118.

<sup>100</sup> African Union, *2016 List of Countries*, *supra* note 47; *Tunisia*, INTERNATIONAL JUSTICE RESOURCE CENTER, *supra* note 60.

<sup>101</sup> Protocol Establishing the African Court, art. 7.

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## Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) was adopted in 2003 and entered into force in 2005.<sup>102</sup> As of September 2017, 39 Member States of the AU have ratified it.<sup>103</sup>

The Maputo Protocol calls for the elimination of discrimination against women as well as the elimination of harmful practices that negatively affect the rights of women. In order to accomplish this task, the Maputo Protocol encourages States to implement legislative, institutional, and other measures aimed at protecting the rights and freedoms of women.<sup>104</sup> For example, the Maputo Protocol recommends the inclusion of the principle of equality in national and other legislative instruments. States should also integrate a gender perspective in policy decisions, legislation, development plans, programs, and activities. More broadly, States should endeavor to “modify the social and cultural patterns of conduct of men and women” through public education, information, and communication. Regarding the elimination of harmful practices, the Maputo Protocol specifically identifies female genital mutilation as a harmful practice deserving of legislative prohibition.<sup>105</sup> Significantly, the Maputo Protocol is the first human rights instrument to recognize women’s sexual and reproductive health rights.<sup>106</sup>

### Maputo Protocol

- 39 States parties
- first human rights instrument to recognize women’s sexual and reproductive rights
- specifically proscribes female genital mutilation

<sup>102</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 13 September 2000, entered into force 25 November 2005), OAU Doc. CAB/LEG/66.6 [hereinafter Maputo Protocol], available at [https://au.int/sites/default/files/treaties/7783-sl-protocol\\_to\\_the\\_african\\_charter\\_on\\_human\\_and\\_peoples\\_rights\\_on\\_the\\_rights\\_of\\_women\\_in\\_africa.pdf](https://au.int/sites/default/files/treaties/7783-sl-protocol_to_the_african_charter_on_human_and_peoples_rights_on_the_rights_of_women_in_africa.pdf); African Commission, Legal Instruments, *supra* note 82; see also ACommHPR, *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, Communication No. 323/2006, 10th Extraordinary Session, 16 December 2011, available at <http://www.achpr.org/communications/decision/323.06/> (finding that State and non-State actors in Egypt had engaged in gender-based violence against women that, having gone unpunished, constituted a violation of articles 2 and 18 (3) of the African Charter).

<sup>103</sup> African Union, *List of Countries which Have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (7 Sept. 2017), [https://au.int/sites/default/files/treaties/7783-sl-protocol\\_to\\_the\\_african\\_charter\\_on\\_human\\_and\\_peoples\\_rights\\_on\\_the\\_rights\\_of\\_women\\_in\\_africa.pdf](https://au.int/sites/default/files/treaties/7783-sl-protocol_to_the_african_charter_on_human_and_peoples_rights_on_the_rights_of_women_in_africa.pdf). These States are Algeria, Angola, Benin, Burkina Faso, Cameroon, Cape Verde, Comoros, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Djibouti, Equatorial Guinea, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Nigeria, Rwanda, Senegal, Seychelles, Sierra Leone, South Africa, Swaziland, Tanzania, Togo, Uganda, Zambia, and Zimbabwe.

<sup>104</sup> Maputo Protocol, arts. 2, 5.

<sup>105</sup> *Id.* at arts. 2(1)(a)-(c), 2(2), 5.

<sup>106</sup> *Id.* at art. 14. The African Commission recently published general comments on the rights of women in Africa, giving special focus to articles 14(1)(d) and (e), which pertain to women’s rights to self-protection and to be protected from HIV infection. See ACommHPR, *General Comments on Article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, (adopted at the Commission’s

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The Maputo Protocol expands on the textual protections of the African Charter in several ways. It explicitly defines discrimination against women to include “any distinction, exclusion or restriction or any differential treatment based on sex” that has either the purpose or effect of negatively impacting women’s human rights.<sup>107</sup> Similarly, the text defines violence against women to include “all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm....”<sup>108</sup> The Maputo Protocol addresses policies and practices that may undermine women’s independence, social status, and livelihoods by protecting their rights as employees and taxpayers,<sup>109</sup> as well as their right to inheritance,<sup>110</sup> access to clean drinking water and nutritious food,<sup>111</sup> and entitlement to adequate housing.<sup>112</sup> Additionally, this instrument recognizes and enshrines the rights of women in vulnerable situations, including widows, elderly women, women with disabilities, and women in distress.<sup>113</sup>

## African Charter on the Rights and Welfare of the Child

Adopted in 1990, the African Charter on the Rights and Welfare of the Child (Children’s Charter) entered into force in 1999.<sup>114</sup> As of July 2016, it has been ratified by 48 AU Member States.<sup>115</sup>

Key provisions of the Children’s Charter include Article 2, which defines a child as every human being under 18 years old.<sup>116</sup> The Children’s Charter guarantees a wide range of children’s rights including the right to education, the right to health, the right to a name and nationality, and protection from harmful social and cultural practices.<sup>117</sup> The Children’s Charter also addresses serious human rights issues such as child labor, child abuse, and the use of children in armed conflicts.<sup>118</sup>

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52nd Ordinary Session, held from 9-12 October 2012), *available at* <http://www.achpr.org/instruments/general-comments-rights-women/>.

<sup>107</sup> Maputo Protocol, art. 1(f).

<sup>108</sup> *Id.* at art. 1(j).

<sup>109</sup> *Id.* at art. 13.

<sup>110</sup> *Id.* at art. 21.

<sup>111</sup> *Id.* at art. 15.

<sup>112</sup> *Id.* at art. 16.

<sup>113</sup> *Id.* at arts. 22-24.

<sup>114</sup> Children’s Charter; ACommHPR, Legal Instruments, *supra* note 82.

<sup>115</sup> African Union, *List of Countries which Have Signed, Ratified/Accessed to the African Charter on the Rights and Welfare of the Child* (15 June 2017), [https://au.int/sites/default/files/treaties/7773-sl-african\\_charter\\_on\\_the\\_rights\\_and\\_welfare\\_of\\_the\\_child\\_1.pdf](https://au.int/sites/default/files/treaties/7773-sl-african_charter_on_the_rights_and_welfare_of_the_child_1.pdf). These States are Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Côte d’Ivoire, Comoros, Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea-Bissau, Guinea, Kenya, Libya, Lesotho, Liberia, Madagascar, Mali, Malawi, Mozambique, Mauritania, Mauritius, Namibia, Nigeria, Niger, Rwanda, South Africa, Senegal, Seychelles, Sierra Leone, Sudan, Swaziland, Tanzania, Togo, Uganda, Zambia, and Zimbabwe. The Central African Republic, Democratic Republic of Congo, Sahrawi Arab Democratic Republic, Somalia, Sao Tome and Principe, South Sudan, and Tunisia have signed but not ratified the treaty.

<sup>116</sup> Children’s Charter, art. 2.

<sup>117</sup> Children’s Charter, arts. 6, 11, 14, 21; *see, e.g.*, African Committee of Experts on the Rights and Welfare of the Child, *IHRDA and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya) v. Kenya*, Communication No. 002/2009, Decision of 22 March 2011, para. 50, *available at* <http://caselaw.ihrda.org/doc/002.09/> (Here, ACERWC interpreted the Children’s Charter in relation to the inability of children of Nubian descent to obtain a nationality. Kenya did not recognize birth registration as proof of



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The Children’s Charter complements the African Charter by addressing children’s particular needs and vulnerabilities. For example, the Children’s Charter adopts the “best interest of the child” standard as the “primary consideration” guiding decisions concerning children,<sup>119</sup> recognizes children’s right to protection and development,<sup>120</sup> and requires States parties to work toward providing free and compulsory primary education and free and accessible secondary education.<sup>121</sup> It also prohibits the juvenile death penalty,<sup>122</sup> child labor,<sup>123</sup> and child marriage,<sup>124</sup> and requires States parties to take measures to protect children who are victims of abuse,<sup>125</sup> refugees,<sup>126</sup> disabled,<sup>127</sup> in detention or accused of a crime,<sup>128</sup> undergoing adoption,<sup>129</sup> or in situations of armed conflict.<sup>130</sup>

## African Charter on the Rights and Welfare of the Child

- 48 States parties
- established the Committee of Experts on the Rights and Welfare of the Child
- addresses child labor, child abuse, and the use of children in armed conflict

Article 32 establishes the Committee of Experts on the Rights and Welfare of the Child. The Child Rights Committee promotes the rights contained in the Children’s Charter by collecting and documenting information, formulating standards for protecting the rights of African children, and working with other African, international, and regional organizations concerned with promoting children’s rights. The Committee receives and considers individual complaints of violations of the Children’s Charter by States parties; after considering a complaint, the Committee expresses its opinion as to whether a violation has taken place. The Child Rights Committee also monitors States’ efforts to implement the Children’s Charter. At the request of a State party, an AU institution, or institution or person recognized by the AU, the Committee will interpret the provisions of the Children’s Charter. Lastly, the Committee carries out functions assigned to it by the AU Assembly, the Secretary-General of the AU, and any other organization of the AU or the United Nations.<sup>131</sup>

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citizenship, and Kenyan children of Nubian descent were not granted identification cards necessary to prove nationality, leaving many stateless. ACERWC decided that “the intent of Article 6(4) of the African Children’s Charter [is] that if a child is born on the territory of a State Party and is not granted nationality by another State, the State in whose territory the child is born, in this particular case Kenya, should allow the child to acquire its nationality.” ACERWC thus concluded that Kenya had violated, among other obligations, Article 6 of the Children’s Charter.).

<sup>118</sup> Children’s Charter, arts. 15-16, 22.

<sup>119</sup> *Id.* at art. 4.

<sup>120</sup> *Id.* at art. 5.

<sup>121</sup> *Id.* at art. 11(3).

<sup>122</sup> *Id.* at art. 5(3).

<sup>123</sup> *Id.* at art 15.

<sup>124</sup> *Id.* at art. 21.

<sup>125</sup> *Id.* at art. 16.

<sup>126</sup> *Id.* at art. 23.

<sup>127</sup> *Id.* at art. 13.

<sup>128</sup> *Id.* at art. 17.

<sup>129</sup> *Id.* at art. 24.

<sup>130</sup> *Id.* at art. 22.

<sup>131</sup> *Id.* at arts. 32, 42(a)-(d).



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The Child Rights Committee comprises 11 individuals of high moral standing, integrity, impartiality, and competence in the areas concerning the rights of children.<sup>132</sup> The Committee has issued two General Comments, the first concerning Article 30 (Children of Imprisoned Mothers) and the second concerning Article 6 (Name and Nationality) of the African Charter on the Rights and Welfare of the Child.<sup>133</sup>

## OUA Convention Governing the Specific Aspects of Refugee Problems in Africa

Adopted in 1969, the AU Convention Governing the Specific Aspects of Refugee Problems in Africa entered into force in 1974.<sup>134</sup> As of June 2017, it has been ratified by 46 AU Member States.<sup>135</sup>

The AU Refugee Convention complements the 1951 UN Convention relating to the Status of Refugees.<sup>136</sup> It contains many of the same definitions and protections, albeit with a few distinct differences. Like the 1951 Refugee Convention, the AU Refugee

Convention recognizes those who have a well-founded fear of persecution based on a protected ground, such as race, religion, nationality, membership of a particular social group, or political opinion; the OAU Refugee Convention, however, goes further, extending refugee status to persons fleeing “external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality.”<sup>137</sup>

### OUA Convention Governing the Specific Aspects of Refugee Problems in Africa

- 46 States parties
- complements the 1951 UN Convention relating to the Status of Refugees
- extends refugee status to persons fleeing external aggression, occupation, foreign domination, or events that seriously disturb public order

<sup>132</sup> ACERWC, The Committee, <http://acerwc.org/about-the-committee/experts/>.

<sup>133</sup> ACERWC, *General Comment on Article 30 of the African Charter on the Rights and Welfare of the Child* (adopted by ACERWC at its 22nd Ordinary Session, held from 4-8 November 2013), ACERWC/GC/01, available at <http://acerwc.org/the-committees-work/general-comments/gc-no1-on-article-30-of-the-african-charter-on-the-rights-and-welfare-of-the-child/>; ACERWC, *General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child*, (adopted by ACERWC at its 23rd Ordinary Session, held 7-16 April 2014), ACERWC/GC/02, available at <http://acerwc.org/the-committees-work/general-comments/gc-no2-on-article-6-of-the-african-charter-on-the-rights-and-welfare-of-the-child/>; see also ACERWC, *General Comments*, <http://acerwc.org/the-committees-work/general-comments/>.

<sup>134</sup> African Union Convention Governing Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 [hereinafter AU Refugee Convention], available at <http://www.achpr.org/instruments/refugee-convention/>; ACommHPR, *Legal Instruments*, *supra* note 82. The AU Refugee Convention remained in force following the succession of the AU to the OAU and is sometimes referred to as the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.

<sup>135</sup> African Union, *List of Countries which Have Signed, Ratified/Acceded to the OAU Convention Governing Specific Aspects of Refugee Problems in Africa* (15 June 2017), [https://au.int/sites/default/files/treaties/7765-sl-oau\\_convention\\_governing\\_the\\_specific\\_aspects\\_of\\_refugee\\_problems\\_in\\_afr.pdf](https://au.int/sites/default/files/treaties/7765-sl-oau_convention_governing_the_specific_aspects_of_refugee_problems_in_afr.pdf) (indicating that Djibouti, Eritrea, Madagascar, Mauritius, Namibia, Sao Tome and Principe, and Somalia have signed but not ratified the treaty. Sahrawi Arab Democratic Republic and Morocco have neither signed nor ratified the treaty.).

<sup>136</sup> AU Refugee Convention; Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 [hereinafter 1951 Refugee Convention], available at <https://treaties.un.org/doc/Publication/UNTS/Volume%20189/v189.pdf>.

<sup>137</sup> Compare OAU Refugee Convention, art. 1(2), with 1951 Refugee Convention, art. 1(A)(2).

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## African Charter on Democracy, Elections and Governance

Adopted in 2011, the African Charter on Democracy, Elections and Governance (Charter on Democracy) entered into force in 2012.<sup>138</sup> It has been ratified by 30 AU Member States, as of June 2017.<sup>139</sup>

States parties to the Charter on Democracy are committed to promoting democracy, the principle of the rule of law and human rights. In order to promote these three objectives, the Charter on Democracy emphasizes strengthening democratic political institutions and ensuring constitutional rule and constitutional transfers of power. The AU Peace and Security Council has the power to issue sanctions where there has been a transfer of power through illegal means, such as by a coup d'état against a democratically elected government.<sup>140</sup>

### African Charter on Democracy, Elections and Governance

- 30 States parties
- requires States parties to report to the African Commission every two years
- promotes democracy, the rule of law, and human rights

Further, the Charter on Democracy requires States parties to address policies and practices that may limit the full political participation of minority or vulnerable groups. For example, Article 8 directs States to “eliminate all forms of discrimination, especially those based on political opinion, gender, ethnic, religious and racial grounds.”<sup>141</sup> Article 29 requires States parties to take proactive measures to ensure women’s “full and active participation” in decision-making and the electoral process.<sup>142</sup> To support citizen engagement, States parties also have an obligation to provide free and compulsory primary education to all and “especially [to] girls, rural inhabitants, minorities, people with disabilities and other marginalized social groups” and to ensure citizens’ ability to read and write.<sup>143</sup> While promoting effective, transparent, and accessible governance, the Charter on Democracy also values the role of traditional authorities.<sup>144</sup> States parties are required to submit a report to the Commission every two years on the steps they have taken to implement the treaty.<sup>145</sup>

<sup>138</sup> African Charter on Democracy, Elections and Governance (adopted 25 October 2011, entered into force 15 February 2012) [hereinafter African Charter on Democracy], available at <http://www.achpr.org/instruments/charter-democracy/>; ACommHPR, Legal Instruments, *supra* note 82.

<sup>139</sup> African Union, *List of Countries which Have Signed, Ratified/Acceded to the African Charter on Democracy, Elections and Governance* (15 June 2017), [https://au.int/sites/default/files/treaties/7790-sl-african\\_charter\\_on\\_democracy\\_elections\\_and\\_governance\\_8.pdf](https://au.int/sites/default/files/treaties/7790-sl-african_charter_on_democracy_elections_and_governance_8.pdf). These States are Algeria, Benin, Burkina Faso, Cameroon, Chad, Comoros, Côte d’Ivoire, Djibouti, Ethiopia, Ghana, Guinea-Bissau, Guinea, Lesotho, Liberia, Madagascar, Mali, Malawi, Mauritania, Namibia, Nigeria, Niger, Rwanda, South Africa, Sahrawi Arab Democratic Republic, Seychelles, Sierra Leone, South Sudan, Sudan, Togo, and Zambia.

<sup>140</sup> African Charter on Democracy, arts. 4, 5, 10(1), 17, 23-25, 27(1).

<sup>141</sup> *Id.* at art 8(1).

<sup>142</sup> *Id.* at art. 29.

<sup>143</sup> *Id.* at art. 43.

<sup>144</sup> *Id.* at art. 35.

<sup>145</sup> *Id.* at art. 49(1).

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## Treaty Ratification by Country (year of deposit of instrument of ratification)

COUNTRY	African Charter	Rights of the Child	African Court	African Union	Rights of Women	Democracy & Elections	Refugee Problems
Algeria	1987	2003	2003	2001	2017	2017	1974
Angola	1990	1999	-	2001	2007	-	1982
Benin	1986	1997	2014	2001	2005	2012	1973
Botswana	1986	2001	-	2001	-	-	1995
Burkina Faso	1984	1992	1999	2001	2006	2010	1978
Burundi	1989	2004	2003	2001	-	-	1975
Cameroon	1989	1999	2015	2002	2012	2012	1986
Cape Verde	1987	1993	-	2001	2005	-	1989
Central African Republic	1986	2016	-	2001	-	-	1970
Chad	1986	2000	2016	2001	-	2011	1981
Comoros	1986	2004	2003	2001	2004	2017	2004
Congo	1983	2006	2010	2002	2012	-	1971
Cote d'Ivoire	1992	2007	2003	2001	2012	2013	1998
Democratic Republic of the Congo	1987	-	-	2002	2009	-	1973
Djibouti	1991	2011	-	2001	2005	2013	-
Egypt	1984	2001	-	2001	-	-	1980
Equatorial Guinea	1986	2003	-	2001	2011	-	1981
Eritrea	1999	2000	-	2001	-	-	-
Ethiopia	1998	2002	-	2001	-	2009	1973
Gabon	1986	2007	2000	2001	2011	-	1986
Gambia	1983	2001	2004	2001	2005	-	1981
Ghana	1989	2005	2005	2001	2007	2010	1983
Guinea	1982	2000	-	2002	2012	2011	1973
Guinea-Bissau	1986	2008	-	2003	2008	2012	1990
Kenya	1992	2000	2005	2001	2010	-	1993
Lesotho	1992	1999	2003	2001	2004	2010	1988
Liberia	1982	2008	-	2001	2008	2017	1972
Libya	1987	2000	2003	2000	2004	-	1981
Madagascar	1992	2005	-	2003	-	2017	-
Malawi	1990	1999	2008	2001	2005	2012	1987
Mali	1982	1998	2000	2000	2005	2013	1981
Mauritania	1986	2005	2005	2002	2005	2008	1972
Mauritius	1992	1992	2003	2001	2017	-	-
Morocco	-	-	-	2017	-	-	-
Mozambique	1989	1998	2004	2001	2005	-	1990
Namibia	1990	2004	-	2001	2004	2016	-
Niger	1986	1997	2004	2001	-	2011	1971
Nigeria	1983	2003	2004	2001	2005	2012	1986
Rwanda	1983	2001	2003	2001	2004	2010	1980
Sahrawi Arab Democratic Republic	1986	-	2014	2001	-	2014	-
Sao Tome and Principe	1986	-	-	2001	-	-	-
Senegal	1982	1998	1998	2000	2005	-	1971
Seychelles	1992	1992	-	2001	2006	2016	1980
Sierra Leone	1984	2002	-	2001	2015	2009	1988
Somalia	1986	-	-	2001	-	-	-
South Africa	1996	2000	2002	2001	2005	2011	1996
South Sudan	2016	-	-	2011	-	2015	2016
Sudan	1986	2008	-	2001	-	2013	1975
Swaziland	1995	2012	-	2001	2012	-	1989
Tanzania	1984	2003	2006	2001	2007	-	1975
Togo	1982	1998	2003	2000	2005	2012	1970
Tunisia	1983	-	2007	2001	-	-	1989
Uganda	1986	1994	2001	2001	2010	-	1987
Zambia	1984	2009	-	2001	2006	2011	1973
Zimbabwe	1986	1995	-	2001	2008	-	1985
<b>Current States Parties</b>	<b>54</b>	<b>48</b>	<b>30</b>	<b>55</b>	<b>39</b>	<b>30</b>	<b>46</b>

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## Other Regional Courts

In addition to the African Commission and African Court on Human and Peoples' Rights, the African continent is home to several other supranational judicial bodies that play an important role in the protection of individuals and groups' fundamental rights. These regional courts have been established through economic integration agreements, whereby groups of States agree to establish a community with preferential trade standards and other policies to allow them to cooperate and, ideally, enhance the group's economic development and stability.<sup>146</sup>

Some of these courts decide individuals' complaints that a State is responsible for violating international human rights standards. In Africa, these include the Economic Community of West African States Community Court of Justice and, previously, the Southern African Development Community Tribunal.

Others are empowered to decide individual complaints concerning alleged violations of national or community laws, which may involve fundamental rights. Such courts include the East African Court of Justice and the Common Market for Eastern and Southern Africa Court of Justice.

## ECOWAS Community Court of Justice

The ECOWAS Community Court of Justice<sup>147</sup> is the judicial organ of the Economic Community of West African States and is charged with resolving disputes related to the Community's treaty, protocols, and conventions. The ECOWAS Community Court of Justice has competence to hear individual complaints of alleged human rights violations.

Founded on May 28, 1975 by the Treaty of the Economic Community of West African States (Treaty of Lagos)<sup>148</sup> for the purpose of promoting economic integration across the region, ECOWAS comprises 15 West African countries: Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

The ECOWAS Community Court of Justice was created pursuant to the Revised Treaty of the Economic Community of West African States (Revised Treaty)<sup>149</sup> of 1993, and is headquartered in Abuja, Nigeria. In addition to providing advisory opinions on the meaning of Community law, the ECCJ has jurisdiction to examine cases involving:

- an alleged failure by a Member State to comply with Community law;
- a dispute relating to the interpretation and application of Community acts;

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<sup>146</sup> See, e.g., International Justice Resource Center, Courts and Tribunals of Regional Economic Communities, <http://www.ijrcenter.org/regional-communities/>.

<sup>147</sup> ECOWAS Community Court of Justice, Welcome, <http://www.courtecowas.org/>.

<sup>148</sup> Treaty of the Economic Community of West African States (adopted 28 May 1975, entered into force 1 August 1995), 1010 UNTS 17 [hereinafter ECOWAS Treaty], available at <http://www.comm.ecowas.int/sec/?id=treaty&lang=en>.

<sup>149</sup> Revised Treaty of the Economic Community of West African States (adopted 24 July 1993, entered into force 23 August 1995), 2373 UNTS 233, available at [http://www.courtecowas.org/site2012/pdf\\_files/revised\\_treaty.pdf](http://www.courtecowas.org/site2012/pdf_files/revised_treaty.pdf).

# OVERVIEW OF THE AFRICAN HUMAN RIGHTS SYSTEM

- dispute between Community institutions and their officials;
- Community liability;
- human rights violations; and
- the legality of Community laws and policies.

The Court gained “jurisdiction to determine case[s] of violation[s] of human rights that occur in any Member State” in 2005 with the implementation of Supplementary Protocol A/SP.1/01/05 (Supplementary Protocol)<sup>150</sup> and following the adoption of Protocol A/SP1/12/01 on Democracy and Good Governance (Protocol on Democracy and Good Governance), which required that the Court be given “the power to hear, inter alia, cases relating to violations of human rights.”<sup>151</sup>

## ECOWAS Community Court of Justice

- judicial organ of the Economic Community of West African States (ECOWAS)
- applies the ECOWAS Treaty, conventions, protocols, and regulations adopted by the Community, and international human rights instruments that have been ratified by the State party to a case
- no exhaustion of domestic remedies requirement

The Court’s decisions on human rights matters interpret the African Charter on Human and Peoples’ Rights, considered by Article 1(h) of the Protocol on Democracy and Good Governance to contain “constitutional principles shared by all Member States” as legally binding on ECOWAS Member States. Corporations and individuals can submit complaints alleging human rights violations by the Community or Member State actors.

There is no domestic exhaustion of remedies requirement limiting the Court’s jurisdiction, meaning individuals do not need to pursue national judicial remedies before bringing a claim to the ECOWAS Court of Justice. Rather, the principal requirements are that the application not be anonymous and that the matter is not pending before another international court.<sup>152</sup>

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<sup>150</sup> Supplementary Protocol A/SP.1/01/05 Amending the Preamble and articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol (adopted 19 January 2005), *available at* [http://www.courtecowas.org/site2012/pdf\\_files/supplementary\\_protocol.pdf](http://www.courtecowas.org/site2012/pdf_files/supplementary_protocol.pdf).

<sup>151</sup> Protocol A/SP1/12/01 on Democracy and Good Governance – Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (adopted 21 December 2001), art. 39, *available at* <http://www.comm.ecowas.int/sec/en/protocoles/Protocol%20on%20good-governance-and-democracy-rev-5EN.pdf>.

<sup>152</sup> See ECOWAS Community Court of Justice, *Hadijatou Mani Koraou v. Niger*, Judgment No. ECW/CCJ/JUD/06/08, 27 October 2008, paras. 36-53, *available at* [http://www.worldcourts.com/ecowascj/eng/decisions/2008.10.27\\_Koraou\\_v\\_Niger.htm](http://www.worldcourts.com/ecowascj/eng/decisions/2008.10.27_Koraou_v_Niger.htm).

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The Court has heard cases involving education,<sup>153</sup> due process,<sup>154</sup> the rights of women and children,<sup>155</sup> and slavery.<sup>156</sup> The ECOWAS Court operates according to its Rules of Procedure.<sup>157</sup>

## SADC Tribunal

The Southern African Development Community Tribunal<sup>158</sup> was established under the Treaty of the Southern African Development Community (SADC Treaty)<sup>159</sup> in 1992, but was only inaugurated in November 2005. Although the SADC Tribunal is currently suspended, it was originally charged with ensuring Member States' compliance with the SADC Treaty and subsidiary instruments. It also had competence to hear individual complaints of alleged human rights violations. The SADC Member States have agreed to replace the court with a new tribunal, whose mandate will be limited to interpreting disputes between States arising under community law (and not individuals' human rights complaints).

### SADC Tribunal

- judicial organ of the Southern African Development Community (SADC)
- currently suspended from hearing cases
- new tribunal is expected to be established that will decide only inter-State disputes

From its headquarters in Gaborone, Botswana, SADC promotes further socio-economic cooperation and integration, and political and security cooperation among 15 southern African States, namely: Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

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<sup>153</sup> See ECOWAS Community Court of Justice, *SERAP v. Nigeria*, Judgment, ECW/CCJ/APP/0808, 27 October 2009, available at [http://www.worldcourts.com/ecowascj/eng/decisions/2009.10.27\\_SERAP\\_v\\_Nigeria.htm](http://www.worldcourts.com/ecowascj/eng/decisions/2009.10.27_SERAP_v_Nigeria.htm) (finding that education is a legal and human right).

<sup>154</sup> See ECOWAS Community Court of Justice, *Manneh v. Gambia*, Judgment No. ECW/CCJ/JUD/03/08, 5 June 2008, available at [http://www.worldcourts.com/ecowascj/eng/decisions/2008.06.05\\_Manneh\\_v\\_Gambia.htm](http://www.worldcourts.com/ecowascj/eng/decisions/2008.06.05_Manneh_v_Gambia.htm).

<sup>155</sup> See ECOWAS Community Court of Justice, *Amouzou Henry v. Côte d'Ivoire*, Judgment No. ECW/CCJ/JUG/04/09, 17 December 2009, available at [http://www.worldcourts.com/ecowascj/eng/decisions/2009.12.17\\_Henry\\_v\\_Cote\\_d'Ivoire.pdf](http://www.worldcourts.com/ecowascj/eng/decisions/2009.12.17_Henry_v_Cote_d'Ivoire.pdf).

<sup>156</sup> See ECOWAS Community Court of Justice, *Hadijatou Mani Koraou v. Niger*, Judgment No. ECW/CCJ/JUD/06/08, 27 October 2008, available at

[http://www.worldcourts.com/ecowascj/eng/decisions/2008.10.27\\_Koraou\\_v\\_Niger.htm](http://www.worldcourts.com/ecowascj/eng/decisions/2008.10.27_Koraou_v_Niger.htm); see also ECOWAS Community Court of Justice, *Habre v. Senegal*, Judgment No. ECW/CCJ/JUD/06/10, 18 November 2010, available at [http://jurafrica.org/html/pdf\\_ecowa.pdf](http://jurafrica.org/html/pdf_ecowa.pdf) (finding that the former President of Chad could not be tried by a Senegalese court for international crimes committed in Chad because it would violate the prohibition of non-retroactive penal law).

<sup>157</sup> See ECOWAS Community Court of Justice, Rules of the Community Court of Justice of the Economic Community of West African States (2002), available at [http://www.courtecowas.org/site2012/pdf\\_files/rules\\_of\\_procedure.pdf](http://www.courtecowas.org/site2012/pdf_files/rules_of_procedure.pdf).

<sup>158</sup> Southern African Development Community Tribunal, Home, <http://www.sadc-tribunal.org/>.

<sup>159</sup> Treaty of the Southern African Development Community (adopted 17 August 1992) [hereinafter SADC Treaty], available at <http://sadc-tribunal.org/wp-content/uploads/2013/03/Treaty.pdf>.



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The SADC Tribunal is headquartered in Windhoek, Namibia and had jurisdiction over disputes among SADC Member States as well as between individuals or corporations and Member States. Article 4 of the SADC Treaty requires SADC and its Member States to act in accordance with the principles of human rights, democracy, and the rule of law. The SADC Tribunal operated according to the Protocol on Tribunal and the Rules of Procedure.<sup>160</sup>

The Tribunal had ruled that it has jurisdiction to hear human rights complaints, but its exercise of this competence led to a SADC-ordered review of the Tribunal's role and functions in 2010, resulting in the suspension of its activity. The SADC Summit of Heads of State and Government agreed in August 2012 to revise the Protocol to authorize a court with a mandate limited strictly to the adjudication of inter-State disputes arising from the SADC Treaty and its protocols, rather than international human rights norms.<sup>161</sup> The revised Protocol was signed in August 2014 by nine countries, but has not received the ratifications needed for its entry into force, despite the urging of the SADC Summit.<sup>162</sup>

Many of the cases brought before the SADC Tribunal involved human rights violations, particularly regarding expropriation of private property by States. In *Mike Campbell (Pvt) LTD and Others v. Zimbabwe*,<sup>163</sup> a Zimbabwe national claimed that his basic rights had been violated as a result of the expropriation without compensation of his private property.<sup>164</sup>

Also in *Cimexpan v. Tanzania*, the Tribunal considered claims of torture in connection with the applicant's deportation.<sup>165</sup> The court determined that the applicant had not exhausted legal remedies and that he had failed to substantiate his claims of ill treatment. In resolving such cases, the SADC Tribunal has looked to common principles of international human rights law, rather than applying one specific human rights treaty.

## East African Court of Justice

The East African Court of Justice<sup>166</sup> is an international court tasked with resolving disputes between Member States of the East African Community. The EACJ was established by Article 9 of the Treaty for

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<sup>160</sup> See SADC Tribunal, Protocol on Tribunal and Rules of Procedure, [http://www.sadc.int/files/1413/5292/8369/Protocol\\_on\\_the\\_Tribunal\\_and\\_Rules\\_thereof2000.pdf](http://www.sadc.int/files/1413/5292/8369/Protocol_on_the_Tribunal_and_Rules_thereof2000.pdf).

<sup>161</sup> See SADC, SADC Tribunal, <http://www.sadc.int/about-sadc/sadc-institutions/tribun/>.

<sup>162</sup> See Protocol on the Tribunal in the Southern African Development Community (2014), available at <http://www.ijrcenter.org/wp-content/uploads/2016/11/New-SADC-Tribunal-Protocol-Signed.pdf>; SADC Summit of Heads of State and Government, *Communique of the 36<sup>th</sup> Summit of SADC Heads of State and Government: Mbabane, Swaziland, August 30-31, 2016*, available at [https://www.sadc.int/files/4914/7274/8383/Communique\\_of\\_the\\_36th\\_SADC\\_Summit\\_Swaziland\\_\\_31\\_August\\_2016.pdf](https://www.sadc.int/files/4914/7274/8383/Communique_of_the_36th_SADC_Summit_Swaziland__31_August_2016.pdf).

<sup>163</sup> SADC Tribunal, *Mike Campbell (Pvt) LTD and Others v. Zimbabwe*, Case No. SADC (T) 2/2007 (Case No. 2 of 2007), Main Decision of 28 November 2008, available at <http://www.saflii.org/sa/cases/SADCT/2008/2.pdf>.

<sup>164</sup> See also SADC Tribunal, *Barry L.T. Gondo and Others v. Zimbabwe*, Case No. SADC (T) 05/2008 (Case No. 5 of 2008), Decision of 9 December 2010, available at <http://www.saflii.org/na/journals/SADCLI/2011/11.html>.

<sup>165</sup> SADC Tribunal, *Tanzania v. Cimexpan (Mauritius) LTD and Others*, Case No. SADC (T) 01/2009 (Case No. 1 of 2009), Decision of 11 June 2010 available at <http://www.saflii.org/sa/cases/SADCT/2010/5.html>.

<sup>166</sup> EACJ, Welcome to the East African Court of Justice, <http://www.eacj.org/>.



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the Establishment of the East African Community (EAC Treaty)<sup>167</sup> and is charged with interpreting and enforcing the treaty, which came into force on July 7, 2000. The East African Court of Justice does not currently have competence to hear individual complaints of alleged violations of human rights law. The EACJ is temporarily based in Arusha, Tanzania.

The East African Community is a regional integration organization comprising Kenya, Uganda, Tanzania, Rwanda, South Sudan, and Burundi. The Community's goals are free movement of people and goods, and economic integration, and political union among the Member States. Article 6(d) of the establishing Treaty lists fundamental principles intended to guide the institution as: "good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights."

With regard to the EACJ's possible role in disputes related to fundamental rights, Article 27 of the Treaty provides, "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." In May 2005, the Council of Ministers issued a Draft Protocol to Operationalise the Extended Jurisdiction of the East African Court of Justice, but the protocol has not yet been approved.<sup>168</sup>

### East African Court of Justice

- judicial organ of the East African Community (EAC)
- lacks competence to hear individual complaints of alleged human rights violations
- may gain human rights jurisdiction, if approved by the Council of Ministers of the EAC

Despite the EACJ's lack of explicit jurisdiction to hear human rights cases, it has addressed cases involving individual rights. In the case of *Katabazi v. Secretary General of the East African Community*,<sup>169</sup> the EACJ was petitioned to determine the lawfulness of the detention of Ugandan prisoners. The EACJ conceded that "jurisdiction with respect to human rights requires a determination of the Council and a conclusion of a protocol to that effect. Both of those steps have not been taken. It follows, therefore, that this Court may not adjudicate on disputes concerning violation of human rights per se." However, the EACJ also determined that "it will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegation of human rights violation." While the

<sup>167</sup> Treaty for the Establishment of the East African Community (adopted 30 November 1999, entered into force 7 July 2000), as amended, 2144 UNTS 255, available at <http://www.eac.int/treaty/>.

<sup>168</sup> See, e.g., AllAfrica, *East Africa: 16<sup>th</sup> Meeting of the EAC Sectoral Council of Legal and Judicial Affairs Concludes in Arusha* (30 September 2014), <http://allafrica.com/stories/201410020982.html>.

<sup>169</sup> EACJ, *James Katabazi and 21 Others v. Secretary General of the EAC and Attorney General of Uganda*, Ref. No. 1 of 2007, Judgment of November 1, 2007, available 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>.

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EACJ did not evaluate the claims within a human rights framework, they found that the respondent had violated the principle of the rule of law and consequently contravened the Treaty.

In 2010, the EACJ further decided, in *Sitenda Sebalu v. The Secretary General of the EAC et al.*,<sup>170</sup> that the failure to extend the jurisdiction of the court pursuant to Article 27 violated the applicant's legitimate expectations that the matter be expedited and contravened the principles of good governance stipulated in Article 6 of the Treaty.

The extension of the court's jurisdiction was the focus of the June 2012 meeting of the EAC Council of Ministers.

## COMESA Court of Justice

The COMESA Court of Justice<sup>171</sup> is the judicial organ of a regional economic community, the Common Market for Eastern and Southern Africa,<sup>172</sup> and is charged with settling disputes arising under the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA Treaty)<sup>173</sup> between COMESA's Member States, Secretary General, individuals, and corporations. The COMESA Court of Justice does not have general competence to hear individual complaints of alleged human rights violations.

The Common Market was established in 1993 by the COMESA Treaty, to bring together Member States from Eastern and Southern Africa for the purpose of economic and social cooperation. Under Article 6(e) of the COMESA Treaty, COMESA also recognizes, promotes and protects the human and peoples' rights as set out in the African Charter on Human and Peoples' Rights. COMESA's 19 Member States are: Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe.

### COMESA Court of Justice

- judicial organ of the Common Market for Eastern and Southern Africa (COMESA)
- lacks competence to hear individual complaints of alleged human rights violations
- COMESA Treaty addresses trade, economic integration, and development, as well as health, education, the environment, access to food and water, and promoting the role of women

<sup>170</sup> EACJ, *Honorable Sitenda Sebalu v. Secretary General of the East African Community et al.*, Ref. No. 1 of 2010, Judgment of June 30, 2010, available at <http://eacj.org/?cases=honorable-sitenda-sebalu-vs-secretary-general-of-the-eac-attorney-general-of-the-republic-of-uganda-honorable-sam-k-njuba-and-the-electoral-commission-of-uganda>.

<sup>171</sup> COMESA, COMESA Court of Justice,

[http://about.comesa.int/index.php?option=com\\_content&view=article&id=83&Itemid=133](http://about.comesa.int/index.php?option=com_content&view=article&id=83&Itemid=133).

<sup>172</sup> COMESA, Home, <http://www.comesa.int/>.

<sup>173</sup> Treaty Establishing the Common Market for Eastern and Southern Africa (adopted 5 November 1993, entered into force 8 December 1994), 33 ILM 1067, available at [http://www.comesa.int/attachments/article/28/COMESA\\_Treaty.pdf](http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf).

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Article 7(c) of the COMESA Treaty establishes the Court of Justice, which now has its seat in Khartoum, Sudan. As laid out in Chapter Five of the Treaty, the Court's principal function is to "ensure the adherence to law in the interpretation and application of [the] Treaty" with Article 2 of the Treaty granting jurisdiction to hear all matters arising under the COMESA Treaty. The Treaty's provisions generally deal with the details of trade, economic integration, and development; however, specific chapters deal with health (Chapter 14), the environment (Chapter 16), access to food, water, education, sanitation, and infrastructure (Chapter 18), promoting the role of women (Chapter 24), and free movement of persons (Chapter 28). The decisions of the COMESA Court are binding and supersede national courts' decisions.

Article 24 of the Treaty dictates that Member States may refer cases to the Court when they consider "that another Member State or the Council has failed to fulfill an obligation under [the] Treaty" or in order for the Court to rule on "the legality of any act, regulation, directive or decision of the Council" alleged to be in violation of the Treaty "or any rule or law relating to its application or [which] amounts to a misuse or abuse of power." Likewise under Article 25, the COMESA Secretary General may refer disputes involving Member States to the Court for the same reasons, but only after allowing the Member State an opportunity to respond.

Moreover, Article 26 grants that individuals and corporations resident in any COMESA Member State "may refer for determination by the Court the legality of any act, regulation, directive, or decision of the Council or of a Member State on the grounds that [it] is unlawful or an infringement of the provisions of [the] Treaty..." In complaints against Member States, the individual or corporation must first exhaust domestic remedies in the national courts.<sup>174</sup>

The Court's decisions, at least as far as those made publicly available online, have not involved alleged fundamental rights violations. The COMESA Court of Justice procedures are outlined in its Rules of Procedure.

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<sup>174</sup> See, e.g., COMESA Court of Justice, *Kenya and Commissioner of Lands v. Coastal Aquaculture*, Ref. No. 3 of 2001, Judgment of 26 April 2002, available at [http://www.worldcourts.com/comesacj/eng/decisions/2002.04.26\\_Kenya\\_v\\_Coastasl.htm](http://www.worldcourts.com/comesacj/eng/decisions/2002.04.26_Kenya_v_Coastasl.htm).

# THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

## The African Commission on Human and Peoples' Rights

Established by Article 30 of the African (Banjul) Charter on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights, was created to promote and protect human and peoples' rights in Africa.<sup>175</sup> The African Commission is headquartered in Banjul, the Gambia.<sup>176</sup> The African Commission monitors State compliance with the African Charter, primarily by establishing special mechanisms, considering State reports, carrying out fact-finding and promotional missions to States parties, and adjudicating individual and State complaints under the Charter.

## Composition of the African Commission

The African Commission is made up of 11 Commissioners. The AU Assembly of Heads of State elects the Commissioners by secret ballot from a list of persons nominated by the States parties to the African Charter. Each State may nominate only two candidates, both of whom must be nationals of one of the States parties to the African Charter and only one of whom may be a national of the nominating State. The Commission cannot include more than one national from the same State.<sup>177</sup>

### African Commission on Human and Peoples' Rights Governing Documents

African Charter  
Rules of Procedure  
Constitutive Act of the African Union

Commissioners to the African Commission are required to be of the "highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights."<sup>178</sup> Particular consideration is given for their having legal experience.<sup>179</sup> The AU Assembly also considers the equitable geographic and

gender representation when electing Commissioners.<sup>180</sup> Commissioners, who serve six-year terms, serve in their personal capacity.<sup>181</sup>

Every two years the Commission elects its Chairperson and Vice-Chairperson, who together constitute the Bureau of the Commission.<sup>182</sup> The Bureau of the Commission is responsible for coordinating the activities of the Commission and supervising the Secretariat.<sup>183</sup> To that end, the Bureau of the Commission works with the Secretary to draft a provisional agenda for ordinary sessions and is responsible for determining whether a proposed item makes it onto the agenda. The Bureau may also

<sup>175</sup> African Charter, art. 30.

<sup>176</sup> ACommHPR, About ACHPR, <http://www.achpr.org/about/>.

<sup>177</sup> African Charter, arts. 31-34.

<sup>178</sup> *Id.* at art. 31(1).

<sup>179</sup> *Id.*

<sup>180</sup> ACommHPR, Structure, <http://www.achpr.org/about/structure/>.

<sup>181</sup> African Charter, arts. 31(2), 36; ACommHPR, Rules of Procedure, Rule 4(2).

<sup>182</sup> African Charter, art. 42(1).

<sup>183</sup> ACommHPR, Structure, *supra* note 180.

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make decisions on emergency situations that arise between sessions, but it is required to keep the Commission informed of its decisions and to present reports at subsequent sessions.<sup>184</sup>

### Secretariat

Headquartered in Banjul, the Gambia, the Secretariat provides administrative, technical, and logistical support to the African Commission.<sup>185</sup> The Secretariat is headed by a Secretary, who is appointed by the Chairperson of the AU Commission after consultation with the Chairperson of the African Commission.<sup>186</sup> In consultation with the Chairperson of the African Commission, the Secretariat helps prepare a draft agenda for each session, the African Commission's strategic plan, an annual work plan and budget, and guidelines for missions to be approved and adopted by the

Commission. The Secretariat is also responsible for registering communications and preparing a draft decision to guide the Commission in its deliberations.<sup>187</sup> Other duties include ensuring public access to non-confidential records of the Commission by keeping records of the Commission's activities, posting documents such as State reports to the Commission's website, and ensuring the maintenance and regular updating of the Commission's website. The Secretariat is required to present a written report on its activities to the Commission at the beginning of each session.<sup>188</sup>

#### Mandate of the African Commission

- interpret the African Charter
- promote human and peoples' rights
- protect human and peoples' rights
- perform any other task assigned to the Commission by the AU Assembly

### Mandate of the African Commission

Article 45 of the African Charter establishes the four primary functions of the African Commission. They are: to interpret all provisions of the Charter, promote human and peoples' rights, protect the rights contained in the African Charter, and to perform any other task assigned to the African Commission by the Assembly of Heads of State and Government.<sup>189</sup>

### Interpretation of Human Rights Standards

The mandate of the African Commission authorizes it to interpret the African Charter, which it does at the request of an AU Member State, an institution of the AU, or an organization recognized by the AU. Although there have been no requests made by a Member State or the AU, non-State actors, such as NGOs, have requested the Commission's interpretation of specific African Charter provisions.<sup>190</sup> The

<sup>184</sup> ACommHPR, Rules of Procedure, Rules 32, 79(3).

<sup>185</sup> *Id.* at Rule 18; ACommHPR, Structure, *supra* note 180.

<sup>186</sup> ACommHPR, Rules of Procedure, Rule 17(3); African Charter, art. 41; ACommHPR, Structure, *supra* note 180.

<sup>187</sup> ACommHPR, Rules of Procedure, Rules 18(f), 83(2); *see also* ACommHPR, Communications Procedure, *supra* note 38.

<sup>188</sup> ACommHPR, Rules of Procedure, Rule 18(c), (g), (i), (j).

<sup>189</sup> African Charter, art. 45.

<sup>190</sup> *Id.*; African Charter, art. 45(1)(b), 45(3).

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African Commission has responded to these requests by issuing thematic resolutions, such as the resolutions on freedom of association and the right to recourse.<sup>191</sup>

The Commission may also issue guidance and interpretations concerning African human rights instruments, at its own initiative, to assist States in understanding and implementing their obligations.<sup>192</sup> These may be called General Comments, Guidelines, or Guidelines and Principles. For example, at the conclusion of its 52<sup>nd</sup> Ordinary Session in October 2012, the Commission adopted *General Comments on Article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*.<sup>193</sup> The General Comments analyze the nature and scope of articles 14(1)(d) and (e), which relate to the reproductive and health rights of women to protect themselves and be protected from sexually transmitted diseases such as HIV/AIDS and to be informed of their health status and the health status of their partner. The African Commission has held that the right to self-protection and the right to be protected, for example, includes women's rights to access information, education, and sexual and reproductive health services.<sup>194</sup>

## Reviewing States' Reports

Another function of the African Commission is to review State reports, which Article 62 of the African Charter requires States parties to submit every two years.<sup>195</sup> The first report submitted by a State is the initial report. The initial report serves as a foundation for later reports; it describes the basic conditions within the State and the programs and institutions relevant to the State's rights and duties under the African Charter.<sup>196</sup> Subsequent reports to the African Commission are called simply periodic reports. Periodic reports explain the legislative and other measures States have taken to give effect to the rights and freedoms contained in the Charter.<sup>197</sup> Ultimately, the report monitoring process is intended to "show the degree of actual satisfaction of the rights, duties, and freedoms of the Charter."<sup>198</sup>

The African Commission reviews State reports during its ordinary sessions, held twice a year, and the review process includes a dialogue between the State and the Commissioners. Typically, representatives of States under review have an opportunity to respond to questions posed by the African Commission and provide any other information requested during or after the session. If a State declines to send a

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<sup>191</sup> ACommHPR, History, *supra* note 26; ACommHPR, *Resolution on the Right to Freedom of Association*, (adopted by the Commission at its 11th Ordinary Session, held 2-9 March 1992), Resolution No. 5, available at <http://www.achpr.org/sessions/11th/resolutions/5/>; ACommHPR, *Resolution on the Right to Recourse and Fair Trial*, (adopted by the Commission at its 11th Ordinary Session, held 2-9 March 1992), Resolution No. 4, available at <http://www.achpr.org/sessions/11th/resolutions/4/>.

<sup>192</sup> African Charter, arts. 45(1)(b), 60.

<sup>193</sup> See ACommHPR, General Comments on Article 14(1)(d) and (e) of the Protocol to the African Charter, *supra* note 106.

<sup>194</sup> *Id.* at para. 11.

<sup>195</sup> African Charter, art. 62.

<sup>196</sup> African Union, Guidelines for National Periodic Reports, 1-3, available at [http://www.achpr.org/files/instruments/guidelines\\_national\\_periodic\\_reports/achpr\\_guide\\_periodic\\_reporting\\_1989\\_eng.pdf](http://www.achpr.org/files/instruments/guidelines_national_periodic_reports/achpr_guide_periodic_reporting_1989_eng.pdf).

<sup>197</sup> African Charter, art. 62.

<sup>198</sup> African Union, Guidelines for National Periodic Reports, *supra* note 196, at 4.

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representative to the review session, the report will be rescheduled for the following session. If the State declines to send a representative to the following session, the African Commission will consider the State report in the absence of a representative.

Institutions, organizations, or any other interested party may also submit their own information on the human rights situation in the State concerned to the Secretary of the Commission. The Commission is empowered to “explore all the pertinent information” in its consideration of a State report. Typically called shadow reports, these reports must be submitted 60 days prior to the Commission’s review of the State report.<sup>199</sup>

Following consideration of a State report, the Commission issues Concluding Observations that recommend steps for the State to achieve further compliance with their African Charter obligations.<sup>200</sup> Generally, the Commission identifies the positive advances in the State’s implementation of the African Charter, describes the factors negatively impacting the enjoyment of human rights in the country, then lists the areas of concern, which often include human rights problems as well as the deficiencies or gaps in the State’s report. The Concluding Observations list recommendations, such as suggesting that the government investigate reported human rights abuses, revise its legislation to ensure respect for certain rights, change its practices with regard to a specific situation, increase its promotion of human rights in the society, ratify additional continental human rights instruments, or provide more detailed and relevant information in its next report to the Commission.<sup>201</sup>

One obstacle that the African Commission faces is lack of compliance with the State reporting requirements set forth in Article 62. The African Commission maintains a list of which States parties are up to date with their periodic reports and which are overdue on its website. Of the 54 States that are party to the African Charter, only 9 were up to date with their reports as of October 2017.<sup>202</sup> Seventeen States are late by one or two reports while 21 States owe three or more reports. There are seven States parties that have never submitted reports to the African Commission, with some States in this category having failed to submit as many as 16 reports.<sup>203</sup>

### Country Missions

The African Commission conducts fact-finding and promotional missions in AU Member States.<sup>204</sup> Fact-finding missions involve the investigation of allegations of “massive and serious human rights violations”

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<sup>199</sup> ACommHPR, Rules of Procedure, Rules 74(2), 75(5).

<sup>200</sup> ACommHPR, Rules of Procedure, Rules 75(3)-(4), 77; *see, e.g.*, ACommHPR, Concluding Observations and Recommendations on the First Combined Periodic Report of the Republic of Togo, *supra* note 42, paras. 21-28.

<sup>201</sup> *See, e.g.*, ACommHPR, *Concluding Observations on the Third and Fourth Combined Periodic Reports of the Peoples Democratic Republic of Algeria* (Presented at the 42nd Ordinary Session of the African Commission held from 14-28 November 2007 in Brazzaville, Congo), *available at* [http://www.achpr.org/files/sessions/42nd/conc-obs/3rd-4th-2001-2006/achpr42\\_conc\\_staterep34\\_2007\\_algeria\\_eng.pdf](http://www.achpr.org/files/sessions/42nd/conc-obs/3rd-4th-2001-2006/achpr42_conc_staterep34_2007_algeria_eng.pdf).

<sup>202</sup> ACommHPR, State Reporting, <http://www.achpr.org/states/>. These States are: Cote d’Ivoire, Democratic Republic of the Congo, Mali, Mauritania, Mauritius, Namibia, Niger, Rwanda, and South Africa.

<sup>203</sup> *Id.* These States are Comoros (15), Equatorial Guinea (15), Eritrea (9), Guinea-Bissau (15), Sao Tome and Principe (15), Somalia (16), and South Sudan.

<sup>204</sup> African Charter, art. 45(1); ACommHPR, Rules of Procedure, Rules 70, 81.



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and the issuance of recommendations to the relevant State on how to improve the human rights situation within its territory. Promotional missions involve State visits by members of the African Commission to organize lectures and disseminate information about the African Charter and the African Commission.<sup>205</sup>

The 2002 mission to Zimbabwe is a typical example of the Commission's activities during fact-finding missions. The Commission undertook its fact-finding mission following reports of widespread human rights violations in Zimbabwe relating to the constitutional review process and land redistribution program. Commissioners met with government officials, lawyers, and civil society representatives in order to gain a greater understanding of issues, such as Zimbabwe's land laws, prison conditions, and the independence of the judiciary. In its report, the African Commission issued a series of recommendations to the government of Zimbabwe, including: establishing independent and credible national institutions that monitor and prevent human rights violations, creating an independent mechanism for receiving complaints about police conduct, and amending the Public Order and Security Act and the Access to Information Act to meet international standards for freedom of expression.<sup>206</sup> Although Zimbabwe had previously accepted the African Commission's fact-finding mission, the government disparaged the report and failed to comply with the Commission's human rights recommendations.<sup>207</sup> This example underscores the inherent challenge of enforcing State compliance with African Commission recommendations.

The African Commission also conducts promotional missions to make the local population and State governments aware of their rights and duties under the African Charter and to encourage States to strengthen their domestic human rights systems.<sup>208</sup> In 2009, for example, the African Commission conducted a promotional mission to Nigeria to encourage dialogue between the Commission and the Nigerian government, exchange views with non-governmental organizations and national human rights organizations on how to enhance Nigerians' enjoyment of their human rights, and follow up on recommendations from the Commission's Concluding Observations to Nigeria's State report. The Commission made several recommendations to the government of Nigeria that included permitting the African Court jurisdiction to hear complaints from individuals.<sup>209</sup> Nigeria ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights in 2004, but has not made a declaration under Section 34(6) of the Protocol accepting the Africa Court's competence to hear complaints from individuals.

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<sup>205</sup> ACommHPR, History, *supra* note 26.

<sup>206</sup> ACommHPR, *Zimbabwe: Report of the Fact-Finding Mission* (conducted 24-28 June 2002), Doc/OS(XXXIV)/346a, 2, 30-32, available at [http://www.achpr.org/files/sessions/34th/mission-reports/zimbabwe/achpr34\\_misrep\\_zimbabwe\\_2002\\_eng.pdf](http://www.achpr.org/files/sessions/34th/mission-reports/zimbabwe/achpr34_misrep_zimbabwe_2002_eng.pdf).

<sup>207</sup> Otto Saki, *Celebrating Minor Victories? Zimbabwe at the African Commission on Human and Peoples' Rights*, PAMBAZUKA NEWS (13 November 2007), <http://www.pambazuka.org/en/category/comment/44417>.

<sup>208</sup> ACommHPR, History, *supra* note 26; see, e.g., ACommHPR, *Report of Promotion Mission to Nigeria, 2009*, (adopted by the Commission at its 47th Ordinary Session, held 12-26 May 2010), available at <http://www.achpr.org/states/nigeria/missions/promo-2009/>.

<sup>209</sup> ACommHPR, *Report of Promotion Mission to Nigeria*, *supra* note 208.

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### Special Mechanisms

The African Commission establishes special, subsidiary mechanisms, such as special rapporteurs, committees, and working groups. These mechanisms have specific mandates and terms of reference to carry out their human rights monitoring work. Each is required to present a report on its activities to the African Commission during ordinary sessions. The African Commission relies on the information gathered by the special mechanisms in its formulations of recommendations to States parties.<sup>210</sup>

As of October 2017, the special mechanisms consist of the following:

- Special Rapporteur on Freedom of Expression and Access to Information
- Special Rapporteur on Prisons, Conditions of Detention, and Policing in Africa
- Special Rapporteur on Human Rights Defenders
- Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons
- Special Rapporteur on Rights of Women
- Committee for the Prevention of Torture in Africa
- Working Group on Economic, Social and Cultural Rights
- Working Group on the Death Penalty and Extra-judicial, Summary or Arbitrary Killings in Africa
- Working Group on Indigenous Populations/Communities in Africa
- Working Group on Specific Issues Related to the Work of the African Commission
- Working Group on Rights of Older Persons and People with Disabilities
- Working Group on Extractive Industries, Environment and Human Rights Violations
- Committee on the Protection of the Rights of People Living with HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV

In addition to these special mechanisms, the Advisory Committee on Budgetary and Staff Matters prepares the Commission's programs budget and ensures their proper execution.<sup>211</sup>

Between 2008 and 2012, these special mechanisms conducted at least 19 missions.<sup>212</sup> In April 2012, the Working Group on the Death Penalty published its *Study on the Question of the Death Penalty in Africa*. The study includes an historical overview of the death penalty in Africa, an analysis of relevant international human rights law, and a discussion of strategies for and challenges to the abolition of the death penalty throughout the continent.<sup>213</sup>

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<sup>210</sup> ACommHPR, Special Mechanisms, *supra* note 36.

<sup>211</sup> ACommHPR, Advisory Committee on Budgetary and Staff Matters, <http://www.achpr.org/mechanisms/budgetary-and-staff-matters/>.

<sup>212</sup> See ACommHPR, *Final Communiqué of the 52nd Ordinary Session of the African Commission on Human and Peoples' Rights* (adopted by the Commission at its 52nd Ordinary Session, held from 9-22 October 2012) [hereinafter ACommHPR, *Final Communiqué of the 52nd Ordinary Session*], available at <http://www.achpr.org/sessions/52nd/info/communique52/>.

<sup>213</sup> ACommHPR, Working Group on the Death Penalty in Africa, *Study on the Question of the Death Penalty in Africa* (adopted by the Commission at its 50th Ordinary Session, held 24 October – 7 November 2011), available at [http://www.achpr.org/files/news/2012/04/d46/study\\_question\\_deathpenalty\\_africa\\_2012\\_eng.pdf](http://www.achpr.org/files/news/2012/04/d46/study_question_deathpenalty_africa_2012_eng.pdf).

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Increasingly, these special mechanisms seek to coordinate with United Nations special procedures mandate holders with similar thematic mandates. An example of this joint approach was seen in 2012, when the African Commission's and the UN's Special Rapporteurs on Human Rights Defenders conducted a joint country visit to Tunisia.<sup>214</sup>

## Complaints Procedure

The African human rights system's complaint procedure is the centerpiece of the African Commission's work. In implementing the complaints procedure, the African Commission hears communications submitted by States, individuals, and non-governmental organizations (NGOs) on alleged human rights abuses.<sup>215</sup> Since its inception through May 2015, the Commission had received 563 communications, out of which it has completed 392 and transferred three to the African Court.<sup>216</sup> Only three of the communications were inter-State communications, with the rest having been presented by an individual or group against a State.<sup>217</sup> Of the 171 communications pending before the Commission as of May 2015, 53 were at the seizure stage, 97 at the admissibility stage, and 33 at the merits stage. One was under the amicable settlement procedure, four are awaiting additional information from the complainants, and one has been stayed pending further consideration.<sup>218</sup>

## Inter-State Communications

The African Commission hears State complaints asserting violations of the African Charter. Articles 48 and 49 govern the submission and consideration of inter-State communications. The Commission facilitates amicable settlements between the parties using "all the information it deems necessary."<sup>219</sup> The African Commission is required to submit a report outlining its facts and findings to the States concerned and the Assembly of the Heads of State and Government within a reasonable time after receiving the first communication by the complaining State. In the report, the Commission may also make nonbinding recommendations to the Assembly of the Heads of State and Government.<sup>220</sup>

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<sup>214</sup> See ACommHPR, *Joint Press Release on the Visit of the United Nations and African Commission on Human and Peoples' Rights Special Rapporteurs on Human Rights Defenders in Tunisia*, Sept. 25, 2012, available at <http://www.achpr.org/press/2012/09/d134/>.

<sup>215</sup> African Charter, arts. 47, 55; ACommHPR, Information Sheet No. 2, *supra* note 38, at 2; ACommHPR, Communications Procedure, *supra* note 38. The Commission may also receive and consider inter-State communications with the primary goal of achieving an amicable settlement between the States parties.

<sup>216</sup> Commissioner Lucy Asuagbor, *Report of the Chairperson of the Working Group on Communications Presented during the 56<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights (Banjul, the Gambia, 21 April – 7 May 2015)*, para. 16, available at [http://www.achpr.org/files/sessions/56th/inter-act-reps/224/56th\\_session\\_wgc\\_report\\_comm\\_asuagbor\\_en.pdf](http://www.achpr.org/files/sessions/56th/inter-act-reps/224/56th_session_wgc_report_comm_asuagbor_en.pdf).

<sup>217</sup> *Id.* at para. 18. These communications are: *Democratic Republic of Congo v. Burundi, Rwanda and Uganda*, Communication No. 227/99; *Sudan v. South Sudan*, Communication No. 422/12; and, *Djibouti v. Eritrea*, Communication No. 487/14.

<sup>218</sup> See *id.* at para. 17.

<sup>219</sup> African Charter, arts. 48-49, 52.

<sup>220</sup> *Id.* at arts. 52-53.

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### Individual Communications

In addition to communications brought by Member States, the Commission may consider communications brought by “anybody, either on his or her own behalf or on behalf of someone else” that denounces a violation of human rights.<sup>221</sup> Articles 55 through 59 of the African Charter govern these individual communications. The Communication Guidelines published by the Commission provides additional guidance. While the Commission does not provide legal assistance for individual communications, it may help individuals locate external sources of legal aid if the Commission is convinced that doing so is “essential for the proper discharge of the Commission’s duties, and to ensure equality of the parties before it; and [t]he author of the Communication has no sufficient means to meet all or part of the costs involved.”<sup>222</sup>

### Provisional Measures

Provisional measures are another powerful way to seek assistance from the African Commission. Provisional measures are requests issued by the Commission to a State, asking the State to take action to prevent imminent, irreparable harm to the victim or victims of a human rights violation.<sup>223</sup> A request by the Commission for provisional measures typically includes a request that the State report back to the Commission within 15 days on the steps it has taken to implement the specific measures requested.<sup>224</sup>

One factor that contributes to the efficacy of provisional measures as an advocacy tool is the Commission’s practice of sending a copy of the letter requesting provisional measures to the victim or victims, the AU Assembly, the Peace and Security Council, and the AU Commission.<sup>225</sup> This practice sheds light on the situation giving rise to the need for provisional measures and has the potential to put pressure on the State concerned to implement the measures and to cease any other harmful conduct.

The purpose of provisional measures is strictly limited to preventing irreversible harm.<sup>226</sup> Thus, the granting of provisional measures by the Commission, or their adoption by the State concerned, does not amount to a prejudgment on the merits of the communication. Rather, the Commission considers the communication independently of whether provisional measures were or were not issued or adopted.

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<sup>221</sup> *Id.* at art. 55; ACommHPR, Information Sheet No. 2, *supra* note 38, at 5. Individual communications are not limited to allegations of a “series of massive violations of human and peoples’ rights.” The Commission will also consider complaints alleging a single violation of the Charter. Article 55 of the African Charter explains when the Commission will consider an individual communication: Prior to each ordinary session, the Secretary of the Commission makes a list of communications that is sent to the Commission who vote on which ones should be considered by the Commission. Communications are considered if a simple majority votes in favor of consideration.

<sup>222</sup> ACommHPR, Rules of Procedure, Rule 104(2).

<sup>223</sup> *Id.* at Rule 98(1).

<sup>224</sup> *Id.* at Rule 98(4).

<sup>225</sup> *Id.* at Rule 98(3).

<sup>226</sup> *Id.* at Rule 98(5).

# THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

## Commission Sessions

The Commission holds two ordinary sessions per year, which typically last between 10 and 15 days.<sup>227</sup> Ordinary sessions generally take place in March or May and October or November.<sup>228</sup> The sessions are generally public unless the Commission decides or the African Charter indicates that the meeting should be held in private. Deliberations on the merits of individual communications, however, are always conducted in private, and decisions, including recommendations, remain confidential until their publication is authorized by the AU Assembly.<sup>229</sup> Other matters conducted in private include the consideration and adoption of draft mission reports, the consideration of Concluding Observations on State reports, and the consideration of draft protocols and resolutions on particular provisions of the Charter or human rights situations in States parties.<sup>230</sup>

The Commission's sessions are held either at its headquarters in Banjul, the Gambia or in a State that has invited the Commission to hold the session in its territory.<sup>231</sup> In the early years of the Commission, a number of States served as hosts; recently, however, the Commission has held most of its sessions in the Gambia due to a decline in invitations from States.<sup>232</sup> The Commission has acknowledged that frequent sessions in the Gambia place a heavy burden on the Gambian government's resources and encourages more States parties to take on hosting duties.<sup>233</sup> Recently, Niger hosted the 60<sup>th</sup> Ordinary Session, and Kenya hosted the 18<sup>th</sup> Extraordinary Session.<sup>234</sup>

In addition to ordinary sessions, the African Commission holds extraordinary sessions. The Chairperson of the Commission convenes these extraordinary sessions at the request of either the Chairperson of the AU Commission or a majority of the Commissioners.<sup>235</sup> The provisional agenda of the extraordinary sessions contains only those items included in the Chairperson's notification of the extraordinary session.<sup>236</sup> Agenda items in the past include the consideration of individual communications, consideration and adoption of Concluding Observations on country reports, and country missions.<sup>237</sup>

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<sup>227</sup> ACommHPR, About Sessions, *supra* note 29.

<sup>228</sup> ACommHPR, History, *supra* note 26.

<sup>229</sup> ACommHPR, Rules of Procedure, Rules 25(2), 110.

<sup>230</sup> African Charter, art. 59; *see, e.g.*, ACommHPR, *Agenda* (followed by the Commission at its 52nd Ordinary Session, held 9-22 October 2012), *available at* [http://www.achpr.org/files/sessions/52nd/info/agenda/session\\_agenda\\_eng.pdf](http://www.achpr.org/files/sessions/52nd/info/agenda/session_agenda_eng.pdf).

<sup>231</sup> ACommHPR, Rules of Procedure, Rule 28(1).

<sup>232</sup> ACommHPR, Sessions, <http://www.achpr.org/sessions>.

<sup>233</sup> *See* ACommHPR, *40th Ordinary Session: Final Communiqué* (adopted by the Commission at the end of its 40th Ordinary Session, held 15-29 November 2006), para. 9, *available at* <http://www.achpr.org/sessions/40th/info/communique40/>.

<sup>234</sup> ACommHPR, Sessions, <http://www.achpr.org/sessions/>.

<sup>235</sup> ACommHPR, Rules of Procedure, Rules 27(1)-(2).

<sup>236</sup> ACommHPR, About Sessions, *supra* note 29.

<sup>237</sup> *See, e.g.*, ACommHPR, *12th Extraordinary Session: Final Communiqué* (adopted by the Commission at the end of its 12th Extraordinary Session, held 30 July – 4 August 2012), *available at* <http://www.achpr.org/sessions/12th-eo/info/communiqueeo12/>; ACommHPR, *Draft Agenda* (drafted for the Commission at its 15th Extraordinary Session, held 7-14 March 2014), *available at* [http://www.achpr.org/files/sessions/15th-eo/info/achpreo15\\_agenda\\_2014\\_eng.pdf/achpreo15\\_agenda\\_2014\\_eng.pdf](http://www.achpr.org/files/sessions/15th-eo/info/achpreo15_agenda_2014_eng.pdf/achpreo15_agenda_2014_eng.pdf).

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Commissioners have also discussed budgetary and other procedural matters during extraordinary sessions.<sup>238</sup>

The number of extraordinary sessions has increased significantly in recent years. Over half of the 22 extraordinary sessions that have been held since the formation of the African Commission have taken place since December 2011.<sup>239</sup> Since 2008, the Commission has generally held two extraordinary sessions per year.<sup>240</sup>

### The African Commission's Relationship with Other AU Structures

The African Commission does not carry out its mandate in isolation; rather, it works in collaboration with other structures of the African Union. Indeed, Rule 124 of the Commission's Rules of Procedure explicitly requires the Commission to establish a formal working relationship with "all African Union organs, and institutions and programmes that have a human rights element in their mandate."<sup>241</sup> This section provides a brief description of the Commission's relationship with three other AU structures: the AU Assembly, the African Court, and the Committee of Experts on the Rights and Welfare of the Child.

#### Assembly of the Heads of State and Government

The Commission's relationship with the AU Assembly is primarily characterized by the Commission's duty to report on its activities to the Assembly. Pursuant to Article 54 of the African Charter, the Commission must submit an activity report at each ordinary session of the AU Assembly.<sup>242</sup> Included in these activity reports are the Commission's decisions and recommendations on communications, as well as reports on promotion and protection missions conducted by the special mechanisms.<sup>243</sup> An activity report must receive authorization from the Executive Council of the AU Assembly before it can be published.<sup>244</sup> If the AU Assembly adopts the Commission's recommendations to States parties regarding a communication, they are published with the force of an AU Assembly decision.<sup>245</sup>

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<sup>238</sup> See, e.g., ACommHPR, 12th Extraordinary Session: Final Communiqué, *supra* note 237.

<sup>239</sup> ACommHPR, Sessions, *supra* note 232.

<sup>240</sup> *Id.*; see ACommHPR, About Sessions, *supra* note 29; ACommHPR, 13th Extraordinary Session: Final Communiqué (adopted by the Commission at the end of its 13th Extraordinary Session, held 19-25 February 2013), available at <http://www.achpr.org/sessions/13th-eo/info/communiqueeo13/>. The year of exception is 2010, during which the Commission held only one extraordinary session. During the 13<sup>th</sup> Extraordinary Session, the African Commission adopted various resolutions, including on elections in Africa, the trial of 25 Sahrawi civilians by a military Tribunal in Morocco, and an investigative mission to Mali from March 27, to April 7, 2013.

<sup>241</sup> ACommHPR, Rules of Procedure, Rule 124(1).

<sup>242</sup> African Charter, art. 54.

<sup>243</sup> ACommHPR, Communications Procedure, *supra* note 38.

<sup>244</sup> African Charter, art. 59(3); ACommHPR, Rules of Procedure, Rules 110(3)-(4); see also ACommHPR, About Sessions, *supra* note 29.

<sup>245</sup> Constitutive Act of the AU, arts. 7, 23; African Charter, art. 54; ACommHPR, Communications Procedure, *supra* note 38 (stating: "These recommendations are included in the Commissioner's Annual Reports which are submitted to the OAU Assembly of Heads of State and Government in conformity with article 54 of the Charter. If they are adopted, they become binding on the States parties and are published."). Decisions of the AU Assembly are made by consensus or a two-thirds majority.

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In some cases, reporting to the AU Assembly also occurs in relation to the Commission's attempt to resolve an inter-State dispute. If, after having tried to help the States reach an amicable solution, the Commission is unsuccessful, then it must submit a report to the States involved in the dispute as well as to the AU Assembly. The Commission may also make recommendations to the AU Assembly if it considers them useful.<sup>246</sup>

When the Commission is faced with one or more communications that "reveal the existence of a series of serious or massive violations of human and peoples' rights," it must bring the matter to the attention of the AU Assembly. Then, the AU Assembly may request the Commission to undertake an "in-depth study" of the cases and submit a factual report, the Commission's findings, and its recommendations. If there is a case of emergency, then the Commission must submit the matter to the Chairperson of the AU Assembly, who may also request an in-depth study.<sup>247</sup>

In addition to receiving activity reports from the Commission, the AU Assembly also determines who will comprise the Commission by electing its members. Article 33 of the African Charter provides that the AU Assembly elects "by secret ballot" the members of the Commission from a list of candidates nominated by States parties to the Charter. If a Commissioner should pass away, resign, or stop discharging his or her duties, then the AU Assembly also finds a person to replace the Commissioner for the remaining time of the term.<sup>248</sup>

Lastly, the AU Assembly can also assign "any other tasks" to the Commission under Article 45(4) of the African Charter. According to its website, the Assembly has not assigned the African Commission any other tasks.<sup>249</sup>

### African Court on Human and Peoples' Rights

The Commission's relationship with the African Court also requires collaboration. Both the Commission's Rules of Procedure and the Court's Protocol Establishing the African Court stipulate that the African Court "complement[s] the protective mandate of the Commission."<sup>250</sup> To complement the protective mandate of the Commission means that the Court must enhance the work of the Commission by providing additional protections and harmonizing with the Commission's jurisprudence. In order to maintain a close working relationship with one another, the Commission and the Court meet on a yearly basis and at any other time they deem necessary. When asked to interpret a provision of the African Charter, the Commission informs the President of the Court of the request and forwards its interpretation to the President of the Court once the interpretation is formally adopted. Similarly, when the AU, an organ of the AU, an organization recognized by the AU, or an AU Member State requests the Court to issue an Advisory Opinion, the Commission may request to be heard by the Court.<sup>251</sup>

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<sup>246</sup> African Charter, arts. 52-53.

<sup>247</sup> *Id.* at arts. 58, 59.

<sup>248</sup> *Id.* at arts. 33, 39.

<sup>249</sup> ACommHPR, History, *supra* note 26.

<sup>250</sup> ACommHPR, Rules of Procedure, Rule 114; *see also* Protocol Establishing the African Court, art. 2.

<sup>251</sup> ACommHPR, Rules of Procedure, Rules 115(1), 116-17.



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The complementary relationship between the two bodies is also evidenced by the African Commission's ability to refer communications to the African Court. There are several ways in which the African Commission may do so. First, when a State party has not complied or is unwilling to comply with the Commission's recommendations within the 180-day time frame indicated in Article 112(2) of the Rules of Procedure, the Commission may submit the communication to the Court for review. Second, the Commission may refer a communication to the Court where the Commission has issued provisional measures and the State has not complied. Third, when the African Commission believes there is a situation that constitutes a serious or massive violation of human rights, it may make an independent submission to the Court against a State party. Lastly, the African Commission may "seize the Court" at any point in the Commission's consideration of a communication.<sup>252</sup>

### Committee of Experts on the Rights and Welfare of the Child

Finally, the Commission also associates with the Committee of Experts on the Rights and Welfare of the Child. Rule 28(5) of the Commission's Rules of Procedures permits the Commission to hold "joint sessions in consultation" with the Child Rights Committee.<sup>253</sup> The Chairperson of the Commission is entitled to be represented at meetings of the Child Rights Committee and to participate, albeit without voting rights. The Child Rights Committee may also ask the AU Assembly to request the Commission to undertake studies relating to the rights and welfare of children on the Committee's behalf.<sup>254</sup>

The Chairperson of the Commission is the receiver of State reports on compliance with the Children's Charter; in this capacity, the Commission informs the Child Rights Committee of cases of non-submission of reports, notifies States parties of the date, location, and venue of the Committee's examination of State reports, and transmits the Committee's suggestions and general recommendations to the State concerned for comment.<sup>255</sup>

The Commission is closely involved with the Child Rights Committee's members and their support staff and has several duties in that regard. The Chairperson of the Commission can declare a seat on the Child Rights Committee to be vacant – due to repeated absences by the Committee member, death, or resignation – and to take "immediate action for replacement." The Chairperson also establishes the secretariat of the Child Rights Committee, appoints the Secretary for the Committee, and provides the Child Rights Committee with a staff and facilities for it to carry out its functions.<sup>256</sup> The Chairperson of the Commission is also responsible for servicing the meetings of the Child Rights Committee. The Chairperson makes arrangements for both the Child Rights Committee meetings and its subsidiary bodies.<sup>257</sup>

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<sup>252</sup> *Id.* at Rules 118(1)-(4).

<sup>253</sup> *Id.* at Rule 28(5).

<sup>254</sup> ACERWC, Rules of Procedure, Cmttee/ACRWC/II.Rev 2, Rule 77 [hereinafter ACEWRC, Rules of Procedure], available at <http://acerwc.org/wp-content/uploads/2011/03/ACERWC-Rules-of-procedure-English.pdf>.

<sup>255</sup> ACERWC, Rules of Procedure, Rules 65-71.

<sup>256</sup> *Id.* at Rules 14, 22.

<sup>257</sup> *Id.* at Rule 24.

# ENGAGING WITH THE AFRICAN COMMISSION

## Engaging with the African Commission

The African Charter provides that the African Commission must cooperate with other African and international institutions that are concerned with promoting and protecting human and peoples' rights.<sup>258</sup> The African Commission has interpreted this provision to include cooperation with human rights organizations operating at the national, regional, and international levels.<sup>259</sup>

### Advocacy Opportunities African Commission

- periodic State reporting process
- shadow reports
- submission of communications
- Commission sessions
- NGO Forum
- *amicus curiae* briefs

As such, there are a number of ways in which advocates and non-governmental organizations can engage with the African Commission. These include obtaining NGO observer status, which allows NGOs to speak during the Commission's public sessions; obtaining National Human Rights Institution (NHRI) affiliation status, which also enables organizations to engage with the African Commission; submitting shadow reports to the African Commission; writing communications to Special Mechanisms; participating in sessions of the African Commission; submitting *amicus curiae* briefs in contentious cases; and, perhaps most importantly, sending communications to the African Commission. Each of these forms of advocacy is discussed in greater detail below.

## NGO Observer Status

Having NGO observer status is a useful way to advocate before the African Commission. Reserved for non-governmental organizations working in the human rights field in Africa, observer status is a formal recognition of an NGO and its authority to participate at the Commission.<sup>260</sup> In applications to obtain observer status, NGOs must show that their objectives are consistent with the principles of the Constitutive Act of the AU and their work is in the field of human rights. They must also provide proof of their legal existence, a declaration of financial resources, their last financial statement, and a statement of activities.<sup>261</sup>

There are several benefits to having NGO observer status. NGOs with observer status may make statements and answer questions during the Commission's public sessions. They may also be invited to attend closed sessions dealing with issues that are of particular importance to them. Additionally, NGOs

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<sup>258</sup> African Charter, art. 45(1)(c).

<sup>259</sup> See ACommHPR, *Resolution on the Cooperation between the African Commission on Human and Peoples' Rights and NGOs having Observer status with the Commission*, Resolution No. 30/1998, adopted at the Commission's 24th Ordinary Session, held 22-31 October 1998, para. 7, available at <http://www.achpr.org/sessions/24th/resolutions/30/>.

<sup>260</sup> ACommHPR, Rules of Procedure, Rule 68(1).

<sup>261</sup> See ACommHPR, *Resolution on the Criteria for Granting and Enjoying Observer status to Non-Governmental Organizations Working the field of Human and Peoples' Rights*, Resolution No. 33/1999, adopted at the Commission's 25th Ordinary Session, held 26 April – 5 May 1999, available at <http://www.achpr.org/sessions/25th/resolutions/33/>.

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with observer status may propose particular items for inclusion in the Commission's provisional agenda for each session.<sup>262</sup>

In practice, a large number of NGOs speak on a variety of human rights issues at the African Commission's public sessions. During the 55<sup>th</sup> Ordinary Session, for example, 41 NGOs with observer status made statements about the human rights situation in Africa.<sup>263</sup>

As of July 2016, there were 477 NGOs holding observer status.<sup>264</sup> While the majority of these NGOs are African human rights organizations, this list also includes a number of NGOs based outside the African continent.<sup>265</sup>

### Applying for Observer Status

At each session, the African Commission considers applications from NGOs seeking observer status before the African Commission. Obtaining observer status is a fairly straightforward process.<sup>266</sup> In order to be granted such status, NGOs must demonstrate conformity with three broad criteria. They must:

- have objectives and activities that resonate with the fundamental principles and objectives contained in the AU Constitutive Act and in the African Charter on Human and Peoples' Rights;
- work in the field of human rights; and
- declare their financial resources.

NGOs seeking observer status should submit a written application to the Secretariat at least three months before the next upcoming session. The application must include:

- statutes of the organization;
- proof of its legal existence;
- a list of members;
- its constituent organs;
- its sources of funding;
- its last financial statement; and
- a statement on its activities.

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<sup>262</sup> *Id.* at Ch. II(3)-(6); ACommHPR, Rules of Procedure, Rules 32(3)(e), 34(2).

<sup>263</sup> ACommHPR, *Final Communiqué of the 55th Ordinary Session of the African Commission on Human and Peoples' Rights* (adopted by the Commission at the end of its 55th Ordinary Session, held 28 April – 12 May 2014), 10, available at [http://www.achpr.org/files/sessions/55th/info/communique55/achpr\\_fico\\_2014\\_eng.pdf](http://www.achpr.org/files/sessions/55th/info/communique55/achpr_fico_2014_eng.pdf).

<sup>264</sup> *Id.* at 11; see ACommHPR, Network, <http://www.achpr.org/network/>. The African Commission's website provides links to search Observers by name, State, or the Session in which they were granted Observer status.

<sup>265</sup> See ACommHPR, NGOs with observer status, <http://www.achpr.org/network/ngo/>.

<sup>266</sup> During the 52nd Ordinary Session, 12 out of 12 applications for Observer status were approved. See ACommHPR, *52nd Ordinary Session: Final Communiqué* (adopted by the Commission at its 52nd Ordinary Session, held 9-22 October 2012), available at <http://www.achpr.org/sessions/52nd/info/communique52/>.

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Once granted observer status by the Commission, NGOs are expected to be actively engaged with the work of the Commission and are further required to submit an activity report on their organizational activities to the Commission every two years. NGOs that do not fulfill their responsibilities may lose their privileges at Commission sessions. The Commission may also suspend or withdraw observer status to such organizations.<sup>267</sup>

### National Human Rights Institutions Affiliation Status

National Human Rights Institutions with affiliation status can also engage with the African Commission. NHRIs are constitutional or statutory bodies established by State governments that work to promote human rights at the national level. The establishment and operation of NHRIs must be consistent with the United Nations Principles relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights (Paris Principles).<sup>268</sup> NHRIs may obtain affiliation status by applying to the African Commission.

#### Applying for Affiliation Status

In order to be granted affiliation status, NHRIs must satisfy four basic criteria.<sup>269</sup> They must:

- be a national institution established by law, constitution, or decree;
- be a national institution of a State that is party to the African Charter;
- conform to the Paris Principles; and
- formally apply for Affiliation Status with the African Commission.

Once granted affiliation status, NHRIs have several rights and responsibilities.<sup>270</sup> They include:

- being invited to attend sessions of the African Commission according to Rule 67 of the Rules of Procedure of the African Commission;
- being represented in public sessions of the African Commission and its subsidiary bodies; and
- permission to participate, without voting rights, in deliberations on issues of particular interest to them, and to submit proposals that, at the request of any Commissioner, may be put to a vote.

While NHRIs with affiliation status and NGOs with observer status share some common privileges and duties, such as the ability to propose agenda items and the requirement to submit regular activity reports, NHRIs with affiliation status enjoy expanded privileges to actively participate in Commission

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<sup>267</sup> ACommHPR, Resolution on the Criteria for Granting and Enjoying Observer status, *supra* note 261.

<sup>268</sup> See ACommHPR, National Human Rights Institutions, <http://www.achpr.org/network/nhri/>; UN General Assembly, Resolution 48/134, *National institutions for the promotion and protection of human rights*, A/RES/48/134, 20 December 1993, available at <http://www.un.org/documents/ga/res/48/a48r134.htm>.

<sup>269</sup> ACommHPR, *Resolution on the Granting of Observer status to National Human Rights Institutions in Africa*, Resolution No. 31/1998 (adopted at the Commission's 24th Ordinary Session, held 22-31 October 1998), available at <http://www.achpr.org/sessions/24th/resolutions/31/>.

<sup>270</sup> *Id.*

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sessions alongside Commissioners.<sup>271</sup> NHRIs with affiliation status must also assist the Commission in carrying out its mandate at the country level, such as by encouraging their national governments to ratify human rights treaties.<sup>272</sup>

It is important to note that the African Commission grants affiliation status to only one NHRI per State party.<sup>273</sup> NHRIs with affiliation status must submit reports on their activities to the African Commission every two years.<sup>274</sup>

### Shadow Reports

As explained in Chapter 2 above, States parties must report every two years on the steps they have taken to implement the African Charter.<sup>275</sup> The Commission considers these reports during its ordinary and extraordinary sessions. After considering the reports, the Commission issues Concluding Observations that contain recommendations for the State to achieve further compliance with the Charter.<sup>276</sup>

The Commission's Rules of Procedure provide that any person or group, regardless of whether they hold observer status, may also submit shadow reports to the Commission on the human rights situation in their country.<sup>277</sup> These shadow reports supplement the State report, thereby providing NGOs the opportunity to bring human rights issues to the Commission's attention even where the State has failed to adequately engage, or has not engaged at all, with civil society. In addition to discussing human rights issues omitted from the State report or superficially addressed by the State, shadow reports also include questions for the Commission to pose to States and possible recommendations.

By way of example, a 2005 NGO shadow report to South Africa's first periodic report, written by the University of Pretoria's Centre for Human Rights, noted that South Africa had relied on outdated statistics and had not engaged with members of civil society. The report also included questions to South Africa regarding issues such as HIV/AIDS, sexual violence, and South Africa's reservations to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.<sup>278</sup> The advocacy impact of this shadow report is evident: in its Concluding Observations, the African

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<sup>271</sup> *Id.*; ACommHPR, National Human Rights Institutions, *supra* note 268; see ACommHPR, Rules of Procedure, Rule 32(3)(e); ACommHPR, *Resolution on the Cooperation between the African Commission on Human and Peoples' Rights and NGOs having Observer status with the Commission*, Resolution No. 30/1998 (adopted by the Commission at its 24th Ordinary Session, held 22-31 October 1998), available at <http://www.achpr.org/sessions/24th/resolutions/30/>.

<sup>272</sup> ACommHPR, National Human Rights Institutions, *supra* note 268.

<sup>273</sup> ACommHPR, Rules of Procedure, Rule 67(3).

<sup>274</sup> ACommHPR, *Resolution on the Granting of Observer status to National Human Rights Institutions in Africa*, *supra* note 269.

<sup>275</sup> African Charter, art. 62; see *supra* 'Reviewing States' Reports' in Chapter 2, above.

<sup>276</sup> ACommHPR, Rules of Procedure, Rule 77; see, e.g., ACommHPR, *Concluding Observations and Recommendations the First Combined Periodic Report on Togo*, *supra* note 42, paras. 21-28.

<sup>277</sup> ACommHPR, Rules of Procedure, Rule 74.

<sup>278</sup> University of Pretoria, Centre for Human Rights, *Shadow Report to South Africa's First Periodic Report to the African Commission on Human and Peoples' Rights*, 18 November 2005, paras. 2-3, 7-15, available at [http://www.sarpn.org/documents/d0001835/ACHPR\\_SA\\_Nov2005.pdf](http://www.sarpn.org/documents/d0001835/ACHPR_SA_Nov2005.pdf).

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Commission listed both the government’s use of outdated statistics and its failure to engage with civil society as “areas of concern.”<sup>279</sup>

The African Commission has stressed that States should consult with members of civil society when drafting their State reports.<sup>280</sup> These consultations can be an opportunity for advocates and organizations to raise issues that otherwise may have not been included in the report. In many States, however, the government’s drafting process – or lack thereof – poses challenges to individuals or groups wishing to contribute to the State report. A number of States do not inform civil society of when they are drafting and submitting reports, thus preventing NGOs from submitting information or comments.<sup>281</sup> Additionally, many Member States have not submitted any reports to the Commission or are seriously overdue in submitting them.<sup>282</sup> The failure of Member States to comply with their reporting obligations is seen as a “serious obstacle to civil society engagement” with the Commission.<sup>283</sup>

Even in the absence of direct consultation with the State, civil society can learn if their State is due to submit a report at the close of each session, when the Commission identifies which States’ reports are to be considered at the upcoming session. Furthermore, the Commission publishes State reports on its website, which enables civil society to review the report and submit their own shadow reports even in cases where the State has not held civil society consultations.<sup>284</sup>

One difficulty occurs when States fail to send representatives to the session in which their State report is being reviewed. If a State declines to send a representative to the review session, the report will be rescheduled for the following session. If the State again declines to send a representative, the African Commission will consider the State report in the absence of a representative.<sup>285</sup> This occurrence delays the African Commission’s consideration and has the potential to leave civil society in the dark as to when the State report will actually be considered.<sup>286</sup>

NGOs intending to contribute to the Commission’s consideration of State reports, including by submitting shadow reports, are also required to submit their contributions to the Secretary of the Commission 60 days prior to the next session.<sup>287</sup>

### Lists of Questions to States

On occasion, the African Commission will send State reports to credible civil society organizations for their comments in preparation of the Commission’s initial list of questions to States. The Commission’s

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<sup>279</sup> ACommHPR, Concluding Observations and Recommendations on the First Periodic Report of the Republic of South Africa, *supra* note 65, paras. 18-19.

<sup>280</sup> *See, e.g., id.* at paras. 19, 34.

<sup>281</sup> ISHR et al., Road Map for Civil Society Engagement, *supra* note 77, at 16.

<sup>282</sup> *See* ACommHPR, State Reporting, *supra* note 202.

<sup>283</sup> ISHR et al., Road Map for Civil Society Engagement, *supra* note 77, at 10.

<sup>284</sup> *Id.*

<sup>285</sup> ACommHPR, Rules of Procedure, Rule 75(4).

<sup>286</sup> ISHR et al., Road Map for Civil Society Engagement, *supra* note 77, at 11.

<sup>287</sup> ACommHPR, Rules of Procedure, Rule 74(2).

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outreach in this regard, however, remains limited.<sup>288</sup> Although NGOs may attend the opening and closing sessions of the African Commission, their participation in the State report review process is limited, which further highlights the importance of submitting shadow reports or other observations to Commissioners prior to the scheduled sessions.<sup>289</sup> The final phase of the consideration of State reports, in which the Commission adopts its concluding observations and recommendations to the State, is generally conducted in private.<sup>290</sup> The concluding observations and recommendations, however, are typically made public upon adoption of the activity report by the AU Assembly.<sup>291</sup> The Commission has noted that NGOs play an important role in “popularising concluding observations,” thereby increasing public awareness of its recommendations and encouraging State compliance with human rights obligations.<sup>292</sup>

### Written Communications to Special Mechanisms

The African Commission has established special mechanisms to help it carry out its mandate of promoting and protecting human and peoples’ rights in Africa.<sup>293</sup> These special mechanisms include special rapporteurs, committees, and working groups.<sup>294</sup> Special mechanisms typically work on thematic human rights issues, such as torture, the rights of women, and capital punishment.<sup>295</sup> A full list of the African Commission’s special mechanisms is provided in Chapter 2 above.<sup>296</sup>

The African Commission has mandated its special mechanisms to engage in consultations and collaboration with non-governmental entities when carrying out their protection and promotion functions.<sup>297</sup>

In addition to the general function of cooperating with NGOs, some special mechanisms may also receive information concerning alleged human rights abuses. The mandate of the Special Rapporteur on Human Rights Defenders, for example, calls for the Special Rapporteur to “seek, receive, examine and

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<sup>288</sup> *Id.* at Rule 74(3); ISHR et al., Road Map for Civil Society Engagement, *supra* note 77, at 18-19.

<sup>289</sup> ACommHPR, Resolution on the Criteria for Granting and Enjoying Observer status, *supra* note 261.

<sup>290</sup> See, e.g., ACommHPR, Agenda, *supra* note 230; ACommHPR, *Draft Agenda of the 51st Ordinary Session* (drafted for the Commission’s 51st Ordinary Session, held 18 April – 2 May 2012), available at <http://www.achpr.org/sessions/51st/info/agenda/>.

<sup>291</sup> African Charter, art. 54; ACommHPR, Rules of Procedure, Rules 59, 77(3).

<sup>292</sup> ACommHPR, Network, *supra* note 264.

<sup>293</sup> African Charter, art. 30; ACommHPR, Rules of Procedure, Rule 23; ACommHPR, Special Mechanisms, *supra* note 36; see, e.g., ACommHPR, *Report of the African Commission’s Working Group on Indigenous Populations/Communities: Research and Information Visit to the Democratic Republic of Congo*, conducted 9-25 August 2009 (adopted by the Commission at its 49th Ordinary Session, held 28 April – 12 May 2011) [hereinafter ACommHPR, *Report on Commission’s Visit to the Democratic Republic of Congo*], available at [http://www.achpr.org/files/sessions/49th/mission-reports/indig-2009/achpr49\\_misrep\\_drcongo\\_2009\\_eng.pdf](http://www.achpr.org/files/sessions/49th/mission-reports/indig-2009/achpr49_misrep_drcongo_2009_eng.pdf).

<sup>294</sup> ACommHPR, Rules of Procedure, Rule 23.

<sup>295</sup> ACommHPR, Special Mechanisms, *supra* note 36.

<sup>296</sup> See *supra* ‘Special Mechanisms’ in Chapter 2, above.

<sup>297</sup> See, e.g., ACommHPR, Report on Commission’s Visit to the Democratic Republic of Congo, *supra* note 293, at 11.



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act upon information on the situation of human rights defenders in Africa.”<sup>298</sup> The Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons can “seek, receive, examine, and act upon” information concerning alleged human rights abuses.<sup>299</sup> Communicating with special mechanisms can thus be a powerful tool for raising awareness of a particular human rights situation. Moreover, such interaction can serve as a tool to directly engage the government in question regarding a particular human rights situation, such as the arrest or potential ill treatment of human rights defenders.<sup>300</sup>

### Participation at Commission Sessions

There are a number of ways in which NGOs can participate in the Commission sessions. First, NGOs with observer status can suggest issues for inclusion in the African Commission’s provisional agenda for upcoming sessions. Second, civil society organizations can offer comments on State reports to help the Commission develop an initial list of questions for the State. NGOs can also directly participate in Commission sessions. Finally, they can prepare side events to take place in the margins of the session.

It is important to note that the African Commission’s Rules of Procedure provide a relatively short timeframe for NGOs seeking to contribute to upcoming sessions, requiring them to begin their advocacy efforts as early as possible.

### Suggestions for Provisional Agendas

Pursuant to Rule 32(3) of the African Commission’s Rules of Procedure, NGOs with observer status can suggest items that relate to any human rights issue for inclusion in the African Commission’s provisional agenda. Observer NGOs must send their proposed agenda items, along with any accompanying documentation, to the Secretary at least 60 days before the opening of the session at which they are to be discussed. Adherence to this timeframe is necessary as the provisional agenda is circulated to Member States, NHRIs with affiliation status, and NGOs with observer status 45 days prior to the ordinary session.<sup>301</sup>

The agenda is adopted at the beginning of each session, and items proposed by NGOs are included in the agenda if a majority of Commissioners present so decides.<sup>302</sup> Further, NGOs with observer status may present statements on particular human rights issues or the general human rights situation in their country at the beginning of Commission sessions. The NGO should provide the statement to the Secretary in advance of the session with “sufficient lead-time” for the statement to be reviewed by the Chairperson.<sup>303</sup>

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<sup>298</sup> ACommHPR, Special Rapporteur on Human Rights Defenders, <http://www.achpr.org/mechanisms/human-rights-defenders/>.

<sup>299</sup> ACommHPR, Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons, <http://www.achpr.org/mechanisms/refugees-and-internally-displaced-persons/>.

<sup>300</sup> See, e.g., ACommHPR, *Press Release on the Arrest and Detention of Ali Idrissa and Ten Other Human Rights Defenders in Niger*, Aug. 11, 2014, <http://www.achpr.org/press/2014/08/d220/>.

<sup>301</sup> ACommHPR, Rules of Procedure, Rules 32(3)(e), 32(4), 33(2), 63.

<sup>302</sup> *Id.* at Rules 32(3), 34.

<sup>303</sup> ACommHPR, Resolution on the Criteria for Granting and Enjoying Observer status, *supra* note 261.

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### Approximate Timeline for Session Preparations

Civil society should seek direct engagement with their national government on State reports to the African Commission as far in advance as possible, which may differ depending on the circumstances of the country concerned. Even where a national government does not provide information on upcoming State reports, the African Commission typically advertises the State reports scheduled for consideration at its next session. This advance notice from the African Commission provides NGOs and other organizations an opportunity to seek further information from their national governments.

For individuals or organizations planning to attend the sessions, logistical matters should be arranged as early as possible. The African Commission typically sends invitations to NGOs with observer status two to three months prior to the scheduled session, providing basic information on registration, visas, and other requirements.<sup>304</sup> An “Information for Participants” packet provides detailed information on these matters as well as information on airlines and hotel accommodations.<sup>305</sup> Both the invitation to NGOs and the information packet are also available on the Commission’s website.<sup>306</sup> Additionally, anyone may subscribe to the Commission’s online newsletter to receive information about upcoming sessions and other Commission activities.<sup>307</sup>

### Side Events

In addition to directly participating in Commission sessions, NGOs often organize side events, which are educational, awareness raising, or networking events focused on a particular topic. Organizations schedule such events around the period of sessions, to take place between sessions or at another time, such as an evening or weekend, when the participants are available to attend.

Commissioners frequently participate in these events.<sup>308</sup> Participation in side events also provides opportunities for NGOs to disseminate information, strengthen their networks with other NGOs, and meet with State representatives.<sup>309</sup> Whether focused on a specific human rights problem or on an issue of continental concern, side events allow advocates and other experts to convey information, draw attention to important questions, and engage allies and stakeholders in dialogue. For example, in April 2015 the East and Horn of Africa Human Rights Defenders Project (EHAHRDP) and its partners organized a side event on the human rights situations in Somalia and Sudan,<sup>310</sup> and in October 2013 a number of

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<sup>304</sup> See, e.g., ACommHPR, *Invitation to the 52nd Ordinary Session of the African Commission: 9 to 22 October 2012*, ACHPR/STC/OS/52/NGOs/01/561/12 (4 July 2012), available at [http://www.achpr.org/files/sessions/52nd/info/invitation-for-ngos/achpr52\\_invit\\_ngos\\_2012\\_eng.pdf](http://www.achpr.org/files/sessions/52nd/info/invitation-for-ngos/achpr52_invit_ngos_2012_eng.pdf).

<sup>305</sup> See, e.g., ACommHPR, *Information for Participants*, [http://www.achpr.org/files/sessions/52nd/info/information-for-participants/achpr52\\_partinf\\_2012\\_eng.pdf](http://www.achpr.org/files/sessions/52nd/info/information-for-participants/achpr52_partinf_2012_eng.pdf).

<sup>306</sup> See ACommHPR, *Sessions*, *supra* note 232.

<sup>307</sup> ACommHPR, Home, <http://www.achpr.org>.

<sup>308</sup> FIDH, *Practical Guide for NGOs*, *supra* note 69, at 8; see e.g., ACommHPR, Final Communiqué of the 52nd Ordinary Session, *supra* note 212.

<sup>309</sup> FIDH, *Practical Guide for NGOs*, *supra* note 69, at 8.

<sup>310</sup> *African Commission on Human & Peoples’ Rights: Side Event on the Human Rights Situation in Somalia and Sudan*, EHAHRDP, Apr. 22, 2015, <http://www.defenddefenders.org/2015/04/african-commission-on-human-peoples-rights-side-event-on-the-human-rights-situation-in-somalia-and-sudan/>.

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organizations collaborated to organize a side event on challenging impunity for international crimes in Africa.<sup>311</sup> Commissioners participated in both events. The Commission itself may also participate in hosting side events, such as a 2015 panel discussion on police officers' role in protecting human rights.<sup>312</sup>

### NGO Forum

Although not formally a part of the African Commission, the NGO Forum has become a key venue for NGO engagement with the Commission. Held in advance of the Commission's ordinary sessions, the NGO Forum provides a platform for NGOs to discuss the human rights situation in Africa, exchange information, and build their advocacy networks. Moreover, Commissioners often participate in the NGO Forum and incorporate language from NGO Forum resolutions into Commission resolutions.

### History and Function

The NGO Forum was first held in 1990, at the initiative of the International Commission of Jurists.<sup>313</sup> The African Centre for Democracy and Human Rights Studies (ACDHRS), a pan-African organization based in the Gambia, now organizes and hosts the NGO Forum. This convening is generally held approximately three to five days before the Commission's ordinary sessions, and brings together a large and diverse group of people with an interest in advocacy before the Commission. The NGO Forum provides an opportunity for a wide range of individuals and organizations to share their knowledge of and experience with human rights issues prior to the Commission's sessions.<sup>314</sup> Forum participants have also included

#### Benefits of Attending the NGO Forum

- provides a good opportunity to **network** and meet other advocates
- creates **opportunities to organize**
- useful to attend **side events** that address specific issues
- the **Commissioners** and the Commission's **staff** also attend

<sup>311</sup> *Side Event on the Fight against Impunity for International Crimes in Africa*, FIDH, Oct. 28, 2013, <https://www.fidh.org/International-Federation-for-Human-Rights/Africa/african-union/african-commission-on-human-and-peoples-rights/14175-side-event-on-the-fight-against-impunity-of-international-crimes-in-africa>.

<sup>312</sup> *Report on Side Event: Panel Discussion on the Role of Police Officers in the Promotion of Human Rights Compliant Policing*, ACHPR, May 27, 2015, <http://www.achpr.org/news/2015/05/d186/>.

<sup>313</sup> See, e.g., ACDHRS, *Report of the NGO Forum of the 32<sup>nd</sup> Ordinary Session of the ACHPR*, ACDHRS, Oct. 16, 2002, <http://www.acdhrs.org/2002/10/2689/>; Pan-African Human Rights Defenders Network, *Good Practices for CSO Participation at the African Commission on Human and Peoples Rights*, CIVICUS, <http://civicus.org/index.php/en/expert-perspectives/2035-good-practices-for-cso-participation-at-the-african-commission-on-human-and-peoples-rights>.

<sup>314</sup> See African Centre for Democracy and Human Rights Studies, *About the Forum*, <http://www.acdhrs.org/ngo-forum/>.

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representatives from national human rights institutions and academia.<sup>315</sup> Past forums have seen participation by over 200 individuals and organizations.<sup>316</sup>

### Relation to the African Commission

The nature of the NGO Forum illustrates how African and other NGOs weave their work together with that of the African Commission. As a primary example of this, the NGO Forum's program itself generally mirrors the African Commission's Provisional Agenda, which is circulated by the Commission prior to the session.<sup>317</sup> For that reason, NGO Forum panel discussions and Special Working Group Sessions tend to focus on the specific human rights issues and State reports about to be considered by the African Commission.

Over the years, the African Commission and the NGO Forum have developed a close working relationship. This relationship enables NGOs to advocate outside Commission sessions; they can also engage with other NGOs and – significantly – with Commissioners. During the NGO Forum preceding the 51st Ordinary Commission Session, for example, five Commissioners participated in the NGO Forum. Several of them even “steered the discussion” towards their specific mandates during Special Interest Working Groups meetings.<sup>318</sup>

At the conclusion of the NGO Forum, participants adopt a number of thematic and country-specific resolutions, which are subsequently delivered to the African Commission. Then, during the opening ceremony of a Commission session, a representative of the NGO Forum typically delivers a statement summarizing the NGO Forum's substantive discussions and resolutions.<sup>319</sup>

The African Commission has a history of incorporating issues raised and resolutions adopted during the NGO Forum into its own discussions and resolutions. During the NGO Forum preceding the 51st Ordinary Session, for example, participants adopted a resolution calling for the African Commission's Special Rapporteur on Freedom of Expression and Access to Information in Africa to expand Part IV of the Declaration of the Principles on Freedom of Expression in Africa (Freedom of Expression Declaration) to include the principles contained in the African Platform on Access to Information Declaration (APAI

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<sup>315</sup> International Service for Human Rights, *'Kumulika': A Spotlight on Human Rights in Africa*, 3 (2012), available at [http://www.ishr.ch/sites/default/files/article/files/kumulika\\_51st\\_session\\_final.pdf](http://www.ishr.ch/sites/default/files/article/files/kumulika_51st_session_final.pdf); ACDHRS, Summary Report of the NGOs Forum, *supra* note 69.

<sup>316</sup> ACDHRS, Summary Report of the NGOs Forum, *supra* note 69.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> ACommHPR, *51st Ordinary Session: Final Communiqué* (adopted by the Commission at the end of its 51st Ordinary Session, held 18 April – 2 May 2012), paras. 14-15, available at <http://www.achpr.org/sessions/51st/info/communique51/>; ACommHPR, *54th Ordinary Session: Final Communiqué of the 54th Ordinary Session of the African Commission on Human and Peoples' Rights*, (adopted by the Commission at the end of its 54th Ordinary Session, held 22 October – 5 November 2013), para. 6, available at <http://www.achpr.org/sessions/54th/info/communique54/>; ACommHPR, Final Communiqué of the 52nd Ordinary Session, *supra* note 230, paras. 26-27; ACommHPR, Final Communiqué of the 55th Ordinary Session, *supra* note 263, para. 7.

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Declaration).<sup>320</sup> The Commission later adopted Resolution 222, which authorized the Special Rapporteur to initiate the process of expanding the Freedom of Expression Declaration to include the right of access to information.<sup>321</sup>

### Advocacy Opportunities

Participation in the NGO Forum offers many opportunities for engagement. First, participants can attend panel discussions, working groups, and networking events.<sup>322</sup> Panel discussions typically focus on specific human rights issues that the African Commission will hear reports on by its special mechanisms, but the NGO Forum also permits civil society to discuss, and raise awareness of, issues that are left off the Commission's agenda or that are of concern in more than one country on the continent. The panel discussions provide an opportunity for NGOs to flag issues not previously raised in State reports to the Commission.

Second, since NGO Forum resolutions are drafted during working groups that are also occasionally attended by Commissioners, participants have the chance to urge the Commission to take action on issues it has avoided or not adequately addressed in the past.<sup>323</sup> The final resolutions are subsequently delivered to the African Commission, creating multiple avenues for advocacy.<sup>324</sup>

#### Group of Litigants for Strengthening the Protective Mandate of the African Commission

- **informal forum** of litigants
- communicates via **email list**
- holds informal meetings during the NGO Forum or Commission Sessions

Third, NGOs can organize side events to take place during or after the NGO Forum. These events tend to focus on issues identified as critical by a coalition of civil society groups. As with the NGO Forum, Commissioners and State delegates sometimes attend these events, providing another opportunity for dialogue outside of the Commission sessions.<sup>325</sup>

Lastly, the NGO Forum also provides valuable opportunities for individuals, civil society, NGOs, and Commissioners to network and collaborate with each other. Indeed, networking and collaboration among civil society organizations forms "the core" of the Forum's objectives. In the past, the NGO Forum has dedicated time to examining the relationships

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<sup>320</sup> See African Centre for Democracy and Human Rights Studies (ACDHRS), *Resolution on Access to Information in Africa*, TRES/002/4/2012 (16 April 2012), available at <http://www.acdhrs.org/2012/04/tres00242012-resolution-on-access-to-information-in-africa/>.

<sup>321</sup> ACommHPR, *Resolution to modify the Declaration of Principles on Freedom of Expression to include Access to Information and Request for a Commemorative Day on Freedom of Information*, Resolution No. 222/2012, (adopted by the Commission at its 51st Ordinary Session, held 18 April – 2 May 2012), available at <http://www.achpr.org/sessions/51st/resolutions/222/>.

<sup>322</sup> See, e.g., ACDHRS, Summary Report of the NGOs Forum, *supra* note 69.

<sup>323</sup> See International Service for Human Rights, *2010 NGO Forum (I): Inside Perspectives*, 2 (2010), available at [http://www.ishr.ch/sites/default/files/article/files/2010\\_ngo\\_forum\\_inside\\_perspectives\\_%28i%29\\_en.pdf](http://www.ishr.ch/sites/default/files/article/files/2010_ngo_forum_inside_perspectives_%28i%29_en.pdf).

<sup>324</sup> See, e.g., ACDHRS, Summary Report of the NGOs Forum, *supra* note 69.

<sup>325</sup> See ISHR, *2010 NGO Forum (I): Inside Perspectives*, *supra* note 323, at 5-6 (referring to a "heated" discussion that occurred between panel participants and Sudanese delegates in attendance on the ongoing crisis in Sudan.).

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between NGOs as well as between NGOs and the African Commission in order to develop strategies to increase collaboration between these groups.<sup>326</sup>

For those advocates or organizations pursuing complaints before the African Commission or Court, another convening may be of interest. Through the Group of Litigants for Strengthening the Protective Mandate of the African Commission, several human rights organizations share information and ideas related to litigation before the Commission.<sup>327</sup> One of the outcomes, to date, of their exchanges has been a manual on submitting complaints to the Commission.<sup>328</sup>

### Complaints of Alleged Human Rights Violations

Submitting communications to the African Commission can be a powerful form of advocacy, keeping in mind that litigation should be used as part of a strategy for achieving specific objectives. It is a way to bring cases of human rights violations to the Commission's attention and provides a record of abuses. It is also a way of pushing a State party to comply with its obligations under the African Charter, identifying best practices nationally and internationally, allowing victims to know and assert their rights, and encouraging potential plaintiffs to come forward and challenge abuses.

As explained previously, the African Commission hears communications submitted by States, individuals, and NGOs on alleged human rights abuses.<sup>329</sup> If the Commission ultimately determines that a violation of human or peoples' rights has occurred, it will recommend that the State party take remedial action.<sup>330</sup> In many cases, if the alleged victim faces a risk of irreparable harm, the Commission will also issue provisional measures, which are requests sent to the State concerned while litigation is still pending to address an immediate threat of irreparable harm.<sup>331</sup>

Furthermore, if the African Commission receives one or more communications that reveal a pattern of "serious or massive" human rights violations, it has the power to bring the case(s) to the attention of the AU Assembly. The AU Assembly may then request the African Commission to "undertake an in-depth study of these cases and make a factual report, accompanied by its finding and recommendations."

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<sup>326</sup> ACDHRS, Summary Report of the NGOs Forum, *supra* note 69.

<sup>327</sup> See ICJ Kenya, *Complainant's Manual for Filing a Communication before the African Commission*, International Commission of Jurists Kenyan Section, Aug. 1, 2013, <http://www.icj-kenya.org/index.php/media-centre/news/552-complainants-manual-for-filing-a-communication-before-the-african-commission-on-human-and-peoples-rights>.

<sup>328</sup> See Alliances for Africa, Cairo Institute for Human Rights Studies, FIDH, HRLS, ICJ Kenya, INTERIGHTS, REDRESS, University of Bristol Human Rights Implementation Centre, & Zimbabwe Lawyers for Human Rights, *Filing a Communication before the African Commission on Human and Peoples' Rights: A Complainant's Manual*, 2 (2013) [hereinafter, REDRESS et al., *Filing a Communication*], available at <http://www.icj-kenya.org/index.php/resources/publications/legal-opinions?download=131:filing-a-communication-before-the-african-commission-on-human-and-peoples-rights>.

<sup>329</sup> African Charter, arts. 47-49, 55; ACommHPR, Information Sheet No. 2, *supra* note 38, at 2; see also ACommHPR, Communications Procedure, *supra* note 38 (indicating that the Commission may also receive and consider inter-State communications with the primary goal of achieving an amicable settlement between the States parties).

<sup>330</sup> ACommHPR, Communications Procedure, *supra* note 38; ACommHPR, Rules of Procedure, Rule 92.

<sup>331</sup> ACommHPR, Rules of Procedure, Rule 98(1).

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Likewise, where the African Commission feels that a case is an emergency situation, it can submit the case to the Chairman of the AU Assembly, who may then request an in-depth study of the case.<sup>332</sup>

### Preventing Imminent Harm

Provisional measures are another powerful way to seek assistance from the African Commission. In essence, provisional measures are requests issued by the Commission to a State, asking the State to take action to prevent imminent, irreparable harm to the victim or victims of a human rights violation.<sup>333</sup>

### An Illustration of Provisional Measures in Practice

One example of provisional measures being requested by the Commission appears in the case of *International PEN, Constitutional Rights Project, Civil Liberties Organisation, and Interights (on behalf of Ken Saro-Wiwa Jnr.) v. Nigeria*. In that case, writer and Ogoni activist Ken Saro-Wiwa Jr. and other Ogoni leaders had been sentenced to death following a trial that was rife with procedural irregularities, intimidation of defense counsel, and bribing of witnesses. The Constitutional Rights Project requested the African Commission to adopt provisional measures to prevent their execution. In response, the Secretariat of the Commission contacted the Ministry of Foreign Affairs of Nigeria, the Secretary General of the OAU, the Special Advisor (Legal) to the Head of State, Nigeria's Ministry of Justice, and the Nigerian High Commission in the Gambia, pleading that, since the case of Saro-Wiwa Jr. and the others was already before the African Commission, the executions should be delayed at least until after the Commission had had an opportunity to discuss them with Nigerian authorities during its upcoming mission to Nigeria. The Commission received no response to its appeal and the executions were ultimately carried out.<sup>334</sup>

The *Saro-Wiwa* case is an excellent example of the advantages and shortcomings of provisional measures. First, the organizations advocating at the Commission had already filed their communications and were sending regular updates to the Commission, but the Commission had not yet made a determination on the merits. The provisional measures procedure enabled them to put pressure on Nigeria to stay the executions until the Commission could involve itself in the process, without having to wait for a final decision.

Second, it is clear why the Commission acted on the Constitutional Rights Project's request for provisional measures: the execution of Saro-Wiwa Jr. and the other Ogoni leaders would have caused immediate, irreversible harm. By invoking the provisional measures procedure, the organizations made a substantial, tangible effort to prevent that harm from being carried out.

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<sup>332</sup> African Charter, arts. 58(1)-(3).

<sup>333</sup> ACommHPR, Rules of Procedure, Rule 98(1).

<sup>334</sup> ACommHPR, *International PEN, Constitutional Rights Project, Civil Liberties Organisation, and Interights (on behalf of Ken Saro-Wiwa Jnr.) v. Nigeria*, Communication Nos. 137/1994, 139/1994, 154/1996, 61/1997, 24th Ordinary Session, 31 October 1998, paras. 6-9, 29, available at [http://www.achpr.org/files/sessions/24th/comunications/137.94-139.94-154.96-161.97/achpr24\\_137.94\\_139.94\\_154.96\\_161.97\\_eng.pdf](http://www.achpr.org/files/sessions/24th/comunications/137.94-139.94-154.96-161.97/achpr24_137.94_139.94_154.96_161.97_eng.pdf).



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Finally, the fact that Nigeria did not honor the Commission's request for provisional measures represents one of the shortcomings of the procedure. Even if the Commission issues a request for provisional measures, there is no guarantee that the State concerned will act on that request. In this way, provisional measures operate as an important advocacy tool, but should not be taken for a uniformly effective one.

### *Amicus Curiae* Briefs

Another way to present information or arguments to the Commission is by submitting an *amicus curiae* brief. *Amicus curiae* – Latin for 'friend of the court' – briefs are typically submissions by individuals or organizations that are neither party to the case nor have they been solicited by any of the parties for help, but who offer information or lines of argument nonetheless in order to assist the court.

Rule 99(16) of the African Commission's Rules of Procedure permits the Commission to receive *amicus curiae* briefs on communications before it. Furthermore, the Commission may allow the drafter of a brief or their representative to address the Commission during the hearing on the communication for which the brief was filed.<sup>335</sup>

Submitting *amicus curiae* briefs to the African Commission is a way to present new facts and original arguments to the Commission, as well as to draw attention to the possible broad legal reach the Commission's decision will have.

The case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya* illustrates how an *amicus curiae* brief can be successful. In the case, the London-based Minority Rights Group (MRG) collaborated with the Kenyan Centre for Minority Rights Development (CEMIRIDE) to file a communication to the Commission on behalf of the indigenous Endorois community, alleging that Kenya had failed to recognize and protect the Endorois' right to their ancestral lands and had refused to pay adequate compensation or grant restitution of their land, all in violation of the African Charter.<sup>336</sup> The Centre on Housing Rights and Evictions (COHRE) submitted an *amicus curiae* brief contending that the displacement of the Endorois community was, in essence, a forced eviction, which violated the international human rights to adequate housing.<sup>337</sup>

In its decision, the Commission referenced COHRE's *amicus curiae* brief as having been received by the Secretariat and addressed by Kenya in its submission on the merits. Moreover, the Commission noted previous cases in which it held that removing people from their homes violated Article 14 (right to property) of the African Charter in addition to the right to adequate housing "which, although not explicitly expressed in the African Charter, is also guaranteed by Article 14." Among the Commission's

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<sup>335</sup> ACommHPR, Rules of Procedure, Rule 99(16).

<sup>336</sup> ACommHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, Communication No. 276/2003, 46th Ordinary Session, 25 November 2009, available at [http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46\\_276\\_03\\_eng.pdf](http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf).

<sup>337</sup> Centre on Housing Rights & Evictions, *Kenya: African Commission Finds Government Guilty of Land Rights Violation*; ACommHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, paras. 1, 46.

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determinations was its conclusion that Kenya had, in fact, violated Article 14 with respect to the housing rights of the Endorois community.<sup>338</sup>

COHRE responded to this decision with excitement. Bret Thiele, COHRE's Senior Expert on Litigation, announced: "This is an historic ruling ... It shows that a government cannot simply evict people from their ancestral land to make way for new developments."<sup>339</sup>

COHRE's *amicus curiae* brief was successful for several reasons. First, it introduced a new line of argument to the Commission: that in spite of the issue of the community's legal claim to the land, their displacement nevertheless amounted to a forced eviction. Second, it highlights how NGOs can support and validate each other's work. An NGO may not have the resources or capacity to bring a case before the Commission, but it may still be able to complement and enhance the work of other NGOs by submitting *amicus curiae* briefs. Lastly, as an NGO that focuses primarily on housing rights and evictions, COHRE was able to give a perspective to the case that MRG and CEMIRIDE had perhaps not considered. In this way, *amicus curiae* briefs have the potential to urge the Commission to explore new lines of legal reasoning, advancing and deepening its jurisprudence along the way.

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<sup>338</sup> ACommHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, paras. 136, 191, 238.

<sup>339</sup> COHRE, Kenya: African Commission Finds Government Guilty of Land Rights Violation, *supra* note 337.

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### The African Commission's Complaints Procedure

The individual complaints procedure is at the heart of the African Commission's work. It is designed as a venue for victims of human rights violations to receive a balanced and impartial assessment of whether the State violated its human rights obligations, particularly where the State has been unable or unwilling to assess the alleged violation domestically.

The Commission plays a quasi-judicial role, receiving evidence and arguments from both the alleged victim and the State before reaching a determination of whether the State breached its obligations. If the Commission determines that there has been a violation, then it issues recommendations on what the State must do to repair the damage and prevent a similar situation from occurring.<sup>340</sup> Litigation

#### Key Terms

**Admissibility:** the stage at which the African Commission determines whether a communication falls within the African Commission's mandate and meets basic requirements.

**Amicable resolution:** an agreement reached between the complainant/victim and the State regarding the State's responsibility and any reparations to be made, thereby foregoing a decision by the Commission.

**Amicus curiae briefs:** briefs submitted by individuals or organizations who are not parties to a case and have not been asked for help by any of the parties, but who want to offer additional information or arguments to the African Commission to help it make its decision.

**Burden of proof:** the obligation of a party to produce evidence proving the truth of allegations made or defenses asserted, or explain why such evidence cannot be obtained. Once a party has satisfied its burden of proof, the burden shifts to the other party.

**Communication:** submissions to the African Commission providing information, evidence, and arguments related to alleged human rights violations. Communications can be submitted by one State against another State, or by individuals and organizations against a State that has allegedly violated one or more of the rights protected by the African Charter.

**Complainant:** the individual, group, organization, or group of organizations presenting the communication. The complainant may be represented by an attorney or organization, and is not necessarily the same person as the victim.

**Exhaustion of domestic remedies:** the requirement that complainants approach domestic courts to try to resolve the dispute before turning to the African Commission. Exhaustion of domestic remedies generally requires appealing to the highest court with jurisdiction.

**Merits:** the stage at which the African Commission decides whether the State is responsible for a specific violation of its human rights obligations.

**Non-duplication:** the requirement that a communication must not deal with a matter that has already been settled by another international human rights body. Communications cannot be submitted twice, or submitted to another international human rights dispute settlement mechanism.

**Provisional measures:** requests issued by the African Commission to a State, asking the State to take action to prevent imminent, irreparable harm to the victim or victims of a human rights violation.

**Seizure:** the stage at which the Commission examines a complaint to decide whether it meets the criteria for further examination. If the Commission decides to be seized of a communication, it receives a case number and the complainant is requested to submit arguments and observations on the admissibility of the complaint.

<sup>340</sup> See REDRESS et al., *Filing a Communication*, *supra* note 328.

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before the African Commission should be considered as a way to fight impunity for human rights violations, apply public pressure on States to respect their international human rights obligations, obtain a remedy where other attempts have been unsuccessful, and address structural problems within a State.<sup>341</sup>

## Requirements for Submitting a Complaint

This section will give a brief overview of the requirements that complainants before the African Commission must satisfy. The following section delves into these requirements in greater detail and provides an explanation of each stage of litigation before the Commission, the possible outcomes, and parallel procedures.<sup>342</sup>

### Practice Tip

Refer to the African Commission's most recent Rules of Procedure for the current requirements. While the Commission has published several "information sheets" and other guidance on its website, these documents are not authoritative and may not be updated to reflect changes in the Rules of Procedure.

Initial complaints should contain the following information and statements:

- the identity of the victim, even if he or she requests anonymity;
- the identity of the author of the communication, even if he or she requests anonymity. The Commission also requires that the author, if he or she is not the victim of the violation, indicate some connection with the victim;
- the State responsible for the alleged violation, due to its action, acquiescence, or omission;
- the date, place, time, and details of the alleged violation of a right protected by the African Charter or a basic principle of the Constitutive Act of the AU, such as freedom, equality, justice, or dignity;
- the steps taken to exhaust domestic remedies, or an indication of the reasons why it was impossible to do so, such as exhaustion was unduly prolonged;
- that the communication has been submitted within a reasonable time after domestic remedies were exhausted;
- whether the communication has been settled by another UN or AU settlement proceeding; and
- whether the victim's life, personal integrity, or health is in imminent danger.<sup>343</sup>

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<sup>341</sup> *Id.*

<sup>342</sup> See *infra* 'How Complaints Are Processed' in this chapter.

<sup>343</sup> African Charter, art. 56; ACommHPR Rules of Procedure, Rule 93(2); ACommHPR, Information Sheet No. 2, *supra* note 38, at 7. See also REDRESS et al., *Filing a Communication*, *supra* note 328, at 3-7;

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Furthermore, the complaint should not:

- be written in disparaging or insulting language against the State or its institutions or against the AU; or
- be based exclusively on news disseminated through mass media.<sup>344</sup>

If the communication does not meet these minimum information requirements, the Commission will not examine the admissibility or merits of the communication. In order for the communication to survive the admissibility phase and proceed to the merits phase, the complainant must also demonstrate that:

- the facts alleged, if true, constitute a possible violation of the African Charter or some basic principle of the Constitutive Act of the AU, such as freedom, equality, justice, or dignity;
- the victim exhausted domestic remedies, or that such remedies were unduly prolonged; and,
- the communication complies with the reasonable time limit.<sup>345</sup>

**To the extent possible, complainants should generally collect and submit information to demonstrate:**

- ✓ the **identity** of the victim(s), whether the victim wishes to remain **anonymous**, and the **identity** of the advocate
- ✓ the occurrence of an alleged **human rights violation**
- ✓ the government agent, agency, or other **State entity responsible** for the violation through action, acquiescence, or omission
- ✓ the **date, time, and location** of the alleged violation
- ✓ the **impact** of the violation on the victim(s); e.g., whether the victim's life, personal integrity, or health is in imminent danger
- ✓ **exhaustion of domestic remedies**, including all appeals and appellate decisions, or the **inadequacy, insufficiency, or unavailability** of such domestic remedies
- ✓ the **timeliness** of the communication
- ✓ **non-duplication** of the communication

The complainant should provide a full explanation to show these requirements have been met. Communications should be submitted in clear, simple, and straightforward language.<sup>346</sup>

Communications to the African Commission should be submitted in writing and should be addressed to the Secretary or Chairman of the African Commission.<sup>347</sup> This means that the Commission will not accept complaints that are made orally, via video, or through any method other than in writing.

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<sup>344</sup> African Charter, art. 56.

<sup>345</sup> *Id.* at arts. 56(2), (5), (6).

<sup>346</sup> ACommHPR, Information Sheet No. 2, *supra* note 38, at 6.

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Communications may be submitted via mail, email, or fax. Where a communication is sent by email, a scanned copy of the signature page should be included.<sup>348</sup> Communications may be submitted using the standard format<sup>349</sup> or the complainant can write his or her own brief or letter, as long as the communication contains the necessary information. Either way, the complainant should request an acknowledgment of receipt and follow up to make sure that the Secretariat has received the complaint.

The Commission conducts its proceedings in the working languages of the African Union, which are Arabic, English, French, and Portuguese.<sup>350</sup> For this reason, communications should be submitted in one or more of these languages, or in another language and accompanied by a translation to one of the Commission's working languages.

### African Commission on Human and Peoples' Rights

Address: African Commission  
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Banjul, the Gambia  
<http://www.achpr.org/>  
Email: [au-banjul@africa-union.org](mailto:au-banjul@africa-union.org)  
Phone: (220) 392962  
Fax: (220) 390764

Complainants must keep the Commission informed, in writing, of significant developments after submitting the communication. The complainant should always keep the Secretariat informed of any changes in contact information or representation. Failure to inform the Secretariat of a new mailing address or other essential contact information may result in the Commission dismissing the complaint for lack of diligent prosecution if it needs to reach the complainant and cannot.

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<sup>348</sup> See REDRESS et al., *Filing a Communication*, *supra* note 328, at 7.

<sup>349</sup> A copy of the standard format is included in the Commission's *Guidelines for the Submission of Communications*. ACommHPR, Information Sheet No. 2, *supra* note 38.

<sup>350</sup> ACommHPR, Rules of Procedure, Rule 36.

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**In order to prepare a documentation strategy, advocates should ask the following questions:**

- ✓ What facts will the complainant need to allege, and provide proof of, in order to show the existence of a specific human rights violation?
- ✓ What facts will the complainant need to allege, and provide proof of, in order to show that the State is responsible for the alleged violations?
- ✓ Which of these facts are known, e.g., the name of the victim of an enforced disappearance, and which of these facts are unknown, e.g., the whereabouts of the victim?
- ✓ What documents, witness accounts, records, or studies are likely to provide support for the victim's allegations?
- ✓ What documents or records can be used to demonstrate that the victim has met the admissibility requirements of exhaustion of domestic remedies and timeliness of the communication's submission?
- ✓ What person, company, or government body possesses or has access to this information?
- ✓ How long will it take to obtain each piece of information or document? Is there a fee or other cost associated?
- ✓ Will the complainant need to keep the source(s) of information confidential? Will witnesses or others be at risk if their identity is made public?
- ✓ If the preferred sources are unavailable, what alternative sources could be used?

### How Complaints Are Processed

Whereas the section above gave a brief overview of the requirements for complainants to satisfy when they submit a communication to the African Commission, this section provides a detailed explanation of how communications advance before the Commission, the various possible outcomes of this process, and procedures that can take place at the same time a communication is being processed.

There are several stages through which a communication proceeds before the African Commission, once the complaint has been registered. Briefly, they include:

- Seizure
- Admissibility
- Merits
- Compliance



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In addition, once a communication has been declared admissible, it may be possible to reach an amicable resolution, or friendly settlement, with the State, at which point the Commission's consideration of a communication ends. Furthermore, the Commission may request the State to undertake provisional measures at any point during the proceedings.

## Submission of Communication

- Send communication to the Secretariat of the African Commission
- Communication must be: 1) signed; 2) lodged against a State party to the African Charter; and 3) make a prima facie case for a violation of the rights contained in the African Charter

## Registry

- Secretariat assigns the communication a file number.
- Communication will not be registered if the alleged violating State is not a party to the African Charter
- Assignment of a file number does not guarantee seizure

## Seizure

- Secretariat summarizes the communication, submits it to the Commissioners, and writes to complainant acknowledging its receipt
- At least 7 Commissioners must approve, or at next session 6 Commissioners (simple majority) must agree to seizure

## Admissibility

- Requirements listed in Article 56 must be satisfied
- Additional criteria enumerated in Commission's Information Sheets
- Admissibility decisions are final; they will only be reviewed if the grounds for inadmissibility have changed

## Merits

- Commission considers substantive issues of the case
- Commission may initiate a friendly settlement
- Complainant must demonstrate the truth of the allegations
- If violations are found, it will issue recommendations to the State

## Registration

The first step in processing a communication is registration. Once the Secretariat of the African Commission receives a communication, it registers it with a file number in the Commission's Official Register of Communications. The Secretariat then acknowledges receipt of the communication. Complainants should contact the Secretariat to ensure that the communication is registered, especially if they do not receive an acknowledgment of receipt. However, if it is clear from the communication that the State against which it is lodged is not a party to the African Charter, the communication will not be registered.

## Seizure

After a communication has been registered, the next step is for it to be seized.<sup>351</sup> Seizure is the Commission's determination that the communication meets the basic requirements and alleges a *prima*

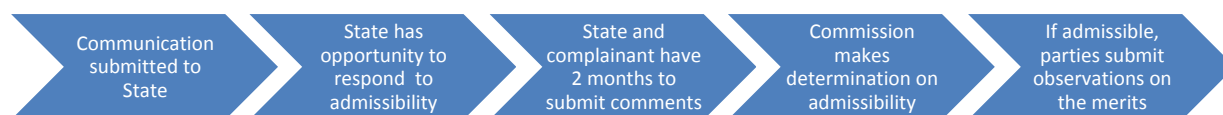
<sup>351</sup> ACommHPR, Rules of Procedure, Rule 93.

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*facie* violation of the African Charter by a State party; that is, that it appears from the facts alleged that a violation has taken place.<sup>352</sup>

At the seizure stage, the Secretariat of the Commission will verify that information required by Rule 93(2) has been provided and, if not, it will request that the complainant provide the missing documentation or data.<sup>353</sup> When the information is complete, the Secretariat will transmit the file to the Commission.<sup>354</sup> The Commission's Working Group on Communications, which is composed of commissioners and Secretariat staff, then reviews the communication and makes a decision regarding seizure.<sup>355</sup> The Working Group on Communications makes its decisions at its meetings, which occur twice per year between sessions and may also occur at the margins of sessions.<sup>356</sup>

Once a communication is seized, the Commission informs both parties (the complainant and the State). The seizure notification marks the first time the State is formally informed of the complaint.



### Admissibility

Next, the Commission must determine whether a communication is admissible. Both parties have an opportunity to present arguments and evidence before the Commission makes its admissibility determination. When the Working Group on Communications decides to seize a communication, the Secretariat forwards the communication to the State and requests the complainant to submit observations on the admissibility of the complaint within two months of the notification regarding seizure.<sup>357</sup> Once the complainant has submitted its evidence and arguments, the Secretariat forwards them to the State and requests the State to submit its own observations on admissibility within two months of receiving the request.<sup>358</sup> Once the State has made its submission, the complainant has one

<sup>352</sup> ACommHPR, Rules of Procedure, Rule 93. See also Commissioner Lucy Asuagbor, *Report of the Chairperson of the Working Group on Communications*, supra note 216, at para. 11 (stating, “With regard to Seizure, Communications brought under Article 55 of the African Charter can only be seized by the Commission if they are filed against a State Party to the African Charter, and if they allege *prima facie* violation of the African Charter.”).

<sup>353</sup> ACommHPR, Rules of Procedure, Rule 93(4).

<sup>354</sup> *Id.* at Rule 93(5).

<sup>355</sup> See ACommHPR, *Resolution on the Mandate of the Working Group on Communications of the African Commission on Human and Peoples’ Rights*, Resolution 212 (adopted by the Commission at its 11<sup>th</sup> Extra-Ordinary Session, held from 21 February to 1 March 2012), available at <http://www.achpr.org/sessions/11th-eo/resolutions/212/>; ACommHPR, *Resolution Establishing a Working Group on Communications and Appointment of Members*, Resolution 194 (adopted by the Commission at its 50<sup>th</sup> Ordinary Session, held from 24 October to 5 November 2011), available at <http://www.achpr.org/sessions/50th/resolutions/194/>.

<sup>356</sup> See ACommHPR, *Resolution Establishing a Working Group on Communications and Appointment of Members*; Commissioner Lucy Asuagbor, *Report of the Chairperson of the Working Group on Communications*, supra note 216, at paras. 19-24.

<sup>357</sup> ACommHPR, Rules of Procedure, Rule 105.

<sup>358</sup> *Id.* at Rule 105(2).

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month to submit comments on the State's arguments and evidence.<sup>359</sup> The Commission may hold an oral hearing, during one of its sessions, to hear supplementary observations on admissibility from the parties.<sup>360</sup>

It is important to note that, generally, admissibility decisions are final.<sup>361</sup> However, the Commission may review its decision when the complainant submits a written request providing new evidence regarding the admissibility of the communication.<sup>362</sup>

If the communication is declared admissible, then the parties will be informed and requested to send their observations on the merits.

## Meeting the Article 56 Admissibility Requirements

Article 56 of the African Charter identifies the requirements that a communication must satisfy in order to be considered admissible.<sup>363</sup> In addition, communications must include the basic information identified in Rule 93 of the Commission's Rules of Procedure. If one or more of these requirements has not been met, then the communication will be declared inadmissible and the case will be closed. These requirements, which are listed above in the section on **Requirements for Submitting a Complaint**, are explained in greater detail below.<sup>364</sup>

### Identify the victim

The author of the communication does not need to be the victim, or be related to the victim in any way, but the victim must be identified in the communication. The communication should state whether the victim wishes to remain anonymous.<sup>365</sup> Although the Commission will generally still convey the victim's name to the State concerned, in order to provide the government with an opportunity to investigate and reply to the allegations, requesting anonymity will help keep the victim's name out of public documents.

### Identify the author of the communication

The person who submits the communication is called the "author," "complainant," or "applicant." This person must be identified in the communication.<sup>366</sup> While a victim may submit a petition on his or her own behalf, this is not necessary. The complainant can be an individual, group of individuals, an NGO, or a group of NGOs. The author of a complaint does not have to be related to the victim, either, as long as

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<sup>359</sup> *Id.* at Rule 105(3).

<sup>360</sup> *Id.* at Rule 105(4).

<sup>361</sup> ACommHPR, Rules of Procedure, Rule 107(4).

<sup>362</sup> *Id.*

<sup>363</sup> African Charter, art. 56.

<sup>364</sup> See African Charter, art. 56; ACommHPR, Information Sheet No. 2, *supra* note 38. See also REDRESS et al., *Filing a Communication*, *supra* note 328, at 3-7.

<sup>365</sup> *Id.* at Rule 93(2)(e).

<sup>366</sup> African Charter, art. 56(1); ACommHPR, Rules of Procedure, Rule 93(2)(a).

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the victim is identified in the complaint. NGOs do not need to have observer status or be located within the territory of the State concerned before the Commission in order to file a complaint.<sup>367</sup> It is advisable that complainants do obtain the consent of the victim, though the Commission has waived this requirement where it was impossible to obtain consent, such as in cases of widespread human rights abuses or when the victim was imprisoned or disappeared.<sup>368</sup>

The author may indicate that he or she wishes to remain anonymous, and the African Commission will honor that request, though the identity of the author is still required for the communication to be admissible.<sup>369</sup> The Commission will usually still convey the author's identity to the State concerned, however.

The communication should also provide the author's nationality, occupation or profession, address, and signature. Providing a telephone and fax number is also helpful.<sup>370</sup> If an NGO is submitting the communication, the communication should provide the NGO's address and the names and signatures of its legal representatives.<sup>371</sup>

### Satisfy the jurisdiction requirements

In order to be compatible with the African Charter and the Constitutive Act of the AU, the communication must satisfy four bases for jurisdiction. These bases are: jurisdiction *ratione materiae* (subject matter jurisdiction), jurisdiction *ratione temporis* (temporal jurisdiction), jurisdiction *ratione personae* (personal jurisdiction), and jurisdiction *ratione loci* (territorial jurisdiction).<sup>372</sup> Communications should indicate how each of these bases are satisfied.

- Jurisdiction *ratione materiae* (subject matter jurisdiction): The communication must allege a violation of a substantive right that is protected by articles 1 through 26 of the African Charter or in the Constitutive Act of the AU, such as freedom, equality, justice, or dignity.<sup>373</sup> To satisfy this requirement, the complainant should provide information describing the violation that took place. Describe the events, decisions, or other actions – or inaction – that impacted the victim and how his or her rights were affected.

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<sup>367</sup> African Charter, art. 55(1). See also REDRESS et al., *Filing a Communication*, *supra* note 328, at 3.

<sup>368</sup> ACommHPR, *Article 19 v. Eritrea*, Communication No. 275/2003, 41st Ordinary Session, 30 May 2007, available at <http://caselaw.ihrrda.org/doc/275.03/>. See also REDRESS et al., *Filing a Communication*, *supra* note 328, at 3.

<sup>369</sup> African Charter, art. 56(1); ACommHPR, Rules of Procedure, Rule 93(2)(b). See also ACommHPR, Information Sheet No. 2, *supra* note 38, at 6-7; ACommHPR, Communications Procedure, *supra* note 38. In such cases, the communication will be assigned a letter of the alphabet while it is considered by the Commission.

<sup>370</sup> ACommHPR, Information Sheet No. 2, *supra* note 38, at 9.

<sup>371</sup> *Id.* at 7.

<sup>372</sup> African Charter, art. 56(2); ACommHPR, *Samuel T. Muzerengwa & 110 Others v. Zimbabwe*, Communication No. 306/2005, 9th Extraordinary Session, 23 February – 3 March 2011, paras. 51-59, available at [http://www.achpr.org/files/sessions/9th-EO/comunications/306.05/achpreos9\\_306\\_05\\_eng.pdf](http://www.achpr.org/files/sessions/9th-EO/comunications/306.05/achpreos9_306_05_eng.pdf).

<sup>373</sup> ACommHPR, *Samuel T. Muzerengwa & 110 Others v. Zimbabwe*, paras. 54-57.

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- Jurisdiction *ratione temporis* (temporal jurisdiction): The alleged violation must have occurred after the State became a party to the African Charter.<sup>374</sup>
- Jurisdiction *ratione personae* (personal jurisdiction): The alleged violation must be attributable to a State party to the African Charter and the complainant must have standing; that is, the complainant must fall within the definition of people or groups eligible to submit complaints. According to the African Charter, States and anyone “other than” a State are entitled to bring cases before the Commission. This provision means, in effect, that both individuals and NGOs have standing to submit complaints to the Commission. Individuals can be ordinary citizens or a group of individuals, and they do not even have to be victims or be related to the victim, as long as the victim is identified in the complaint. NGOs do not need to have observer status or be located within the territory of the State concerned in order to have standing.<sup>375</sup>
- Jurisdiction *ratione loci* (territorial jurisdiction): Territorial jurisdiction typically means that the alleged violation must have occurred within the State’s territory.<sup>376</sup> There is some debate regarding whether the Commission has extraterritorial jurisdiction; that is, whether the Commission has jurisdiction over violations that occurred outside the territory of the respondent State. None of the African system’s human rights instruments explicitly states that the obligation of States to respect, protect, and fulfill human rights is limited to their own territories. Indeed, Article 1 of the African Charter simply states that the States parties to the African Charter “shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.”<sup>377</sup> One could argue that States cannot be held responsible for violations outside their borders, particularly since the language of the African Charter is not clear. Conversely, one could derive such a responsibility from the object and purpose of the Charter: to promote the protective system that the Charter established.<sup>378</sup>

The Commission’s case law provides some guidance. In the case of *Democratic Republic of Congo v. Burundi, Rwanda, and Uganda*, the Commission noted that “the violations complained of are allegedly being perpetrated by the Respondent States in the territory of the Complainant State.”<sup>379</sup> None of the respondent States objected to the Commission’s application of extraterritorial jurisdiction, and the Commission found they had violated

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<sup>374</sup> *Id.* at para. 58.

<sup>375</sup> *Id.*; African Charter, arts. 47, 55(1); BBC, Profile: African Union, *supra* note 19; ACommHPR, State Reporting, *supra* note 202.

<sup>376</sup> ACommHPR, *Samuel T. Muzerengwa & 110 Others v. Zimbabwe*, para. 58.

<sup>377</sup> African Charter, art. 1.

<sup>378</sup> Takele Soboka Bulto, *Patching the ‘Legal Black Hole’: The Extraterritorial Reach of States’ Human Rights Duties in the African Human Rights System*, 27 S. AFR. J. H.R. 249, 257-58 (2011).

<sup>379</sup> ACommHPR, *DRC v. Burundi, Rwanda, and Uganda*, Communication No. 227/1999, 33rd Ordinary Session, 29 May 2003, para. 63, available at <http://caselaw.ihrrda.org/doc/227.99/>.

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fundamental rights and freedoms on territory over which they had “effective control.”<sup>380</sup> Although it is not certain what factors – State consent to the proceedings, effective control, or other factors – led to territorial jurisdiction being a non-issue, at the very least it is clear that the Commission is receptive to the application of extraterritorial jurisdiction.

### Do not use disparaging or insulting language

Communications should not disparage or insult the State concerned, its institutions, or the AU.<sup>381</sup> This rule, however, may come into conflict with the right to freedom of expression, which the African Commission has held to be a “basic human right.”<sup>382</sup> The threshold between language that merely criticizes and language that disparages or insults, however, is often hazy. The Commission has held that, in order to conclude that language is disparaging or insulting, it “must be aimed at undermining the integrity and status of the institution and bring it into disrepute.”<sup>383</sup> If the language is geared to “unlawfully and intentionally violating the dignity, reputation or integrity of a [State] officer or body” or is used “in a manner calculated to pollute the minds of the public or any reasonably man,” the Commission may determine that the communication does not comply with Article 56(3) of the African Charter and decide that it is inadmissible.<sup>384</sup>

The rule against the use of disparaging or insulting language came into question in the case of *Zimbabwe Lawyers for Human Rights v. Zimbabwe*. In that case, the Commission noted that Zimbabwe did not explain how the complainant’s language had in fact brought the judiciary and government into disrepute.<sup>385</sup> The State was required to show the “detrimental effect” of the statements contained in the communication, or to produce evidence that “the statements were used in bad faith or calculated to poison the mind of the public against the government and its institutions.”<sup>386</sup>

### Do not base the complaint only on news disseminated through the mass media

Communications should also be based on more than merely news disseminated through the mass media.<sup>387</sup> The African Commission has found that communications compiled from, for example, affidavits and applications from State institutions meet this requirement.<sup>388</sup> Communications, though, may rely on information from mass media in part, provided that the communication does not only contain facts or allegations obtained from media reports.<sup>389</sup>

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<sup>380</sup> *Id.* at para. 91.

<sup>381</sup> African Charter, art. 56(3).

<sup>382</sup> ACommHPR, *Zimbabwe Lawyers for Human Rights v. Zimbabwe*, Communication No. 293/2004, 43rd Ordinary Session, 22 May 2009, para. 53, available at <http://caselaw.ihrda.org/doc/293.04/>.

<sup>383</sup> *Id.* at para. 51.

<sup>384</sup> *Id.*

<sup>385</sup> *Id.* at para. 55.

<sup>386</sup> *Id.*

<sup>387</sup> African Charter, art. 56(4).

<sup>388</sup> ACommHPR, *Zimbabwe Lawyers for Human Rights v. Zimbabwe*, para. 56.

<sup>389</sup> See ACommHPR, *Sir Dawda K. Jawara v. Gambia*, Communication No. 147/95-149/96, 27th Ordinary Session, 11 May 2000, para. 24, available at <http://caselaw.ihrda.org/doc/147.95-149.96/>. See also ACommHPR, *Sudan Human Rights Organisation & COHRE v. Sudan*, Communication No. 279/03-296/05, 45th Ordinary Session, 27 May

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## Exhaust domestic remedies before submitting a communication

While it is necessary for complainants to ensure that all seven requirements set out in Article 56 of the Charter are met, according to the Commission, exhaustion of domestic remedies is “one of the most important conditions for admissibility.”<sup>390</sup> This requirement ensures that the State has an opportunity to remedy the issue through its domestic system and prevents the African Commission from acting as a court of first instance.<sup>391</sup> There is, however, an exception: if it is obvious that the process of exhausting domestic remedies is “unduly prolonged,” it is not necessary to wait to submit the communication. The African Commission will also waive this requirement in cases of serious and massive violations of human rights.<sup>392</sup> Thus, the communication should clearly state that all domestic remedies were exhausted, or explain why the process of exhausting domestic remedies would have been unduly prolonged.

The African Commission has noted that the exhaustion of domestic remedies requirement “should be interpreted liberally so as not to close the door on those who have made at least a modest attempt to exhaust domestic remedies.”<sup>393</sup> However, according to the Commission, “[i]t is not enough for the complainant to merely doubt the ability of the domestic remedies of the state to absolve it from pursuing the same.”<sup>394</sup>

A remedy must be available, effective, and sufficient in order to be considered a remedy that the complainant should have exhausted prior to seeking review by the African Commission.<sup>395</sup> Available means that the complainant could have pursued the remedy “without impediment.”<sup>396</sup> This means that the existence of the remedy must be “sufficiently certain” both in theory and in *practice*; otherwise, it will not be considered a viable remedy. Effective means that the remedy offers “a prospect of success.”

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2009, para. 92-93, available at <http://caselaw.ihrda.org/doc/279.03-296.05/> (finding that where the communication relied on UN reports and reports and press releases from international organizations, the communication was “not based exclusively on mass media,” and because of the international attention on the issue, “[i]t would be impractical to separate allegations contained in the communications from the media reports.”)

<sup>390</sup> ACommHPR, *Sir Dawda K. Jawara v. Gambia*, Communication Nos. 147/1995, 149/1996, 27th Ordinary Session, 11 May 2000, para. 30, available at <http://caselaw.ihrda.org/doc/147.95-149.96/>.

<sup>391</sup> *Id.* at para. 31.

<sup>392</sup> African Charter, arts. 56(5), 58; ACommHPR, *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. Zaire*, Communication Nos. 25/1989, 47/1990, 56/1991, 100/1993 (joined), 18th Ordinary Session, 4 April 1996, paras. 35-38, available at <http://caselaw.ihrda.org/doc/25.89-47.90-56.91-100.93/> (stating: “The Commission has never held the requirement of local remedies to apply literally in case where it is impractical or undesirable for the Complainant to seize the domestic courts in the case of each violation. This is the situation here, given the vast and varied scope of the violations alleged and the general situation prevailing in Zaire.”).

<sup>393</sup> ACommHPR, *Bakweri Land Claims Committee v. Cameroon*, Communication No. 260/2002, 36th Ordinary Session, 4 December 2004, para. 55, available at <http://caselaw.ihrda.org/doc/260.02/>.

<sup>394</sup> *Id.*

<sup>395</sup> ACommHPR, *Sir Dawda K. Jawara v. Gambia*, para. 31; ACommHPR, *Front for the Liberation of the State of Cabinda v. Angola*, Communication No. 328/2006, 54th Ordinary Session, 5 November 2013, para. 44, available at <http://caselaw.ihrda.org/doc/328.06/>.

<sup>396</sup> ACommHPR, *Sir Dawda K. Jawara v. Gambia*, para. 32.

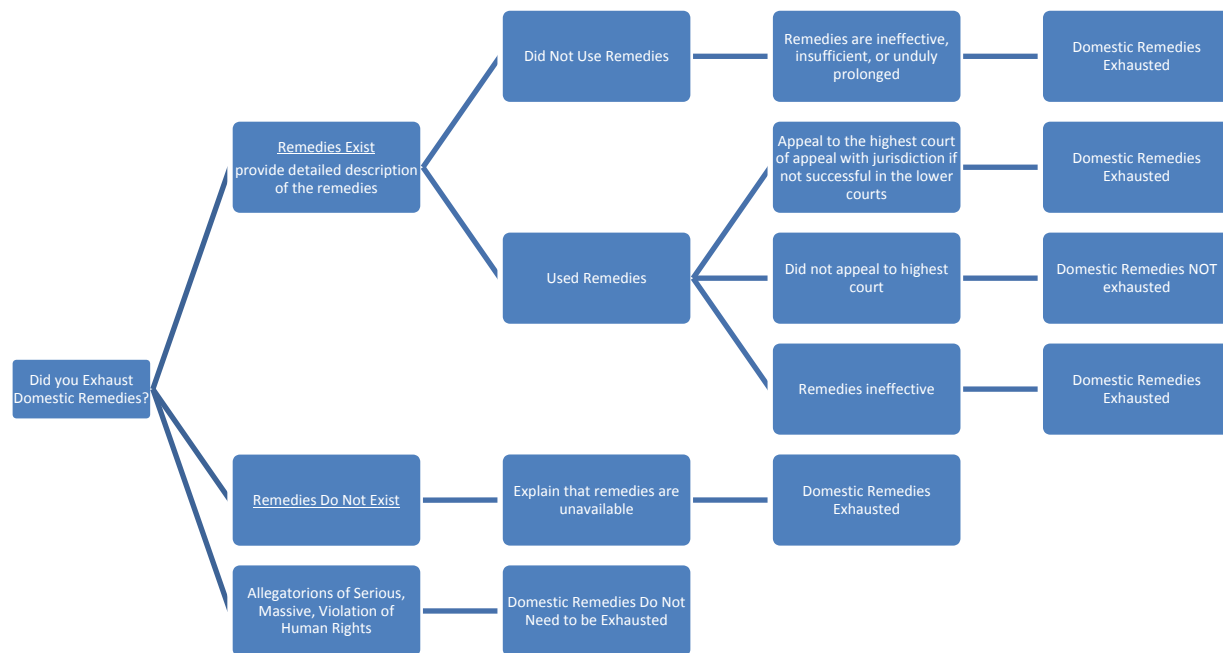


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The Commission has held that “a remedy that has no prospect of success” does not constitute an effective remedy. Sufficient means that the remedy is capable of redressing the complaint.<sup>397</sup>

Whether a remedy is unavailable, ineffective, or insufficient should be distinguished from instances where the complainant is afraid to pursue domestic remedies. In some cases, the African Commission has held that where there is a “clear establishment of the element of fear perpetrated by identified state institutions,” it would be contrary to justice to request the complainant to attempt local remedies.<sup>398</sup> Nevertheless, the African Commission has denied admissibility where the complainant simply declined to use domestic remedies that were available and which, had he attempted to use them, “might have yielded some satisfactory resolution.”<sup>399</sup>

### Exhaustion of Domestic Remedies Flow Chart



Similarly, the unavailability, ineffectiveness, or insufficiency of domestic remedies is distinguishable from instances where the complainant feels strongly that he or she could not obtain justice from local or national judicial bodies. In order for a complaint to be admissible, the Commission requires complainants to “take all the necessary steps” to exhaust or attempt to exhaust domestic remedies.<sup>400</sup>

<sup>397</sup> *Id.* at paras. 32, 35, 38.

<sup>398</sup> ACommHPR, *Obert Chinhamo v. Zimbabwe*, Communication No. 307/2005, 42nd Ordinary Session, 28 November 2007, para. 72, available at <http://caselaw.ihrrda.org/doc/307.05/>.

<sup>399</sup> *Id.* at para. 86.

<sup>400</sup> ACommHPR, *Bakweri Land Claims Committee v. Cameroon*, Communication No. 260/2002, 36th Ordinary Session, 4 December 2004, para. 55, available at <http://caselaw.ihrrda.org/doc/260.02/>.

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Frequently, States object to the admissibility of a communication on the grounds that domestic remedies were not exhausted. For that reason, it is crucial for complainants to describe the ways in which they have attempted to resolve the issue through “local or national judicial bodies” and explain how these local remedies were either exhausted or unduly prolonged.<sup>401</sup> Once the complainant makes this preliminary showing, the burden shifts to the State to show that local remedies were available or that they were not unduly prolonged.<sup>402</sup>

## Submit the communication within a reasonable time

The African Charter requires communications to be submitted within a reasonable time, but does not define the time frame in which communications must be submitted in order to be considered “reasonable.”<sup>403</sup> The African Commission has been flexible in deciding the reasonableness of the lapse of time between exhaustion of domestic remedies and the submission of the communication. The Commission considers the reasonableness of the time frame in which each communication was deposited based on the particular context and characteristics of the complaint.<sup>404</sup> For this reason, there is a lot of uncertainty regarding timeliness for complaints before the African Commission.

Previous admissibility decisions have made reference to the requirements of the European and Inter-American human rights systems, both of which prescribe a six-month limit for a complaint to be submitted following exhaustion of domestic remedies.<sup>405</sup> The Commission has held, for example, that 15-, 22-, and 29-month intervals were not “reasonable,” under the particular circumstances of those cases.<sup>406</sup> While this area of the Commission’s doctrine is evolving and remains unclear, it is nonetheless generally advisable to submit communications to the Commission within six months of exhausting domestic remedies, if possible.

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<sup>401</sup> See ACommHPR, *Bakweri Land Claims Committee v. Cameroon*, Communication No. 260/2002, 36th Ordinary Session, 4 December 2004, para. 55, available at <http://caselaw.ihrda.org/doc/260.02/>.

<sup>402</sup> ACommHPR, *Marcel Wetsh'okonda Koso and Others v. Democratic Republic of Congo*, Communication No. 281/2003, 45th Ordinary Session, 27 May 2009, para. 53, available at <http://caselaw.ihrda.org/doc/281.03/>.

<sup>403</sup> African Charter, art. 56(6).

<sup>404</sup> ACommHPR, *Gabriel Shumba v. Zimbabwe*, Communication No. 288/2004, 51st Ordinary Session, 2 May 2012, para. 44, available at <http://caselaw.ihrda.org/doc/288.04/>.

<sup>405</sup> *Id.* at para. 42; ACommHPR, *Obert Chinhamo v. Zimbabwe*, para. 89; ACommHPR, *Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Center for the Protection of Human Rights) v. Kenya*, Communication No. 375/2009, 50th Ordinary Session, 5 November 2011, para. 59, available at <http://caselaw.ihrda.org/doc/375.09/>.

<sup>406</sup> ACommHPR, *Dr. Farouk Mohamed Ibrahim (represented by REDRESS) v. Sudan*, Communication No. 386/2010, 13th Extraordinary Session, 25 February 2013, paras. 77-78, available at <http://caselaw.ihrda.org/doc/386.10/>; ACommHPR, *Michael Majuru v. Zimbabwe*, Communication No. 308/2005, 44th Ordinary Session, 24 November 2008, para. 110, available at <http://caselaw.ihrda.org/doc/308.05/>; ACommHPR, *Darfur Relief and Documentation Centre v. Sudan*, Communication No. 310/2005, 46th Ordinary Session, 25 November 2009, paras. 77-79, available at <http://caselaw.ihrda.org/doc/310.05/>.

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### Tip for Practitioners:

#### *Time Frame for Submitting a Communication*

While the Commission has been flexible in deciding what constitutes a “reasonable” time period and considers the characteristics of each case, it has made multiple references to the standards applied by the **European** and **Inter-American human rights systems**, both of which prescribe a six-month time period to file complaints when the complainant is required to exhaust domestic remedies. Therefore, it is advisable to submit communications to the Commission within **six months of exhausting domestic remedies**.

### Do not submit a complaint that has already been decided by another UN or AU body

A communication must not deal with a matter that has already been settled by another international human rights body. This requirement ensures that a State will not be found “in violation twice for one violating act or conduct.” Further, once a case has been finalized on the merits, it should not be reexamined.<sup>407</sup>

### Burden of Proof at the Admissibility Stage

At the outset, the complainant has the burden of proof to show that he or she has met all of the admissibility requirements.<sup>408</sup> If the Commission is satisfied that the complainant has met each of the above prerequisites to admissibility, then he or she is considered to have met the requirements of Article 56 of the African Charter. The burden then shifts to the State to refute each of the complainant’s assertions and provide evidence to support its arguments.<sup>409</sup>

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<sup>407</sup> African Charter, art. 56(7); ACommHPR, Information Sheet No. 2, *supra* note 38, at 6; Malcolm Evans & Rachel Murray, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: THE SYSTEM IN PRACTICE* (1986-2006), 126 (2nd ed. 2008).

<sup>408</sup> ACommHPR, *Front for the Liberation of the State of Cabinda v. Angola*, Communication No. 328/2006, 54th Ordinary Session, 5 November 2013, para. 45, available at <http://caselaw.ihrda.org/doc/328.06/>.

<sup>409</sup> ACommHPR, *Zimbabwe Lawyers for Human Rights v. Zimbabwe*, para. 44.

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## **Burden of Proof at the Admissibility Stage**

1. Complainant must first demonstrate that all of the admissibility requirements have been met
2. The burden of proof then shifts to the State to refute each of the complainant's assertions
3. The burden of proof shifts back to the complainant to overcome the State's rebuttals or explain how an exception applies

## **– Illustration –**

### **Exhaustion of Domestic Remedies Requirement**

1. The complainant describes the ways in which domestic remedies were exhausted or unduly prolonged and provides evidence to support his or her assertions
2. The State introduces evidence that domestic remedies existed, but were not exhausted
3. The complainant has another opportunity to demonstrate that remedies were exhausted, or to claim that an exception applies

## **Merits**

The merits stage follows the admissibility stage. At this stage, the African Commission considers the substantive issues of the case. Specifically, the Commission examines the allegations asserted by the complainant and the response of the State concerned, keeping in mind the provisions of the African Charter and other international human rights norms.<sup>410</sup>

Once the Commission has determined that a communication is admissible, it schedules a 60-day period for the complainant to submit its arguments and evidence concerning the merits, which are then transmitted to the State, which also has 60 days to submit observations.<sup>411</sup> If the State submits observations, the complainant then has an additional 30 days to reply with any additional information or arguments.<sup>412</sup>

As in the admissibility stage, the African Commission may decide to hold a hearing on the merits of a communication either on its own initiative or at the request of either party.<sup>413</sup> Importantly, complainants or their representatives are not required to present their case in person before the African Commission; it is possible to reach the conclusion of a case entirely through written correspondence.<sup>414</sup> Parties requesting a hearing, however, must do so at least 90 days before the beginning of the session during which the communication is to be considered. The persons typically allowed to attend hearings are the parties to the communication or their representatives, witnesses and experts, States parties, the Chairperson of the AU Commission, affiliate institutions, and observers.<sup>415</sup>

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<sup>410</sup> ACommHPR, Communications Procedure, *supra* note 38.

<sup>411</sup> ACommHPR, Rules of Procedure, Rule 108(1).

<sup>412</sup> *Id.* at Rule 108(2).

<sup>413</sup> *Id.* at Rule 99(1).

<sup>414</sup> ACommHPR, Information Sheet No. 2, *supra* note 38, at 5.

<sup>415</sup> ACommHPR, Rules of Procedure, Rules 99(4)-(8), 33(2).

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After careful consideration of the substantive issues in a case, the African Commission will reach a decision as to whether a violation has occurred or not. If the African Commission finds the State responsible for one or more violations, it will issue recommendations to the State concerned.<sup>416</sup> Generally, the recommendations outline the action necessary for the State concerned to remedy the violation.

The Commission has indicated that its recommendations are not immediately binding on the State; rather, they only become binding when they are adopted by the AU Assembly of Heads of State and Government after being submitted to the AU Assembly in the Commission's annual activity report.<sup>417</sup>

However, others argue that the Commission's recommendations are binding on their own, by virtue of the African Charter. Specifically, Article 1 requires AU Member States to recognize and give effect to the rights protected in the Charter, while articles 30 and 45 charge the Commission with protecting those rights. Moreover, Article 59 requires that the AU Assembly review the Commission's activity reports before they are made public and, once reviewed, the Commission's recommendations become AU Assembly decisions, which States must implement or face sanctions, pursuant to Article 23(2) of the Constitutive Act. As a practical matter, however, the African Charter does not provide the Commission with a mechanism for enforcing its recommendations itself.

### What Must the Complainant Prove?

By the time a communication reaches the merits stage, the complainant has already established a *prima facie* case for a violation of the African Charter and satisfied the conditions for admissibility laid down in Article 56 of the African Charter.<sup>418</sup> In general, the burden of proof rests with the complainant to prove the truth of his or her allegations. To meet this burden of proof, complainants must furnish evidence of the allegations, or explain why such evidence cannot be obtained.<sup>419</sup>

Next, the burden of proof shifts to the State to refute each of the complainant's allegations.<sup>420</sup> The State must do more than simply deny the allegations; rather, it must offer specific responses and evidence to refute them.<sup>421</sup> If the State does not offer any evidence contradicting the allegations, then the Commission will consider the facts asserted in the allegations as proven, or at least plausible or probable.<sup>422</sup>

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<sup>416</sup> *Id.* at Rule 92(1).

<sup>417</sup> ACommHPR, *Communications Procedure*, *supra* note 38.

<sup>418</sup> ACommHPR, *Zimbabwe Lawyers for Human Rights v. Zimbabwe*, Communication No. 293/2004, 43rd Ordinary Session, 22 May 2009, para. 44, available at <http://caselaw.ihnda.org/doc/293.04/>.

<sup>419</sup> ACommHPR, *Sir Dawda K. Jawara v. Gambia*, Communication Nos. 147/1995, 149/1996, 27th Ordinary Session, 11 May 2000, para. 53, available at <http://caselaw.ihnda.org/doc/147.95-149.96/>.

<sup>420</sup> ACommHPR, *Gabriel Shumba v. Zimbabwe*, Communication No. 288/2004, 51st Ordinary Session, 2 May 2012, para. 140, available at <http://caselaw.ihnda.org/doc/288.04/>; ACommHPR, *Zimbabwe Lawyers for Human Rights v. Zimbabwe*, para. 44.

<sup>421</sup> ACommHPR, *Information Sheet No. 3: Communication Procedure*, 7 [hereinafter ACommHPR, *Information Sheet No. 3*], available at [http://www.achpr.org/files/pages/communications/procedure/achpr\\_communication\\_procedure\\_eng.pdf](http://www.achpr.org/files/pages/communications/procedure/achpr_communication_procedure_eng.pdf).

<sup>422</sup> ACommHPR, *Gabriel Shumba v. Zimbabwe*, para. 140.

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The failure of the State to meet its burden of proof does not, however, mean that complainants are free to make “unsubstantiated statements.”<sup>423</sup> The complainant must still convince the Commission that a violation has taken place. The Commission has held, for example, that “without specific information as to the nature of the acts themselves” or some form of “concrete proof,” the Commission cannot hold that there has been a violation.<sup>424</sup>

Due to the very nature of some cases, it may be difficult for complainants to provide clear evidence of a violation. For instance, where a person is injured while he or she is in detention or otherwise under the State’s control, it may be difficult to gather the evidence necessary to prove how those injuries came about. In such circumstances, a presumption arises that the person was subjected to ill treatment. The State then has the burden of giving a satisfactory explanation of how the injuries were sustained, or the steps it took to investigate and address the situation.<sup>425</sup> Where the State fails to do so, the African Commission might reach the conclusion that the State violated the African Charter.

Under Article 46 of the African Charter, the Commission has the authority to “resort to any appropriate method of investigation.”<sup>426</sup> This provision enables the Commission to obtain information from alternative sources and third parties.<sup>427</sup> Thus, it is essential that the complainant make precise allegations of facts and, where possible, include documents supporting the complaint’s allegations.

## Amicable Resolution

Once a communication has been declared admissible, it may be possible for both parties to reach an amicable resolution. An amicable resolution is the friendly settlement of the case by the parties, and is distinct from a stage in the proceedings. Amicable resolutions are *alternate* outcomes to a case: rather than having a case dismissed or decided in favor of one of the parties, the Commission can facilitate an agreement that is satisfactory to both parties. Best of all, amicable resolutions can be reached at any stage of the proceedings.

The African Commission offers its “good offices” to facilitate amicable resolutions. Good offices means assistance by a third party, in this case the African Commission, in the form of mediation between parties to a dispute. If the parties express willingness to negotiate a friendly settlement, the Commission will appoint a Commissioner to facilitate the negotiations.<sup>428</sup>

Once a friendly settlement has been reached, the terms of the settlement will be included in a report to be presented to the African Commission at its next session, and the Commission’s consideration of the

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<sup>423</sup> *Id.* at para. 132.

<sup>424</sup> *Id.* at para. 140; ACommHPR, *Sir Dawda K. Jawara v. Gambia*, Communication Nos. 147/1995, 149/1996, 27th Ordinary Session, 11 May 2000, para. 53, available at <http://caselaw.ihrrda.org/doc/147.95-149.96/>.

<sup>425</sup> ACommHPR, *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, Communication No. 323/2006, 10th Extraordinary Session, 16 December 2011, para. 163, 170, available at <http://www.achpr.org/communications/decision/323.06/>.

<sup>426</sup> African Charter, art. 46.

<sup>427</sup> ACommHPR, Communications Procedure, *supra* note 38.

<sup>428</sup> ACommHPR, *Information Sheet No. 3*, *supra* note 421, at 7.

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case will discontinue.<sup>429</sup> If it is not possible to reach a friendly settlement, however, the Commission will proceed to consider the case on its merits, as discussed above.

### Compliance

The compliance stage is the final stage for communications before the Commission. As detailed in the merits section above, if the parties to a communication have not achieved a friendly settlement of the case, then it is up to the African Commission to decide whether one or more violations have occurred. If the Commission finds that the State has committed any violations, it will generally issue recommendations to the State concerned, outlining the actions necessary for the State to remedy the violations. These recommendations are not binding on the State; they are, however, included in the Commissioner's Annual Activity report to the AU Assembly. If the AU Assembly adopts the recommendations, then they become binding.<sup>430</sup>

Although the Commission has not established a procedure for supervising the implementation of its recommendations, it has developed various strategies to encourage States to give effect to them. First, once the AU Assembly has considered the Commission's Annual Activity report, the Secretary of the Commission notifies the parties to the communication that they may disseminate the decision. Public dissemination of a favorable decision can put pressure on States to abide by the Commission's recommendations because public knowledge of their failure to do so can cause damage to their reputations, both nationally and internationally.<sup>431</sup>

Second, when the Commission reaches a decision against a State, it requires the parties to the communication to inform it of "all measures, if any, taken or being taken" by the State to implement the Commission's decision, and it must do so within 180 days of learning of the decision. This requirement in effect causes the State concerned to hold itself accountable and allows complainants to provide the Commission with information about implementation that may supplement or contradict the State. If, after receiving the State's response, the Commission has further questions, it may invite the State to provide further information about the steps it has taken to implement the decision. If the State does not respond, then the Commission may send a reminder for the State to provide further information within 90 days of the date of the reminder.<sup>432</sup>

Third, the Commission appoints either the Rapporteur for the communication or any other Commissioner to monitor the State's implementation of the Commission's recommendations. To the extent that it is necessary, the Rapporteur or Commissioner can make contacts and take action to achieve this end. He or she must also report on the State's degree of compliance during the public session of the Commission's ordinary sessions. This procedure acts as another way to bring awareness to a State's non-compliance with the African Commission's recommendations.<sup>433</sup>

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<sup>429</sup> *Id.*

<sup>430</sup> ACommHPR, Communications Procedure, *supra* note 38.

<sup>431</sup> *Id.*; ACommHPR, Rules of Procedure, Rule 112(1).

<sup>432</sup> ACommHPR, Rules of Procedure, Rules 112(2)-(4); ACommHPR, Communications Procedure, *supra* note 38.

<sup>433</sup> ACommHPR, Rules of Procedure, Rules 112(5)-(7).



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Lastly, where a State is not in compliance with its recommendations, the Commission must also bring the issue to the attention of the Sub-Committee of the AU Permanent Representatives Committee and the Executive Council on the Implementation of the Decisions of the African Union.<sup>434</sup> These bodies may then decide to act in a way to influence the State to carry out the Commission's recommendations.

Despite these varying monitoring methods, State noncompliance remains a serious challenge for the African Commission. The Commission itself recognizes that "[t]he major problem is that of enforcement." Although the Commission, other States, and advocates on the ground all strive to encourage adherence to the Commission's recommendations, "[m]uch remains on the good will of the States."<sup>435</sup>

## Provisional Measures

Provisional measures are requests issued by the Commission to a State, asking the State to take action to prevent imminent, irreparable harm to the victim or victims of a human rights violation. A request by the Commission for provisional measures typically includes a request that the State report back to the Commission within 15 days on the steps it has taken to implement the specific measures requested.<sup>436</sup>

### Emergency Communications

#### ***Provisional Measures***

- purpose is to "prevent irreparable harm to the victim or victims of the alleged violation as urgently as the situation demands," according to Rule 98(1) of the African Commission's Rules of Procedure
- may be requested *after* the Commission seizes a communication and *before* a determination on the merits

#### ***Urgent Appeals***

- adopted in matters of emergency, which include "serious or massive human rights violations," the "danger or irreparable harm," and the need for "urgent action to avoid irreparable damage," according to Rule 80(2) of the African Commission's Rules of Procedure
- involve a request by the Commission for the State to take specific action with respect to a case or a matter of emergency

Applicants are not alone in their ability to request provisional measures. The Commission may also request them on its own initiative, in addition to States that are party to the communication.<sup>437</sup>

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<sup>434</sup> *Id.* at Rule 112(8); *see also* African Union, Executive Council, *supra* note 25; African Union, Permanent Representatives Committee, <http://www.au.int/en/organs/prc>. The AU Permanent Representatives Committee comprises permanent representatives of Member States and prepares the work of the Executive Council. The Executive Council is responsible to the AU Assembly and monitors the implementation of the policies, decisions, and agreements adopted by the AU Assembly.

<sup>435</sup> ACommHPR, Communications Procedure, *supra* note 38.

<sup>436</sup> ACommHPR, Rules of Procedure, Rules 98(1), (4).

<sup>437</sup> *Id.* at Rule 98(1).

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It is important for advocates to understand that, even if the Commission requests provisional measures and the State concerned adopts them, the Commission's request does not constitute a prejudgment of the case on its merits.<sup>438</sup> The Commission will consider the substance of the communication independent of whether it decided to request provisional measures.

### What Are the Requirements for Requesting Provisional Measures?

The main requirement for requesting provisional measures is that they must be necessary to prevent irreparable harm to the victim. Rule 98(1) of the Commission's Rules of Procedure state that the purpose for provisional measures is to "prevent *irreparable* harm to the victim or victims of the alleged violation." Consequently, when considering a request for provisional measures, the Commission will likely consider the scope of the harm that could befall the victim or victims.<sup>439</sup> Thus, requests for provisional measures should explain clearly the danger of irreparable harm facing the victim.

Furthermore, because the Commission's request for a State to adopt provisional measures includes a reference to the *urgency* of the situation, it is advisable for advocates to be clear about the imminence of the potentially irreparable harm.<sup>440</sup>

Finally, there is a specific period during the proceedings of a case in which provisional measures can be requested. Rule 98(1) of the Commission's Rules of Procedure states that they can be requested "[a]t any time *after* the receipt of a Communication and *before* a determination on the merits."<sup>441</sup> For applicants before the Commission, this provision offers a large measure of freedom: applicants may

#### Tip for Practitioners: *Time Frame for Submitting a Request for Provisional Measures*

Timing is important. Requests should be submitted **as soon as possible** in order to obtain a timely decision that provides maximum benefit to the victim.

Also, be aware of the **session calendar**, since the Commission might not decide on requests for provisional measures until it is in session.

request provisional measures at any point after they have submitted their communication, but before the Commission has made its determination on the merits. They may not, however, request provisional measures prior to submitting a communication or subsequent to the Commission's determination on the merits of the case.

### How the Commission Handles Requests for Provisional Measures

If the African Commission is in session when it receives a request for provisional measures, then the Commission decides whether to issue a request to the State concerned. If, however, the Commission is

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<sup>438</sup> *Id.* at Rule 98(5).

<sup>439</sup> *Id.* at Rule 98(1)

<sup>440</sup> *Id.*

<sup>441</sup> *Id.* (emphasis added).

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not in session when the request is received, the Chairperson, or alternately the Vice-Chairperson, decides on the Commission's behalf. After doing so, the Chairperson or Vice-Chairperson informs the other members of the Commission.<sup>442</sup>

If the Commission, Chairperson, or Vice-Chairperson decides to move forward with a request for provisional measures, then they transmit the request to the State concerned, sending a copy of the letter to the victim, the AU Assembly, the Peace and Security Council, and the AU Commission.<sup>443</sup>

States are expected to report back to the Commission within 15 days of receiving the Commission's request for provisional measures. The State should inform the Commission of the steps it has taken to implement the specific measures requested.<sup>444</sup>

### Other Protection Activities of the African Commission

In addition to provisional measures, the Commission can adopt other measures in matters of emergency.<sup>445</sup> A matter of emergency, according to the Commission's Rules of Procedure, is one in which there are "serious or massive human rights violations," it "presents the danger of irreparable harm," or it requires "urgent action" to prevent irreparable harm.<sup>446</sup> When a matter of emergency arises, the Commission must take several steps to address it. It must first bring the matter to the attention of the Chairperson of the AU Assembly and the Peace and Security Council. Second, it must inform the AU Executive Council and the Chairperson of the AU Commission. Finally, the Commission as well as its subsidiary mechanisms, such as the special mechanisms, must take "any appropriate action" to address the matter.<sup>447</sup>

According to the Commission's Rules of Procedure, any appropriate action can include urgent appeals. Urgent appeals are requests by the Commission for States to take specific action with respect to a case or a matter of emergency.<sup>448</sup> In the case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, for example, the Commission issued two letters of urgent appeal to the government of Kenya. The first letter requested that the government "stay any action or measure" until after the Commission had issued its decision. The second letter, sent by the Chairperson of the Commission, was directed to the President of Kenya and requested that he address allegations of harassment of the Chairperson of the Endorois Assistance Council, who was involved in the communication.<sup>449</sup>

An example of an urgent appeal being issued in response to a matter of emergency arose following the 2011 uprising in Egypt, which spawned widespread human rights violations, including torture, arbitrary

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<sup>442</sup> *Id.* at Rule 98(2).

<sup>443</sup> *Id.* at Rule 98(3).

<sup>444</sup> *Id.* at Rule 98(4).

<sup>445</sup> *Id.* at Rules 79-80; African Charter, art. 58(3); ACommHPR, Information Sheet No. 2, *supra* note 38, at 7.

<sup>446</sup> ACommHPR, Rules of Procedure, Rule 79(1).

<sup>447</sup> *Id.* at Rule 80.

<sup>448</sup> *Id.*

<sup>449</sup> ACommHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, Communication No. 276/2003, 46th Ordinary Session, 25 November 2009, paras. 32, 43, available at [http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46\\_276\\_03\\_eng.pdf](http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf).

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detention, and sexual violence against women. In April 2014, the Commission issued a letter of urgent appeal to the government of Egypt, requesting that it “uphold its obligations under international human rights law,” including giving opportunities to appeal to those who had been sentenced to death.<sup>450</sup>

If a matter of emergency arises while the Commission is in session, then the Commission as a whole makes the decision to treat it as such. If the matter arises while the Commission is not in session, then the Bureau of the Commission – the Chairperson and the Vice-Chairperson – decides whether to treat it as a matter of emergency. In such situations, the Bureau keeps the other Commissioners informed and presents a report on the matter at the Commission’s next session.<sup>451</sup>

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<sup>450</sup> ACommHPR, *Resolution on Human Rights Abuses in Egypt*, Resolution No. 287 (adopted by the Commission at its 16th Extraordinary Session, held 20-29 July 2014), available at <http://www.achpr.org/sessions/16th-ee/resolutions/287/>.

<sup>451</sup> ACommHPR, Rules of Procedure, Rule 10.

# THE AFRICAN COMMISSION'S COMPLAINTS PROCEDURE

## NGOs' Top Recommendations for Other Advocates

- avoid potential delays by submitting communications **as quickly as possible**, preferably within **six months** of exhausting domestic remedies
- **communicate** directly with Commission staff to stay informed of the status of the case and to ensure that it is not unnecessarily delayed
- if funds are available, **go to Banjul** to get updates on the case
- make sure that the communication is **received in time**, that you receive a **confirmation of registration**, and that the Commission makes a **timely decision on seizure**
- once a communication has been filed, make sure that later submissions to the Commission are **filed on time** and track whether the State makes its responses on time as well
- meet procedural requirements, which the Commission now interprets and applies more stringently
- remember that the **ends sought may be different** based on the victim's wishes, the nature of the violation, and the circumstances of the case
- where there is a large number of victims, individualized treatment is more difficult to obtain, but it might be possible to show a **general pattern of misconduct** on the part of the State
- understand that the proceedings can be lengthy, in part because resources are often limited
- be clear about the **wishes of the victim**; what the victim hopes to get out of a case will impact their satisfaction with the result achieved
- it is important to be clear about the **remedies sought** at the time you file a complaint or make a filing on the merits, since the Commission does not ask the parties to make a separate submission on remedies
- when drafting complaints, it is important to have a good understanding of the Commission's **jurisprudence**. The Case Law Analyzer is useful for this.
- remember that a **positive ruling is itself a form of reparation**: even without implementation by the State, it can serve as a symbolic victory for the victims and support other advocacy efforts

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### Inter-State Communications

The African Charter offers a way for States that have “good reasons to believe that another State party to [the African] Charter has violated [its] provisions” to settle their dispute peacefully, with the help of the African Commission.<sup>452</sup> One aspect of the process that makes it amenable to States is that the Commission places its “good offices” at the States’ disposal in order to reach an amicable settlement. Another is that communications to the Commission must be decided within 12 months of initially receiving it.<sup>453</sup>

One method of peaceably resolving an inter-State dispute is for the State concerned about Charter violations to contact the other State by written communication. The communication should also be addressed to the Secretary-General of the AU and the Chairperson of the Commission. The State alleged to have violated the African Charter then has three months to respond with a “written explanation or statement elucidating the matter.” The State should provide as much information as possible about the laws and rules of procedure it has used, the redress it has provided, and whether any other courses of action are available to it. This procedure makes it possible for the States to settle the dispute through bilateral negotiation or any other peaceful measures.<sup>454</sup>

If the three-month period expires before the States have settled the dispute, then either State is entitled to submit the issue to the Chairperson of the African Commission. The State must notify any other States that are involved in the dispute.<sup>455</sup>

Another method of resolving an inter-State dispute is for the State concerned about violations to refer the matter directly to the African Commission. To do so, the State must address a communication to the Chairperson of the Commission, the Secretary-General of the AU, and the other State or States concerned.<sup>456</sup>

### Initial Consideration of the Communication

Regardless of the method leading up to the submission of an inter-State communication to the Commission, once received, the Chairperson of the Commission gives notice to the State concerned of the allegations and invites it to submit its observations on the communication’s admissibility within 90 days. Once received, the observations are forwarded to the complaining State, to which the State has a 90-day period to respond.<sup>457</sup>

Before the Commission can address an inter-State dispute, it must verify that “all local remedies, if they exist, have been exhausted,” unless it is clear that the process of pursuing these remedies would be “unduly prolonged.”<sup>458</sup> In assessing whether local remedies have been exhausted and in considering the

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<sup>452</sup> African Charter, art. 47.

<sup>453</sup> ACommHPR, Rules of Procedure, Rules 90(1), 92(1).

<sup>454</sup> African Charter, art. 47.

<sup>455</sup> African Charter, art. 48; ACommHPR, Rules of Procedure, Rule 87(1).

<sup>456</sup> African Charter, art. 49; ACommHPR, Rules of Procedure, Rule 87(1).

<sup>457</sup> ACommHPR, Rules of Procedure, Rule 88(1).

<sup>458</sup> *Id.* at Rule 87(2); African Charter, art. 50.

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dispute, the Commission can request that the State concerned provide it with “all relevant information.”<sup>459</sup>

According to the Commission's Rules of Procedure, the Commission must designate one or more Commissioners to serve as Rapporteur for the communication. Rapporteurs can request information from the States regarding the dispute and transmit information between the States for comments. With each request, the State has 90 days from the date the request was received to respond.<sup>460</sup>

The Rapporteurs also prepare a report advising the Commission of the admissibility of the dispute. The report must contain the relevant facts, the provisions of the African Charter alleged to have been violated, and a recommendation on admissibility and on any other action that should be taken. The Commission may request the States parties to submit their observations within 90 days; any written responses received will be transmitted to the other State. The Commission may permit the States to make oral representations as well.<sup>461</sup>

## Admissibility

After considering the Rapporteurs' report, the Commission decides on the admissibility of the communication. It informs the parties of its decisions and offers its reasons for deciding as it did.<sup>462</sup>

## Amicable Settlement

At this stage, the Commission makes itself available to the parties to facilitate negotiations for an amicable settlement. The Bureau of the Commission establishes contact with the relevant authorities from each State party and reports its findings to the Commission at its next session. Then, the Commission decides which course of action to take, which could include appointing a rapporteur, convening a meeting to discuss the possibility of reaching an amicable settlement, or helping to draft a Memorandum of Understanding containing proposed terms of settlement.<sup>463</sup>

If the parties reach an amicable settlement, the Rapporteur prepares a draft report for the Commission to adopt at its next session. The final report is then sent to the States parties and the AU Assembly. Through the Rapporteur, the Commission monitors the implementation of the terms of the settlement and reports its observations to the Commission at each of its ordinary sessions until the settlement is concluded. The reports are included in the Commission's activity report to the AU Assembly.<sup>464</sup>

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<sup>459</sup> African Charter, art. 51.

<sup>460</sup> ACommHPR, Rules of Procedure, Rules 88(2)-(3).

<sup>461</sup> *Id.* at Rules 88(4)-(6).

<sup>462</sup> *Id.* at Rule 89.

<sup>463</sup> *Id.* at Rules 90(1)-(4).

<sup>464</sup> *Id.* at Rules 90(6)-(8).



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### Decision of the Commission

If the parties do not reach an amicable settlement, the Commission gives each State a period of 30 days to provide their written submissions on the case. The Commission transmits each party's submission to the other party and gives both parties 30 days to respond.<sup>465</sup>

Once the Commission has obtained all of the necessary information, the Rapporteur prepares a draft report on the facts, findings, and recommendations for the Commission to consider. At this stage, the States may also make oral representations at a hearing convened by the Commission.<sup>466</sup>

Finally, the Commission adopts a decision, prepares a report, and issues recommendations to the States parties. The Commission may also make "such recommendations as it deems useful" to the AU Assembly.<sup>467</sup>

The Commission's activities concerning inter-State disputes are to be included in the Activities report to the AU Assembly, required at each of the Assembly's ordinary sessions.<sup>468</sup>

### Requirements for Submitting a Complaint

A State that has decided to submit its inter-State dispute to the African Commission is advised to include the following statements and information:

- identity of the complaining State, including its official language, and the year in which it ratified the African Charter;
- identity of the State alleged to have committed a violation, including its official language and the year the State became a party to the African Charter;
- specific facts about the alleged violation, such as date, place, time, and a description of the occurrence;
- indication that local remedies were exhausted, such as the measures taken to exhaust local remedies, measures taken to reach an amicable settlement, and why these measures failed or were not used;
- indication of the local remedies that were not pursued, along with reasons for not pursuing them;
- details of whether the case has been referred to another UN or AU settlement body, and if so, where; and
- any responses received by the accused State or the AU Secretary-General.<sup>469</sup>

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<sup>465</sup> *Id.* at Rules 91(1)-(2).

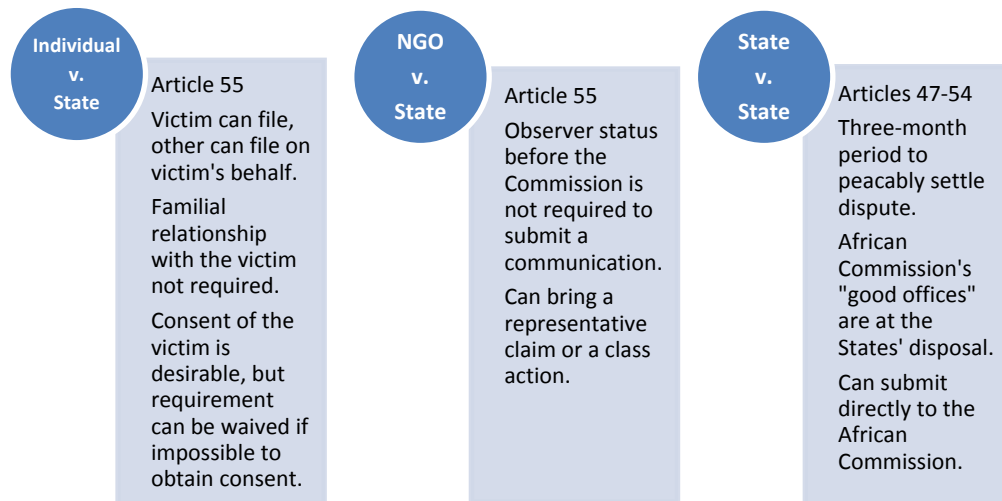
<sup>466</sup> *Id.* at Rule 91(3)-(4); African Charter, art. 51.

<sup>467</sup> African Charter, arts. 52-53; ACommHPR, Rules of Procedure, Rule 92(1).

<sup>468</sup> African Charter, art. 54; ACommHPR, Rules of Procedure, Rule 92(3).

<sup>469</sup> ACommHPR, Rule 87(2); ACommHPR, Information Sheet No. 2, *supra* note 38, at 8.

# THE AFRICAN COMMISSION'S COMPLAINTS PROCEDURE



## The Decisions of the African Commission

The following section provides brief summaries of some of the most prominent cases to come before the African Commission on Human and Peoples' Rights.

### *Mohammed Abdullah Saleh Al-Asad v. Djibouti*

Mohammed Abdullah Saleh Al-Asad was a Yemeni citizen who lived in Tanzania for over a decade with a forged Tanzanian birth certificate and passport. In December 2003, he was abducted from his home by two Tanzanian men and flown to an undisclosed location, allegedly in Djibouti. There, he was detained for two weeks and repeatedly interrogated about terrorist-related activities. He was then flown to a series of U.S.-operated detention facilities, two of which were located in Afghanistan, and held in secret, incommunicado detention. In May 2005, the U.S. transferred him to Yemen where he was tried for forging travel documents. After pleading guilty, a Yemeni court sentenced him to time served, and he was released in March 2006.<sup>470</sup> In 2009, Al-Asad through the Global Justice Clinic at New York University (NYU) School of Law and INTERIGHTS filed a communication with the African Commission alleging that Djibouti committed violations of articles 1, 2, 3, 4, 5, 6, 7(1), 12(4), 14, and 18 of the African Charter.<sup>471</sup>

In its decision, the Commission primarily focused on the "profoundly contested" issue of whether the communication was compatible with the African Charter as required by Article 56(2) of the Charter.<sup>472</sup> Compatibility requires that communications to the Commission meet four jurisdictional requirements. The Commission declined to analyze three of these requirements – temporal, subject matter, and

<sup>470</sup> ACommHPR, *Mohammed Abdullah Saleh Al-Asad v. Djibouti*, Communication No. 383/2010, 55th Ordinary Session, 14 October 2014, paras. 1-14, available at <http://www.achpr.org/communications/decision/383.10/>.

<sup>471</sup> *Id.* at paras. 1, 15.

<sup>472</sup> *Id.* at para. 126.

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personal jurisdiction – and instead directed its attention to the fourth requirement, territorial jurisdiction.<sup>473</sup>

Territorial jurisdiction requires alleged violations to have taken place within the territory of the respondent State in order to be admissible. Alternatively, a violation that takes place beyond the State's territory but where the State "assume[d] effective control of part of a territory of another state [or] exercise[d] control or authority over an individual" also satisfies the territorial jurisdiction requirement.<sup>474</sup> Territorial jurisdiction, the Commission noted, was an issue to be determined at the admissibility stage of a communication, rather than at the merits stage.<sup>475</sup>

The appropriate standard of proof for the admissibility stage was another significant factor in the Commission's decision, with Djibouti claiming that the standard should be "beyond a reasonable doubt" and Al-Asad asserting that it should be lower than the standard applied at the merits stage.<sup>476</sup> The Commission noted that "there cannot be adopted a single standard of proof that can be applied uniformly regardless of the admissibility condition and circumstance of the case at hand," since some admissibility conditions, such as subject matter jurisdiction, would be "revisited with more rigour" at the merits stage.<sup>477</sup> Since territorial jurisdiction would "no longer be under consideration" after the admissibility stage, the Commission concluded that the appropriate standard of proof was for territorial jurisdiction to be "conclusively substantiated at the admissibility stage."<sup>478</sup>

The Commission determined that the circumstantial evidence presented was insufficient to meet the standard of proof for territorial jurisdiction; the evidence did not reliably and conclusively indicate that Mr. Al-Asad had been deported to Djibouti. The Commission discounted the evidence presented – including an immigration official's affidavit and immigration document supporting the contention that Mr. Al-Asad had been deported from Tanzania to Djibouti – because it found the legitimacy of the immigration document to be in question and concluded that other evidence did not support this factual finding.<sup>479</sup> In particular, the Commission found that the type of plane allegedly used to transfer him from Tanzania to Djibouti was not capable of making that flight in one shot and that some of the details of Mr. Al-Asad's detention could equally apply to other African countries.<sup>480</sup> Although it acknowledged that "the barrage of evidence produced by the Complainant make a strong case of the existence of the U.S. government's extraordinary rendition program and that the Republic of Djibouti participated in the program, there are multiple factual lacunae and inconsistenc[i]es which renders the evidence inconclusive on one critical issue: whether the Complainant was indeed in Djibouti."<sup>481</sup> For these reasons, the Commission declared the communication incompatible with Article 56(2) of the African Charter.

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<sup>473</sup> *Id.*

<sup>474</sup> *Id.* at para. 134.

<sup>475</sup> *Id.* at para. 137.

<sup>476</sup> *Id.* at para. 140.

<sup>477</sup> *Id.* at para. 143.

<sup>478</sup> *Id.* at paras. 145-46.

<sup>479</sup> *Id.* at para. 149.

<sup>480</sup> *Id.* at paras. 156-65.

<sup>481</sup> *Id.* at para. 175.

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While the Commission declined to consider the other jurisdictional requirements in the context of this case, it did remark on their respective standards of proof for compatibility.<sup>482</sup> Both temporal jurisdiction and personal jurisdiction, the Commission stated, should be “made out conclusively at [the] admissibility stage.”<sup>483</sup>

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

On May 25, 2005, the Egyptian Movement for Change (Kefaya) organized a demonstration to support a referendum to amend Article 76 of the Egyptian Constitution, which would allow multiple candidates to run in the presidential elections. At around midday, supporters of President Hosni Mubarak and the National Democratic Party (NDP) began attacking the demonstrators; riot police present at the scene did not intervene. Four female journalists – Nawal ‘Ali Mohamed Ahmed, ‘Abir Al-‘Askari, Shaimaa Abou Al-Kheir, and Iman Taha Kamel – experienced brutal physical attacks and sexual assault, partially encouraged and inflicted by the State Security Intelligence (SSI). The investigation of these attacks ended when the Qasr Al-Nil Public Prosecutor’s Office decided not to prosecute due to the inability to identify the perpetrators of the attacks.<sup>484</sup>

The Commission found that Egypt violated articles 1, 2, 3, 5, 9(2), 18(3), and 26 of the African Charter. Highlighting that equality and non-discrimination are “core principles” in human rights law, the Commission determined that the State violated both rights. The Commission considered that the sexual assaults against the women were “designed to silence women who were participating in the demonstration and deter their activism in the political affairs” of Egypt, were solely targeted at women, and were acts of gender-based violence. Accordingly, the women experienced, the Commission concluded, violations of their human rights in the form of gender discrimination. As such, Egypt was in violation of articles 2 (right to non-discrimination) and 18(3) (elimination of discrimination against women).<sup>485</sup> Additionally, the Commission found “no logical explanation” for how the assaults could have come about if the State had protected them, and it, therefore, concluded that there had been a violation of Article 3 (equality before the law and equal protection) of the African Charter.<sup>486</sup>

The Commission also found that the acts of sexual molestation committed against the complainants were “debasing and humiliating,” and sufficiently severe to qualify as inhuman and degrading treatment. Furthermore, Egypt failed in its obligation to effectively investigate the acts and to punish the perpetrators. As such, the State violated Article 5 (rights to dignity and the prohibition of slavery, torture, and cruel, inhuman or degrading treatment).<sup>487</sup> The Commission further concluded that the State violated Article 26 (independence of courts) because, in spite of its reasons why the perpetrators could not be prosecuted, the State failed to explain whether any mechanisms had been put in place after the attacks “to afford protections and redress” to the victims, and to prevent such violations in the future.<sup>488</sup>

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<sup>482</sup> *Id.* at para. 183.

<sup>483</sup> *Id.* at paras. 144-45.

<sup>484</sup> ACommHPR, *Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, Communication No. 323/2006, 10th Extraordinary Session, 16 December 2011, paras. 1-22, available at <http://www.achpr.org/communications/decision/323.06/>.

<sup>485</sup> *Id.* at paras. 117-67.

<sup>486</sup> *Id.* at paras. 168-80.

<sup>487</sup> *Id.* at paras. 181-209.

<sup>488</sup> *Id.* at paras. 210-38.

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Because the assaults and sexual molestation of the women prevented them from participating in the May 25 demonstration, their right to freedom of expression and opinion was restricted in violation of Article 9(2) (right to express and disseminate one's opinions).<sup>489</sup> Finally, the Commission held that Egypt had violated Article 1 (obligations of Member States to recognize and give effect to rights under the Charter) by failing to provide a police force to protect the complainants during the demonstration, maintain a justice system that provides remedies for violations and imposes sanctions on perpetrators, and effectively investigate any violations that do occur.<sup>490</sup>

The Commission recommended that Egypt amend its laws so that they are consistent with the African Charter, compensate each of the victims in the amount of EP 57,000 for physical and emotional damage and trauma, investigate the violations and bring the perpetrators to justice, and ratify the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.<sup>491</sup>

### *Gabriel Shumba v. Zimbabwe*

While Mr. Gabriel Shumba, a law student at the University of Pretoria's Centre for Human Rights, and three others were conducting a meeting with Parliamentary Member John Sikhala, a member of the opposition party Movement for Democratic Change (MDC), riot police and plain-clothes policemen entered and arrested everyone present.<sup>492</sup> They took Mr. Shumba to the Saint Mary's police station, where they detained him without charge and denied him access to counsel. Deprived of food and water, Mr. Shumba was then taken to an unknown location, stripped naked, and questioned by approximately 15 interrogators. The interrogators threatened him with death and inflicted a series of bodily injuries, including electric shocks, contact with harmful chemicals, and forced vomiting. He was compelled to write several statements implicating himself and senior members of the MDC in "subversive activities." He was then charged with violating section 5 of the Public Order and Security Act for conspiring to overthrow the government through unconstitutional means. Upon release, he fled to South Africa.<sup>493</sup>

The Commission declined to find that Zimbabwe had violated articles 4 (right to life), 6 (right to liberty and security), 7 (right to fair trial), 10(1) (freedom of association), and 14 (right to property). In finding no violation of these rights, the Commission found, respectively, that there was an absence of evidence to show the use of lethal force, that Mr. Shumba was charged after his arrest and released on bail after two days, that he had representation in court, that the State's ability to make arrests where there is suspicion of criminal activity did not infringe on the ability of the opposition party to exist and carry out its functions, and that temporary seizure of a phone or diary was not "in the minds of the framers of the African Charter" when drafting Article 14.<sup>494</sup>

The Commission held that Zimbabwe had violated Article 5 (the rights to dignity and to prohibition of slavery, torture, and cruel, inhuman, and degrading treatment) of the African Charter. In response to the evidence submitted by Mr. Shumba, the State had simply responded that his claims were "unsubstantiated." The Commission held that the State's rebuttal was insufficient, holding instead that

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<sup>489</sup> *Id.* at paras. 239-56.

<sup>490</sup> *Id.* at paras. 268-74.

<sup>491</sup> *Id.* at para. 275.

<sup>492</sup> ACommHPR, *Gabriel Shumba v. Zimbabwe*, Communication No. 288/2004, 51st Ordinary Session, 2 May 2012, paras. 1-2, available at <http://caselaw.ihrda.org/doc/288.04/>.

<sup>493</sup> *Id.* at paras. 3-10.

<sup>494</sup> *Id.* at paras. 137, 140-141, 168-88, 192.

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it “must provide evidence to the contrary.”<sup>495</sup> It recommended the State to pay adequate compensation to Mr. Shumba and conduct an inquiry and investigation into the violation in order to bring the perpetrators to justice.<sup>496</sup>

### *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*

The Endorois indigenous community, consisting of approximately 60,000 people, lived for centuries in the Lake Bogoria area of the Baringo and Koibatek administrative districts. Since 1978, however, the community had been denied access to the land on which it had allegedly practiced “a sustainable way of life” and to which it was “inextricably linked.” The complainants claimed that Kenya violated their rights under the African Charter by displacing the community, failing to adequately compensate them, disrupting their pastoral enterprise and process of development, and violating their right to practice their religion and culture.<sup>497</sup>

The Commission found that the Endorois community are an indigenous people. The four criteria previously identified by the Commission to identify indigenous peoples are “the occupation and use of specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; an experience of subjugation, marginalization, dispossession, exclusion or discrimination.” Furthermore, the Commission noted that in international law definitions of indigenous peoples recognize “the linkages between people, their land, and culture.” The Commission then acknowledged both that the Endorois community’s culture, religion, and way of life was “intimately intertwined with their ancestral lands” and that the Endorois community self-identifies as indigenous as “an essential component of their sense of identity.” Furthermore, they are “a distinct tribal group whose members enjoy and exercise certain rights ... in a distinctly collective manner.” As such, the Commission agreed that the Endorois are an indigenous people and fulfill the “criterion of ‘distinctiveness.’”<sup>498</sup>

The Commission accepted that the Endorois community’s “spiritual beliefs and ceremonial practices” qualify as a religion under the African Charter and noted that the Endorois’ “religious practices are centered around Lake Bogoria.” Kenya’s forced eviction of the Endorois from their ancestral lands thus interfered with their right to religious freedom and was not necessary “by any significant public security interest or other justification,” in violation of Article 8 (freedom of religion).<sup>499</sup>

The Commission noted that the right to property “includes not only the right to have access to one’s property and not to have one’s property invaded or encroached upon, but also to undisturbed possession, use and control of such property.”<sup>500</sup> States have the dual obligation to respect and protect

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<sup>495</sup> *Id.* at para. 159.

<sup>496</sup> *Id.* at “Holding.”

<sup>497</sup> ACommHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, Communication No. 276/2003, 46th Ordinary Session, 25 November 2009, paras. 1-21, available at [http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46\\_276\\_03\\_eng.pdf](http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf).

<sup>498</sup> *Id.* at paras. 144-62.

<sup>499</sup> *Id.* at paras. 163-73.

<sup>500</sup> *Id.* at para. 186; see also ACommHPR, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Communication No. 155/1996, 30th Ordinary Session, 27 October 2001, para. 54, available at <http://caselaw.ihrrda.org/doc/155.96/>.

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the right to property. The Commission considered that the Endorois community's property had been "severely encroached upon" and continued to be encroached upon. In the view of the Commission, this encroachment was "not proportionate to any public need" and "not in accordance with national and international law." The Commission therefore concluded that Kenya had violated Article 14 (right to property) of the African Charter.<sup>501</sup>

The Commission also found that Kenya had violated Article 17(2)-(3) (right to culture and protection of morals and traditional values) by "forcing the community to live on semi-arid lands without access to medicinal salt links and other vital resources for the health of their livestock," which threatened the Endorois community's pastoral way of life.<sup>502</sup> The State also violated Article 21 (right to lawful recovery of property and adequate compensation) by failing to provide adequate compensation or restitution of their land.<sup>503</sup> Finally, the Commission found that Kenya had violated Article 22 (right to economic, social, and cultural development) by failing to provide "adequate compensation and benefits, or provide suitable land for grazing," thus inhibiting the Endorois community's development process.<sup>504</sup>

Having found Kenya in violation of articles 1, 8, 14, 17, 21, and 22 of the African Charter, it recommended the State to recognize the Endorois community's right of ownership to the ancestral lands, ensure unrestricted access to Lake Bogoria and surrounding areas, pay adequate compensation to the community, pay royalties to the community from existing economic enterprises and make sure they benefit from employment possibilities within the reserve, grant registration to the Endorois Welfare Committee, and engage in dialogue with the complainants on the effective implementation of the Commission's recommendations.<sup>505</sup>

### *Marcel Wetsh'okonda Koso and Others v. Democratic Republic of Congo*

In 1999, Ngimbi Nkiama Gaby, a contractor, placed an order for 3.5 cubic meters of petroleum from a petroleum company. He was arrested along with a trade inspector and three soldiers when police purportedly discovered that he was in possession of a higher volume of petroleum than that for which he had placed the order. Arraigned before the Military Court of the Democratic Republic of Congo for partaking in acts of sabotage during wartime, the five individuals were sentenced to death without the opportunity for review or appeal. Of the five judges of the Military Court, only one was a "trained jurist."<sup>506</sup>

The Commission considered the trial of civilians and soldiers by a military court for an offense "of a civilian nature" to be a "flagrant violation" of the right to fair trial.<sup>507</sup> The independence, impartiality, and equity of the court were further weakened because it was staffed by army officers.<sup>508</sup> Since the national legislation that had established the Military Court – Decree No. 019 of 1997 – was "not in line with [the DRC's] international commitments," the Commission held that the Democratic Republic of

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<sup>501</sup> *Id.* at paras. 174-238.

<sup>502</sup> *Id.* at paras. 239-51.

<sup>503</sup> *Id.* at paras. 252-68.

<sup>504</sup> *Id.* at paras. 269-98.

<sup>505</sup> *Id.* at "Recommendations of the African Commission."

<sup>506</sup> ACommHPR, *Marcel Wetsh'okonda Koso and Others v. Democratic Republic of Congo*, Communication No. 281/2003, 44th Ordinary Session, 27 May 2009, paras. 1-6, available at <http://caselaw.ihrra.org/doc/281.03/>.

<sup>507</sup> *Id.* at paras. 83-88.

<sup>508</sup> *Id.* at para. 89.



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Congo had violated articles (7)(1)(a), (b), and (d) (right to fair trial), and 26 (judicial independence) of the African Charter.<sup>509</sup>

The Commission recommended the State guarantee the independence of its tribunals and improve the national institutions responsible for promoting and protecting the rights contained in the African Charter. The Commission also recommended that the State pay compensation to the victims for “the moral wrong suffered,” and harmonize its domestic legislation with its international commitments.<sup>510</sup>

### *Article 19 v. Eritrea*

In August 2001, a group of senior Eritrean officials and “other members of the ruling elite” signed a public letter that criticized President Isaias Afwerki, leading to a political crisis and cancellation of the country’s upcoming general elections. The Eritrean government banned the private press, leaving the Hadas Eritrea, a government-owned newspaper, as the only permitted publication in the country. At least 18 journalists and 11 political dissidents were detained and held incommunicado without trial for almost two years before the communication was filed before the African Commission.<sup>511</sup>

In its decision on the merits, the Commission first noted that the African Charter does not permit derogation from its provisions, even in time of war or other emergency, finding violations of the rights to liberty and to fair trial.<sup>512</sup> It also noted that the core facts of the case were undisputed: almost 30 political dissidents and journalists were detained incommunicado and without trial for nearly six years at the time of the ruling, and private newspapers were banned nationwide.<sup>513</sup> The Commission reasoned that the failure of the State to charge or bring the detainees to trial “in itself constitute[d] arbitrariness” in violation of Article 6 (right to liberty). The lengthy period for which they were detained was unreasonable, despite the country being in a state of war and facing a backlog of cases, thus violating Article 7(1)(d) (right to fair trial).<sup>514</sup>

Holding the detainees incommunicado also violated articles 5 (prohibition of slavery, torture, and cruel, inhuman, and degrading treatment), 7(1)(c) (right to fair trial), and 18 (right to family) because they were denied access to both their families and legal representation.<sup>515</sup> Finally, the ban on the private press and the imprisonment of journalists violated Article 9 (freedom of expression) because it deprived the journalists of their right to freely express and disseminate their opinions, and the public of its right to receive information. The Commission considered the wholesale nature of the ban was particularly problematic, stating that the free press “is one of the tenets of a democratic society, and a valuable check on potential excesses by government.”<sup>516</sup>

The Commission thus held that Eritrea had violated articles 1, 5, 6, 7(1), 9, and 18 of the African Charter. It recommended that the State release or “bring to a speedy and fair trial” the detained journalists, lift

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<sup>509</sup> *Id.* at paras. 90-94.

<sup>510</sup> *Id.* at “Holding.”

<sup>511</sup> ACommHPR, *Article 19 v. Eritrea*, Communication No. 275/2003, 41st Ordinary Session, 30 May 2007, paras. 1-8, 88, available at <http://caselaw.ihrda.org/doc/275.03/>.

<sup>512</sup> *Id.* at para. 87.

<sup>513</sup> *Id.* at paras. 88-89, 95.

<sup>514</sup> *Id.* at paras. 90-100.

<sup>515</sup> *Id.* at paras. 101-03.

<sup>516</sup> *Id.* at paras. 104-08.

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the ban on the press, grant the detainees access to their families and legal representatives, and pay compensation to the detainees.<sup>517</sup>

### *Democratic Republic of Congo v. Burundi, Rwanda, and Uganda*

In this case, the government of the Democratic Republic of Congo (DRC) alleged that its neighbors to the east – Burundi, Rwanda, and Uganda – were implicated in the activities of rebel armed forces on its territory since August 1998. Allegedly, the governments of Rwanda and Uganda were acquiescent in the presence of their armed forces in the DRC’s territory in order to “safeguard ... their interests.” Burundi was also allegedly involved. The DRC cited several incidents purportedly evidencing “grave and massive” human rights violations. In particular, it alleged that massacres resulting in thousands of deaths had taken place, in addition to the deliberate spreading of sexually transmitted diseases, widespread rapes, and mass transfers of populations. Furthermore, Rwandan and Ugandan forces had allegedly looted its “underground riches” and the possessions of its civilian population.<sup>518</sup>

Burundi declined to participate in any of the proceedings before the Commission. Rwanda and Uganda refused to take part in any proceedings following the admissibility stage. As such, the Commission considered that the States had accepted the facts asserted against them as true.<sup>519</sup>

Noting that the respondent States were obliged, pursuant to Article 23 (right to peace and security) of the African Charter, to conform their conduct to the UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States, the Commission held that their intervention in the DRC’s affairs violated articles 23 and 20 (right to self-determination) of the African Charter.<sup>520</sup> The Commission also held that articles 60 and 61 of the African Charter enabled it to “draw inspiration from international law on human and peoples’ rights,” including the humanitarian law principles reflected in the Geneva Conventions of 1949 and the two Additional Protocols. Relying on these instruments, the Commission found that the respondent States had violated articles 2 (non-discrimination), 4 (right to life), 12(1) and (2) (freedom of movement), 14 (right to property), 16 (right to health), 17 (right to education and culture), 18(1) and (3) (right to family and non-discrimination against women), 19 (right to equality), 21 (free disposal of wealth and resources), and 22 (right to economic, social, and cultural development).<sup>521</sup>

The Commission recommended the States to respect their obligations under the UN Charter, the AU Charter, the African Charter, the UN Declaration on Friendly Relations, and other relevant principles of international law; remove their troops from the DRC’s territory; and pay adequate reparations to the DRC on behalf of the victims of the human rights violations.<sup>522</sup>

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<sup>517</sup> *Id.* at “Holding.”

<sup>518</sup> ACommHPR, *Democratic Republic of Congo v. Burundi, Rwanda, and Uganda*, Communication No. 227/1999, 33rd Ordinary Session, 29 May 2003, paras. 1-7, available at <http://caselaw.ihrrda.org/doc/227.99/>.

<sup>519</sup> *Id.* at paras. 96-98.

<sup>520</sup> *Id.* at paras. 66-68.

<sup>521</sup> *Id.* at paras. 66-95.

<sup>522</sup> *Id.* at “Holding.”

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## *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*

Lying in the oil-rich Niger Delta, Ogoniland had seen decades of oil operations by the Nigerian National Petroleum Company (NNPC) and Shell Petroleum Development Corporation. After environmental degradation and health problems began to emerge, the Ogoni people protested the damage being done to their communities and land.<sup>523</sup> In 1996, the Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) filed a communication before the African Commission, alleging that Nigeria's exploitation of the area's oil reserves without regard for its environmental impact or the health of the Ogoni people violated the African Charter.<sup>524</sup>

The Commission held that Nigeria violated articles 16 (right to health) and 24 (right to environment) by failing to order or permit "independent scientific monitoring of threatened environments," require or publicize environmental and social impact studies, monitor and inform communities exposed to hazardous materials and activities, and provide meaningful opportunities for the Ogoni community to participate in the development decisions that affect the community.<sup>525</sup> It also violated Article 21 (free disposal of wealth and natural resources) by failing in its obligation to protect individuals from interferences in the enjoyment of their rights; namely, by allowing private oil companies to "devastatingly affect the well-being of the Ogonis."<sup>526</sup>

The Commission also discerned a right to housing based on the combined rights contained in articles 14 (right to property), 16 (right to health), and 18(1) (right to family), holding that States have dual responsibilities with regard to the right to housing. First, they must respect housing rights by not destroying the housing of its citizens. Second, they must protect against the violation of housing rights by non-State actors. If violations do occur, the States are obligated to prevent further violations from occurring and guarantee access to legal remedies. Nigeria violated the right to housing by destroying Ogoni houses and villages, forcibly evicting individuals and families from their homes, and allowing its security forces to obstruct, harass, beat, and shoot and kill "innocent citizens who have attempted to return to rebuild their ruined homes."<sup>527</sup>

Taken together, articles 4 (right to life), 16 (right to health), and 22 (right to economic, social, and cultural development) protect the right to food, which Nigeria violated by destroying food sources through its security forces, allowing private oil companies to destroy food sources, and creating obstacles to food, through the use of terror against Ogoni communities.<sup>528</sup> Finally, Nigeria violated Article 4 (right to life) by permitting its security forces to terrorize and kill Ogonis and allowing pollution and environmental degradation to reach a point that human life cannot survive in the area.<sup>529</sup>

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<sup>523</sup> *Nigeria Ogoniland oil clean-up 'could take 30 years,'* BBC (4 August 2011, 3:30PM), <http://www.bbc.com/news/world-africa-14398659>.

<sup>524</sup> ACommHPR, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Communication No. 155/1996, 30th Ordinary Session, 27 October 2001, paras. 1-9, available at <http://caselaw.ihrda.org/doc/155.96/>.

<sup>525</sup> *Id.* at paras. 50-54.

<sup>526</sup> *Id.* at para. 58.

<sup>527</sup> *Id.* at paras. 60-63.

<sup>528</sup> *Id.* at paras. 64-66.

<sup>529</sup> *Id.* at para. 67.

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Having found Nigeria in violation of Articles 2, 4, 14, 16, 18(1), 21, and 24 of the African Charter, the Commission recommended that the State “ensure protection of the environment, health and livelihood” of the Ogoni people by ceasing attacks on Ogoni communities and their leaders by State actors; investigate any human rights violations and, if appropriate, prosecute State officials and agencies involved in any of the violations; provide adequate compensation to the victims; undertake a cleanup of land and rivers damaged by oil operations; prepare environmental and social impact assessments prior to further oil development; establish “effective and independent oversight bodies” to ensure that future oil developments are safe; and provide communities “likely to be affected by oil operations” with information on health and environmental risks and meaningful ways to access regulatory and decision-making bodies.<sup>530</sup>

### *Malawi African Association, Amnesty International, Ms. Sarr Diop, Union interafricaine des droits de l’Homme and RADDHO, Collectif de veuves etayants-Droit, Association mauritanienne des droits de l’Homme v. Mauritania*

The population of Mauritania comprises various ethnic groups. The Moors, also called Beidanes, live primarily in the North of the country, and black ethnic groups, such as the Soninke, Wolofs, and Hal-Pulaar, live in the South. Freed slaves known as the Haratines physically resemble the southern groups, though they associate primarily with the Moors. In 1984, Colonel Maaouya Ould Sid Ahmed Taya rose to power following a *coup d’état* that was widely criticized by members of the black ethnic groups.<sup>531</sup>

The complaints before the Commission alleged that numerous human rights violations took place following the release of a document called *Le Manifeste des negro-mauritaniens opprimés*, or Manifesto of the Oppressed Black Mauritaniens, in September 1986. In addition to the arrest of over 30 persons, the complaint denounced the arbitrariness and length of their detentions, the lack of access to defense lawyers, lengthy sentences, and various procedural defects. The protests that followed the 1986 trials led to more arrests and trials. Some arrestees were allegedly detained in harsh prison conditions, tortured, and killed. Women villagers were also raped.<sup>532</sup>

The Commission found that appellate proceedings were not objective and impartial, compelled statements were improperly admitted into evidence, access to lawyers was denied, and the trial was conducted in Arabic, a language which all but three of the defendants did not speak, all in violation of articles 6 (right to liberty) and 7(1) (right to fair trial).<sup>533</sup> The non-independence of the courts amounted to a violation of Article 26 (independence of courts).<sup>534</sup> The Commission found that the trials that took place after the African Commission’s entry into force for Mauritania violated Article 9(2) (freedom of expression) and that the subsequent detentions were arbitrary in violation of articles 6 (right to liberty)

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<sup>530</sup> *Id.* at “Holding.”

<sup>531</sup> ACommHPR, *Malawi African Association, Amnesty International, Ls. Sarr Diop, Union interafricaine des droits de l’Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l’Homme v. Mauritania*, Communication Nos. 54/1991, 61/1991, 96/1993, 98/1993, 164/1997, 196/1997, 210/1998, 27th Ordinary Session, 11 May 2000, paras. 1-2, available at [http://caselaw.ihrda.org/doc/54.91-61.91-96.93-98.93-164.97\\_196.97-210.98/](http://caselaw.ihrda.org/doc/54.91-61.91-96.93-98.93-164.97_196.97-210.98/).

<sup>532</sup> *Id.* at paras. 3-27.

<sup>533</sup> *Id.* at paras. 86-98, 113.

<sup>534</sup> *Id.* at paras. 99-100.

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and 18(1) (right to family) for those held in solitary confinement.<sup>535</sup> The imprisonment and prosecution of the Ba'ath Arab Socialist Party supporters and those involved with the drafting and distribution of the Manifesto violated articles 10(1) (right to free association) and 11 (right to free assembly).<sup>536</sup>

The Commission also found that the “widespread utilization of torture and of cruel, inhuman and degrading forms of treatment” and use of “practices analogous to slavery” amounted to a violation of Article 5 (prohibition of torture and cruel, inhuman, and degrading treatment).<sup>537</sup> The State’s “shocking lack of respect for life” constituted a violation of Article 4 (right to life), and the conditions in which it kept its prisoners violated Article 16 (right to health).<sup>538</sup> Forcibly evicting Black Mauritians, stripping them of their citizenship, and confiscating and looting their property violated articles 12(1) (freedom of movement and residence) and 14 (right to property).<sup>539</sup> Finally, the State’s discriminatory treatment of the black ethnic groups violated Article 2 (right to non-discrimination).<sup>540</sup>

Finding Mauritania in violation of articles 2, 4, 5, 6, 7(1), 9(2), 10(1), 11, 12(1), 14, 16(1), 18(1), and 26 of the African Charter, the Commission recommended that Mauritania establish an independent enquiry into the fate of the disappeared persons; identify, prosecute, and, if appropriate, punish the perpetrators of the disappearances; coordinate the return of the expelled Mauritians and replace their national identity documents, recompense them for the belongings taken from them, and pay reparations; establish a scheme for paying compensation to the beneficiaries of the deceased victims; reinstate the unduly dismissed or forcibly retired workers; assess the status of degrading practices so as to decipher the “deep-rooted causes for their persistence”; and ensure effective enforcement of national laws abolishing slavery in Mauritania.<sup>541</sup>

### *Sir Dawda K. Jawara v. Gambia*

Sir Dawda K. Jawara was the Gambia’s first Head of State; in 1965, he led the country to independence and in 1970 he oversaw the drafting of the Gambian Constitution. In 1994, Lieutenant Yahya Jammeh and the Gambian army seized power, ousting Sir Jawara from his position as Head of State. He spent the following years in asylum in the United Kingdom, until he returned to the Gambia in 2002.<sup>542</sup> In his complaint, Sir Jawara alleged that the military government that ousted him had “initiated a reign of terror, intimidation and arbitrary detention.” In addition to banning political parties and the abolition of the Gambian Constitution’s Bill of Rights, the military government had engaged in mass killings of soldiers, arbitrary and indefinite detentions, and the prohibition of *habeas corpus* proceedings.<sup>543</sup>

The Commission found that because the Bill of Rights gave legal effect to some of the African Charter’s provisions, its suspension constituted a violation of Article 1 (obligations of Member States to recognize

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<sup>535</sup> *Id.* at paras. 101-05, 113-14, 123-24.

<sup>536</sup> *Id.* at paras. 106-11.

<sup>537</sup> *Id.* at paras. 115-18, 132-35.

<sup>538</sup> *Id.* at paras. 119-22.

<sup>539</sup> *Id.* at paras. 125-28.

<sup>540</sup> *Id.* at paras. 129-31.

<sup>541</sup> *Id.* at “the Commission Declares.”

<sup>542</sup> *Gambia: Sir Dawda Jawara Is 90 Years Old Today*, ALLAFRICA (16 May 2014), <http://allafrica.com/stories/201405161567.html>.

<sup>543</sup> ACommHPR, *Sir Dawda K. Jawara v. Gambia*, Communication Nos. 147/1995, 149/1996, 27th Ordinary Session, 11 May 2000, paras. 1-7, available at <http://caselaw.ihrrda.org/doc/147.95-149.96/>.

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and give effect to rights under the Charter) of the Charter. Furthermore, the suspension also restricted the enjoyment of the rights and freedoms contained in the Charter, constituting a violation of Article 2 (right to non-discrimination) of the Charter.<sup>544</sup>

The Gambia's practice of arresting individuals and holding them in *incommunicado* detention was also inconsistent with its obligations under Article 6 (right to liberty and security of the person).<sup>545</sup> The Commission found a violation of Article 7(1)(d) (right to be tried within a reasonable time) because the Minister of Interior could detain anyone without trial for up to six months, and could extend that period indefinitely. Furthermore, the Economic Crimes (Specific Offenses) Decree of 25 November 1994 imposed retroactive legislation in violation of Article 7(2) (non-retroactivity).<sup>546</sup> Due to its failure to defend the allegations of arrests, detentions, expulsions, and intimidation of journalists, the Gambia had also violated Article 9 (right to information and freedom of expression).<sup>547</sup>

In its consideration of the State's ban on political parties, the Commission considered that "competent authorities should not enact provisions which limit the exercise of this freedom [of association]," and thus held that the State violated Article 10(1) (freedom of association). The ban on political parties also violated Article 11 (right to free assembly).<sup>548</sup> The Commission further held that the restrictions to travel that were placed on former Ministers and members of Parliament violated their right to freedom of movement, as protected by Article 12 (freedom of movement) of the African Charter.<sup>549</sup> The ban on former Ministers and Members of Parliament from "taking part in any political activity," the Commission held, violated Article 13 (right to participate in government).<sup>550</sup>

The military coup was considered a "grave violation" of the Gambian people's right to freely choose their government in contravention of Article 20(1) (right to self-determination).<sup>551</sup> Finally, the Gambia violated Article 26 (independence of courts) by stripping national courts of their human rights competence and ignoring court judgments.<sup>552</sup>

The Commission declined to find that the State violated Article 4 (right to life) because Sir Jawara had failed to furnish "evidence of his allegations" to the Commission.<sup>553</sup> The Commission also declined to find a violation of Article 5 (prohibition of torture and cruel, inhuman, or degrading treatment) because Sir Jawara failed to provide "specific information as to the nature of the acts themselves."<sup>554</sup>

The Commission recommended that the State bring its laws into conformity with the provisions of the African Charter.<sup>555</sup>

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<sup>544</sup> *Id.* at paras. 44-50.

<sup>545</sup> *Id.* at paras. 57-59.

<sup>546</sup> *Id.* at paras. 60-63.

<sup>547</sup> *Id.* at paras. 64-65.

<sup>548</sup> *Id.* at paras. 68-69.

<sup>549</sup> *Id.* at para. 70.

<sup>550</sup> *Id.* at paras. 3, 67.

<sup>551</sup> *Id.* at paras. 71-73.

<sup>552</sup> *Id.* at para. 74.

<sup>553</sup> *Id.* at paras. 51-53.

<sup>554</sup> *Id.* at paras. 54-56.

<sup>555</sup> *Id.* at "Decision of the African Commission."

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### *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan*

In the spring of 1989, tensions were high in Sudan owing to a weakened economy and the ongoing internal armed conflict that caused famine in the south of the country. On June 30, military forces led by Brigadier Omar Hassam Ahmed al-Bashir overthrew the civilian government.<sup>556</sup> Hundreds were detained, allegedly without charge or trial. Members of opposition groups, lawyers, and human rights activists were also detained indefinitely and tortured.<sup>557</sup> Following the suspension of the Constitution, Decree No. 2 of 1989 was issued to allow state agents to detain anyone “suspected of being a threat to political or economic security” under a state of emergency, with no provisions for judicial challenges of the bases for detention. Section 9 of the Decree stripped ordinary courts of their jurisdiction.<sup>558</sup>

The Constitution of Special Tribunals Act established special tribunals staffed by three military officers or any other person deemed “competent” by the President, his deputies, or senior army officers. The special tribunals were later abolished and replaced by the Revolutionary Security Courts, which comprised judges chosen by the Revolutionary Command Council (RCC). Appeal from the Revolutionary Security Courts’ judgments was only permissible for sentences of death or life imprisonment of longer than 30 years.<sup>559</sup>

Political prisoners were imprisoned in secret detention centers, referred to as “ghost houses.” Torture and ill treatment in prisons and ghost houses were allegedly widespread. Similarly prevalent was the government and militia groups’ practice of committing extra-judicial killings without any follow-up investigations or prosecutions.<sup>560</sup> Sudanese Christians, religious leaders, and missionaries also experienced arrests, detention, destruction of religious buildings and figures, and expulsion from the country. In particular, non-Muslims were prevented from preaching, building churches, and having access to work and food aid.<sup>561</sup>

In its consideration of the communications on the merits, the Commission noted that its competence was limited to violations that occurred subsequent to the African Charter’s entry into force on October 21, 1986 and previously occurring violations that continued after the treaty’s entry into force.<sup>562</sup> The Commission also recognized that Sudan and other States may face “difficult situations,” but nonetheless

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<sup>556</sup> ACommHPR, *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan*, Communication Nos. 48/1990, 50/1991, 52/1991, 89/1993 (joined), 26th Ordinary Session, 15 November 1999, available at <http://www.achpr.org/communications/decision/48.90-50.91-52.91-89.93/>; see also Alan Cowell, *Military Coup in Sudan Ousts Civilian Regime*, NEW YORK TIMES (1 July 1989), <http://www.nytimes.com/1989/07/01/world/military-coup-in-sudan-ousts-civilian-regime.html>; *Profile: Sudan's President Bashir*, BBC (25 November 2003, 5:50 PM), <http://news.bbc.co.uk/2/hi/africa/3273569.stm>. The Commission’s decision erroneously places the date of the coup d’état on July 30, 1989, rather than June 30, 1989.

<sup>557</sup> *Id.* at paras. 1-2.

<sup>558</sup> *Id.* at para. 3.

<sup>559</sup> *Id.* at paras. 13-14.

<sup>560</sup> *Id.* at paras. 4-12.

<sup>561</sup> *Id.* at paras. 18-20.

<sup>562</sup> *Id.* at para. 40.



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observed that the African Charter does not permit States to derogate from their responsibilities even in times of urgency.<sup>563</sup>

First addressing Article 4 (right to life), the Commission considered that, in the absence of any evidence offered by the State to contradict the complainants' allegations, it would take those allegations "as proven, or at the least probable or plausible."<sup>564</sup> Although Sudan had brought some officials to trial for torture, the Commission stated that "the scale of the government's measures [wa]s not commensurate with the magnitude of the abuses." The Commission observed that both punishment of torturers and measures aimed at preventing torture are necessary for States to be in line with their international responsibilities. Thus, Sudan was found to have violated Article 5 (prohibition of slavery, torture, and cruel, inhuman, and degrading treatment) of the African Charter.<sup>565</sup> Furthermore, the wording of Decree No. 2 allowed for "individuals to be arrested for vague reasons, and upon suspicion, not proven acts," and the appeals process provided "no guarantee of good administration of justice." For those reasons, the Commission found Sudan in violation of Article 6 (right to liberty).<sup>566</sup>

The Commission also found Sudan in violation of articles 7(1)(a), (c), and (d) (right to fair trial) and 26 (judicial guarantees) because "basic standards of fair trial" were unmet in the case of 28 executed army officers, the composition of the Special Courts indicated a lack of impartiality, and accused persons were denied the right to defense council of their own choice.<sup>567</sup> Because the government did not provide evidence or justifications in response to the allegations of restrictions to non-Muslims' freedom to exercise their religions, the Commission found that Article 8 (freedom of religion) had been violated.<sup>568</sup> The Commission held that Sudan had violation articles 9 (freedom of expression) and 10 (freedom of association) because the State had "imposed a blanket restriction" on freedom of expression, when any restrictions should have been "as minimal as possible" so as to avoid undermining fundamental rights, and because the State had prohibited "any assembly for a political purpose in a public or private place" without special permission.<sup>569</sup>

Holding that Sudan had violated articles 2, 4, 5, 6, 7(1)(a), 7(1)(c), 7(1)(d), 8, 9, 10, and 26, the Commission issued a recommendation to the State to "put an end to" its violations.<sup>570</sup>

### *Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) v. Zambia*

On February 26 and 27, 1992, 517 West Africans were expelled from Zambia, on the grounds that they were allegedly unlawfully present in the State. A majority of the deportees were administratively detained for more than two months. The deportees suffered the loss of all of their material belongings. Many were separated from their families as well.<sup>571</sup>

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<sup>563</sup> *Id.* at para. 42.

<sup>564</sup> *Id.* at paras. 47-52.

<sup>565</sup> *Id.* at paras. 53-57.

<sup>566</sup> *Id.* at paras. 58-60.

<sup>567</sup> *Id.* at paras. 61-70.

<sup>568</sup> *Id.* at paras. 71-76.

<sup>569</sup> *Id.* at paras. 77-82.

<sup>570</sup> *Id.* at "Holding."

<sup>571</sup> ACommHPR, *Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) v. Zambia*, Communication No. 71/1992, 20th Ordinary Session, 31 October 1997, para. 1, available at <http://caselaw.ihrrda.org/doc/71.92/>.

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Relying on Article 12(5) (prohibition of mass expulsion of national, racial, ethnic, or religious groups), taken together with Article 2 (freedom from discrimination), the Commission determined that States have the obligation “to secure the rights protected in the Charter to all persons within their jurisdiction, national or non-nationals.”<sup>572</sup> Based on the information provided by the complainants and the government of Zambia, the Commission recognized that, excluding deportees from Tanzania and the Democratic Republic of Congo (formally known as Zaire), the majority of individuals deported were from West African countries, including Mali, Senegal, and Guinea.<sup>573</sup>

The inability of the deportees to contact their lawyers and appeal the decision on their deportation added another layer to the problem of their expulsion from Zambia. Article 7(1)(a) (right to appeal to competent national organs) provides that everyone has the right to have their cause heard by appealing to “competent national organs against acts of violating his fundamental rights.” Since the detainees were kept in camps that made it impossible for them to contact their lawyers and were denied access to Zambian courts to challenge their detention or deportation, the Commission concluded that the State had violated Article 7 of the African Charter.<sup>574</sup>

Holding that Zambia had violated articles 2, 7(1)(a), and 12(5) of the African Charter, the Commission resolved to continue to pursue an amicable resolution in the case.<sup>575</sup>

### *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. Zaire*

This case involved a series of communications that the Commission believed “evidenced a grave and massive violation of human rights in Zaire.” For that reason, the Commission brought the situation to the attention of the AU Assembly in December 1995. The Commission also requested that two Commissioners carry out a mission to the State to uncover the extent and cause of any human rights violations and help the government ensure respect for the African Charter.<sup>576</sup>

The communications, submitted by various NGOs, alleged an array of human rights abuses, including torture, arbitrary and indefinite detention, extrajudicial executions, unfair trials, restrictions on the right to freedom of association and peaceful assembly, misappropriation of property, and denial of access to education.<sup>577</sup>

Zaire provided “no substantive response” to the Commission’s communications, despite numerous attempts by the Commission to solicit answers to the allegations. Relying on the principle that where allegations of human rights violations are uncontested, the Commission must decide on the facts provided by complainants and “treat those facts as given,” the Commission found Zaire in violation of articles 4 (right to life), 5 (prohibition of torture and cruel, inhuman, and degrading treatment), 6 (right

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<sup>572</sup> *Id.* at paras. 18-22.

<sup>573</sup> *Id.* at paras. 23-26.

<sup>574</sup> *Id.* at paras. 27-31.

<sup>575</sup> *Id.* at “Holding.”

<sup>576</sup> ACommHPR, *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. Zaire*, Communication Nos. 25/1989, 47/1990, 56/1991, 100/1993 (joined), 18th Ordinary Session, 4 April 1996, paras. 5-6, available at <http://caselaw.ihrda.org/doc/25.89-47.90-56.91-100.93/>

<sup>577</sup> *Id.* at paras. 1-6.

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to liberty), 7 (right to fair trial), 8 (freedom of religion and conscience), 16 (right to health), and 17 (right to education).<sup>578</sup> The Commission did not issue recommendations to the State.<sup>579</sup>

### *Commission nationale des droits de l'Homme at des libertés v. Chad*

In this case, the complainant alleged that State security agents as well as non-State actors committed “several massive and severe violations” during the ongoing internal conflict in Chad. Specifically, it complained of the assassinations of more than 15 individuals, including Joseph Betudi, the Vice-President of Ligue tchadienne des droits de l'Homme (Chadian League of Human Rights), and Bissou Mamdou, the Director of the State-owned Société tchadienne d'électricité et de l'eau (Chadian Electricity and Water Company). Investigations into at least one of the killings did not take place. In addition to the killings, the complaint contained allegations of forced disappearances, torture, harassment of journalists, and the arbitrary detention of members of the opposition party, Rassemblement pour la démocratie et le progrès (Rally for Democracy and Progress, RDP). The government of Chad offered a “blanket denial” in response to the allegations.<sup>580</sup>

The Commission held that there had been “serious and massive” human rights violations in Chad. Noting that the African Charter “does not allow for State parties to derogate from their treaty obligations during emergency situations,” the Commission recognized that Chad had allowed serious and massive violations to take place by failing to provide “security and stability in the country.” Even where violations were committed by non-State actors, Chad still was under the obligation to investigate them. The Commission thus concluded that Chad was responsible for violations of the African Charter.<sup>581</sup>

Relying on the principle that where governments do not contest individual allegations of human rights abuses, the Commission must make its decision based on the facts provided by the complainant and “treat those facts as given,” the Commission found Chad in violation of articles 4 (right to life), 5 (prohibition of slavery, torture, and cruel, inhuman, and degrading treatment), 6 (right to liberty), and 7 (right to fair trial). The Commission declined to issue recommendations to the State.<sup>582</sup>

### *Civil Liberties Organisation (in respect of the Nigerian Bar Association) v. Nigeria*

In this case, the Civil Liberties Association alleged that a new decree – the Legal Practitioners’ Decree – violated the right to free association. The Decree established a new governing body of the Nigerian Bar Association called the Body of Benchers, which would comprise 31 nominees from the Nigerian Bar Association and 97 nominees from the government. The Body of Benchers would have the authority to prescribe practicing fees and discipline practitioners. The Decree also retrospectively criminalizes the

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<sup>578</sup> *Id.* at para. 40.

<sup>579</sup> *Id.* at paras. 39-48, “ *Holding.*”

<sup>580</sup> ACommHPR, *Commission nationale des droits de l'Homme et des libertés v. Chad*, Communication No. 74/1992, 18th Ordinary Session, 11 October 1995, paras. 1-6, 24, available at <http://caselaw.ihrda.org/doc/74.92/>; see also Amnesty International, *Extrajudicial execution concern* (1992), available at <http://www.amnesty.org/en/library/asset/AFR20/002/1992/en/3cc0153e-f93f-11dd-92e7-c59f81373cf2/afr200021992en.pdf/>; Human Rights Watch, *Chad: The Victims of Hissène Habré Still Awaiting Justice* (2005), available at <http://www.hrw.org/reports/2005/chad0705/chad0705.pdf>.

<sup>581</sup> *Id.* at paras. 17-22.

<sup>582</sup> *Id.* at paras. 23-26, “ *Holding.*”

## THE AFRICAN COMMISSION'S COMPLAINTS PROCEDURE

bringing of “an action or any legal proceeding” relating to the Body of Benchers’ exercise of its powers.<sup>583</sup>

The Commission found Nigeria in violation of articles 6, 7, and 10 of the African Charter. First, its retroactive application violated articles 6 (right to liberty) and 7(2) (non-retroactivity). The prohibition on litigation against the powers of the Body of Benchers contravened “the right to appeal to national organs,” in violation of Article 7(1) (right to fair trial). Finally, the domination of the Body of Benchers by government actors interfered with the right to free association, as protected by Article 10 (right to free association).<sup>584</sup> The Commission recommended the State to annul the Decree.<sup>585</sup>

### *Constitutional Rights Project (in respect of Zamani Lakwot and six others) v. Nigeria*

This case involved the prosecution and sentencing of seven men – Zamani Atomic Kude, Yohanna Karau Kibori, Marcus Mamman, Yahaya Duniya, Julius Sarki Zamman Dabo, and Iliya Maza – under Nigeria’s Civil Disturbances (Special Tribunal) Decree No. 2 of 1987. The trials were allegedly tainted by intimidation and harassment of defense counsel and the seven men. The defense counsel ultimately withdrew from the cases. The men received convictions for culpable homicide, unlawful assembly, and breach of the peace, and were sentenced to death.<sup>586</sup>

The Commission held that Nigeria had violated articles 7(1)(a), (c), and (d) of the African Charter. The Commission found that the absence of any avenue to appeal the convictions and sentences to competent national organs “clearly violate[d]” Article 7(1)(a) (right to appeal to competent national organs) of the Charter. Depriving the men of the right to defense and the right to choose one’s defense counsel violated Article 7(1)(c) (right to defense). The tribunal that tried the men comprised individuals from the executive branch of government, creating “the appearance, if not actual lack, of impartiality.” This lack of apparent impartiality violated Article 7(1)(d) (right to be tried by impartial court or tribunal).<sup>587</sup>

Finding that Nigeria violated articles 7(1)(a), (c), and (d) of the African Charter, the Commission recommended that the State free the complainants.<sup>588</sup>

### *Constitutional Rights Project (in respect of Wahab Akamu, G. Adeg, and others) v. Nigeria*

In Nigeria, the Robbery and Firearms (Special Provision) Decree No. 5 of 1984 established special tribunals staffed by a serving or retired judge, a member of the armed forces, and a member of the police force. Sentences issued by the special tribunals were not subject to judicial appeal, though they

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<sup>583</sup> ACommHPR, *Civil Liberties Organisation (in respect of the Nigerian Bar Association) v. Nigeria*, Communication No. 101/1993, 17th Ordinary Session, 22 March 1995, paras. 1-3, available at <http://caselaw.ihrda.org/doc/101.93/>.

<sup>584</sup> *Id.* at paras. 6-17.

<sup>585</sup> *Id.* at “Holding.”

<sup>586</sup> ACommHPR, *Constitutional Rights Project (in respect of Zamani Lakwot and six others) v. Nigeria*, Communication No. 87/1993, 17th Ordinary Session, 22 March 1995, paras. 1-2, available at <http://caselaw.ihrda.org/doc/87.93/>.

<sup>587</sup> *Id.* at paras. 10-14.

<sup>588</sup> *Id.* at “Holding.”

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could be confirmed or disallowed by a state Governor. In this case, Wahab Akamu and Gbolahan Adegga had been imprisoned and sentenced to death by the Robbery and Firearms Tribunal 1 in Lagos, Nigeria. They alleged that they were tortured to provide confessions while in State custody.<sup>589</sup>

The Commission found that Nigeria violated Article 7(1)(a), (c), and (d) of the African Charter. The absence of an appeals process violated Article 7(1)(a) (right to appeal to competent national organs). The composition of the tribunal of members from the executive branch of government who do not necessarily have legal expertise violated Article 7(1)(d) (right to be tried by impartial court or tribunal). The Commission declined to specifically address how the State violated Article 7(1)(c) (right to defense), but nevertheless indicated it was violated in the Commission's holdings.<sup>590</sup> The Commission recommended that the State free the complainants and planned to confirm whether they had been released when it carried out its next mission to Nigeria.<sup>591</sup>

### *Embga Mekongo Louis v. Cameroon*

In this case, Mr. Embga Mekongo Louis, a citizen of Cameroon, alleged that he was falsely imprisoned, suffered a miscarriage of justice, and was entitled to damages.<sup>592</sup>

The Commission found that Cameroon violated the complainant's due process rights under Article 7 (right to fair trial) of the African Charter, and recommended that the State determine the amount of damages that should be paid to him.<sup>593</sup>

### *Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), and Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi*

In this case, Mr. Aleke Banda, a well-known political figure in Malawi, was imprisoned without legal charge or trial for over 12 years. Two successive heads of intelligence informed his son-in-law, Mr. Krishna Achuthan, that no case was pending against Mr. Banda and that he was being held "at the pleasure of the head of state."<sup>594</sup>

Due to differences between Mr. Orton Chirwa, a politician, and Malawi's President Hastings Banda, Orton and Vera Chirwa lived in exile in Zambia from 1964 until 1981, when Malawi security agents took them into custody, allegedly by abducting them from Zambia. The Southern Regional Traditional Court tried them for treason and sentenced both to death; they were denied legal counsel at the trial. The

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<sup>589</sup> ACommHPR, *Constitutional Rights Project (in respect of Wahab Akamu, G. Adegga, and others) v. Nigeria*, Communication No. 60/1991, 17th Ordinary Session, 22 March 1995, paras. 1-3, available at <http://caselaw.ihrda.org/doc/60.91/>.

<sup>590</sup> *Id.* at paras. 12-14.

<sup>591</sup> *Id.* at "Holding."

<sup>592</sup> ACommHPR, *Embga Mekongo Louis v. Cameroon*, Communication No. 59/1991, 17th Ordinary Session, 22 March 1995, para. 1, available at <http://www.achpr.org/communications/decision/59.91/>.

<sup>593</sup> *Id.* at para. 2.

<sup>594</sup> ACommHPR, *Krishna Achuthan (on behalf of Aleke Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi*, Communication Nos. 64/1992, 68/1992, and 78/1992\_8AR (joined), 17th Ordinary Session, 22 March 1995, para. 1, available at [http://www.achpr.org/communications/decision/64.92-68.92-78.92\\_8ar/](http://www.achpr.org/communications/decision/64.92-68.92-78.92_8ar/).

## THE AFRICAN COMMISSION'S COMPLAINTS PROCEDURE

National Traditional Appeals Court criticized some aspects of the trial, but upheld the sentences nonetheless. Due to protests from the international community, the sentences were commuted to life imprisonment.<sup>595</sup> The conditions of their detention were severe, with husband and wife separated from each other for years, kept in solitary confinement, provided with inadequate medical care and poor food, and shackled for long periods of time.<sup>596</sup>

In addition to the allegations pertaining to Mr. Banda and the Chirwas, the communication also alleged the arrest, imprisonment under poor conditions, and torture of office workers in 1992, purportedly because the equipment they used “could be used to disseminate propaganda of the prodemocracy movement.” Roman Catholic Bishops were also detained and intimidated by police. Furthermore, police allegedly imprisoned, tortured, and killed trade union leaders, striking workers, and students.<sup>597</sup>

Based on the allegations contained in the communication, the Commission held that Malawi had violated articles 4 (right to life), 5 (prohibition of slavery, torture, and cruel, inhuman, and degrading treatment), 6 (right to liberty), 7(1)(a) (right to appeal to competent national organs), 7(1)(c) (right to defense), and 7(1)(d) (right to be tried within a reasonable time by impartial court or tribunal) of the African Charter.<sup>598</sup>

Noting that Malawi had recently undergone a change in government, with multi-party elections having been held after the complainants filed their communication, the Commission reminded the State of the international legal principle that “a new government inherits the previous government’s international obligations, including the responsibility for the previous government’s mismanagement.” Even though the current government of Malawi did not commit the violations addressed in this case, “it is responsible for the reparation of these abuses.”<sup>599</sup> The Commission declined to issue any recommendations to the State.<sup>600</sup>

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<sup>595</sup> *Id.* at paras. 2-3.

<sup>596</sup> *Id.* at para. 3.

<sup>597</sup> *Id.* at paras. 4-5.

<sup>598</sup> *Id.* at paras. 6-10.

<sup>599</sup> *Id.* at paras. 11-12.

<sup>600</sup> *Id.* at “Holding.”

## CHAPTER FIVE

### The African Court on Human and Peoples' Rights

Established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol Establishing the African Court), the African Court on Human and Peoples' Rights became operational in November 2006.<sup>601</sup> The African Court is designed to work in conjunction with the African Commission, to “complement and reinforce” its functions. Unlike the African Commission, the African Court is empowered to issue binding judgments on States.<sup>602</sup> Nevertheless, despite its potential to protect human rights and promote accountability, the Court faces a number of challenges, which are discussed in greater detail below.

### Composition of the African Court

#### African Court on Human and Peoples' Rights Governing Documents

African Charter  
Rules of Court  
Protocol to the African Charter  
Constitutive Act of the African Union

Eleven judges sit on the African Court. These 11 judges are “jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights.”<sup>603</sup> The Protocol Establishing the African Court and the Rules of Court ensure the independence and impartiality of the African Court through a series of provisions. First, judges may not hear cases concerning their State of nationality.<sup>604</sup> Second, judges may not concurrently serve as government officials or legal advisers at the national

level.<sup>605</sup> Third, while judges are elected by the AU Assembly, they may only be removed by the unanimous decision of all of the other judges.<sup>606</sup> Finally, whilst judges may come from any AU Member State, only one judge per State may serve at a time.<sup>607</sup>

Following a nomination of judicial candidates by States parties, the AU Assembly as a whole elects the judges by secret ballot.<sup>608</sup> In these elections the AU Assembly is charged with ensuring “that in the Court as a whole there is representation of the main regions of Africa and of their principal legal traditions” as well as ensuring adequate gender representation.<sup>609</sup>

All judges serve six-year terms and may not serve more than two terms.<sup>610</sup> Additionally, all judges, with the exception of the President of the Court, serve on a part-time basis.<sup>611</sup> The judges elect a President

<sup>601</sup> See Protocol Establishing the African Court; AfCHPR, African Court in Brief, *supra* note 47.

<sup>602</sup> Protocol Establishing the African Court, Preamble, art. 30; AfCHPR, Rules of Court, Rule 61(5).

<sup>603</sup> Protocol Establishing the African Court, art. 11.

<sup>604</sup> *Id.* at art. 22; *see also* AfCHPR, Rules of Court, Rule 8(2).

<sup>605</sup> AfCHPR, Rules of Court, Rule 5.

<sup>606</sup> *Id.* Rule 7; Protocol Establishing the African Court, art. 19.

<sup>607</sup> Protocol Establishing the African Court, art. 11(2).

<sup>608</sup> *Id.* at arts. 12, 14(1).

<sup>609</sup> *Id.* at arts. 14(2)-(3).

<sup>610</sup> *Id.* at art. 15(1).



# THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

and Vice-President of the Court who serve two-year terms and may only be reelected once to these positions.<sup>612</sup> The President and Vice-President together form the Bureau of the Court.<sup>613</sup>

## Registry

The Registry is composed of the Registrar, the Deputy Registrar, and other staff.<sup>614</sup> The Registry is responsible for assisting the Court with its administrative functions.<sup>615</sup> It operates under the supervision of the President of the Court and performs various functions, including keeping a general list of cases before the Court and serving as the “regular channel of communication to and from the Court.”<sup>616</sup> The African Court appoints the Registrar, Deputy Registrar, and other Registry staff.<sup>617</sup>

## The Court's Mandate

### Mandate of the African Court

- **complement** the protective mandate of the Commission
- issue **advisory opinions**
- decide **contentious cases**
- **interpret** its own decisions
- **report** on its activities to the AU Assembly

A central aspect of the Court's mandate is its relationship to the African Commission. Article 2 of the Protocol indicates that the African Court is designed to “complement the protective mandate of the African Commission on Human and Peoples' Rights.”<sup>618</sup> In order to achieve this complementary relationship, the Court meets with the Commission at least once a year to consult each other. The Court may

also transfer cases to the Commission and the Commission may refer cases to the Court.<sup>619</sup>

Beyond complementing the Commission's mandate, the African Court has two primary types of jurisdiction: advisory and contentious. Advisory jurisdiction means that the African Court can issue advisory opinions on legal matters relating to the African Charter and other relevant human rights instruments, so long as the matter is not already under examination by the African Commission. Contentious jurisdiction means that the Court has the power to hear cases and disputes concerning the interpretation and application of the African Charter.

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<sup>611</sup> *Id.* at arts. 15(1), (4); see AfCHPR, African Court in Brief, *supra* note 47. In the first election, the Justices of the Court were elected to two-, four-, and six-year terms. These staggered terms were designed to allow for a continuity of practices to develop and to enhance the Court's institutional memory, even with the replacement and election of Justices.

<sup>612</sup> Protocol Establishing the African Court, art. 21(1); *see also* AfCHPR, Rules of Court, Rule 9.

<sup>613</sup> AfCHPR, Rules of Court, Rule 29(1)(b); AfCHPR, The Court elects a new Bureau, [http://www.african-court.org/en/images/documents/Press\\_Docs/Press\\_Release\\_-\\_The\\_Court\\_elects\\_a\\_new\\_Bureau.pdf](http://www.african-court.org/en/images/documents/Press_Docs/Press_Release_-_The_Court_elects_a_new_Bureau.pdf).

<sup>614</sup> AfCHPR, Rules of Court, Rule 20(1).

<sup>615</sup> *Id.* at Rule 25; Protocol Establishing the African Court, art. 24.

<sup>616</sup> AfCHPR, Rules of Court, Rules 25(2)-(4).

<sup>617</sup> *Id.* at Rules 21(1), 22(1), 24(1).

<sup>618</sup> Protocol Establishing the African Court, art. 2.

<sup>619</sup> *Id.* at arts. 5(1), 6(3); AfCHPR, Rules of Court, Rule 29(1)-(2).

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### Advisory Jurisdiction

By virtue of its advisory jurisdiction, the Court is empowered to issue advisory opinions. An advisory opinion may be issued at the request of a Member State, the AU or any of its organs, or any organization recognized by the AU. Advisory opinions may address “any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.”<sup>620</sup> Rule 68 of the Rules of Court provides guidelines for the submission of requests for advisory opinions, explaining that these requests should “state with precision” the specific questions and articles of the human rights instrument for which the advisory opinion is sought as well as the circumstances that gave rise to the request.<sup>621</sup> As of July 2016, the Court has received 11 requests for advisory opinions.<sup>622</sup>

### Accessing the African Court’s Advisory Jurisdiction

In lieu of attempting to reach the Court through its contentious jurisdiction, NGOs can also reach the Court through its *advisory* jurisdiction. Given that “any African organization recognized by the OAU” can request an advisory opinion, NGOs with observer status before the African Union are entitled to make requests for advisory opinions.<sup>623</sup>

Indeed, several NGOs have requested such opinions. The Pan African Lawyers’ Union and Southern African Litigation Center have, for example, requested the Court to give its opinion on the validity of the Southern African Development Community’s decision to suspend its Tribunal in light of its responsibilities under the African Charter. The Court declined to issue an advisory opinion because a matter relating to the SADC Tribunal was then pending before the Commission.<sup>624</sup>

Although advisory opinions are not binding on States, they can have “profound persuasive force and international repercussions.”<sup>625</sup> In this way, the pursuit of advisory opinions from the African Court constitutes a powerful alternative remedy.<sup>626</sup>

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<sup>620</sup> Protocol Establishing the African Court, art. 4(1); *see also* AfCHPR, Rules of Court, Rule 26(1)(b).

<sup>621</sup> AfCHPR, Rules of Court, Rule 68(1)-(2).

<sup>622</sup> AfCHPR, List of All Cases: Advisory Opinion, <http://en.african-court.org/index.php/cases#advisory-opinions>.

<sup>623</sup> Protocol Establishing the African Court, art. 4(1); *see, e.g.*, AfCHPR, *Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project*, App. No. 001/2013, Order of 26 May 2017, available at [http://www.african-court.org/en/images/Cases/Advisory%20Opinion/Advisory%20Opinions/Request%20for%20Advisory%20Opinion%20No.001-2013-Socio-%20Economic%20Rights%20and%20Accountability%20Project%20\(SERAP\)%20ENGLISH%20\(2\).pdf](http://www.african-court.org/en/images/Cases/Advisory%20Opinion/Advisory%20Opinions/Request%20for%20Advisory%20Opinion%20No.001-2013-Socio-%20Economic%20Rights%20and%20Accountability%20Project%20(SERAP)%20ENGLISH%20(2).pdf). *See generally* AfCHPR, *Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project*, App. No. 001/2013, Order of 26 May 2017 (Rafâa Ben Achour, J., separate opinion), available at [http://www.african-court.org/en/images/Cases/Dissenting-Separate%20Opinions/Separate\\_Opinion\\_of\\_Judge\\_Rafa%C3%A2\\_Ben\\_Achour-\\_Adv\\_opinions-\\_SERAP.pdf](http://www.african-court.org/en/images/Cases/Dissenting-Separate%20Opinions/Separate_Opinion_of_Judge_Rafa%C3%A2_Ben_Achour-_Adv_opinions-_SERAP.pdf).

<sup>624</sup> AfCHPR, *Request for Advisory Opinion by Pan African Lawyers’ Union and Southern African Litigation Center*, App. No. 002/2012, Order of 15 March 2013, available at <http://en.african-court.org/images/Cases/Advisory%20Opinion/Orders/Order%20Adv.%20Opin.%20002-2012%20PALU%20&%20SALC%20Engl..pdf>.

<sup>625</sup> Viljoen, *supra* note 71, at 52.

# THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

## Contentious Jurisdiction

The contentious jurisdiction of the African Court is governed by both the Protocol and the Rules of Court. Currently, 30 States have ratified the Protocol and are therefore subject to the Court's contentious jurisdiction.<sup>627</sup>

The Court has jurisdiction to interpret and apply the provisions of the African Charter, the Protocol Establishing the African Court, and any other regional and international human rights treaties ratified by the State party concerned.<sup>628</sup> In all cases of disputed jurisdiction, the Court holds final authority to decide on the limits of its jurisdiction.<sup>629</sup> The African Court's judgments are binding, and States parties are charged with ensuring the execution of these judgments.<sup>630</sup>

The Court also may interpret its own decisions. Judgments issued by the Court are not appealable unless the parties uncover new evidence not known at the time the case was originally heard, in which case parties may request the Court to review its judgment.<sup>631</sup>

At each regular session of the AU Assembly, the African Court submits a report on its activities during the previous year. In particular, the African Court notifies the Assembly of the cases in which a State has failed to comply with the Court's judgment on the merits or decision on provisional measures. The AU Executive Council monitors the implementation of judgments on behalf of the AU Assembly.<sup>632</sup>

## Accessing the African Court's Contentious Jurisdiction

Article 5 of the Protocol Establishing the African Court identifies who may submit cases to the African Court. The possible complainants are: the African Commission, a State party that has filed a complaint with the African Commission, the State party against which a complaint has been filed before the African Commission, a State party whose citizen is a victim of the alleged human rights violation, and African intergovernmental organizations.<sup>633</sup>

In some cases, NGOs with observer status before the Commission and individuals can access the Court. NGOs with observer status and individuals are entitled to initiate a case against a State party before the African Court *only if* the State concerned has accepted the competence of the Court to receive such cases.<sup>634</sup> As of April 2017, only eight States have made this declaration and not withdrawn from it.<sup>635</sup>

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<sup>626</sup> Mukundi Wachira, *supra* note 59, at 19.

<sup>627</sup> African Union, *2016 List of Countries*, *supra* note 47.

<sup>628</sup> Protocol Establishing the African Court, art. 3(1).

<sup>629</sup> *Id.* at art. 3(2); *see also* AfCHPR, Rules of Court, Rule 26(2).

<sup>630</sup> Protocol Establishing the African Court, art. 30; *see also* AfCHPR, Rules of Court, Rule 61(5).

<sup>631</sup> Protocol Establishing the African Court, art. 28(2)-(4); *see also* AfCHPR, Rules of Court, Rules 61(4), 67.

<sup>632</sup> Protocol Establishing the African Court, art. 31; *see also* AfCHPR, Rules of Court, Rules 51(4), 64(2).

<sup>633</sup> Protocol Establishing the African Court, art. 5; *see also* AfCHPR, Rules of Court, Rule 33(1).

<sup>634</sup> Protocol Establishing the African Court, arts. 5(3) and 34(6).

<sup>635</sup> African Union, *2016 List of Countries*, *supra* note 47; Tunisia, INTERNATIONAL JUSTICE RESOURCE CENTER, *supra* note 60.

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Finally, a State party with “an interest in a case” may request the Court’s permission to join.<sup>636</sup>

### Sources of Law

According to Article 7 of the Protocol Establishing the African Court, the Court may apply provisions of the African Charter and any other relevant regional or international human rights instrument ratified by the State concerned in its decisions.<sup>637</sup> The latitude of Article 7 presents various possibilities, many of which depend on how the African Court interprets the scope of its mandate. Accordingly, the African Court may be “likely to give far wider notice to international legal resources, standards and norms than is currently in practice with the African Commission.”<sup>638</sup>

### Remedies

The Court has the power to adopt provisional measures in cases of “extreme gravity and urgency, and when necessary to avoid irreparable harm to persons.”<sup>639</sup> The issuance of provisional measures generally occurs at the request of a party to a pending case, the Commission, or on its own accord. In cases of “extreme urgency,” the President of the Court can also arrange for an extraordinary session of the Court to take place in order for the Court to decide on the measures to be taken.<sup>640</sup>

Similar to the African Commission, the African Court may also try to achieve an amicable settlement between the parties.<sup>641</sup> In cases where the parties reach an amicable settlement, the Court’s decision is limited to a “brief statement of the facts and the solution adopted.” The Court has discretion, however, to proceed with a hearing on the application even in the case of an amicable settlement.<sup>642</sup>

The binding nature of African Court’s judgments enables the Court to issue judicially enforceable remedies. Article 27 of the Protocol Establishing the African Court provides that where the Court “finds that there has been a violation of a human or peoples’ right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.”<sup>643</sup> In cases where an applicant seeks reparations, either on his or her own behalf or on behalf of another, the applicant must submit a request for reparations in the initial application to the Court. Such requests should include the amount of reparations sought as well as any supporting evidence. The Court generally rules on requests for reparations in the same decision establishing one or more violations of a human and peoples’ right; in some cases, however, the Court will issue a separate judgment on reparations.<sup>644</sup>

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<sup>636</sup> Protocol Establishing the African Court, art. 5(2); *see also* AfCHPR, Rules of Court, Rule 33(2).

<sup>637</sup> Protocol Establishing the African Court, art. 7.

<sup>638</sup> Mukundi Wachira, *supra* note 59, at 18.

<sup>639</sup> Protocol Establishing the African Court, art. 27(2).

<sup>640</sup> AfCHPR, Rules of Court, Rules 51(1)-(2).

<sup>641</sup> Protocol Establishing the African Court, art. 9.

<sup>642</sup> AfCHPR, Rules of Court, Rules 56(2)-(3), 57(3)-(4).

<sup>643</sup> Protocol Establishing the African Court, art. 27(1).

<sup>644</sup> AfCHPR, Rules of Court, Rules 34(5), 63.

# THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

## Court Sessions

The Court sits in Arusha, Tanzania where the Tanzanian government has provided the Court with temporary premises “pending the construction of a permanent structure.”<sup>645</sup> While Court sessions are held in Arusha, the Protocol Establishing the African Court and the Rules of Court also allow sessions to be held in any AU Member State as long as a majority of the Court agrees and the State concerned gives consent.<sup>646</sup> For example, the Court’s 27<sup>th</sup> Ordinary Session in 2012 was held in Port Louis, Mauritius.<sup>647</sup> According to Rule 14, the Court holds four ordinary sessions a year, with each session lasting about 15 days. Sessions are convened on dates set by the Court during previous sessions. Nonetheless, “[u]nder exceptional circumstances the President may, in consultation with the other Members of the Court, change the dates of a session.” At least 30 days before the scheduled session, the judges receive an invitation letter, which includes the dates, agenda, duration, and location of the upcoming session.<sup>648</sup> This information is also made available to the public on the Court’s website.<sup>649</sup> While the hearing of cases generally dominates the agenda of sessions, during its sessions the Court also carries out administrative functions, such as the election of a new Bureau of the African Court.<sup>650</sup> As the only full-time member of the Court, the President briefs the other judges on activities that have been carried out between sessions.<sup>651</sup>

The President may convene extraordinary sessions either on his or her own initiative or at the request of a majority of the Court’s judges. In the case of extraordinary sessions, the judges of the Court receive an invitation letter containing details about the dates, agenda, duration, and venue of the extraordinary session at least 15 days before the scheduled session.<sup>652</sup> Since 2007, the Court has held six extraordinary sessions.<sup>653</sup>

The African Court conducts its proceedings in public unless, upon the request of a party or at its own initiative, the Court determines that it is “in the interest of public morality, safety or public order” to conduct proceedings *in camera*.<sup>654</sup>

## Challenges Facing the Court

Despite its potential for strengthening the human rights system in Africa, the African Court faces a number of challenges. One leading concern is that the Protocol Establishing the African Court is not

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<sup>645</sup> AfCHPR, African Court in Brief, *supra* note 47.

<sup>646</sup> Protocol Establishing the African Court, art. 25(1); AfCHPR, Rules of Court, Rule 16.

<sup>647</sup> AfCHPR, 27<sup>th</sup> Ordinary Session of the African Court in Mauritius, [http://en.african-court.org/images/Media%20Advisory%20Notes/MEDIA\\_ADVISORY\\_for\\_Mauritius.pdf](http://en.african-court.org/images/Media%20Advisory%20Notes/MEDIA_ADVISORY_for_Mauritius.pdf).

<sup>648</sup> AfCHPR, Rules of Court, Rules 14(1)-(3).

<sup>649</sup> See AfCHPR, Calendar of Sessions, *supra* note 647.

<sup>650</sup> See, e.g., AfCHPR, The Court elects a new Bureau, *supra* note 613.

<sup>651</sup> AfCHPR, Rules of Court, Rule 11(1)(e); see, e.g., AfCHPR, *Press Release: The African Court Opens its 25th Ordinary Session*, May 11, 2012, <http://african-court.org/ar/index.php/news/latest-news/92-25>.

<sup>652</sup> AfCHPR, Rules of Court, Rule 15(1)-(2).

<sup>653</sup> AfCHPR, Calendar of Sessions, *supra* note 647.

<sup>654</sup> Protocol Establishing the African Court, art. 10(1); AfCHPR, Rules of Court, Rule 43.

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widely ratified; only 30 of 54 AU Member States have ratified the Protocol.<sup>655</sup> This low number of ratifications places a limit on the scope of the African Court's protective mandate.<sup>656</sup> Additionally, the mere handful of States – eight in total – that have accepted the Court's competence to hear cases brought by NGOs and individuals further limits opportunities for victims to seek redress.<sup>657</sup>

There are several possible reasons for the marginal number of ratifications. First, States may wish to avoid examination of their human rights records. Second, they may be unwilling to subject themselves to the Court's binding judgments. Lastly, States may be reluctant to ratify the Protocol because they perceive the Court's current structure as temporary. With the adoption of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights that will restructure the Court after the protocol comes into force, the Court appears to be in transition.<sup>658</sup> As Justice of the African Court Augustino S.L. Ramadhani explained, "the fluidity of the situation makes the Court's stakeholders and partners unsure of the extent to which to support the Court and for what activities."<sup>659</sup>

The Court also faces logistical challenges due to a shortage of staff and a lack of awareness of its existence and procedures across the continent. Regarding the low levels of awareness of the Court's existence, the Court commits itself to raising awareness by carrying out informational missions to a number of AU Member States.<sup>660</sup>

### Proposed African Court of Justice and Human Rights

Recent years at the AU have revealed a growing political movement that supports extending the African Court's jurisdiction to include the international crimes of genocide, war crimes, and crimes against humanity. This development is due in part to an ongoing dialogue about the exercise – and possible

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<sup>655</sup> African Union, *2016 List of Countries*, *supra* note 47.

<sup>656</sup> AfCHPR, Hon. Justice Augustino S.L. Ramadhani, *Remarks at the Third Meeting of Legal Advisors of the African Union and the Regional Economic Communities*, 11-13 July 2011, 9-10 [hereinafter Justice Ramadhani, *Remarks*].

<sup>657</sup> African Union, *2016 List of Countries*, *supra* note 47; *Tunisia*, INTERNATIONAL JUSTICE RESOURCE CENTER, *supra* note 60.

<sup>658</sup> AU Assembly, Decision Assembly/AU/Dec.529(XXIII), *Decision on the Draft Legal Instruments*, Doc. Assembly/AU/8(XXIII), 26-27 June 2014, para. 2(e) [hereinafter AU Assembly, *Decision on Draft Legal Instruments*], available at [http://au.int/en/sites/default/files/Assembly%20AU%20Dec%20517%20-%20545%20%28XXIII%29%20\\_E.pdf](http://au.int/en/sites/default/files/Assembly%20AU%20Dec%20517%20-%20545%20%28XXIII%29%20_E.pdf); Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, (adopted during the AU Assembly's 23rd Ordinary Session, held 26-27 June 2014) [hereinafter Protocol on Amendments to the Protocol on the Statute of the ACJHR], available at [http://africancourtcoalition.org/images/docs/legal-texts/Protocol\\_on\\_amendments\\_to\\_the\\_Protocol\\_on\\_the\\_Statute\\_of\\_the\\_African\\_Court\\_of\\_Justice\\_and\\_Human\\_Rights%20.pdf](http://africancourtcoalition.org/images/docs/legal-texts/Protocol_on_amendments_to_the_Protocol_on_the_Statute_of_the_African_Court_of_Justice_and_Human_Rights%20.pdf).

<sup>659</sup> Justice Ramadhani, *Remarks*, *supra* note at 656, 11-12.

<sup>660</sup> *Id. See, e.g.*, AfCHPR, South African Law Society Hosts Colloquium to Raise Awareness of African Court on Human and Peoples' Rights, 16 October 2015, <http://en.african-court.org/index.php/news/press-releases/item/48-south-african-law-society-hosts-colloquium-to-raise-awareness-of-african-court-on-human-and-peoples-rights>; AfCHPR, Large Turn-out for Lesotho National Sensitization Seminar, 1 September 2015, <http://en.african-court.org/index.php/news/press-releases/item/40-large-turn-out-for-lesotho-national-sensitization-seminar>.

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misuse – of universal jurisdiction by low-ranking European Courts.<sup>661</sup> African States have begun to take the view that they are being “singularly targeted in the indictment and arrest of their officials and that the exercise of universal jurisdiction by European states is politically selective against them.”<sup>662</sup> The subjection of African State officials to the jurisdiction of European States has been felt to be “contrary to the sovereign equality and independence of states ... evok[ing] memories of colonialism.”<sup>663</sup>

The structure of the AU is already such that it could support a court with jurisdiction over international crimes. The Constitutive Act of the AU provides for a Court of Justice to settle disputes over the interpretation of the treaties of the AU.<sup>664</sup> In 2003, the AU had already adopted a protocol to establish the AU Court of Justice.<sup>665</sup> Although the protocol entered into force on February 11, 2009, the AU Court of Justice has never become operational. Instead, the AU Assembly decided in 2008 that the AU Court of Justice should be merged with the African Court on Human and Peoples' Rights, forming the African Court of Justice and Human Rights.<sup>666</sup> To give effect to this merger, the AU Assembly joined the Protocol of the Court of Justice with the Protocol Establishing the African Court, thus creating the Protocol on the Statute of the African Court of Justice and Human Rights.<sup>667</sup>

The AU Assembly adopted the Protocol on the Statute of the African Court of Justice and Human Rights in July 2008, and as of June 2017, six States have ratified it.<sup>668</sup> The Protocol will enter into force 30 days after the fifteenth Member State deposits its instrument of ratification.<sup>669</sup>

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<sup>661</sup> Don Deya, *Is the African Court Worth the Wait* (Mar. 6, 2012),

<http://www.osisa.org/openspace/regional/african-court-worth-wait>. Universal jurisdiction is jurisdiction that arises from none of the four traditional jurisdictional bases: *territoriality*, *nationality* (or active personality), *passive personality*, or the *protective principle* (the exercise of jurisdiction over extra-territorial acts by non-nationals where a vital interest of the State is threatened). Instead, universal jurisdiction arises due to the nature of the crimes themselves; because of the seriousness of the crimes, they are of *international* concern and are thus proscribed by customary international law. Because of this, customary international law permits the exercise of universal jurisdiction over such international crimes as genocide, crimes against humanity, war crimes, torture, and piracy.

<sup>662</sup> Council of the European Union, *AU-EU Expert Report on the Principle of Universal Jurisdiction*, Report from the Council Secretariat to the Delegations, Doc. 8672/1/09, 16 April 2009, para. 34 [hereinafter EU Council, *AU-EU Expert Report*], available at [http://www.africa-eu-partnership.org/sites/default/files/documents/rapport\\_expert\\_ua\\_ue\\_competence\\_universelle\\_en\\_0.pdf](http://www.africa-eu-partnership.org/sites/default/files/documents/rapport_expert_ua_ue_competence_universelle_en_0.pdf).

<sup>663</sup> *Id.* at para. 37.

<sup>664</sup> Constitutive Act of the AU, arts. 5, 18.

<sup>665</sup> Protocol of the Court of Justice of the African Union (adopted 11 July 2003, entered into force 11 February 2009), art. 2, available at [http://www.au.int/en/sites/default/files/treaties/7784-file-protocol\\_court\\_of\\_justice\\_of\\_the\\_african\\_union.pdf](http://www.au.int/en/sites/default/files/treaties/7784-file-protocol_court_of_justice_of_the_african_union.pdf).

<sup>666</sup> Protocol on the Statute of the African Court of Justice and Human Rights (adopted July 1, 2008, not yet entered into force), art. 2, available at [http://en.african-court.org/images/Basic%20Documents/ACJHR\\_Protocol.pdf](http://en.african-court.org/images/Basic%20Documents/ACJHR_Protocol.pdf).

<sup>667</sup> *Id.* at arts. 1-2.

<sup>668</sup> *Id.* The ratifying States are: Benin, Burkina Faso, Congo, Liberia, Libya, and Mali. See African Union, *List of Countries which Have Signed, Ratified/Accessed to the Protocol on the Statute of the African Court of Justice and Human Rights* (15 June 2017), available at [https://au.int/sites/default/files/treaties/7792-sl-protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights.pdf](https://au.int/sites/default/files/treaties/7792-sl-protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights.pdf).

<sup>669</sup> Protocol on the Statute of the African Court of Justice and Human Rights, art. 9.



## CHAPTER FIVE

The merged Court was initially expected to have two sections: a General Affairs section and a Human Rights section, each of which would address inter-State disputes and human rights matters, respectively.<sup>670</sup> In early 2009, the AU Assembly began considering the addition of a third section – an International Criminal Law section – to empower the merged Court to assert jurisdiction over international crimes.

This shift occurred partly in response to the perceived misuse of universal jurisdiction that occurred when a French Magistrate’s Court issued an arrest warrant against Rose Kabuye, the Chief of Protocol to the President of Rwanda. In response, the AU Assembly adopted Decision 213(XII), which expressed “regret” over the resulting tensions between the AU and the European Union (EU) and emphasized that the “appropriate collective response to counter the exercise of power by strong states over weak states” was for the AU to speak “with one voice.”<sup>671</sup> Decision 213(XII) requested the AU Commission, in consultation with the African Commission, to assess the implications of extending the African Court’s jurisdiction to include international crimes and to issue a report on its findings.<sup>672</sup>

A few months later, the AU-EU Expert Panel on the Principle of Universal Jurisdiction was established to “discuss the issue of the exercise of universal jurisdiction by European states” and “find ... a lasting solution to concerns expressed by the African side.”<sup>673</sup> In its subsequent report, the Expert Panel supported “a return to the idea of empowering African States to try international crimes on African soil.”<sup>674</sup> The report encouraged African States to enact national laws and to take other measures with the goal of preventing and punishing genocide, war crimes, and crimes against humanity. The report also endorsed the AU Assembly’s Decision 213(XII) requiring the AU Commission to examine the implications of empowering the African Court to hear international crimes.<sup>675</sup>

In June 2014, the AU Assembly adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.<sup>676</sup> This new Protocol has “arguably superseded” the Protocol that merged the African Court of Justice with the African Court on Human and Peoples’ Rights.<sup>677</sup> The criminal jurisdiction of the new Court will extend to the following crimes: genocide, crimes

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<sup>670</sup> *Id.* at art. 16; Beth Van Schaack, *Immunity Before the African Court of Justice & Human & Peoples’ Rights – The Potential Outlier*, JUST SECURITY, <http://justsecurity.org/12732/immunity-african-court-justice-human-peoples-rights-the-potential-outlier/>.

<sup>671</sup> Deya, *supra* note 661; AU Assembly, Decision Assembly/AU/Dec.213(XII), *Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction*, Doc. Assembly/AU/3(XII), 1-3 February 2009, paras. 4-5 [hereinafter AU Assembly, *Decision on Implementation*], available at [http://www.au.int/en/sites/default/files/decisions/9559-assembly\\_en\\_1\\_3\\_february\\_2009\\_auc\\_twelfth\\_ordinary\\_session\\_decisions\\_declarations\\_message\\_congratulations\\_motion.pdf](http://www.au.int/en/sites/default/files/decisions/9559-assembly_en_1_3_february_2009_auc_twelfth_ordinary_session_decisions_declarations_message_congratulations_motion.pdf).

<sup>672</sup> AfCHPR, Jurisdiction, <http://www.african-court.org/en/index.php/about-the-court/jurisdiction>; AU Assembly, *Decision on Implementation*, *supra* note 671, para. 9.

<sup>673</sup> EU Council, AU-EU Expert Report, *supra* note 662, para. 1; Deya, *supra* note 661.

<sup>674</sup> Deya, *supra* note 661.

<sup>675</sup> EU Council, AU-EU Expert Report, *supra* note 662, paras. 46(R2)-(R3).

<sup>676</sup> AU Assembly, *Decision on Draft Legal Instruments*, *supra* note 658, para. 2(e); Protocol on Amendments to the Protocol on the Statute of the ACJHR, *supra* note 658. See also Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court* (2016), available at <https://www.amnesty.org/en/documents/afr01/3063/2016/en/>.

<sup>677</sup> Van Schaack, *supra* note 670.

## THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, drugs, or hazardous waste, illicit exploitation of natural resources, and the crime of aggression.<sup>678</sup>

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<sup>678</sup> Protocol on Amendments to the Protocol on the Statute of the ACJHR, *supra* note 658, art. 28A(1).

## CHAPTER SIX

### Advocacy before the African Court

Advocacy before the African Court provides NGOs and other advocates an opportunity to put an end to or seek redress for human rights abuses in the form of binding judgments. The Court may, for instance, order a State party to give full effect to citizens' rights according to regional and international human rights law. Furthermore, the Court's advisory opinions provide clarification of human rights instruments applicable to States parties. And although the number of States parties that have accepted the Court's jurisdiction to hear complaints from NGOs and individuals is small, it is nevertheless another possible avenue for advocacy.

#### Advocacy Opportunities before the African Court

- request for advisory opinion
- individual complaints process
- provisional measures
- amicus curiae briefs

### Types of Engagement

#### Advisory Opinions

As mentioned in Chapter 5 above, NGOs with observer status at the African Union can reach the Court through its advisory jurisdiction.<sup>679</sup> According to the Protocol Establishing the African Court, "any African organization recognized by the OAU" can request an advisory opinion. Thus, NGOs with observer status before the African Union are entitled to make requests for advisory opinions.<sup>680</sup> Although advisory opinions are not binding on States, they can have "profound persuasive force and international repercussions."<sup>681</sup> Since advisory opinions are interpretations of international law rather than judgments on an individual case, they apply equally to all States parties. In this way, the pursuit of advisory opinions from the African Court constitutes a powerful form of advocacy.<sup>682</sup>

<sup>679</sup> See *supra* 'Advisory Jurisdiction' in Chapter 5, above.

<sup>680</sup> Protocol Establishing the African Court, art. 4(1); Protocol Establishing the African Court, art. 4(1); see, e.g., AfCHPR, *Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project*, App. No. 001/2013, Order of 26 May 2017, available at [http://www.african-court.org/en/images/Cases/Advisory%20Opinion/Advisory%20Opinions/Request%20for%20Advisory%20Opinion%20No.001-2013-Socio-%20Economic%20Rights%20and%20Accountability%20Project%20\(SERAP\)%20ENGLISH%20\(2\).pdf](http://www.african-court.org/en/images/Cases/Advisory%20Opinion/Advisory%20Opinions/Request%20for%20Advisory%20Opinion%20No.001-2013-Socio-%20Economic%20Rights%20and%20Accountability%20Project%20(SERAP)%20ENGLISH%20(2).pdf). See generally AfCHPR, *Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project*, App. No. 001/2013, Order of 26 May 2017 (Rafâa Ben Achour, J., separate opinion), available at [http://www.african-court.org/en/images/Cases/Dissenting-Separate%20Opinions/Separate\\_Opinion\\_of\\_Judge\\_Rafa%C3%A2\\_Ben\\_Achour\\_-\\_Adv\\_opinions-\\_SERAP.pdf](http://www.african-court.org/en/images/Cases/Dissenting-Separate%20Opinions/Separate_Opinion_of_Judge_Rafa%C3%A2_Ben_Achour_-_Adv_opinions-_SERAP.pdf).

<sup>681</sup> Viljoen, *supra* note 71, at 52.

<sup>682</sup> Mukundi Wachira, *supra* note 59, at 19.

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According to Rule 68(2) of the Rules of the Court, requests for advisory opinions must specify which provisions of the African Charter or other international human rights instrument are being questioned. The request must also describe the circumstances giving rise to the request, as well as the names and addresses of the representatives or the entities making the request. It is important to note that the subject matter of the request must not be related to a case that is pending before the African Commission.<sup>683</sup>

Once the Registrar receives a request for an advisory opinion, the Registrar sends copies of the request to Member States, the African Commission, and any other interested entity. This process enables States parties and other interested entities to file written submissions on any of the issues raised in the request within the time limit established by the African Court.<sup>684</sup>

After considering the written submissions, the African Court has the option to set a date for oral proceedings to take place. Once the Court has finalized the advisory opinion, it prepares for its delivery. Unless the Court decides otherwise, the delivery of advisory opinions takes place in open court. At the same time, the Court gives its reasons for its conclusions reached, with each Judge having an opportunity to deliver a separate or dissenting opinion.<sup>685</sup> Finally, the Court sends a copy of the advisory opinion to Member States, the African Commission, and any other interested parties.<sup>686</sup>

### Complaints of Alleged Human Rights Violations

Similar to the African Commission, the African Court hears cases concerning alleged human rights violations, with several distinctions. The African Court's complaint procedure, like that of the African Commission, is designed to protect and strengthen the human rights system in Africa – its stated vision is “an Africa with a viable human rights culture.”<sup>687</sup> The African Court emphasizes its responsibility to “complement and reinforce” the work of the African Commission and, in so doing, enhances its working relationship with the Commission and fosters Africa's human rights culture.

However, those who may access the Court are limited to a few categories. The African Commission, a State party that has lodged a complaint with the Commission, a State party against which a complaint has been lodged with the Commission, a State party whose citizen is a victim of a human rights violation, and an African intergovernmental organization are all entitled to submit cases to the Court. Only where a State has made a declaration under Article 34(6) of the Protocol Establishing the Court are NGOs with observer status before the African Commission and individuals entitled to submit cases to the Court directly.<sup>688</sup> If the State has not done so, NGOs and individuals are limited to submitting their cases to the African Commission only.

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<sup>683</sup> AfCHPR, Rules of Court, Rules 68(2)-(3).

<sup>684</sup> *Id.* at Rules 69-70. Note that, according to Rule 70(2), interested entities may be required to obtain authorization from the African Court before being able to file written submissions on issues raised in the request.

<sup>685</sup> Protocol Establishing the African Court, art. 4(2); AfCHPR, Rules of Court, Rules 71, 73(1)-(2).

<sup>686</sup> AfCHPR, Rules of Court, Rule 73(3).

<sup>687</sup> African Court, Mandate, Missions, and Values, <http://en.african-court.org/index.php/about-us/mandate-mission-values>.

<sup>688</sup> Protocol Establishing the African Court, arts. 5(1), 34(6).

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Nevertheless, it may still be possible to access the Court. For example, when a State party has not complied or is unwilling to comply with the Commission's recommendations, the Commission may submit the communication to the Court for review. The Commission may also refer a communication to the Court where the Commission has issued provisional measures and the State has not complied.<sup>689</sup>

### Preventing Imminent Harm

Parties before the African Court have another powerful tool for protecting their own or their clients' rights: provisional measures. The Protocol Establishing the African Court gives the Court power to adopt provisional measures "[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons ... as it deems necessary."<sup>690</sup> Provisional measures are measures taken to temporarily address an urgent situation pending a final judgment by the Court.<sup>691</sup> The Court can adopt such measures on its own accord or at the request of the Commission or one of the parties. In cases of "extreme urgency," the President of the Court can convene an extraordinary session so that the Court can decide on whether to adopt measures.<sup>692</sup> The Court can issue provisional measures any time before it closes a case, even before it has examined whether it has jurisdiction or the case is admissible.<sup>693</sup>

Once the Court has decided to adopt provisional measures, it notifies the parties, the African Commission, the AU Assembly, the Executive Council, and the AU Commission. It also discloses the provisional measures adopted during the previous year in its annual report to the AU Assembly.

An example of a provisional measure is the request for a State party to stop attacking civilian protestors and to cooperate with regional and international mechanisms to resolve the issue.<sup>694</sup> When provisional measures are complied with, they have the potential to prevent or end the violation of human rights. Unfortunately, a State's failure to comply is unlikely to result in any serious repercussions for the State.<sup>695</sup> If the State or other party to the case does not comply with the Court's provisional measures, the Court will make recommendations "as it deems appropriate." The Court may also invite the parties to provide information regarding the implementation of provisional measures.<sup>696</sup> The Court reports non-

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<sup>689</sup> ACommHPR, Rules of Procedure, Rules 112(2), 118(1)-(2).

<sup>690</sup> Protocol Establishing the Court, art. 27(2).

<sup>691</sup> FIDH, *Practical Guide to African Court*, *supra* note 719, at 123.

<sup>692</sup> AfCHPR, Rules of Court, Rules 51(1)-(2).

<sup>693</sup> FIDH, *Practical Guide to African Court*, *supra* note 719, at 106.

<sup>694</sup> See AfCHPR, *African Commission on Human and Peoples' Rights v. Libya*, App. No. 004/2011, Order for Provisional Measures of March 25, 2011, para. 25, available at <http://www.african-court.org/en/index.php/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> (requesting Libya to "immediately refrain from any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the Charter or of other international human rights instruments to which it is a party" and to report to the Court within 15 days on the measures it had taken to implement the Order).

<sup>695</sup> Constitutive Act of the AU, arts. 7, 23(2); Protocol Establishing the African Court, arts. 27(2), 31; see also Dolidze, *supra* note 73.

<sup>696</sup> AfCHPR, Rules of Court, Rule 51(3)-(5); Protocol Establishing the African Court, art. 31.

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compliance with its provisional measures in an annual report to the AU Assembly, but there is little else that can be done beyond what the State chooses to do.<sup>697</sup>

The Rules of Court provide that parties may request provisional measures.<sup>698</sup> As explained above, if a State has made a declaration under Article 34(6) of the Protocol Establishing the African Court, NGOs with observer status before the African Commission and individuals can institute cases directly before the Court.<sup>699</sup> This ability means that NGOs with observer status and individuals can become parties before the African Court, and thus can make requests for provisional measures.<sup>700</sup>

Where the State party concerned has not, however, made such a declaration, it may still be possible for NGOs and individuals to cause the African Court to issue provisional measures. An example of this can be seen in the Court's first issuance of provisional measures in 2011. At that time, the State of Libya was party to both the African Charter and the Protocol Establishing the African Court.<sup>701</sup> Libya was in the midst of an internal armed conflict, with rebel forces seeking to oust Colonel Muammar Gaddafi, Libya's *de facto* ruler since 1969. Demonstrators on the streets of Benghazi were met with violence by pro-government security forces; hundreds died.<sup>702</sup> On February 24, 2011, the Egyptian Initiative for Personal Rights (EIPR), Human Rights Watch, and INTERIGHTS – all NGOs – jointly submitted a request for provisional measures to the African Commission. They requested the African Commission to ask Libya to “stop the human rights violations, including the unlawful killings, and to ensure that those responsible for crimes are held accountable.”<sup>703</sup> The following day, the African Commission called on Libya to “immediately end the violence against civilians and take necessary steps to ensure that the human rights of its citizens and all its inhabitants are respected.” Specifically, it called on the government to respect the right to freedom of expression and of assembly, and the right to peaceful protest.<sup>704</sup>

On March 3, 2011, the African Commission instituted proceedings against Libya before the African Court for “serious and massive violations of human rights.”<sup>705</sup> The African Court, of its own accord, issued

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<sup>697</sup> AfCHPR, Rules of Court, Rules 51(4)-(5).

<sup>698</sup> AfCHPR, Rules of Court, Rule 51(1).

<sup>699</sup> Protocol Establishing the African Court, arts. 5(3), 34(6).

<sup>700</sup> AfCHPR, Rules of Court, Rule 51(1).

<sup>701</sup> Dolidze, *supra* note 73; African Union, *2016 List of Charter Parties*, *supra* note 83; African Union, *2016 List of Countries*, *supra* note 47. Libya ratified the African Charter on July 19, 1986. It ratified the Protocol Establishing the Court on November 19, 2003. Please note that in Dolidze's article, the author states that Libya was *signatory* to the African Charter and party to the Protocol Establishing the Court.

<sup>702</sup> *A timeline of the conflict in Libya*, CNN (24 August 2011, 2:59 PM),

<http://www.cnn.com/2011/WORLD/africa/08/18/libya.timeline/>; *Libya: Governments Should Demand End to Unlawful Killings*, HUMAN RIGHTS WATCH (20 February 2011), <http://www.hrw.org/news/2011/02/20/libya-governments-should-demand-end-unlawful-killings>; *Libya: Security Forces Kill 84 over Three Days*, HUMAN RIGHTS WATCH (19 February 2011), <http://www.hrw.org/news/2011/02/18/libya-security-forces-kill-84-over-three-days>.

<sup>703</sup> Dolidze, *supra* note 73; *Libya, Africa Rights Body Should Act Now*, HUMAN RIGHTS WATCH (26 February 2011), <http://www.hrw.org/news/2011/02/25/libya-africa-s-rights-body-should-act-now>.

<sup>704</sup> ACommHPR, Press Statement on the Human Rights Situation in North Africa, <http://www.achpr.org/press/2011/02/d9/>.

<sup>705</sup> AfCHPR, *African Commission on Human and Peoples' Rights v. Libya*, App. No. 004/2011, Order for Provisional Measures of March 25, 2011, “After deliberations,” *available at* <http://www.african-court.org/en/index.php/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>.

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provisional measures, finding that there was “a situation of extreme gravity and urgency, as well as a risk of irreparable harm to persons ... in particular, in relation to the rights to life and to physical integrity of persons.”<sup>706</sup> The Court requested Libya to “refrain from any action that would result in loss of life or violation of physical integrity of persons” and to report to the Court on the measures taken to implement the order within 15 days.<sup>707</sup>

Although Libya ultimately ignored the Court’s order, this case exemplifies how NGOs and individuals may have access to the Court indirectly, by influencing the African Commission to bring the issue before the Court.<sup>708</sup>

### *Amicus Curiae* Briefs

Another method of presenting information or arguments to the Court is by submitting an *amicus curiae* brief. *Amicus curiae* briefs are typically submissions by individuals or organizations that are neither party to the case nor have they been solicited by any of the parties for help, but who offer information or new arguments in order to assist the court.

While neither the Protocol Establishing the African Court nor the Rules of Court contain specific provisions or rules regarding the submission of *amicus curiae* briefs, the Court’s *Practice Directions*, which provide guidance to potential litigants, do identify these briefs as a possible means of contributing to the work of the Court.<sup>709</sup>

An important distinction between the African Commission and the African Court is the requirement that individuals or organizations seeking to act as *amicus curiae* must submit a request to the Court prior to making any submissions. Along with their request, they must also specify the contribution they wish to make.<sup>710</sup>

Upon receiving such a request, the Court examines it and then determines whether or not to accept it.<sup>711</sup> If the Court grants the individual or organization’s request, then the Registrar notifies and invites them to “make submissions, together with any annexes, at any point during the proceedings.” The Court also makes the initial application, as well as any subsequent pleadings, available to the individual or

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<sup>706</sup> *Id.* at para. 22.

<sup>707</sup> *Id.* at para. 25.

<sup>708</sup> Dolidze, *supra* note 73.

<sup>709</sup> AfCHPR, Practice Directions (adopted by the Court at its 5th Extraordinary Session, held 1-5 October 2012), paras. 42-47, [hereinafter AfCHPR, Practice Directions], available at <http://www.african-court.org/en/images/documents/Court/Cases/Procedures/Practice%20Directions%20to%20Guide%20Potential%20Litigants%20En.pdf>; see also AfCHPR, Protocol Establishing the Court; AfCHPR, Rules of Court, Rule 45(1). Rule 45(1) of the Rules of Court provides: “The Court may, of its own accord, or at the request of a party, or the representatives of the Commission, where applicable, obtain any evidence which in its opinion may provide clarification of the facts of a case. The 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.”

<sup>710</sup> AfCHPR, Practice Directions, *supra* note 709, para. 42.

<sup>711</sup> *Id.* at para. 43.



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organization.<sup>712</sup> If, however, the Court declines to grant a request for *amicus curiae* status, its decision is final – it is entirely within the Court's discretion to grant or deny such requests.<sup>713</sup>

In addition to receiving and deciding on requests for *amicus curiae* status, the Court may also invite individuals and organizations to act as *amicus curiae* on a specific case or issue before it.<sup>714</sup>

Once the Court receives an *amicus curiae* brief and its annexes, it immediately transmits the materials to all parties to the pending case “for their information.”<sup>715</sup>

Submitting *amicus curiae* briefs to the African Court is an effective way to present new facts and original arguments to the Court, as well as to draw attention to the possible broad legal reach the Court's decision may have. The case of *African Commission on Human and Peoples' Rights v. Libya* illustrates the process of attaining *amicus curiae* status before the Court. In the case, the African Commission filed a complaint against Libya, alleging that the State had carried out “serious and massive violation[s] of human rights.”<sup>716</sup> The Pan African Lawyers Union (PALU) requested permission to participate as *amicus curiae* in the case. The Court's Registry invited PALU to “specify the issues it intends to contribute” with respect to the application. After receiving PALU's submission, the Court decided to allow the organization to participate as *amicus curiae*. It ordered the Registrar to send PALU copies of the pleadings and gave PALU a deadline to file its submissions.<sup>717</sup> This grant of *amicus curiae* status to PALU marked the first time an organization participated as a “friend of the Court.”

## Requirements for Submitting a Complaint

This section will give a brief overview of the requirements that individuals and organizations must satisfy in order to successfully submit an application to the African Court. The following section – How Complaints Are Processed – goes into these requirements in greater

### Practice Tips for Seizure and Admissibility Stages

- ✓ present a ***prima facie*** case
- ✓ make **precise allegations** and attach relevant documents
- ✓ avoid making allegations in **general terms**
- ✓ submit **as soon as possible** after exhausting domestic remedies

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<sup>712</sup> *Id.* at para. 44.

<sup>713</sup> *Id.* at para. 47.

<sup>714</sup> *Id.* at para. 45.

<sup>715</sup> *Id.* at para. 46.

<sup>716</sup> AfCHPR, *African Commission on Human and Peoples' Rights v. Libya*, App. No. 004/2011, Order for Provisional Measures of March 25, 2011, “After deliberations,” available at <http://www.african-court.org/en/index.php/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>.

<sup>717</sup> AfCHPR, *African Commission on Human and Peoples' Rights v. Libya*, App. No. 004/2011, Order regarding Application for Leave to Participate as Amicus Curiae of March 30, 2012, para. 2, 4, 6, 9, available at <http://www.african-court.org/en/images/documents/orders/ORDER-%20PALU%20Amicus%20Curie%20-%20APPLICATION%20004.2011.pdf>.

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detail and provides an explanation of each stage of litigation before the Court, the possible outcomes, and parallel procedures.<sup>718</sup>

In order to be considered, an application must contain the following information and statements:

- the identity of the victim;
- the identity of the author of the application, even if he or she requests anonymity. In practice, if the complainant is not the victim, he or she should have the victim's authorization to file the complaint to avoid the complaint being dismissed by the Court;
- the State responsible for the alleged violation, due to its action, acquiescence, or omission;
- the date, place, time, and details of the alleged violation of a right protected by the African Charter or any other relevant human rights instrument ratified by the State concerned;
- the steps taken to exhaust domestic remedies, or an indication of the reasons why it was impossible to do so, such as exhaustion was unduly prolonged;
- that the application has been submitted within a reasonable time after domestic remedies were exhausted;
- the outcome desired from submitting the case;
- that the State against which the application is lodged is party to the Protocol Establishing the African Court and has made a declaration under Article 34(6) to entitle individuals and NGOs with observer status before the Commission to institute cases before the Court;
- whether the application has been settled by another UN or AU settlement proceeding; and
- whether the victim's life, personal integrity, or health is in imminent danger.<sup>719</sup>

Furthermore, in order to be considered, applications must not:

- be written in disparaging or insulting language against the State or its institutions or against the AU; or
- be based exclusively on news disseminated through mass media.<sup>720</sup>

If the application does not meet these minimum information requirements, the Court will not examine the admissibility or merits of the application.

In order for the application to survive the admissibility phase and proceed to the merits phase, the complainant must further demonstrate that:

- the facts alleged, if true, constitute a possible violation of the African Charter or other relevant human rights instrument ratified by the State concerned;

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<sup>718</sup> See *infra* 'How Complaints Are Processed' in this chapter, below.

<sup>719</sup> African Charter, art. 56; Protocol Establishing the African Court, arts. 6(2), 7; International Federation for Human Rights, *Practical Guide: The African Court on Human and Peoples' Rights – Towards the African Court of Justice and Human Rights*, 94 [hereinafter FIDH, *Practical Guide to African Court*], available at [http://www.fidh.org/IMG/pdf/african\\_court\\_guide.pdf](http://www.fidh.org/IMG/pdf/african_court_guide.pdf).

<sup>720</sup> *Id.*

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- the victim did in fact exhaust domestic remedies, or that such remedies were unduly prolonged; and
- the communication complies with the reasonable time limit.<sup>721</sup>

### African Court on Human and Peoples' Rights

Address: Registry of the Court  
P.O. Box 6274  
Arusha, Tanzania  
<http://www.african-court.org/en/>  
Email: [registry@african-court.org](mailto:registry@african-court.org)  
Phone: (225) 27-2050-134, 135, 136, 137, or 138  
Fax: (225) 732-97 95 03

The complainant should provide a full explanation to show these requirements have been met, and keep the Court informed, in writing, of significant developments after submitting the application. The complainant should always keep the Registry informed of any changes in contact information or representation. Once an application has been submitted, it is vitally important for advocates to adhere to the Court's deadlines, or else to formally request an extension from the Court.<sup>722</sup> Applications should

be submitted in clear, simple, and straightforward language, addressed to the Registrar of the Court.

The initial application and any subsequent pleadings or filings may be submitted by registered post, email, fax, or courier. Submissions by email, however, must be accompanied by a submission of the original application – by registered post, fax, or courier – to the Registrar.<sup>723</sup>

The Court's *Practice Directions* provide guidance regarding the formatting of the application. According to the guide, applications should:

- include a cover sheet indicating the parties, leaving a space for the Registrar to insert a case number, and including a heading indicating that the document is the complainant's application;
- be typed in 12-point, Arial font with line spacing set at 1.5. Footnotes should be in 11-point font;
- be written in one of the working languages of the Court – Arabic, English, French, or Portuguese;
- contain consecutively numbered pages;
- number each paragraph on the left-hand side;
- express numbers in figures rather than spelling them out;
- contain an executive summary less than three pages in length;
- employ headings to separate the application into sections, such as "facts," "jurisdiction," "admissibility," "merits," "relief sought"; and
- have written text that appears on only one side of the page
- be signed by the complainant or his or her representative.<sup>724</sup>

<sup>721</sup> African Charter, arts. 56(2)-(6); Protocol Establishing the African Court, art. 6(2).

<sup>722</sup> AfCHPR, How to File a Case, <http://en.african-court.org/index.php/27-filing-a-case/106-how-to-file-a-case>.

<sup>723</sup> AfCHPR, How to File a Case, *supra* note 722; FIDH, *Practical Guide to African Court*, *supra* note 719, at 97.

<sup>724</sup> AfCHPR, How to File a Case, *supra* note 722; AfCHPR, Practice Directions, *supra* note 709, at 3-4; AfCHPR, Rules of Court, Rule 18(2)-(3). See also Constitutive Act of the AU, art. 25. Regarding the language requirements, the

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The Court endeavors to adjudicate cases within a reasonable timeframe. Thus, while potential parties are not subject to a statute of limitations for submitting an application, there are strict deadlines for the subsequent stages of the judicial process. Once an application has been submitted, the Registrar forwards copies of the application to the appropriate entities, in particular the Respondent State party. The State party must respond within 30 days of receiving the application with the names and addresses of its representatives. The Respondent State party has 60 days to respond to the application, or else to request an extension of time.<sup>725</sup> An important takeaway from these requirements is that, once an application has been submitted, it is vitally important for complainants to adhere to the Court's deadlines, or else to formally request an extension from the Court.<sup>726</sup>

### How Complaints Are Processed

Whereas the section above – Requirements for Submitting a Complaint – gave a brief overview of the requirements for complainants to satisfy when they submit an application to the African Court, this section provides a detailed explanation of how applications advance before the Court, the various possible outcomes of this process, and procedures that can take place at the same time a communication is being processed.<sup>727</sup>

It is important to note that this section is designed to inform individuals and NGOs with observer status before the Commission about bringing a case before the Court. Other entities, such as the Commission, States, and African intergovernmental organizations, may also file applications with the Court, and this manual provides guidance for them below. For the purposes of the following section, though, the focus remains on individuals and NGOs with observer status.<sup>728</sup>

There are several stages through which a communication proceeds before the African Court. Briefly, they include:

- Registration
- Seizure
- Admissibility
- Merits
- Compliance

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Court may make exceptions in order to allow persons appearing before the Court to use a language of their choice “if it is shown” that they do not have sufficient knowledge of the Court’s official languages to be able to communicate adequately.

<sup>725</sup> AfCHPR, Rules of Court, Rules 35(2)-(4)(a), 37.

<sup>726</sup> AfCHPR, How to File a Case, *supra* note 722.

<sup>727</sup> The Protocol Establishing the African Court does not specifically describe the examination procedure of applications. Article 8 simply provides: “The Rules of Procedure of the Court shall lay down the detailed conditions under which the Court shall consider cases brought before it, bearing in mind the complementarity between the Commission and the Court.”

<sup>728</sup> AfCHPR, Rules of Court, Rule 33; Protocol Establishing the African Court, arts. 5, 34(6).

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In addition, once an application has been declared admissible, it may be possible to reach an amicable settlement with the State, at which point the Court's consideration of an application ends.

Furthermore, the Court may request the State to undertake provisional measures at any point during the proceedings.

## Registration

The first stage of an application before the African Court is the registration stage. Once the Court's Registrar receives an application, it assigns it a case number and acknowledges that it has been received. Then, the Registrar transmits a copy of the application and its annexes to the President and other Members of the Court. Unless the Court decides otherwise, the Registrar also forwards copies of the application to:

- the State party against which the application was filed;
- the State party whose citizen is a victim of the alleged violation;
- the State party against which an application has been filed at the Commission;
- the African Commission; and/or
- the individual, legal entity, or NGO that has filed an application at the Commission under Article 55 of the African Charter.<sup>729</sup>

The Registrar also informs the Chairperson of the AU Commission of the application, who will then inform the AU Executive Council and all other States parties to the Protocol Establishing the African Court.<sup>730</sup>

During the process for forwarding copies of the application to the States, bodies, and individuals mentioned above, the Registrar also invites:

- the respondent State to reply, within 30 days of receiving the application, to give the names and addresses of its representatives;
- any other State party wishing to intervene in the case, to inform the Registrar as soon as possible, or at least before the written proceedings have closed; and
- if applicable, the Commission to reply, within 30 days of receiving the application, to give the names and addresses of its representatives.<sup>731</sup>

The registration process enables the Registrar to inform potentially interested parties of the application and identify all future parties to the case.<sup>732</sup>

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<sup>729</sup> AfCHPR, Rules of Court, Rules 35(1)-(2); AfCHPR, Practice Directions, *supra* note 709, at 3. *See also* FIDH, *Practical Guide to African Court*, *supra* note 719, at 97.

<sup>730</sup> AfCHPR, Rules of Court, Rule 35(3).

<sup>731</sup> *Id.* at Rules 35(4), 53(1); Protocol Establishing the Court, art. 5(2). *See also* FIDH, *Practical Guide to African Court*, *supra* note 719, at 99-100.

<sup>732</sup> FIDH, *Practical Guide to African Court*, *supra* note 719, at 100.

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Finally, it is important to note that registration of an application does not guarantee that it will be seized by the Court.

### Seizure

After an application has been registered, the next step is for it to be seized. Seizure is the Court's consideration of whether the application, on one hand, alleges a *prima facie* violation of the African Charter or other relevant human rights instrument ratified by the Court or, on the other hand, is unfounded. If the Court determines that an application is unfounded, it can dismiss the application without requiring the parties to the case to appear. Examples of unfounded applications include those that simply do not refer to any human rights violation, that do not include a State as the respondent, or that consist of facts that are patently incorrect. The purpose of dismissing unfounded applications at this stage is to clear the Court's heavy workload so that it can focus on cases with more merit.<sup>733</sup> If the Court determines that the application alleges a *prima facie* violation, then it will allow it to proceed to the admissibility stage.

### Admissibility

After registering and seizing the case, the Court conducts a preliminary examination of the basis for its jurisdiction and the admissibility of the application.<sup>734</sup> It is important to note that when the African Court is at the stage of deciding a submission's admissibility, it may request the opinion of the African Commission. The Court may also *transfer* cases to the African Commission if it considers it appropriate.<sup>735</sup>

In order to be found admissible, applications *must* meet the requirements identified above, in the section on Requirements for Submitting a Complaint.<sup>736</sup>

### Identify the victim

The author of the application does not need to be the victim, or be related to the victim in any way, but the victim must be identified in the application.

### Identify the author of the application

The person who submits the application is generally called the "author," "complainant," or "applicant." While a victim may submit a petition on his or her own behalf, this is not necessary. In practice, however, the Court requires that an author who is not the victim of the alleged violation have the victim's

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<sup>733</sup> *Id.*

<sup>734</sup> AfCHPR, Rules of Court, Rules 39(1), 40; African Charter, arts. 50, 56.

<sup>735</sup> Protocol Establishing the African Court, arts. 6(1), (3).

<sup>736</sup> African Charter, art. 56; Protocol Establishing the African Court, arts. 6(2), 7. *See also* FIDH, *Practical Guide to African Court*, *supra* note 719, at 94.

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authorization to submit the complaint. The complainant can be an individual, group of individuals, an NGO with observer status before the Commission, or a group of NGOs, all with observer status before the Commission. The author may indicate that he or she wishes to remain anonymous to the State, and the Court will honor that request, though the notification of identity of the author to the Court is still required for the application to be admissible.<sup>737</sup>

The application should also provide the author's address, signature, and, if possible, a telephone and fax number. If an NGO is submitting the application, the application should provide the NGO's address and the names and signatures of its legal representatives.

### States that Have Accepted the African Court's Jurisdiction over Individual Applications

Benin	2016
Burkina Faso	1998
Côte d'Ivoire	2013
Ghana	2011
Malawi	2008
Mali	2010
Rwanda*	2013
Tanzania	2010
Tunisia	2017

\* Rwanda withdrew from this jurisdiction

### Satisfy the jurisdiction requirements

In order to be compatible with the African Charter and the Constitutive Act of the AU, the communication must satisfy four bases for jurisdiction. These bases are: jurisdiction *ratione materiae* (subject matter jurisdiction), jurisdiction *ratione temporis* (temporal jurisdiction), jurisdiction *ratione personae* (personal jurisdiction), and jurisdiction *ratione loci* (territorial jurisdiction).<sup>738</sup> Communications should indicate how each of these bases are satisfied.

- Jurisdiction *ratione materiae* (subject matter jurisdiction): The communication must allege a violation of a substantive right that is contained in the African Charter or other relevant human rights instrument to which the State is a party. The Court has further held that the Universal Declaration of Human Rights, even though it had not been ratified by States, had "attained the status of customary international law." Since the specific rights alleged to have been violated in the case were also guaranteed by the African Charter and other human rights instruments that the State had ratified in addition to the Universal Declaration of Human Rights, the Court found it had subject matter jurisdiction.<sup>739</sup>
- Jurisdiction *ratione temporis* (temporal jurisdiction): The alleged violation must have occurred after the State became a party to both the African Charter and the Protocol Establishing the Court, and also after the State made its declaration under Article 34(6) of the Protocol Establishing the Court.<sup>740</sup>

<sup>737</sup> African Charter, art. 56(1); AfCHPR, Rules of Court, Rule 40(1).

<sup>738</sup> African Charter, art. 56(2).

<sup>739</sup> AfCHPR, *Frank David Omary and Others v. Tanzania*, App. No. 001/2012, Judgment of 28 March 2014, paras. 69-77, available 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>.

<sup>740</sup> *Id.* at paras. 81-84.



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- Jurisdiction *ratione personae* (personal jurisdiction): The alleged violation must be attributable to a State party to the African Charter and the complainant must have standing; that is, the complainant must fall within the definition of people or groups eligible to submit complaints. Those who may access the Court are limited to a few categories. The African Commission, a State party that has lodged a complaint with the Commission, a State party against which a complaint has been lodged with the Commission, a State party whose citizen is a victim of a human rights violation, and an African intergovernmental organization are all entitled to submit cases to the Court.<sup>741</sup> Only where a State has made a declaration under Article 34(6) of the Protocol Establishing the Court are NGOs with observer status before the African Commission and individuals entitled to submit cases to the Court directly.<sup>742</sup> If the State has not done so, NGOs and individuals are limited to submitting their cases to the African Commission only.
- Jurisdiction *ratione loci* (territorial jurisdiction): The alleged violation must have occurred within the State's territory.<sup>743</sup> Similar to the African Commission, there is some debate regarding whether the Court has extraterritorial jurisdiction; that is, whether the Court has jurisdiction over violations that occurred outside the territory of the respondent State. None of the African system's human rights instruments, including the Protocol Establishing the African Court, explicitly states that the obligation of States to respect, protect, and fulfill human rights is limited to their own territories. Article 1 of the African Charter simply states that the States parties to the Charter "shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them."<sup>744</sup> One could argue that States cannot be held responsible for violations outside their borders, particularly since the language of the African Charter is not clear. Conversely, one could derive such a responsibility from the object and purpose of the Charter: to promote the protective system that the Charter established.<sup>745</sup>

The Commission's case law provides some guidance. In the case of *Democratic Republic of Congo v. Burundi, Rwanda, and Uganda*, the Commission noted that "the violations complained of are allegedly being perpetrated by the Respondent States in the territory of the Complainant State."<sup>746</sup> None of the respondent States objected to the Commission's

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<sup>741</sup> Protocol Establishing the African Court, art. 5(1).

<sup>742</sup> *Id.* at arts. 5(1), 34(6); AfCHPR, *Frank David Omary and Others v. Tanzania*, paras. 78-80; AfCHPR, *Peter Joseph Chacha v. Tanzania*, App. No. 003/2012, Judgment of 28 March 2014, para. 125, available 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>.

<sup>743</sup> ACommHPR, *Samuel T. Muzerengwa & 110 Others v. Zimbabwe*, Communication No. 306/2005, 9th Extraordinary Session, 23 February – 3 March 2011, para. 58, available at [http://www.achpr.org/files/sessions/9th-eo/comunications/306.05/achpreos9\\_306\\_05\\_eng.pdf](http://www.achpr.org/files/sessions/9th-eo/comunications/306.05/achpreos9_306_05_eng.pdf).

<sup>744</sup> African Charter, art. 1.

<sup>745</sup> Soboka Bulto, *supra* note 378, at 257-58.

<sup>746</sup> ACommHPR, *DRC v. Burundi, Rwanda, and Uganda*, Communication No. 227/1999, 33rd Ordinary Session, 29 May 2003, para. 63, available at <http://caselaw.iharda.org/doc/227.99/>.

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application of extraterritorial jurisdiction, and the Commission found they had violated fundamental rights and freedoms on territory over which they had “effective control.”<sup>747</sup> Although it is not certain what factors – State consent to the proceedings, effective control, or other factors – led to territorial jurisdiction being a non-issue, at the very least it is clear that the Commission is receptive to the application of extraterritorial jurisdiction. The Court may opt to follow the Commission’s lead in order to preserve jurisprudential harmony.

### Exhaust domestic remedies before submitting a communication

According to the African Court, exhaustion of domestic remedies “is not a matter of choice. It is a legal requirement in international law.”<sup>748</sup> This requirement ensures that the State has an opportunity to remedy the alleged violation through its domestic system and prevents the African Court from acting as a court of first instance. There is, however, an exception: if it is obvious that the process of exhausting domestic remedies is “unduly prolonged,” it is not necessary to wait to submit the communication. Thus, the communication should clearly state that all domestic remedies were exhausted, or explain why the process of exhausting domestic remedies would have been unduly prolonged.<sup>749</sup>

The Court has held that the remedies “envisaged in Article 6(2) of the Protocol read together with Article 56(5) of the Charter are primarily judicial remedies as they are the ones that meet the criteria of availability, effectiveness and sufficiency that has been elaborated in jurisprudence.”<sup>750</sup> The Court explains that to be available, effective, and sufficient, a remedy must be “freely accessible to each and every individual;” it should not be discretionary or capable of being abandoned without notice.<sup>751</sup> For example, in the *Zongo* case, the Court held that the applicant is not required to pursue domestic remedies that, pursuant to the national legislation, it has no legal standing to bring.<sup>752</sup> On the other

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<sup>747</sup> *Id.* at para. 91.

<sup>748</sup> AfCHPR, *Peter Joseph Chacha v. Tanzania*, App. No. 003/2012, Judgment of 28 March 2014, para. 142, available 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>.

<sup>749</sup> African Charter, art. 56(5); AfCHPR, *Frank David Omary and Others v. Tanzania*, App. No. 001/2012, Judgment of 28 March 2014, paras. 98, 125, available 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> (holding that without “proof of an end of the action before domestic Courts ... there is no indication that they have exhausted local remedies.”).

<sup>750</sup> African Charter, art. 56(5); Protocol Establishing the African Court, art. 6(2); AfCHPR, *Tanganyika Law Society, Legal and Human Rights Centre & Reverend Christopher R. Mtikila v. Tanzania*, App. Nos. 009/2011 & 011/2011 (joined), Judgment of 14 June 2013, para. 82(1), available 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>.

<sup>751</sup> AfCHPR, *Tanganyika Law Society, Legal and Human Rights Centre & Reverend Christopher R. Mtikila v. Tanzania*, para. 82(3).

<sup>752</sup> See AfCHPR, *Norbert Zongo v. Burkina Faso*, App. No. 013/11, Judgment of 21 June 2013, paras. 107-12, available at <http://www.african-court.org/en/index.php/55-finalised-cases-details/846-app-no-013-2011-abdoulaye-nikiema-ernest-zongo-blaise-ilboudo-burkinabe-human-and-peoples-rights-movement-v-burkina-faso-details>.

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hand, the Court has held that frustration does not excuse an applicant's failure to exhaust domestic remedies.<sup>753</sup>

Given the limited number of finalized cases that have been issued by the Court, there are not many decisions analyzing the exhaustion requirements. Nevertheless, the Court frequently relies on the jurisprudence of the African Commission in weighing the availability, effectiveness, and sufficiency of a local remedy. For that reason, it is highly recommended that advocates review the section on "How Complaints Are Processed" by the Commission in Chapter 4, above, for a full understanding of this requirement.<sup>754</sup>

### Submit the communication within a reasonable time

The African Charter does not define the time frame in which communications must be submitted in order to be considered "reasonable."<sup>755</sup> Furthermore, in the small number of cases decided by the Court, there is little to no discussion of the requirement that applications be submitted within a reasonable time after exhaustion of domestic remedies.<sup>756</sup>

For that reason, it is likely to be very helpful to refer to the section on "How Complaints Are Processed" at the Commission, above, for a better understanding of this requirement.<sup>757</sup>

Briefly, the Commission's approach is that it is flexible in general, considering the context and characteristics of each communication, but it has begun restricting the lengths of time it finds to be reasonable. Specifically referring to the European and Inter-American human rights systems, the Commission appears to be leaning towards a similar six-month time limit. For that reason, if at all possible, it is advisable to submit communications to the Commission within six months of exhausting domestic remedies, if at all possible.

Furthermore, in order to be found admissible, the communication should also refrain from using disparaging or insulting language, from relying solely on mass media, and from submitting a complaint that has been settled by another international body; these requirements are discussed further below.

### Do not use disparaging or insulting language

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<sup>753</sup> AfCHPR, *Peter Joseph Chacha v. Tanzania*, para. 145.

<sup>754</sup> See *supra* 'How Complaints Are Processed' in Chapter 4, above.

<sup>755</sup> African Charter, art. 56(6).

<sup>756</sup> See, e.g., AfCHPR, *Frank David Omary and Others v. Tanzania*, App. No. 001/2012, Judgment of 28 March 2014, para. 140, available 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> (declining to address the admissibility requirements contained in article 56(6), holding: "Having concluded that the Applicants have not exhausted local remedies ... this Court does not find it necessary to pronounce itself on condition of reasonable delay.").

<sup>757</sup> See *supra* 'How Complaints Are Processed' in Chapter 4, above.

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Communications should not disparage or insult the State concerned, its institutions, or the AU.<sup>758</sup> For a closer examination on the line between free expression and language that disparages or insults, see the “How Complaints Are Processed” section regarding the Commission, above.<sup>759</sup>

### Do not base the complaint only on news disseminated through mass media

Communications should also be based on more than merely news disseminated through the mass media.<sup>760</sup>

### Do not submit a complaint that has been settled by another UN or AU body

This requirement means that the communication must not deal with a matter that has already been settled by another international human rights body.<sup>761</sup> The Court will not consider cases that are active before or were previously settled by another body.

## Merits & Reparation

The merits and reparation stage follows the admissibility stage. At this stage, the African Court considers the substantive issues of the case. The proceedings generally take place in two phases: the written phase and, if necessary, the oral phase.

During the written phase of Court proceedings, communication takes place between the Court, the parties, and the Commission via “applications, statements of the case, defences and observations and replies if any, as well as all papers and documents in support, or of certified copies thereof.”<sup>762</sup> In cases where an applicant seeks reparations, either on his or her own behalf or on behalf of another, the applicant must submit the request in the initial application to the Court. Such requests should include the amount of reparations sought as well as any supporting evidence.<sup>763</sup> The Court generally rules on requests for reparations in the same decision establishing one or more violations of a human and peoples’ right; in some cases, however, the Court will issue a separate judgment on reparations.<sup>764</sup>

During the oral phase, the Court hears the representatives of the parties, in addition to any witnesses, experts, or other persons the Court decides to hear.<sup>765</sup> If and when the case is ready to be heard, the President of the Court consults the parties (or their representatives) and sets a date for the hearing.<sup>766</sup> A quorum of at least seven judges is required before the Court may begin its examination of a case.<sup>767</sup> The African Court’s hearings are generally conducted in open court; the Court may, however, decide to hold

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<sup>758</sup> African Charter, art. 56(3).

<sup>759</sup> See *supra* ‘How Complaints Are Processed’ in Chapter 4, above.

<sup>760</sup> African Charter, art. 56(4).

<sup>761</sup> *Id.* at art. 56(7).

<sup>762</sup> AfCHPR, Rules of Court, Rules 27(1)-(2).

<sup>763</sup> *Id.* at Rule 34(5).

<sup>764</sup> *Id.* at Rule 63.

<sup>765</sup> *Id.* at Rule 27(3).

<sup>766</sup> *Id.* at Rule 42.

<sup>767</sup> *Id.* at Rule 17; Protocol Establishing the African Court, art. 23.

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hearings *in camera* either on its own initiative or at the request of a party. In such cases, the Court must believe that holding the hearings *in camera* “is in the interest of public morality, safety or public order.” Regardless of where the Court decides to hold its hearings, parties to a case or their legal representatives are permitted to be present and heard.<sup>768</sup> Once the hearings have concluded, the Court will close the proceedings in order to carry out its deliberations and judgment.<sup>769</sup>

The Court’s deliberations, conducted *in camera*, are confidential. Only those Judges who were Members of the Panel that hears a case may participate in deliberations on the case. Decisions of the Court are to be made by a “majority of the Members of the Panel present.” If there is a tie vote among the Judges, the Presiding Judge has the casting vote. Any Member of the Court who heard the case may, however, deliver a separate or dissenting opinion.<sup>770</sup>

After deliberations have reached an end, the Court has 90 days to render its decision. The judgment, which is final and binding on the parties, must include the names and signatures of the Judges who deliberated on the case and their reasons for the judgment made.<sup>771</sup>

Finally, after notifying the parties, the Court reads the judgment in open court.<sup>772</sup> In practice, the Court generally takes about two years to finalize a decision after initially receiving a case.<sup>773</sup> As the Court begins to receive more applications, this time period may change, depending on whether the Court receives the staff and financial resources needed to handle an increased caseload.

Advocates should note that Rule 61(4), which relates to the finality of the Court’s judgments, is subject to Article 28(3) of the Protocol Establishing the Court.<sup>774</sup> Article 28(3) provides that “the Court may review its decision in the light of new evidence.” In those cases where the Court reviews a final judgment, the application for review must be submitted within six months of discovery of the new evidence.<sup>775</sup>

One notable distinction between the African Court and the African Commission is the provision of legal aid. Generally, the African Commission will help parties locate external sources of legal aid if the Commission finds that doing so is “essential for the proper discharge of the Commission’s duties, and to ensure equality of the parties before it,” and if “[t]he author of the Communication has no sufficient means to meet all or part of the costs involved.” The Commission will *not*, however, provide legal aid itself.<sup>776</sup> By contrast, litigation before the African Court entitles any party to a case to legal

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<sup>768</sup> AfCHPR, Rules of Court, Rules 43(1)-(3); Protocol Establishing the African Court, art. 10(1).

<sup>769</sup> AfCHPR, Rules of Court, Rule 59(1).

<sup>770</sup> *Id.* at Rules 60(1)-(5).

<sup>771</sup> *Id.* at Rule 59(2), 61.

<sup>772</sup> *Id.* at Rule 61(3); Protocol Establishing the African Court, art. 28(5).

<sup>773</sup> See African Court Coalition, African Court Cases & Judgments,

[http://www.africancourtcoalition.org/index.php?option=com\\_content&view=category&layout=blog&id=51&lang=en](http://www.africancourtcoalition.org/index.php?option=com_content&view=category&layout=blog&id=51&lang=en).

<sup>774</sup> Protocol Establishing the African Court, art. 28(3); AfCHPR, Rules of Court, Rule 61(4).

<sup>775</sup> AfCHPR, Rules of Court, Rule 67(1).

<sup>776</sup> ACommHPR, Rules of Procedure, Rule 104(2).

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representation of that party's choice. Moreover, the Court provides free legal representation "where the interests of justice so require."<sup>777</sup>

## Amicable Settlement

Once an application has been declared admissible, it may be possible for both parties to reach an amicable settlement. An amicable settlement is the friendly settlement of the case by the parties, and is distinct from a stage in the proceedings. Amicable settlements are alternate outcomes to a case: rather than having a case dismissed or decided in favor of one of the parties, the Court can facilitate an agreement that is satisfactory to both parties. One attractive aspect of amicable settlements can be reached at any stage before the Court gives its judgment.<sup>778</sup>

According to Article 9 of the Protocol Establishing the African Court, the Court "may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter."<sup>779</sup> This provision means that the Court may try to facilitate a settlement between the parties, as long as the settlement is consistent with the values and principles contained in the African Charter. One of the benefits of pursuing an amicable settlement is that the negotiations are confidential and any observations, written or oral communications, or concessions made do not prejudice the parties if the case ends up proceeding before the Court.<sup>780</sup>

Once an amicable settlement is reached, regardless of whether the Court facilitated it, the parties report the details of the settlement to the Court, and the Court then renders a brief judgment summarizing the facts of the case and the resolution that was reached. The Court has discretion, however, to proceed with a case in spite of an amicable settlement having been reached.<sup>781</sup>

## Compliance

The compliance stage is the final stage for applications before the Court. As detailed in the merits section above, and if the parties to an application have not reached an amicable settlement of the case, then it is the task of the Court to decide whether one or more violations have occurred. If the Court finds that a violation has taken place, it issues orders for the State to remedy the violation, which can include orders for the State to pay fair compensation or make reparations.<sup>782</sup>

The Court has 90 days after finishing its deliberations to render a judgment, after which time the parties are notified and the judgment is transmitted to AU Member States, the African Commission, and the Executive Council. A judgment that has been reached by a majority of the Justices is final and not subject to appeal.<sup>783</sup>

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<sup>777</sup> Protocol Establishing the African Court, art. 10(2).

<sup>778</sup> AfCHPR, Rules of Court, Rule 56(1).

<sup>779</sup> Protocol Establishing the African Court, art. 9; *see also* AfCHPR, Rules of Court, Rule 26(1)(c).

<sup>780</sup> AfCHPR, Rules of Court, Rules 57(1), (4).

<sup>781</sup> *Id.* at Rules 56(2)-(3), 57(3)-(4).

<sup>782</sup> Protocol Establishing the African Court, art. 27(1).

<sup>783</sup> *Id.* at arts. 28(2), 29.

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The Court's judgments are binding on States.<sup>784</sup> The Executive Council monitors the execution of the Court's judgments on behalf of the AU Assembly.<sup>785</sup> Furthermore, the Court reports on which States have not complied with its judgments at each regular session of the AU Assembly.<sup>786</sup>

Beyond compliance monitoring by the Executive Council of the AU and the bare commitment of States to implement the Court's judgments, compliance with judgments remains voluntary; there is no concrete way to force States to comply.<sup>787</sup> As with regard to the Commission, some scholars have suggested that the AU Assembly has the power to impose sanctions on non-complying States by virtue of the Constitutive Act. Article 23(2) empowers the AU Assembly to impose sanctions on States for failing to comply with the "decisions and policies of the Union."<sup>788</sup> Since the African Court is an "organ" of the AU, its binding judgments may qualify as decisions of the AU under Article 23(2).<sup>789</sup> In this way, it may be possible for the AU Assembly to impose sanctions on States that fail to comply with the Court's judgments.

Relatedly, in January 2014, the Executive Council of the AU asked the Court to "propose, for consideration by the [Permanent Representatives' Committee], a concrete reporting mechanism that will enable it to bring to the attention of relevant policy organs, situations of non-compliance and/or other issues within its mandate, at any time, when the interest of justice so requires."<sup>790</sup>

In any case, public dissemination of the Court's judgments, political pressure at the national and international level, and States' genuine desire to respect human rights all compel compliance.

### Inter-State Communications

Similar to the African Commission, the African Court has the authority to hear inter-State disputes, though in more limited circumstances. First, a case may be brought to the Court by a State that has been either a respondent or a petitioner before the Commission against a State party to the Protocol Establishing the Court.<sup>791</sup> Second, the Commission may refer an inter-State dispute to the Court if it considers that either State has failed to comply with its recommendations.<sup>792</sup> Whereas the Commission

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<sup>784</sup> See *id.* at art. 30 (providing: "The States 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.").

<sup>785</sup> *Id.* at art. 29(2); FIDH, *Practical Guide to African Court*, *supra* note 719, at 136.

<sup>786</sup> Protocol Establishing the African Court, art. 31.

<sup>787</sup> FIDH, *Practical Guide to African Court*, *supra* note 719, at 135-36.

<sup>788</sup> Constitutive Act, art. 23(2).

<sup>789</sup> *Id.* at art. 5(1)(d).

<sup>790</sup> Executive Council of the African Union, *Decision on the 2013 Activity Report of the African Court on Human and Peoples' Rights Doc. EX.CL/825(XXIV)*, EX.CL/Dec.806(XXIV), para. 9., in *Executive Council Twenty-Fourth Ordinary Session (21-28 January 2014): Decisions and Recommendation*, EX.CL/Dec.783-812(XXIV), EX.CL/Recom.(XXIV), available at [https://www.wmo.int/amcomet/sites/default/files/field/doc/events/ex\\_cl\\_dec\\_783-812\\_xxiv\\_e.pdf](https://www.wmo.int/amcomet/sites/default/files/field/doc/events/ex_cl_dec_783-812_xxiv_e.pdf).

<sup>791</sup> Protocol Establishing the African Court, arts. 5(1)(b)-(c), 7. See also AfCHPR, Rules of Court, Rules 33(1)(b)-(c); African Charter, art. 47.

<sup>792</sup> ACommHPR, Rules of Procedure, Rule 118(1); Protocol Establishing the African Court, art. 5(1)(a); African Charter, arts. 48-49.



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may receive complaints against States parties to the African Charter submitted by other States parties to the Charter, the Court may *only* receive inter-State complaints against States parties to the Protocol Establishing the Court that meet one of two criteria: they must have either lodged a complaint, or had a complaint lodged against them at the Commission.

To bring an inter-State complaint to the Court, the respondent or petitioner State before the Commission must submit the case to the Court before the Commission reaches its decision on the merits. This requirement arises as a condition of admissibility: applications before the Court must not raise any matter or issue “previously settled by the parties” in accordance with the principles of the UN Charter, the Constitutive Act of the AU, the African Charter, or of any legal instrument of the AU.<sup>793</sup> This requirement ensures that States are not held responsible twice for the same violative conduct.<sup>794</sup>

While the requirement that a State submit its application to the Court before the Commission has decided on the merits necessarily indicates that the case must be pending before the Commission, the Court is not permitted to hear such cases. Rather, in order for the Court to consider any application relating to issues in a communication before the Commission, it must first ascertain that the communication has been formally *withdrawn*.<sup>795</sup> For that reason, a third requirement exists for States wishing to bring an inter-State dispute to the Court: they must withdraw from the communication being heard by the Commission.

By meeting the above requirements, States that have been a respondent or a petitioner before the Commission can file an application against another State party to the Protocol asserting violations of the African Charter.

Another way for inter-State disputes to reach the Court is through direct referral by the Commission. Rule 118(1) of the Commission’s Rules of Procedure states that if, after issuing a decision with respect to an inter-State dispute (or a case brought by an individual or NGO), the Commission “considers that the State has not complied or is unwilling to comply with its recommendations ... it may submit the communication to the Court.”<sup>796</sup> Thus, if a communication before the Commission has reached an end and the Commission is unsatisfied with a State’s efforts to implement its recommendations, it may refer the dispute to the Court.

As a final remark on inter-State disputes before the Court, the Protocol Establishing the Court, the Rules of Court, and the *Practice Directions* all offer scant guidance regarding the processing of inter-State applications *specifically*. For that reason, it may be inferred that the ample guidance provided regarding other types of cases within the Court’s jurisdiction – stages of proceedings, amicable settlements, and provisional measures – also applies to cases between States. The section, above, on “How Complaints Are Processed” by the Court provides detailed information in this area.<sup>797</sup>

### The Decisions and Judgments of the African Court

<sup>793</sup> AfCHPR, Rules of Court, Rule 40(7).

<sup>794</sup> EVANS & MURRAY, *supra* note 407, at 126.

<sup>795</sup> AfCHPR, Rules of Court, Rule 29(6).

<sup>796</sup> ACommHPR, Rules of Procedure, Rule 118(1); Protocol Establishing the African Court, art. 5(1)(a).

<sup>797</sup> See *supra* ‘How Complaints Are Processed’ in this chapter, above.

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In 2009, the Court issued its first judgment in the case of *Michelot Yogogombaye v. Senegal*.<sup>798</sup> As of August 2016, the Court has finalized an additional 27 cases.<sup>799</sup> There are 83 cases currently pending before the Court as well as four requests for advisory opinions.<sup>800</sup>

Notable cases that have been decided by the African Court include the previously mentioned *Michelot Yogogombaye v. Republic of Senegal* case, as well as *Femi Falana v. African Union*, in which the Court conducted its first hearing.<sup>801</sup> *African Commission on Human and Peoples' Rights v. Libya* is also noteworthy, first, for being the first case brought to the Court by the Commission and, second, for being the first case in which the Court has issued provisional measures and granted *amicus curiae* status to an NGO.<sup>802</sup> Each of these three cases is discussed in greater detail below.

As of August 2016, the Court has finalized seven cases on the merits.<sup>803</sup> In most instances, the Court dismisses cases for lack of jurisdiction, often because the case was submitted by an individual or NGO against a State party that had not made the requisite declaration under Article 34(6) of the Protocol Establishing the Court. For that reasons, opportunities to evaluate State compliance with a final

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<sup>798</sup> AfCHPR, *Michelot Yogogombaye v. Senegal*, App. No. 001/2008, Judgment of 15 December 2009, available 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>.

<sup>799</sup> AfCHPR, List of All Cases: Finalized Cases, <http://en.african-court.org/index.php/cases#finalised-cases>.

<sup>800</sup> AfCHPR, List of All Cases: Pending Cases, <http://en.african-court.org/index.php/cases#pending-cases>; AfCHPR, List of All Cases: Advisory Opinion, <http://en.african-court.org/index.php/cases#advisory-opinions>.

<sup>801</sup> AfCHPR, *Femi Falana v. African Union*, App. No. 001/2011, Judgment of 26 June 2012, para. 20, available at <http://www.african-court.org/en/index.php/55-finalised-cases-details/833-app-no-001-2011-femi-falana-v-african-union-details>.

<sup>802</sup> AfCHPR, *African Commission on Human and Peoples' Rights v. Libya*, App. No. 004/2011, Order for Provisional Measures of 25 March 2011, para. 25, available at <http://www.african-court.org/en/index.php/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>.

<sup>803</sup> AfCHPR, *Tanganyika Law Society, Legal and Human Rights Centre & Reverend Christopher R. Mtikila v. Tanzania*, App. Nos. 009/2011 & 011/2011 (joined), Judgment of 14 June 2013, available 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>; AfCHPR, *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement v. Burkina Faso*, App. No. 013/2011, Judgment of 21 June 2013, available at <http://www.african-court.org/en/index.php/55-finalised-cases-details/846-app-no-013-2011-abdoulaye-nikiema-ernest-zongo-blaise-ilboudo-burkinabe-human-and-peoples-rights-movement-v-burkina-faso-details>; AfCHPR, *Lohé Issa Konaté v. Burkina Faso*, App. No. 004/2013, Judgment of 5 December 2014, available at <http://www.african-court.org/en/index.php/55-finalised-cases-details/857-app-no-004-2013-lohe-issa-konate-v-burkina-faso-details>; AfCHPR, *Alex Thomas v. Tanzania*, App. No. 005/2013, Judgment of 20 November 2015, available at <http://www.african-court.org/en/index.php/55-finalised-cases-details/858-app-no-005-2013-alex-thomas-v-united-republic-of-tanzania-details>; AfCHPR, *Wilfred Onyango Nganyi & 9 Others v. Tanzania*, App. No. 006/2013, Judgment of 18 March 2016, available at <http://www.african-court.org/en/index.php/55-finalised-cases-details/859-app-no-006-2013-wilfred-onyango-nganyi-9-others-v-united-republic-of-tanzania-details>; AfCHPR, *Mohamed Abubakari v. Tanzania*, App. No. 007/2013, Judgment of 3 June 2016, available at <http://www.african-court.org/en/index.php/55-finalised-cases-details/860-app-no-007-2013-mohamed-abubakari-v-united-republic-of-tanzania-details>; AfCHPR, *African Commission on Human and Peoples' Rights v. Libya*, App. No. 002/2013, Judgment of 3 June 2016, available at <http://www.african-court.org/en/index.php/55-finalised-cases-details/856-app-no-002-2013-the-african-commission-on-human-and-peoples-rights-v-libya-details>.

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judgment have been scarce. With more cases being finalized and the number of cases pending before the Court on the rise, this state of affairs will likely change.<sup>804</sup>

### Summary of Select Cases Decided Prior to June 2016

The following section provides brief summaries of select cases heard by the African Court on Human and Peoples' Rights prior to June 2016, including each case decided on the merits in that time and other select cases that represent the Court's decisions on admissibility.

#### *African Commission on Human and Peoples' Rights v. Libya*

The African Commission on Human and Peoples' Rights referred Saif al-Islam Gaddafi's case to the African Court after a representative of Gaddafi submitted an application to the Commission in 2012.<sup>805</sup> The Commission's application before the Court alleged that Libya violated articles 6 (right to liberty and security) and 7 (right to a fair trial) of the African Charter.<sup>806</sup> The Commission alleged first that in violation of the right to liberty and security of person, Gaddafi has been detained since November 2011 and has not appeared in court during that time. According to the Commission, his detention has been extended more than once without a court order and the location of his detention is a secret.<sup>807</sup> Second, the Commission also alleged that the State violated the right to a fair trial due to Gaddafi's lack of access to counsel and due to a prolonged delay in the start of his trial.<sup>808</sup>

The Court determined that it has jurisdiction to hear the case. First, it found it had *ratione personae* jurisdiction. It stated that it has personal jurisdiction over both the African Commission, the applicant in the case, and over Libya, the respondent and a State party to the Protocol Establishing the African Court. The Court noted that when the Commission brings a case to the Court, the Court need not consider whether the State involved has made a declaration under Article 34(6) of the Protocol Establishing the African Court.<sup>809</sup>

Second, the Court determined that it has *ratione materiae* jurisdiction. The Court has jurisdiction over matters concerning interpretation of the African Charter and any other human rights instrument ratified by the State involved, and the allegations before the Court involve application of the African Charter, which Libya ratified.<sup>810</sup>

Third, the Court found it has *ratione temporis* jurisdiction. The allegations took place after the entry into force of the Protocol and of the African Charter with respect to Libya.<sup>811</sup> Finally, the Court also has *ratione loci* jurisdiction over the case because the facts of the case took place within Libya.<sup>812</sup>

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<sup>804</sup> AfCHPR, Cases Status, <http://www.african-court.org/en/index.php/2012-03-04-06-06-00/cases-status1>.

<sup>805</sup> AfCHPR, *African Commission on Human and Peoples' Rights v. Libya*, App. No. 002/2013, Judgment of 3 June 2016, paras. 4 and 5, available at <http://www.african-court.org/en/index.php/55-finalised-cases-details/856-app-no-002-2013-the-african-commission-on-human-and-peoples-rights-v-libya-dets>.

<sup>806</sup> *Id.* at para. 9.

<sup>807</sup> *Id.* at para. 78.

<sup>808</sup> *Id.* at para. 86.

<sup>809</sup> *Id.* at para. 47-48, 51-52.

<sup>810</sup> *Id.* at para. 54.

<sup>811</sup> *Id.* at paras. 55-57.

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Additionally, the Court held that the application is admissible. The requirements of identification of the authors of the application, compatibility of the application with the AU Charter, refraining from disparaging language, reliance on evidence that extends beyond the news in mass media, and not duplicating a case already decided by an international body were not in dispute, and the Court noted that nothing in the submissions by the parties indicated that the application did not meet any of those requirements of admissibility.<sup>813</sup>

Furthermore, Gaddafi was unable to utilize domestic remedies due to his isolation, lack of access to counsel, and lack of access to a judge. Additionally, the remedies, if they had been available to him, were not necessarily effective, such as the court before which he was arraigned; the Supreme Court of Libya later found the court to be unconstitutional.<sup>814</sup> Therefore, as Gaddafi need not exhaust domestic remedies and as the application was filed a year after “the firm conclusion that the Respondent State has not complied with Provisional Measures,” the application, the Court concluded, is admissible.<sup>815</sup>

The African Commission asked the Court to issue a judgment in default against Libya as the State refused to cooperate or appear before the Court.<sup>816</sup> Rule 55 of the Rules of Court allows the Court to render a default judgment if the State does not defend its case or appear before the Court.<sup>817</sup> The Court found that the pleadings were served on the State, it has jurisdiction to hear the case, and the application is admissible, which are all conditions for passing a judgment in default.<sup>818</sup>

The Court then turned to the merits of the case. It held that Libya violated Gaddafi’s right to liberty and security of person by holding him incommunicado and by repeatedly extending his detention without Gaddafi present and without providing him access to a lawyer to challenge the extensions.<sup>819</sup>

The Court also held that Libya violated Gaddafi’s right to a fair trial.<sup>820</sup> First, the State is required to bring criminal defendants before a competent judge or other authority who is “entitled by law to exercise judicial function,” but Gaddafi was arraigned before an extraordinary court that was later found unconstitutional.<sup>821</sup> Additionally, Libya failed to provide Gaddafi with access to counsel, which the State is required to do with criminal defendants, and materials for preparing his defense.<sup>822</sup>

The Court ordered Libya to protect the rights of Gaddafi and discontinue the criminal proceedings.

### *Wilfred Onyango and Others v. Tanzania*

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<sup>812</sup> *Id.* at paras. 58-59.

<sup>813</sup> *Id.* at paras. 64-65.

<sup>814</sup> *Id.* at paras. 68-69.

<sup>815</sup> *Id.* at paras. 71, 74.

<sup>816</sup> *Id.* at para. 38.

<sup>817</sup> *Id.* at para. 40; Rules of Court, Rule 55.

<sup>818</sup> *African Commission on Human and Peoples’ Rights v. Libya*, Judgment of 3 June 2016, para. 42-48.

<sup>819</sup> *Id.* at para. 85.

<sup>820</sup> *Id.* at para. 97.

<sup>821</sup> *Id.* at para. 91.

<sup>822</sup> *Id.* at paras. 93-96.

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Ten applicants, all citizens of Kenya, filed an application with the African Court in July 2013 against Tanzania alleging that they were kidnapped from Mozambique in 2005, transported to Tanzania, and subjected to torture and inhuman treatment. The applicants were charged for a variety of criminal offenses, including murder, and while three were released, five were convicted for armed robbery and conspiracy and sentenced to 30 years' imprisonment. The other two applicants died in custody. At a hearing, the applicants asked the African Court to find a violation of the right to a fair trial because, they allege, they were not tried within a reasonable time and they were not provided legal aid.<sup>823</sup>

Tanzania submitted objections before the Court alleging that the Court did not have jurisdiction over the case and the application was inadmissible.<sup>824</sup>

The African Court held that it has *ratione materiae*, *ratione personae*, *ratione temporis*, and *ratione loci* jurisdiction over the case. Responding to one of the State's objections, the Court noted that the applicants need not name provisions within the African Charter for the Court to have *ratione materiae* jurisdiction. "[I]t suffices that the rights allegedly violated are guaranteed by the Charter or any other instrument to which the Respondent is party."<sup>825</sup>

Additionally, the Court noted that the violations alleged are of a continuous nature so that even though they first occurred before Tanzania made the declaration under Article 34(6) of the Protocol Establishing the African Court - which provided for the Court's jurisdiction over individual complaints submitted directly to it against Tanzania – the violations continued after the date of the declaration, giving the Court jurisdiction over them.<sup>826</sup>

The African Court further held that the application was admissible because it met the requirements under Article 56(5) of the African Charter and Rule 40 of the Rules of Court. On exhaustion, the Court noted that the applicants admitted to not exhausting remedies and to remedies being available but that the applicants alleged that the remedies were unduly prolonged.<sup>827</sup> Under Rule 40(5) and Article 56(5) of the Rules of Court and the African Charter, respectively, an applicant need not exhaust local remedies if they are unduly prolonged.<sup>828</sup> Unduly prolonged, the Court opined, indicates that there is not a reasonable justification for the delay.<sup>829</sup> Ten years elapsed between when the applicants were charged and when they applied to the African Court. The Court found this to be an undue prolongation of their proceedings and that they, therefore, need not exhaust remedies.<sup>830</sup>

On the merits, the Court considered two questions both involving Article 7 (the right to a fair trial) of the African Charter.<sup>831</sup> The first issue involved the applicants' allegation that the proceedings were unduly

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<sup>823</sup> AfCHPR, *Wilfred Onyango Nganyi & 9 Others v. Tanzania*, App. No. 006/2013, Judgment of 18 March 2016, paras. 2-6, 9, 46, available at <http://www.african-court.org/en/index.php/55-finalised-cases-details/859-app-no-006-2013-wilfred-onyango-nganyi-9-others-v-united-republic-of-tanzania-details>.

<sup>824</sup> *Id.* at paras. 52-54, 69-70.

<sup>825</sup> *Id.* at paras. 58-60.

<sup>826</sup> *Id.* at paras. 66.

<sup>827</sup> *Id.* at paras. 85, 88.

<sup>828</sup> *Id.* at para. 87.

<sup>829</sup> *Id.* at para. 91.

<sup>830</sup> *Id.* at paras. 94, 96.

<sup>831</sup> *Id.* at paras. 113-15.

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prolonged. The parties disputed how long the proceedings pended before domestic courts, but the Court noted that even if Tanzania was correct in arguing that the matter was settled, the proceedings had been pending for a least six years.<sup>832</sup>

The Court, relying on jurisprudence from the European Court of Human Rights, considered the actions of both parties during the proceedings and complexity of the case in determining if the length of proceedings was reasonable.<sup>833</sup> Tanzania argued that the delay was due to the complexity of the case with numerous accused standing trial and due to the domestic court waiting for Kenya to extradite additional suspects. The African Court found that first, the case is not automatically complex because there is more than one accused and second, the domestic court did not need to wait for the extradition of the other suspects to proceed with the applicants' trial.<sup>834</sup>

The Court determined that while the defense counsel was occasionally sick and did not appear before the domestic court, the African Court held there was no evidence to suggest that defense counsel was responsible for the delay or had intended to delay the proceedings. Further, the Court found that even if the defense counsel deliberately sought to delay proceedings, "there rests a special duty upon the authorities of domestic courts to ensure that all those who play a role in the proceedings do their utmost to avoid any unnecessary delay."<sup>835</sup> The Court, accordingly, concluded that the delay in the proceedings was due to the "lack of due diligence on the part of the national judicial authorities" specifically when the case was put on hold for two years to conclude investigations and wait for the other suspects.<sup>836</sup>

The second issue review by the Court involved the alleged lack of legal aid provided to the applicants. The applicants, the Court noted, had counsel during the proceedings until their counsel left while the cases were still pending. The Tanzanian court was aware that the applicants' counsel had left.<sup>837</sup> The Court used Article 14(3)(d) of the International Covenant on Civil and Political Rights to interpret the relevant provision, Article 7(1)(c), of the African Charter. The former guarantees the right of the defendant to be present during the proceeding, to defend himself through legal assistance of his choosing, and to have legal assistance assigned without cost "if the interests of justice so require."<sup>838</sup>

The Court found first that the domestic courts had the duty to ensure that the applicants were assisted with legal counsel during the proceedings particularly because of the gravity of the offense with which they were charged and second that the applicants need not first request legal aid for the State to then ensure the right.<sup>839</sup> The Court held that Tanzania failed to ensure the applicants were provided legal aid as the court continued with the proceedings after their counsel abandoned them.<sup>840</sup>

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<sup>832</sup> *Id.* at paras. 130, 133.

<sup>833</sup> *Id.* at para. 136.

<sup>834</sup> *Id.* at paras. 143-44.

<sup>835</sup> *Id.* at paras. 149, 153.

<sup>836</sup> *Id.* at para. 155.

<sup>837</sup> *Id.* at para. 161.

<sup>838</sup> *Id.* at paras. 165-67.

<sup>839</sup> *Id.* at paras. 168, 182.

<sup>840</sup> *Id.* at paras. 183-84.

## THE AFRICAN COURT'S COMPLAINTS PROCEDURE

The African Court ordered Tanzania to provide legal aid to the applicants and to expedite the proceedings.<sup>841</sup>

### *Mohamed Abubakari v. Tanzania*

Mohamed Abubakari submitted an application to the African Court in October 2013 alleging violations of the rights protected within the African Charter due to irregularities in the procedure of his arrest, detention, and trial. Abubakari was arrested in April 1997, held in police custody for four days, charged and later convicted in July 1998 for armed robbery, and sentenced to 30 years' imprisonment. His subsequent appeals were dismissed.<sup>842</sup>

Both in its written submissions to the Court and at the public hearing in March 2015, Tanzania raised several objections on the Court's jurisdiction and admissibility of the application.<sup>843</sup>

In response to the State's first objection, the Court reiterated that while not an appellate court, it may review domestic proceedings, including the evidence present therein, to determine if a trial was conducted in compliance with international human rights law. The Court, therefore, only applies the law contained in the African Charter and other international human rights instruments ratified by the State or States named in the complaint and not the domestic laws applied by the domestic judicial authorities.<sup>844</sup>

The Court held that it had *ratione personae*, *ratione temporis*, and *ratione loci* because Tanzania has made the necessary declaration under Article 34(6) of the Protocol Establishing the African Court, the alleged violations are continuous as Abubakari's conviction still holds, and the alleged violations occurred within the territory of Tanzania.<sup>845</sup>

The Court found the application admissible. Tanzania alleged that Abubakari failed to exhaust domestic remedies before submitting his application before the African Court.<sup>846</sup> Abubakari appealed to the highest court. The Court determined that the two additional remedies raised by the State – a constitutional claim and an application to review before the appellate court – are extraordinary remedies because they “are apparently exceptional judicial remedies, which are not normally thought about.”<sup>847</sup> Additionally, constitutional claims are only reviewed in Tanzania if other remedies are not available; a review is not guaranteed.<sup>848</sup> Only ordinary remedies must be exhausted under international law.<sup>849</sup> The Court found that Abubakari exhausted all the necessary ordinary remedies.<sup>850</sup>

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<sup>841</sup> *Id.* at para. 193.

<sup>842</sup> AfCHPR, *Mohamed Abubakari v. Tanzania*, App. No. 007/2013, Judgment of 3 June 2016, paras. 3-5, available at <http://www.african-court.org/en/index.php/55-finalised-cases-details/860-app-no-007-2013-mohamed-abubakari-v-united-republic-of-tanzania-details>.

<sup>843</sup> *Id.* at paras. 11, 14.

<sup>844</sup> *Id.* at paras. 25-29.

<sup>845</sup> *Id.* at para. 36.

<sup>846</sup> *Id.* at paras. 53-57.

<sup>847</sup> *Id.* at para. 67.

<sup>848</sup> *Id.* at paras. 70, 72.

<sup>849</sup> *Id.* at para. 64.

<sup>850</sup> *Id.* at para. 77.



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The Court held that the application was submitted in a timely manner. Abubakari's application was submitted over three years after Tanzania made its declaration under Article 34(6) of the Protocol Establishing the African Court to accept the Court's jurisdiction to hear individuals' cases against it.<sup>851</sup>

Timeliness of an application is decided on a case by case basis. Abubakari's status as a detainee, as indigent, and as illiterate are all factors relevant to considering the timeliness of the application. Additionally, that fact that he could not pay an attorney and that the African Court only recently began operations are also considerations. Based on those factors, the filing, the Court found, was timely.<sup>852</sup>

The Court then turned to the merits. Abubakari alleged that after his arrest, he was not able to obtain a lawyer or communicate with the police and was not provided legal assistance during the proceedings. The Court relied on African Commission jurisprudence that a lack of access to a lawyer after arrest affects the victims' ability to defend themselves, and it determined that Abubakari's right to have access to counsel upon arrest was violated because the authorities failed to inform him of this right.<sup>853</sup>

Further, the Court found that Article 7 (right to a fair trial) of the African Charter read in the context of Article 14 (right to a fair trial) of the International Covenant on Civil and Political Rights protects the right to be assigned counsel when charged of a crime and to receive legal assistance at no cost if the individual cannot afford it.<sup>854</sup> Citing *Alex Thomas v. Tanzania*, the Court noted that a criminal defendant is "particularly entitled to free legal assistance where the offence is serious, and the penalty provided by law is severe."<sup>855</sup> Noting that the State failed to show that it "had absolutely no financial capacity to grant free legal assistance to indigent persons," the Court held that Tanzania violated Abubakari's right to free legal assistance.<sup>856</sup>

The State's failure to turn over the indictment and the statements of the witnesses and to communicate the elements of the charge to Abubakari, the Court determined, is a violation of the right to defense under Article 7 of the African Charter. The prosecution used excuses "as flimsy as shortage of paper" to delay providing Abubakari with the necessary witness statements, and the proceedings went ahead as planned even though Abubakari was not in possession of all of the evidence. The authorities also did not act "with due diligence to communicate in due time to [Abubakari] all the elements of the charge." Both failures on the part of the State – to provide the witness statements in a timely manner and to communicate the charges in a timely manner – constituted a violation of Article 7(1)(c) of the African Charter and Article 14(3)(a) and (b) of the ICCPR.<sup>857</sup>

The Court also held that Tanzania violated the right to fair trial because the domestic court failed to respond to Abubakari's accusations that the prosecutor had a conflict of interest; the domestic court should have investigated and produced a formal decision.<sup>858</sup> Abubakari requested the domestic court change prosecutors, but the court did not take any action.<sup>859</sup> The African Court noted that "a possible

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<sup>851</sup> *Id.* at para. 90.

<sup>852</sup> *Id.* at paras. 91-93.

<sup>853</sup> *Id.* at paras. 121-22.

<sup>854</sup> *Id.* at para. 138.

<sup>855</sup> *Id.* at para. 139; *Alex Thomas v. Tanzania*, Judgment of 20 November 2015, para. 115.

<sup>856</sup> *Mohamed Abubakari v. Tanzania*, Judgment of 3 June 2016, paras. 144-45.

<sup>857</sup> *Id.* at paras. 160-61.

<sup>858</sup> *Id.* at para. 111.

<sup>859</sup> *Id.* at para. 109.

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conflict of interest on the part of a Prosecutor . . . is a matter of crucial importance in any trial . . . as it touches on the very principle of impartiality of judicial institutions . . . [and] impartiality is one of the pillars of a fair trial.”<sup>860</sup>

Additionally, the Court found a violation of the right to a fair hear because the charge and conviction were based solely on testimony from one witness and based on contradictory statements.<sup>861</sup> Several points of fact were not established through the evidence due to inconsistencies in the statements and charge sheet; the facts not established were the day Abubakari was arrested, the day the incident was reported, whether the alleged victim already knew Abubakari's address, the day the victim visited Abubakari at his residence, and when Abubakari “intervened in the course of the incident.”<sup>862</sup> Tanzanian law provides that conviction should not be based on the evidence from one witness unless the possibility of error in identification can be sufficiently eliminated and the testimony is unassailable.<sup>863</sup>

The Court held Tanzania violated the right to a fair trial because it did not adequately consider Abubakari's alibi that he raised during the investigation and during the trial. The Court found that “[i]mplicit in the right to a fair trial is the need for a defence grounded on possible alibi to be thoroughly examined and possibly set aside, prior to a guilty verdict.” The Court, therefore, determined that the State may not rely on technicalities – such as, in this case, that the defendant did not properly raise his alibi – as an excuse for not properly examining an alibi.<sup>864</sup>

The Court refused to find violations of the right to a fair trial and to nondiscrimination in several other circumstances that were raised. The Court held there was no violation of the right to a fair trial where Abubakari claimed that the State's failure to charge other suspects affected his trial; where he was convicted without the weapons used in the crime available as evidence in court; where Abubakari alleged that the sentence of 30 years' imprisonment was not valid under domestic law at that time; and where the judgment was announced in the judge's chambers, to which the public appeared to have access.<sup>865</sup>

Additionally, the Court found no violation of the right to nondiscrimination because Abubakari did not show that Tanzania's law on providing legal assistance was applied differently to him than to others in a similar situation.<sup>866</sup>

Abubakari also alleged that the police station at which he was held upon arrest lacked basic facilities. However, the Court dismissed this allegation because Abubakari, the Court found, had not met his burden of proof after the State responded to the allegation.<sup>867</sup>

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<sup>860</sup> *Id.* at para. 110.

<sup>861</sup> *Id.* at para. 185.

<sup>862</sup> *Id.* at para. 180.

<sup>863</sup> *Id.* at para. 175.

<sup>864</sup> *Id.* at paras. 192, 194.

<sup>865</sup> *Id.* at paras. 106, 199, 213, 227.

<sup>866</sup> *Id.* at para. 154.

<sup>867</sup> *Id.* at para. 99.

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The Court ordered Tanzania “to take all appropriate measures . . . to remedy all the violations established, excluding a reopening of the trial.” The Court ordered Abubakari to submit a brief on reparations within 30 days of the judgment.<sup>868</sup>

### *Alex Thomas v. Tanzania*

Alex Thomas submitted an application with the African Court in August 2013 alleging violations of articles 1 (recognition of the rights of the Charter), 3 (right to equality before the law), 5 (prohibition of torture), 6 (right to liberty), 7(1) (right to have one’s cause heard), and 9(1) (right to receive information) of the African Charter.<sup>869</sup> Thomas was charged with armed robbery in December 1996 in Tanzania. His case went to trial in March 1997, and while the prosecution spent over a month presenting its case, the defense spent two days. Although Thomas was not present for trial on the day the defense opened its case in June 1997 because he was in the hospital, the court still convicted him of armed robbery in his absence and sentenced him to 30 years’ imprisonment.<sup>870</sup>

Ultimately, Thomas’ subsequent appeals were dismissed. First, the High Court of Tanzania dismissed Thomas’ appeal finding that “he cannot blame the trial court for convicting him *in absentia*” as is allowed under Tanzanian law.<sup>871</sup> Thomas then appealed to the High Court at Moshi and requested the court records of the previous proceeding. After repeatedly requesting a copy of court records between April 2003 and October 2004 – which he received in June 2007 – and after his appeal was once struck out due to a lack of signature and a late filing, Thomas submitted a request to file late and was able to again file a notice of appeal to the High Court of Tanzania at Moshi on June 13, 2008. The court, though, dismissed his appeal and upheld his conviction and sentence in May 2009. Thomas then requested a review of his decision in June 2009, January 2010, September 2010, January 2011, September 2011, and July 2013, but Tanzania had not responded to his requests at the time he filed before the African Court. He also requested pro bono legal assistance during this time but never received assistance.<sup>872</sup>

In its written submissions and in the public hearing held in December 2014 before the Court, Tanzania made several objections, claiming the Court lacked jurisdiction and that the application is inadmissible.<sup>873</sup>

The African Court held that it has jurisdiction over Thomas’ complaint. First, it found it has *ratione materiae* jurisdiction because Thomas alleged violations of rights protected by the African Charter. Tanzania filed a declaration under Article 34(6) of the Protocol Establishing the African Court, and therefore, the Court held it has *ratione personae* jurisdiction over the matter.<sup>874</sup>

The African Court found Thomas’ complaint admissible. The State argued that after he filed a request to have the appeals decision reviewed in 2009, Thomas should have waited for the decision and that he

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<sup>868</sup> *Id.* at para. 242.

<sup>869</sup> AfCHPR, *Alex Thomas v. Tanzania*, App. No. 005/2013, Judgment of 20 November 2015, paras. 7, 19, available at <http://www.african-court.org/en/index.php/55-finalised-cases-details/858-app-no-005-2013-alex-thomas-v-united-republic-of-tanzania-details>.

<sup>870</sup> *Id.* at paras. 23-26.

<sup>871</sup> *Id.* at para. 27.

<sup>872</sup> *Id.* at paras. 29-31, 33-36.

<sup>873</sup> *Id.* at paras. 12, 21-22.

<sup>874</sup> *Id.* at paras. 45-48.

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should have filed a constitutional claim. The African Court held that Thomas exhausted domestic remedies because the Court of Appeal dismissed his complaint and because, the African Court found, filing a constitutional complaint over the delay in proceedings was not required; it is an extraordinary remedy.<sup>875</sup>

The Court further held that Thomas' application with the African Court was timely. The Court opined that although Thomas' appeal was settled on May 29, 2009 when the Court of Appeal rendered a decision, March 29, 2010 – the date that Tanzania made a declaration under Article 34(6) of the Protocol – is the relevant date for determining if Thomas filed his application with the African Court in a timely manner.<sup>876</sup> Further, the Court stated that Thomas' situation, "that he is a lay, indigent, incarcerated person, compounded by the delay in providing him with Court records, and his attempt to use extraordinary measures," explained the time in between the State's declaration and his submission to the African Court, which was three years and five months.<sup>877</sup>

The Court then turned to consider the merits. The Court held that Tanzania violated Thomas' right to a fair trial. First, the Court determined that Thomas was denied the right to be heard and defend himself as provided for under Article 7(1)(c) of the African Charter.<sup>878</sup>

The Court interpreted the African Charter in the context of the relevant article in the International Covenant on Civil and Political Rights, which Tanzania ratified in 1976. Article 14(3)(d) of the ICCPR specifies that the right to fair trial in the context of a criminal trial includes the right of the defendant to be present during the trial, to defend himself through legal assistance or by himself, and to have legal assistance assigned without cost to him if he cannot pay. The Court reasoned that the domestic court was aware of Thomas' poor health. It is reasonable, therefore, the Court found, for the domestic court to inquire as to Thomas' whereabouts and adjourn, and not doing so, violated his right to defend himself.<sup>879</sup>

Next, the Court determined that there was an inordinate delay in the proceedings in violation of the right to a fair trial.<sup>880</sup> Article 7(1)(d) of the African Charter provides for the "right to be tried within a reasonable time."<sup>881</sup> Relying on African Commission jurisprudence, the Court reiterated that undue delay in proceedings at the appellate level violates Article 7(1)(d).<sup>882</sup> The Court noted that the Inter-American Court of Human Rights and the European Court of Human Rights have both relied on three factors to determine whether a trial was unduly prolonged. The factors are "a) the complexity of the matter, b) the procedural activities carried out by the interested party, and c) the conduct of judicial authorities."<sup>883</sup>

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<sup>875</sup> *Id.* at para. 65.

<sup>876</sup> *Id.* at para. 73.

<sup>877</sup> *Id.* at para. 74.

<sup>878</sup> *Id.* at para. 99.

<sup>879</sup> *Id.* at paras. 88-90, 92-94.

<sup>880</sup> *Id.* at para. 106.

<sup>881</sup> *Id.* at para. 102.

<sup>882</sup> *Id.* at para. 103.

<sup>883</sup> *Id.* at para. 104.

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Over eight years lapsed between when Thomas filed an appeal with the High Court in Moshi and when the appellate court accepted the filing of that appeal. The delay was due to the failure of the domestic court to provide court records and Thomas' lack of counsel to guide him in the procedures of filing. Therefore, the African Court held the appeal to the High Court of Moshi was unduly prolonged.<sup>884</sup> The African Court additionally found that Tanzania violated Thomas' right to a fair trial because it failed to provide legal aid assistance and because there were inconsistencies during the proceedings.<sup>885</sup> The Court again relied on Article 7(1)(c) of the African Charter and Article 14(3)(d) of the ICCPR, the latter of which provides that legal assistance should be provided in the interest of justice and without cost if one is unable to pay.<sup>886</sup>

The Court found that defendants in criminal proceedings have a right to legal assistance depending on the "seriousness of the offence and severity of the sentence" and that Tanzania's domestic law recognizes a right to legal aid in criminal proceedings. As Thomas was charged with a serious offense that holds a minimum sentence of 30 years' imprisonment, the Court held that the State should have provided him with legal assistance.<sup>887</sup>

A failure to determine ownership of the alleged stolen goods and the discrepancies in descriptions of the items purported stolen, the Court determined, were both errors that amounted to a violation of the right to a fair trial. The charge sheet contradicted the prosecution's witnesses' statements with regards to the ownership of the items, how to refer to the items, the number of items, and the value of the items.<sup>888</sup> The Court found that while it is not a court of appeal, it could determine if the way the domestic court dealt with the errors was in violation of international law, and the Court held it was.<sup>889</sup> The Court also held that Tanzania violated the duty to recognize and give effect to the rights of the Charter under Article 1 due to the above holdings.<sup>890</sup>

The Court did not find violations of the rights to equality and equal treatment of the law; prohibition of torture and cruel, inhuman, or degrading treatment; liberty; and receive information.<sup>891</sup>

Thomas requested the Court to order his release from prison, but the Court denied to do so. Thomas, the Court determined, failed to set out specific and compelling circumstances under which the Court should order his release.<sup>892</sup> The Court opined that while the State should in light of the violations reopen the defense case or provide for a retrial, "considering the length of the sentence [Thomas] has served so far, being about twenty (20) years out of thirty (30) years, both remedies would result in prejudice and occasion a miscarriage of justice." The Court, therefore, ordered Tanzania to remedy the violations appropriately and to, within six months, notify the Court of the actions it has taken to do so.<sup>893</sup>

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<sup>884</sup> *Id.* at para. 106-109.

<sup>885</sup> *Id.* at paras. 124, 131.

<sup>886</sup> *Id.* at para. 114.

<sup>887</sup> *Id.* at para. 121-23.

<sup>888</sup> *Id.* at para. 125.

<sup>889</sup> *Id.* at paras. 130-31.

<sup>890</sup> *Id.* at para. 137.

<sup>891</sup> *Id.* at paras. 140, 146, 150, 154.

<sup>892</sup> *Id.* at para. 157.

<sup>893</sup> *Id.* at paras. 158-59, 161.

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### *Lohé Issa Konaté v. Burkina Faso*

Lohé Issa Konaté submitted an application to the African Court alleging violations of the right to freedom of expression under both the African Charter and the International Covenant on Civil and Political Rights.<sup>894</sup> The application also alleged a violation of Article 66(2)(c) of the Treaty of the Economic Community of West African States (ECOWAS Treaty), which obligates States parties to protect the rights of journalists.<sup>895</sup> Konaté wrote two articles alleging that Placide Nikiéma, a local prosecutor, had engaged in laundering. The two articles, along with a third article also regarding the prosecutor's misconduct, were published in *L'Ouragan*, a magazine for which Konaté was the editor-in-chief.<sup>896</sup> Konaté and the author of the third article were charged with defamation, public insult, and contempt of court. The High Court of Ouagadougou sentenced Konaté to 12 months' imprisonment and ordered him to pay both a fine and damages. Additionally, by court order, the magazine was suspended for six months. The Ouagadougou Court of Appeal confirmed the judgment.<sup>897</sup>

Konaté also sought provisional measures from the African Court to order Burkina Faso to release him from detention or in the alternative, provide him with adequate medical care while in detention. The Court granted the provisional measures and ordered the State to provide the necessary medical care.<sup>898</sup> In the written submissions and during the public hearings in the case in March 2014, Tanzania made several objections to admissibility and to the applicant's status as a journalist.<sup>899</sup>

The Court, though, concluded it had jurisdiction *ratione personae*, *ratione materiae*, *ratione temporis*, and *ratione loci*. As Burkina Faso is both a party to the Protocol Establishing the African Court and has made the required declaration under Article 34(6) of the Protocol, the Court has jurisdiction over the State, and as the Court has jurisdiction over Konaté, the Court had *ratione personae* jurisdiction.<sup>900</sup> Burkina Faso has ratified all three instruments named in the complaint – the African Charter, the ICCPR, and the ECOWAS Treaty – so the Court has *ratione materiae* jurisdiction.<sup>901</sup> As the alleged violation occurred at the time of Court of Appeal's judgment and that was after Burkina Faso accepted the African Court's jurisdiction, the Court found it has *ratione temporis* jurisdiction.<sup>902</sup>

The State argued that Konaté failed to exhaust domestic remedies. The parties disagree on whether proceedings before the *Cour de Cassation*, which Konaté did not attempt to pursue, are unduly prolonged and if the *Cour de Cassation* is a remedy that is available, effective, and sufficient or not.<sup>903</sup> On the first point, Konaté argued that an appeal to the *Cour de Cassation* takes on average between five and nine years.<sup>904</sup> On the latter, Konaté alleged that it is an ineffective remedy because the law only

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<sup>894</sup> AfCHPR, *Lohé Issa Konaté v. Burkina Faso*, App. No. 004/2013, Judgment of 5 December 2014, para. 9, available at <http://www.african-court.org/en/index.php/55-finalised-cases-details/857-app-no-004-2013-lohe-issa-konate-v-burkina-faso-details>.

<sup>895</sup> *Id.* at para. 12; ECOWAS Treaty, 66(2)(c).

<sup>896</sup> *Lohé Issa Konaté v. Burkina Faso*, Judgment of 5 December 2014, paras. 1, 3.

<sup>897</sup> *Id.* at paras. 4-7.

<sup>898</sup> *Id.* at paras. 16, 23.

<sup>899</sup> *Id.* at paras. 28-29.

<sup>900</sup> *Id.* at paras. 30-34.

<sup>901</sup> *Id.* at paras. 35-37.

<sup>902</sup> *Id.* at paras. 38-40.

<sup>903</sup> *Id.* at paras. 75-76.

<sup>904</sup> *Id.* at para. 83.

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allows for five days to file an appeal, which is before Konaté was provided with the judgment in his case from the lower court, against which he would be filing the appeal. Accordingly, as an ineffective remedy, he argued, he was not required to exhaust it.<sup>905</sup>

The Court found that while it considered an appeal to the *Cour de Cassation* available, an appeal to the *Cour de Cassation* is insufficient and ineffective as a remedy.<sup>906</sup> The Court noted that the *Cour de Cassation* allows for the appeal brief to be filed up to two months after a statement is submitted with the *Cour de Cassation* within the five day time limit.<sup>907</sup> In order to appeal to the *Cour de Cassation*, the Court reasoned, the appellant need not have the entirety of the written judgment to simply submit a notice for appeal within five days.<sup>908</sup>

The Court concluded that Konaté need not exhaust domestic remedies. As Konaté wanted the laws under which he was tried to be annulled, only the Constitutional Council could provide such relief but does not take such cases when instituted by individuals. A remedy, the Court reiterated, is effective if it offers a prospect of success and can redress the complaint. Accordingly, the Court found that Burkina Faso does not have an effective and sufficient remedy that Konaté could have sought out to overturn the relevant laws.<sup>909</sup>

The Court then proceeded to make a determination on the merits. First, it noted restrictions to the right to freedom of expression must be provided by law and grounded in international norms, in pursuit of a legitimate purpose, and proportional to that purpose.<sup>910</sup>

The Court found that the limitations placed on freedom of expression by Burkina Faso were provided by law and sought to achieve a legitimate aim, to protect the rights of others. The domestic laws, the Court held, are sufficiently clear so that an individual may mold their behavior accordingly, and therefore, the restrictions are provided by law.<sup>911</sup>

The purpose of the domestic laws in question, the Court found, are “to protect the honour and reputation of Magistrates, jurors and assessors in the performance of their duties or in the course of performing the duty.”<sup>912</sup> The Court held that this is a legitimate objective in keeping with standards under international law.<sup>913</sup>

The Court, however, found that the restrictions were disproportionate, or unnecessary, to achieve the legitimate aim sought.<sup>914</sup> Proportionality, the Court reiterated, requires that the interests of society and the rights and freedoms of the individual are balanced and the means of restricting the right are the least restrictive possible. The Court determined that freedom of expression “must be the subject of a

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<sup>905</sup> *Id.* at para. 88.

<sup>906</sup> *Id.* at para. 114.

<sup>907</sup> *Id.* at para. 101.

<sup>908</sup> *Id.* at para. 106.

<sup>909</sup> *Id.* at para. 108, 111-13.

<sup>910</sup> *Id.* at paras. 129, 133.

<sup>911</sup> *Id.* at paras. 130-31, 137, 163.

<sup>912</sup> *Id.* at para. 136.

<sup>913</sup> *Id.* at para. 137.

<sup>914</sup> *Id.* at para. 163.



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lesser degree of interference when it occurs in the context of a public debate relating to public figures,” and the punishment for dishonoring the reputation of a public figure should not be more than that for tarnishing the reputation of an ordinary individual.<sup>915</sup>

The Court held that the State failed to show the necessity of criminalizing defamation punishable with a custodial sentence. Further, the Court found that custodial sentences are a disproportionate means of seeking to protect the rights of others through the limitation on freedom of expression as exercised by journalists specifically under Article 66(2)(c) of the ECOWAS Treaty.<sup>916</sup>

The Court also noted that the African Commission has stated that when a restriction targets a specific individual or entity, the restriction is likely discriminatory. The Court concluded that the State failed to show that the suspension of the magazine was necessary and proportionate to protect the rights of the prosecutor.<sup>917</sup>

The Court held that Burkina Faso violated Article 9 of the African Charter, Article 19 of the ICCPR, and Article 66(2)(c) of the revised ECOWAS Treaty by applying custodial sentences for defamation; by convicting and sentencing Konaté; by ordering Konaté to pay a fine, damages, and costs; and by suspending the publication of Konaté’s magazine. The Court ordered the State to amend its laws on defamation to bring it into compliance with the instruments listed above.<sup>918</sup>

### *Frank David Omary and Others v. Tanzania*

Mr. Frank David Omary, Karata Ernest, and others, all Tanzanian nationals and all former employees of the East African Community (EAC), filed a complaint against Tanzania, alleging that, following the EAC’s dissolution, Tanzania failed to honor its obligations to pay reparations on the assets and liabilities of the EAC, in addition to the pensions and benefits of the former employees, and had engaged in police brutality. They argued that Tanzania’s failure to pay the entire pension and severance benefits owed to them violated articles 7 (Non-Discrimination), 8 (Effective Remedy), 23 (Right to Work and Just Pay), 25 (Adequate Standard of Living), and 30 (Prohibition of Destruction of Rights and Freedoms) of the Universal Declaration of Human Rights.<sup>919</sup>

The Court found that it had jurisdiction to hear the case. The Court found it had jurisdiction *ratione materiae* because, although the Universal Declaration of Human Rights was not ratified by Tanzania, the Declaration had “attained the status of customary international law” and, in any case, the specific rights alleged to have been violated were also guaranteed by the African Charter and the International Covenant on Economic, Social and Cultural Rights, both of which Tanzania had ratified.<sup>920</sup>

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<sup>915</sup> *Id.* at paras. 149, 153, 155-56.

<sup>916</sup> *Id.* at para. 164.

<sup>917</sup> *Id.* at paras. 150, 169.

<sup>918</sup> *Id.* at paras. 170, 176.

<sup>919</sup> AfCHPR, *Frank David Omary and Others v. Tanzania*, App. No. 001/2012, Judgment of 28 March 2014, paras. 1-3, 5, 19, available 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>.

<sup>920</sup> *Id.* at paras. 69-77.

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The Court found it had jurisdiction *ratione personae* because Tanzania was a party to the Protocol Establishing the African Court and had made a declaration under Article 34(6) of the Protocol empowering the Court to hear cases against Tanzania from NGOs with observer status and individuals.<sup>921</sup>

The Court found it had jurisdiction *ratione temporis* because the alleged violations – non-execution of the repayment agreement and police brutality – occurred in the years leading up to October 2010 and on May 23, 2011, respectively, which was after Tanzania made the declaration under Article 34(6) on March 9, 2010.<sup>922</sup>

By a majority vote of nine to one, the Court declared that it had jurisdiction to hear the application.<sup>923</sup>

Next, the Court examined the admissibility of the application. It found that, while the applicants were properly identified (Article 56(1) of the African Charter), the application alleged violations of rights guaranteed by the African Charter (Article 56(2) of the Charter), and the application was not based exclusively on news from the mass media (Article 56(4) of the Charter), the application nevertheless failed to meet the requirements for admissibility because domestic remedies had not been exhausted as is required under Article 56(5) of the African Charter.<sup>924</sup>

Having determined that the application was inadmissible, the Court declined to consider the case on its merits. By a unanimous vote, the Court declared the application inadmissible.<sup>925</sup>

### *Peter Joseph Chacha v. Tanzania*

Mr. Peter Joseph Chacha, a national of Tanzania, filed a complaint against Tanzania, alleging that the State had unlawfully arrested, interrogated, detained, charged, and imprisoned him and had searched and seized his property in violation of Tanzania criminal laws and the Constitution. He requested the Court to declare that Tanzania was in violation of articles 3, 5, 6, 7(1), 14, and 26 of the African Charter and order the State to pay reparations and compensation for the deprivation of his property.<sup>926</sup>

The Court dismissed the State's first preliminary objection that Mr. Chacha's application lacked jurisdiction *ratione materiae* on the grounds that the national Constitution and legislation formed the only basis for his complaint. The Court's position was that "the substance of the complaint must relate to rights guaranteed by the Charter or any other human rights instrument ratified by the State concerned, without necessarily requiring that the specific rights alleged to have been violated be

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<sup>921</sup> *Id.* at paras. 78-80.

<sup>922</sup> *Id.* at paras. 81-84.

<sup>923</sup> *Id.* at para. 145(1).

<sup>924</sup> *Id.* at paras. 88-138. The Court declined to address the admissibility requirements contained in article 56(3), which prohibits the use of insulting or disparaging language directed against the State, article 56(6), which requires applications to be submitted within a reasonable time after domestic remedies were exhausted, and article 56(7), which requires that cases not be settled by another international body.

<sup>925</sup> *Id.* at paras. 142, 145(3).

<sup>926</sup> AfCHPR, *Peter Joseph Chacha v. Tanzania*, App. No. 003/2012, Judgment of 28 March 2014, para. 1-4, 66-67, available 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>.

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specified in the Application.” For that reason, the Court unanimously overruled the State’s preliminary objection.<sup>927</sup>

The Court also unanimously dismissed the State’s objection that the application was incompatible with the Charter of the OAU, finding that the application was “in line” with the objectives of the African Union.<sup>928</sup>

Regarding jurisdiction *ratione personae*, the Court held that it had such jurisdiction because Tanzania had made the declaration under Article 34(6) of the Protocol Establishing the African Court, allowing the Court to receive complaints submitted by individuals and NGOs with observer status against the State.<sup>929</sup>

Regarding jurisdiction *ratione temporis*, the Court found that the alleged violations against Mr. Chacha, though they began before Tanzania ratified the Protocol Establishing the African Court on February 10, 2006, continued even after the State had made the optional declaration under Article 34(6).<sup>930</sup>

Having determined that it had jurisdiction to hear the case, the Court considered whether the application was admissible, and specifically, whether Mr. Chacha had exhausted domestic remedies. By a majority vote of six to four, the Court found that he had not because he did not appeal his case merely out of his own frustration, and, for that reason, concluded that the case was inadmissible.<sup>931</sup>

Three Justices – President of the Court Justice Sophia A.B. Akuffo, Justice Elsie N. Thompson, and Justice Ben Kioko – wrote separately to dissent on the issue of whether or not Mr. Chacha’s application was admissible on the grounds of exhaustion of domestic remedies.<sup>932</sup> They argued that Mr. Chacha’s unsuccessful attempts to have his complaints determined indicated that “he was caught in a vicious cycle of attempting to find resolution to his complaints and finding himself thwarted at practically every turn by procedural technicalities that effectively had nothing to do with the substance of his complaints.”<sup>933</sup> Thus, the application should have been deemed admissible by the Court.

### *Urban Mkandawire v. Malawi*

Mr. Urban Mkandawire, a Malawi national, filed a complaint against Malawi, alleging he was wrongfully dismissed as a lecturer from the University of Malawi in violation of articles 4, 5, 7, 15, and 19 of the African Charter.<sup>934</sup> He sought an order from the Court reinstating him as a lecturer and payment by

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<sup>927</sup> *Id.* at paras. 112, 118, 159(1).

<sup>928</sup> *Id.* at paras. 124, 159(2).

<sup>929</sup> *Id.* at para. 125.

<sup>930</sup> *Id.* at para. 126.

<sup>931</sup> *Id.* at paras. 127-53, 159(3)-(4).

<sup>932</sup> AfCHPR, *Peter Joseph Chacha v. Tanzania*, App. No. 003/2012, Judgment of 28 March 2014, Separate Opinion of Justices Akuffo, Thompson, & Kioko, para. 1, available 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>.

<sup>933</sup> *Id.* at para. 12.

<sup>934</sup> AfCHPR, *Urban Mkandawire v. Malawi*, App. No. 003/2011, Judgment of 21 June 2013, paras. 1, 17, available 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>.

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Malawi for damages, legal costs, lost wages, and the unfulfilled contributions to the National Insurance Company. The Court held public hearings on the case on November 29-30, 2012.<sup>935</sup>

The Court first responded to Malawi's preliminary objection that the Court lacked jurisdiction *ratione temporis* to hear the case. The Court considered that the alleged violations of Mr. Mkandawire's right occurred initially in 1999 and were of a continuing nature. Malawi ratified the African Charter in 1989 and the Protocol Establishing the African Court in 2008. Thus, Malawi was under a duty to protect Mr. Mkandawire's rights when they began, and since they were continuing, the Court had jurisdiction to hear the application.<sup>936</sup>

Next, the Court responded to Malawi's objection that the application was inadmissible because it was still pending before the African Commission. The Court observed that Mr. Mkandawire formally withdrew his application from the Commission before lodging it before the Court in March 2008. For that reason, the Court found Malawi's objection to be invalid.<sup>937</sup>

The Court then considered its jurisdiction in terms of the Protocol Establishing the African Court. It found that the application met all of the requirements for jurisdiction *ratione materiae*, jurisdiction *ratione personae*, and jurisdiction *ratione temporis*.<sup>938</sup>

In its consideration of the admissibility of the application, the Court found the application inadmissible due to non-exhaustion of domestic remedies, as is required by Article 56(5) of the African Charter. Mr. Mkandawire still had available to him access to the High Court to challenge the judgment of the Industrial Relations Courts. If he were not to succeed before the High Court, he could appeal to the Supreme Court of Appeal. The Court also found that there had not been any undue delay in the disposal of Mr. Mkandawire's cases before the Malawi Supreme Court of Appeal.<sup>939</sup>

For those reasons, the Court, by a majority of seven votes to three, found the application inadmissible and struck it out.<sup>940</sup>

### *Beneficiaries of the Late Norbert Zongo et al. v. Burkina Faso*

After the alleged assassinations of Mr. Norbert Zongo, an investigative journalist, and his three companions, Abdoulaye Nikiema, Blaise Ilboudo, and Ernest Zongo, their beneficiaries filed a complaint against Burkina Faso on their behalf, alleging violations of articles 1, 2, 3, 4, 7, and 9 of the African Charter; articles 2(3), 6(1), 14, and 19(2) of the International Covenant on Civil and Political Rights; Article 66.2(c) of the Revised Treaty of the Economic Community of West African States (ECOWAS); and Article 8 of the Universal Declaration of Human Rights due to the State's failure to identify, prosecute, and, if appropriate, punish those responsible for the crime.<sup>941</sup>

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<sup>935</sup> *Id.* at paras. 14, 18.

<sup>936</sup> *Id.* at para. 32.

<sup>937</sup> *Id.* at para. 33.

<sup>938</sup> *Id.* at paras. 33-36.

<sup>939</sup> *Id.* at para. 40.

<sup>940</sup> *Id.* at para. 42. Justices Niyungeko and Guisse wrote a separate dissenting opinion. Justice Fatsah Ouguergouz was the third dissenter.

<sup>941</sup> AfCHPR, *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement v. Burkina Faso*, App. No. 013/2011, Judgment of 21 June 2013, paras. 1-3, 7-15 available at <http://www.african->

## THE AFRICAN COURT'S COMPLAINTS PROCEDURE

Burkina Faso raised a preliminary objection that the applicants had failed to exhaust domestic remedies, but the Court found that although there was an effective remedy that the applicants had not exhausted, they were no longer under the obligation to exhaust because judicial procedures had been unduly prolonged.<sup>942</sup>

The Court found violations of articles 7 (right to a fair trial) and 1 (obligation to give effect to rights in Charter) of the African Charter. The Court concluded that the State had failed to act with due diligence to investigate, prosecute, and, if appropriate, punish those responsible for the victims' deaths in violation of Article 7.<sup>943</sup> The Court then further concluded that the State had failed to meet its obligations to take steps, other than merely legislative, to ensure that the applicants' right to be heard by competent national courts was protected.<sup>944</sup>

The Court declined to find violations of articles 3 (the right to equal protection before the law) and 9 (right to freedom of expression) read together with article 66(2)(c) of the Revised Treaty of ECOWAS. The Court held that equality before the law does not require that all cases are adjudicated within the same length of time. Additionally, the Court found that the applicants did not provide sufficient evidence to show that the media was not able to exercise the right to freedom of expression after the failure to identify and prosecute the individuals responsible for the victims' deaths.<sup>945</sup>

The Court ordered the applicants to submit their brief of reparations within 30 days of the pronouncement of the judgment. The Court ordered Burkina Faso to submit its brief in response on the reparations within 30 days of receipt of the applicants' brief.<sup>946</sup>

### *Tanganyika Law Society, Legal and Human Rights Centre, and Reverend Christopher R. Mtikila v. Tanzania*

The Court issued its first consolidated decision on the merits in the case of *Tanganyika Law Society, Legal and Human Rights Centre, and Reverend Christopher R. Mtikila v. Tanzania*.

On June 2, 2011, the Tanganyika Law Society and the Legal and Human Rights Centre, both NGOs with observer status before the African Commission and based in Tanzania, filed a complaint against Tanzania, alleging that recent amendments to the Constitution of Tanzania had the effect of prohibiting independent candidates to contest Presidential, Parliamentary, and local elections.<sup>947</sup> They argued that these amendments violated Tanzania's citizens' rights to freedom of association, participation in public

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[court.org/en/index.php/55-finalised-cases-details/846-app-no-013-2011-abdoulaye-nikiema-ernest-zongo-blaise-ilboudo-burkinabe-human-and-peoples-rights-movement-v-burkina-faso-details](http://court.org/en/index.php/55-finalised-cases-details/846-app-no-013-2011-abdoulaye-nikiema-ernest-zongo-blaise-ilboudo-burkinabe-human-and-peoples-rights-movement-v-burkina-faso-details).

<sup>942</sup> *Id.* at paras. 45, 70-71, 106.

<sup>943</sup> *Id.* at paras. 152-56.

<sup>944</sup> *Id.* at paras. 196-99.

<sup>945</sup> *Id.* at paras. 167-69, 180-87.

<sup>946</sup> *Id.* at para. 203.

<sup>947</sup> AfCHPR, *Tanganyika Law Society, Legal and Human Rights Centre & Reverend Christopher R. Mtikila v. Tanzania*, App. Nos. 009/2011 & 011/2011 (joined), Judgment of 14 June 2013, paras. 1-4, available 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>.

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affairs, and non-discrimination. Furthermore, they argued that the initiation of a constitutional review process to settle a pending issue before Tanzanian courts violated the rule of law. They asked the Court to declare Tanzania in violation of articles 2 and 13(1) of the African Charter, articles 3 and 25 of the International Covenant on Civil and Political Rights (ICCPR), and Article 21(1) of the Universal Declaration of Human Rights; order the State to take the necessary constitutional, legislative, and other steps to guarantee these rights; order the State to comply with the Court's orders within a period of 12 months; grant any other remedy or relief the Court deems necessary; and order Tanzania to pay the organizations' costs.<sup>948</sup>

Eight days later, on June 10, 2011, Reverend Christopher R. Mtikila, a Tanzania national, filed a complaint against Tanzania, alleging similar violations. He requested the Court to find Tanzania had violated and continues to violate his rights, order the State to pay compensation to him, and acknowledge his reservation of the right to augment his arguments for claiming compensation and reparations.<sup>949</sup>

By the time both of these complaints came before the Court, Tanzania had ratified the African Charter and the Protocol Establishing the African Court, and had made a declaration under Article 34(6) of the Protocol, allowing the Court jurisdiction to hear claims against the State from NGOs with observer status and individuals.<sup>950</sup>

On September 22, 2011, the Court decided to consolidate the two applications. The Court held a public hearing on June 14 to 15, 2012, during which the applicants and Tanzania made oral arguments on preliminary objections and the merits.<sup>951</sup>

The Court found that the applications were admissible and that the Court had jurisdiction. The Court concluded that the applicants exhausted domestic remedies. In the case of the second applicant, Mtikila, the parties were in agreement that the applicant exhausted local remedies. The Court found that the first applicant was not required to attempt to utilize the same remedies knowing the outcome. Furthermore, Tanzania argued that the political process is a remedy that the applicant should have exhausted, but the Court found that it is not accessible to everyone, it is discretionary, and the outcome depends on "the will of the majority." Therefore, the Court concluded that the remedy is not one that must be exhausted as "it cannot be equated to an independent judicial process for the vindication of the rights under the Charter."<sup>952</sup>

The Court found that the time the applicants took to file their application since exhausting domestic remedies was reasonable. The time elapsed was nearly one year.<sup>953</sup>

Tanzania alleged that the Court did not have temporal jurisdiction because, it argued, the ban on independent candidates went into place before the Protocol came into effect. However, because the rights alleged in the application are protected under the Charter and Tanzania had already ratified the

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<sup>948</sup> *Id.* at paras. 4, 76, 92.

<sup>949</sup> *Id.* at paras. 2, 4, 14, 77.

<sup>950</sup> *Id.* at para. 3.

<sup>951</sup> *Id.* at para. 23, 62.

<sup>952</sup> *Id.* at para. 82.3.

<sup>953</sup> *Id.* at para. 83.

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Charter at the time of the alleged violation, the Court held that it has temporal jurisdiction. (84) Furthermore, the alleged violation is of a continuous nature as independent candidates continue to be barred from the election process.<sup>954</sup>

The Court held that it has *ratione personae* and *ratione materiae* jurisdiction over the parties. Tanzania made the necessary declaration under Article 34(6) of the Protocol Establishing the African Court so that the Court has jurisdiction over individual complaints against Tanzania submitted to the Court.<sup>955</sup> *Ratione materiae* jurisdiction was not challenged, and the Court found that it had jurisdiction over the subject matter.<sup>956</sup>

The Court proceeded to analyze the case on its merits. Noting that any restriction on the exercise of rights “must be necessary in a democratic society [and] they must be reasonably proportionate to the legitimate aim pursued,” the Court reasoned that the ultimate determination to be made is whether there is a “fair balance” of the needs of the community and the protection of the rights of individuals. The Court determined that the prohibition of independent candidacy was “not proportionate” to Tanzania’s alleged need to foster national unity and solidarity.<sup>957</sup>

Regarding the question of whether Tanzania violated the right to freedom of association, the Court interpreted articles 10(2) (right not to be compelled to join an organization), 27(2) (individual rights are balanced with rights of others, collective security, morality, and common interest), and 29(4) (individual obligation to preserve social and national solidarity) to mean that freedom of association “implies freedom to associate and freedom not to associate.” For that reason, Tanzania’s practice of requiring individuals to belong to and obtain sponsorship from existing political parties violated the right to freedom of association. As the Court had already determined, Tanzania’s asserted social needs were insufficient to justify the limitation on the right to freedom of association.<sup>958</sup> The Court also found a violation of Article 13(1) (right to participate in government), reasoning that if individuals must join a political party to participate in elections, they are prevented from freely participating.<sup>959</sup>

Regarding the issue of whether Tanzania violated the right not to be discriminated against and the right to equality, the Court interpreted articles 2 (right to non-discrimination) and 3(2) (right to equal protection of the law) of the African Charter to mean that distinctions based on “political or any other opinion” might amount to discrimination, and for that reason such distinctions must be reasonable and legitimate. As the Court had already determined, Tanzania’s asserted social needs for the “construction of a pluralist democracy in unity” were insufficient to justify the limitations on the rights to not be discriminated against and to be equal before the law.<sup>960</sup>

Regarding the issue of whether Tanzania violated the rule of law, the Court reasoned that the rule of law is “an all-encompassing principle under which human rights fall and so cannot be treated in abstract or

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<sup>954</sup> *Id.*

<sup>955</sup> *Id.* at para. 86.

<sup>956</sup> *Id.* at para. 87.

<sup>957</sup> *Id.* at paras. 79-88, 106.1, 107.1, 107.2.

<sup>958</sup> *Id.* at paras. 113-15.

<sup>959</sup> *Id.* at para. 111.

<sup>960</sup> *Id.* at para. 119.



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wholesale,” and that it is not related to a specific right. As such, the Court held that the issue of whether the rule of law was violated “does not properly arise in this case.”<sup>961</sup>

Finally, regarding the alleged violations of the ICCPR and the Universal Declaration of Human Rights, the Court held that it was unnecessary to consider the application of the two instruments because it had already considered the alleged violations under the African Charter.<sup>962</sup>

Having found by a majority vote that Tanzania violated articles 2, 3, 10, and 13(1) of the African Charter with respect to all the applicants, the Court ordered the State to “take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations,” and to keep the Court informed of the measures taken.<sup>963</sup>

### *Atabong Denis Atemnkeng v. African Union*

Mr. Atabong Denis Atemnkeng, a Cameroonian national, sought a judgment finding that Article 34(6) of the Protocol Establishing the African Court was inconsistent with the Constitutive Act of the AU and the Africa Charter, and as such, should be declared null and void.<sup>964</sup> Article 34(6) of the Protocol Establishing the African Court empowers the Court to receive cases from NGOs with observer status and individuals when the State concerned has made a declaration accepting the Court’s competence in this regard.<sup>965</sup> Mr. Atemnkeng claimed that Article 34(6) is an “impediment to justice,” as it prevents access to the Court by African citizens, particularly victims of human rights abuses who are unable to obtain redress from national courts or the African Commission.<sup>966</sup>

The first issue the Court addressed was whether it had jurisdiction to hear the case. This case was one which had been initiated by an individual, Mr. Atemnkeng. Because of this, the application needed to meet the requirements of articles 5(3) and 34(6) of the Protocol Establishing the Court. Cameroon has never made a declaration giving the Court competence to hear cases submitted by NGOs with observer status and individuals.<sup>967</sup> Mr. Atemnkeng argued that, because his application was not lodged against Cameroon or any specific State, but rather against the African Union, Article 34(6) should not apply. The Court considered that, even if a non-State entity such as the African Union were not bound by Article 34(6), that fact alone would not confer jurisdiction on the Court to receive applications from individuals. Indeed, since the African Union was not even party to the African Charter or the Protocol Establishing the Court, any application submitted against it falls outside the jurisdiction of the Court. By a vote of six

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<sup>961</sup> *Id.* at para. 121.

<sup>962</sup> *Id.* at para. 122.

<sup>963</sup> *Id.* at para. 126.

<sup>964</sup> AfCHPR, *Atabong Denis Atemnkeng v. African Union*, App. No. 014/2011, Judgment of 15 March 2013, para. 1, available at <http://www.african-court.org/en/index.php/55-finalised-cases-details/847-app-no-014-2011-atabong-denis-atemnkeng-v-african-union-details>.

<sup>965</sup> Protocol Establishing the African Court, arts. 5(3), 34(6).

<sup>966</sup> AfCHPR, *Atabong Denis Atemnkeng v. African Union*, para. 17.

<sup>967</sup> AfCHPR, African Court in Brief, *supra* note 47. The States that have accepted such jurisdiction are: Burkina Faso, Côte d’Ivoire, Ghana, Malawi, Mali, Tanzania, and Tunisia.

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to three, the Court ruled that it did not have jurisdiction to hear Mr. Atemnkeng's case against the African Union.<sup>968</sup>

### *African Commission on Human and Peoples' Rights v. Libya*

In this case, the African Commission filed a complaint against the Great Socialist Peoples' Libyan Arab Jamahiriya, alleging that the State had carried out "serious and massive violation[s] of human rights" guaranteed by articles 1, 2, 4, 5, 9, 11, 12, 13, and 23 the African Charter.<sup>969</sup> At the time, Libya was in the midst of an internal armed conflict, with rebel forces seeking to oust Colonel Muammar Gaddafi, Libya's *de facto* ruler since 1969. Demonstrators on the streets of Benghazi were met with violence by pro-government security forces and hundreds had been killed.<sup>970</sup>

On March 25, 2011, the Court, of its own volition and for the first time in its history, issued an order of provisional measures against Libya.<sup>971</sup> The Court observed that there was "a situation of extreme gravity and urgency, as well as a risk of irreparable harm to persons ... in particular, in relation to the rights to life and to physical integrity of persons."<sup>972</sup> The Court ordered Libya to "refrain from any action that would result in loss of life or violation of physical integrity of persons" and to report to the Court on the measures taken to implement the order within fifteen days.<sup>973</sup> Also for the first time, the Court issued a grant of *amicus curiae* status, allowing the Pan African Lawyers' Union to participate as "friends of the Court."<sup>974</sup>

As the year went on, the Court received multiple requests for extensions of time to respond from the African Commission and Libya, and eventually communication with the Court broke down. Finding that the African Commission had "failed to pursue" its application, and that Libya and the Pan African Lawyers' Union had declined to respond to communications from the Registry, the Court unanimously decided to order that the application be struck out.<sup>975</sup>

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<sup>968</sup> AfCHPR, *Atabong Denis Atemnkeng v. African Union*, paras. 37-38, 40, 46 (also ruling that each party should bear its own costs).

<sup>969</sup> AfCHPR, *African Commission on Human and Peoples' Rights v. Libya*, App. No. 004/2011, Judgment of 15 March 2013, para. 1, available at [http://www.african-court.org/en/images/documents/Court/Cases/Judgment/DECISION\\_-\\_Application\\_004-](http://www.african-court.org/en/images/documents/Court/Cases/Judgment/DECISION_-_Application_004-2011_African_Commission_v_Libya_Struck_outEngl.pdf)

2011\_African\_\_Commission\_v\_Libya\_Struck\_outEngl.pdf; AfCHPR, *African Commission on Human and Peoples' Rights v. Libya*, App. No. 004/2011, Order for Provisional Measures of March 25, 2011, para. 3, available at <http://www.african-court.org/en/index.php/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>.

<sup>970</sup> A timeline of the conflict in Libya, *supra* note 702; Libya: Governments Should Demand End to Unlawful Killings, *supra* note 702; Libya: Security Forces Kill 84 over Three Days, *supra* note 702.

<sup>971</sup> AfCHPR, *African Commission on Human and Peoples' Rights v. Libya*, Order for Provisional Measures of March 25, 2011, para. 25.

<sup>972</sup> *Id.* at para. 22.

<sup>973</sup> *Id.* at para. 25.

<sup>974</sup> AfCHPR, *African Commission on Human and Peoples' Rights v. Libya*, App. No. 004/2011, Order regarding Application for Leave to Participate as Amicus Curiae of March 30, 2012, para. 9, available at <http://www.african-court.org/en/images/documents/orders/ORDER-%20PALU%20Amicus%20Curie%20-%20APPLICATION%20004.2011.pdf>.

<sup>975</sup> AfCHPR, *African Commission on Human and Peoples' Rights v. Libya*, Judgment of 15 March 2013, paras. 8-26, "Now Therefore."

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### *Baghdadi Ali Mahmoudi v. Tunisia*

In this case, the applicant, Mr. Baghdadi Ali Mahmoudi, filed a complaint against Tunisia and requested the Court to order interim measures.<sup>976</sup>

Since Mr. Mahmoudi was an individual, the Registrar submitted an inquiry to the Office of Legal Counsel of the AU Commission to learn whether Tunisia had made a declaration under Article 34(6) of the Protocol Establishing the African Court, which would have empowered the Court to receive cases against Tunisia from NGOs with observer status and individuals. The AU Commission's Office of Legal Counsel responded that Tunisia had not made such a declaration. The Court thus concluded that it did not have jurisdiction to receive the application.<sup>977</sup>

In order for the Court to be able to order interim measures, it must first satisfy itself that it has *prima facie* jurisdiction. Since the Court previously determined that it lacked such jurisdiction, it unanimously decided not to order interim measures.<sup>978</sup>

### *Femi Falana v. African Union*

Mr. Femi Falana, a Nigerian human rights lawyer, filed a complaint against the African Union, alleging that conditioning the Court's jurisdiction to hear complaints from NGOs and individuals on whether a State has made a declaration under Article 34(6) of the Protocol Establishing the Court was inconsistent with articles 1, 2, 7, 13, 26, and 66 of the African Charter and a violation of his right to freedom from discrimination, fair trial, equality of treatment, and his right to be heard. He asked the Court to issue a declaration that Article 34(6) of the Protocol was illegal, null, and void for being inconsistent with the African Charter, a declaration that Mr. Falana was entitled to file complaints before the African Court, and an order annulling Article 34(6) of the Protocol. The Court held a public hearing – its first ever – in March 2012 in Arusha, Tanzania.<sup>979</sup>

The Court first addressed the AU's preliminary objection, which was that the Court did not have jurisdiction to hear Mr. Falana's complaint. At issue was whether, since Article 34(6) of the Protocol applied to Member States and not to the AU itself, the absence of a declaration under Article 34(6) from the AU invalidated the Court's jurisdiction. Mr. Falana argued that the lack of a declaration from the AU did not invalidate the Court's jurisdiction, while the AU argued that it did.<sup>980</sup>

The Court observed that "in principle, international obligations arising from a treaty cannot be imposed on an international organization, unless it is a party to such a treaty or it is subject to such obligations by any other means recognized under international law." Since the AU was not a party to the Protocol Establishing the African Court, it cannot be subject to the obligations arising from it. The Court

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<sup>976</sup> AfCHPR, *Baghdadi Ali Mahmoudi v. Tunisia*, App. No. 007/2012, Judgment of 26 June 2012, para. 1, available 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>.

<sup>977</sup> *Id.* at paras. 6-9, 11, 13(i).

<sup>978</sup> *Id.* at paras. 12, 13(ii).

<sup>979</sup> AfCHPR, *Femi Falana v. African Union*, App. No. 001/2011, Judgment of 26 June 2012, paras. 1-3, 20, 40, available at <http://www.african-court.org/en/index.php/55-finalised-cases-details/833-app-no-001-2011-femi-falana-v-african-union-details>.

<sup>980</sup> *Id.* at paras. 56-63.

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concluded that the AU could not be sued before the Court on behalf of its Member States. For that reason, the Court, by a majority of seven votes to three, held that it lacked jurisdiction to hear the case and refrained from examining the questions of admissibility and merits of the complaint.<sup>981</sup>

### *Efoua Mbozo'o Samuel v. Pan-African Parliament*

In this case, the applicant, Mr. Efoua Mbozo'o Samuel, filed a complaint against the Pan African Parliament, alleging that it had violated his employment contract and the OAU Staff Regulations, and had further improperly refused to renew his contract and re-grade him.<sup>982</sup>

The Court reasoned that its jurisdiction to hear disputes was articulated in Article 3(1) of the Protocol Establishing the African Court, which states that the Court has jurisdiction over “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.” Given that Mr. Samuel's application was grounded upon a breach of his employment contract – and not a human rights instrument – the Court unanimously decided that it lacked jurisdiction to hear the case.<sup>983</sup>

The Court posited that the Ad hoc Administrative Tribunal of the AU would have competence to decide the case, and appeals from it could hypothetically be taken before the not-yet-operational African Court of Justice and Human Rights. Nevertheless, the African Court itself was “manifestly” without jurisdiction.<sup>984</sup>

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<sup>981</sup> *Id.* at paras. 69-75. The Court noted that, if the AU were allowed to become a party to the Protocol Establishing the African Court and it was willing to do so, then it could be subject to the obligations arising from it. In this case, neither alternative applied.

<sup>982</sup> AfCHPR, *Efoua Mbozo'o Samuel v. Pan African Parliament*, App. No. 010/2011, Judgment of 30 September 2011, paras. 1, 4, available at <http://www.african-court.org/en/index.php/55-finalised-cases-details/842-app-no-010-2011-efoua-mbozo-o-samuel-v-pan-african-parliament-details>.

<sup>983</sup> *Id.* at paras. 5-7.

<sup>984</sup> *Id.* at para. 6.

## CHAPTER SEVEN

### Additional Resources and Information

The following resources provide additional information on the African human rights system.

#### African Commission on Human and Peoples' Rights

The African Commission's website is a good starting point for advocates wishing to learn more about the Commission and the African human rights system in general. The Commission's website provides links to information on the following items:

##### African (Banjul) Charter on Human and Peoples' Rights

Web page: <http://www.achpr.org/instruments/achpr/>  
Description: This treaty established the African Commission and, along with the Rules of Procedure, governs its mandate, procedures, and functions.

##### Rules of Procedure of the African Commission on Human and Peoples' Rights (2010)

Web page: <http://www.achpr.org/instruments/rules-of-procedure-2010/>  
Description: The Rules of Procedure provide information regarding the Commission's sessions, its special mechanisms, country missions, NGO observer status and NHRI affiliated status, and the relationship between the Commission and the Court, as well as offer guidelines for submitting inter-State and individual communications.

##### Sessions of the African Commission

Web page: <http://www.achpr.org/sessions/>  
Description: The 'Sessions' page includes general information about the Commission's Ordinary and Extraordinary sessions and the adoption of the provisional agenda, as well as links to the Commission's agendas and final communiqués for individual sessions.

##### Communications of the African Commission

Web page: <http://www.achpr.org/communications/>  
Description: The 'Communications' page provides links to the Commission's latest decisions on communications and to documents explaining the communications procedure and the guidelines for submitting communications. These two documents in particular provide valuable guidance. It is important to note, however, that these documents reference the 1998 Rules of Procedure of the African Commission, which have since been replaced by the 2010 Rules of Procedure. This change has resulted in incorrect rule citations, although the substantive information contained in these documents is still accurate.

##### Special Mechanisms

Web page: <http://www.achpr.org/mechanisms/>  
Description: The 'Special Mechanisms' page provides information on the formation and mandate of each of the Commission's special mechanisms. It provides links to

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each special mechanism’s individual page. The page also provides links to the latest fact-finding and promotional mission reports.

### State Reporting

Web page: <http://www.achpr.org/states/>  
Description: The ‘State Reporting’ page lists which AU Member States are up-to-date and which are overdue in their periodic report submission and, if they are behind, by how many reports.

### Network

Web page: <http://www.achpr.org/network/>  
Description: The ‘Network’ page provides information and links relating to NGOs with observer status and NHRIs with affiliated status with the Commission. It also provides links to the Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organizations Working in the Field of Human Rights and the Resolution on the Granting of Observer (Affiliate) Status to National Human Rights Institutions in Africa. Lastly, it provides a link to the NGO Forum on the African Centre for Democracy and Human Rights Studies’ website.

### Legal Instruments

Web page: <http://www.achpr.org/instruments/>  
Description: The ‘Legal Instruments’ page provides a list of the main AU treaties and protocols, their dates of adoption and entry into force, and the number of States that have ratified each instrument. The page also provides links to “soft law,” such as declarations, guidelines, and draft model laws and guidelines. Please consult the African Union website for the most recent ratification information: <http://au.int/en/treaties/status>.

### Documents

Web page: <http://www.achpr.org/search/>  
Description: The ‘Documents’ page allows visitors to search for documents published by the Commission, such as activity reports, session information, State reports, concluding observations, NGO statements, and mission reports.

### About ACHPR

Web page: <http://www.achpr.org/about/>  
Description: The Commission’s website also lists the Commission’s contact information and allows visitors to subscribe to receive email updates about the activities, sessions, and events of the Commission.

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### African Court on Human and Peoples' Rights

While not as comprehensive as the African Commission's website, particularly with respect to background information and information on its sessions, the African Court's website is still an excellent resource for information about the Court and its processes. The Court's website provides information on the following aspects of the Court:

#### Basic Documents

- Web page: <http://en.african-court.org/index.php/basic-documents/basic-documents-featured-articles>
- Description: The 'Basic Documents' page contains links to the Court's main legal documents, including its principal treaties, statute, and rules of procedure. Please consult the African Union website for the most recent ratification information: <http://au.int/en/treaties/status>.

#### Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights

- Web page: <http://www.african-court.org/en/images/documents/Court/Court%20Establishment/africancourt-humanrights.pdf>
- Description: This Protocol established the African Court and, along with the Rules of Court, governs the procedures and functions of the Court.

#### Rules of the Court

- Web page: [http://www.african-court.org/en/images/documents/Court/Interim%20Rules%20of%20Court/Final\\_Rules\\_of\\_Court\\_for\\_Publication\\_after\\_Harmonization\\_-\\_Final\\_\\_English\\_7\\_sept\\_1\\_.pdf](http://www.african-court.org/en/images/documents/Court/Interim%20Rules%20of%20Court/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf)
- Description: The Rules of the Court specify the rules regarding the submission and adjudication of cases, election of judges, issuance of advisory opinions and provisional measures, jurisdiction of the Court, and other aspects of the Court's procedures.

#### Cases Status

- Web page: <http://en.african-court.org/index.php/cases>
- Description: The 'Cases' page lists of all of the applications that have been submitted to the Court, including which cases have been finalized and which are still pending. The page provides links to the actual decisions.

#### Finalised Cases

- Web page: <http://en.african-court.org/index.php/cases#finalised-cases>
- Description: The 'Finalised Cases' page lists all of the cases for which the African Court has issued decisions, which are organized by year. Clicking on a case name will bring the user to the applications, case summaries, decisions, and orders pertaining to that case.



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### Pending Cases

Web page: <http://en.african-court.org/index.php/cases#pending-cases>  
Description: The 'Pending Cases' page lists all of the cases that are pending before the African Court. Clicking on a case will bring the user to that case's application, case summary, decision, and orders, if available.

### Advisory Opinions

Web page: <http://en.african-court.org/index.php/cases#advisory-opinions>  
Description: The 'Advisory Opinions' page lists all of the requests for advisory opinions that have been submitted to the African Court. Clicking on a request will bring the user to the Court's response to the request.

### Jurisdiction

Web page: <http://en.african-court.org/index.php/about-us/jurisdiction>  
Description: The 'Jurisdiction' page explains the Court's advisory and contentious jurisdiction. It also discusses the possible extension of the Court's jurisdiction to include genocide, crimes against humanity, and war crimes. Note, however, that this page was written several years ago and, for that reason, does not cover more recent developments on this issue.

### African Court in Brief

Web page: <http://en.african-court.org/index.php/about-us/court-in-brief>  
Description: The 'African Court in Brief' page gives a brief description of the African Court, including its formation, jurisdiction, sources of law, and daily functioning. It is an excellent place to go for a broad understanding of the African Court.

### Mandate, Mission & Values

Web page: <http://en.african-court.org/index.php/about-us/mandate-mission-values>  
Description: The 'Mandate, Mission & Values' page briefly explains the purpose of the African Court, its objectives, and the values that guide it.

### Frequently Asked Questions

Web page: <http://en.african-court.org/index.php/faqs/frequent-questions#Application>  
Description: The 'How to Submit a Complaint' page provides information on how to submit a complaint to the African Court as well as information on the Court's mandate and the relationship between the Court and the Commission. The page provides essential information about the logistics of submitting an application. It explains, for example, where to submit an application, the required conditions, and the suitable languages to use in the application. The page also provides a link to the Court's Practice Directions under 'What are the directions to guide litigants,' an invaluable guide for potential litigants.

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### Practice Directions

- Web page: <http://www.african-court.org/en/images/documents/Court/Cases/Procedures/Practice%20Directions%20to%20Guide%20Potential%20Litigants%20En.pdf>
- Description: The African Court adopted these Practice Directions as a guide to potential litigants. They contain the working hours of the Court, procedures to follow before and during hearings, formatting instructions for applications, time limits, and instructions for requesting to act as *amicus curiae* and for provisional measures. It is an invaluable resource for potential litigants.

### African Union

The African Union website also provides information on the mission and functions of the African Union.

#### AU in a Nutshell

- Web page: <http://www.au.int/en/about/nutshell>
- Description: The 'AU in a Nutshell' page introduces the African Union and provides information on the mission of the AU, details about its various organs, and its primary objectives.

#### Constitutive Act of the African Union

- Web page: [http://www.au.int/en/about/constitutive\\_act](http://www.au.int/en/about/constitutive_act)
- Description: The 'Constitutive Act' page provides links to the Constitutive Act of the African Union in English, French, and Arabic.

#### AU Treaties, Convention, Protocols & Charters

- Web page: <http://au.int/en/treaties/status>
- Description: This page provides links to the most recent information on the status of each AU treaty, including the human rights instruments. It provides information on States' ratification of each treaty and the treaty's entry into force.

### News & Updates on the African Human Rights System

#### African Center for Democracy & Human Rights Studies (ACDHRS)

- Web page: <http://www.acdhhs.org/ngo-forum/>
- Description: The ACDHRS's website provides valuable information about the objectives and history of the NGO Forum. It contains links to past NGO Forum sessions, as well as resolutions adopted at the NGO Forum and submitted to the African Commission for consideration.

#### International Justice Resource Center

- Web page: <http://www.ijrcenter.org>
- Description: IJRC's website includes information on the African human rights system, and news articles on the sessions and decisions of the Commission and Court. It also offers a calendar featuring upcoming hearings and events held by international

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human rights institutions and organizations. For news on the African human rights bodies, visit: <http://www.ijrcenter.org/category/regional-human-rights-protection/african-system/>.

### **International Service for Human Rights (ISHR)**

Web page: <http://www.ishr.ch/>

Description: ISHR's website provides useful information about the workshops, panel discussions, and other activities that take place during the NGO Forum. See, for example, ISHR's page on the African Commission on Human and Peoples' Rights: <http://www.ishr.ch/news/african-commission-human-and-peoples-rights>.

### **Guides and Roadmaps**

#### **Road Map to the African Commission on Human and Peoples' Rights (2011)**

Author: International Service for Human Rights (ISHR), Association for Justice, Peace & Democracy and Conectas Human Rights

Web page: [http://www.ishr.ch/sites/default/files/article/files/roadmap\\_english.pdf](http://www.ishr.ch/sites/default/files/article/files/roadmap_english.pdf)

Description: This roadmap provides useful information to civil society organizations looking to contribute to the Commission's consideration of State reports. The guide also provides a critical evaluation of the challenges created by States' non-compliance with their reporting obligations.

#### **A Human Rights Defender's Guide to the African Commission (2012)**

Author: International Service for Human Rights (ISHR) and Institute for Human Rights and Development in Africa (IHRDA)

Web page: <http://www.ihrda.org/2012/10/a-human-rights-defenders-guide-to-the-african-commission-on-human-and-peoples-rights/>

Description: This guide is "intended as a practical resource for human rights defenders in Africa." It contains explanations of the scope of protections the Commission can offer, as well as details the Commission's progress over the past 20 years.

#### **Filing a Communication before the African Commission on Human and Peoples' Rights: A complainant's manual (2013)**

Author: REDRESS Trust, et al.

Web page: <http://www.redress.org/downloads/publications/1307-manual-to-the-african-commission.pdf>

Description: This guide takes readers step-by-step through the process of preparing and submitting a complaint to the African Commission.

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### **Human Rights Tools for a Changing World: A step-by-step guide to human rights fact-finding, documentation, and advocacy (2015)**

Author: The Advocates for Human Rights  
Web page: <http://www.theadvocatesforhumanrights.org/uploads/change.pdf>  
Description: Chapter 10 of this guide covers the regional systems, including advocacy before the African human rights system:  
[http://www.theadvocatesforhumanrights.org/uploads/chapter\\_10.pdf](http://www.theadvocatesforhumanrights.org/uploads/chapter_10.pdf)

### **Reaching for Justice: The Right to Reparation in the African Human Rights System (2013)**

Author: REDRESS Trust  
Web page: <http://www.redress.org/downloads/publications/1310reaching-for-justicefinal.pdf>  
Description: This guide reviews the right to reparation for victims of torture in the African human rights system.

### **African Commission Shadow Report Template**

Author: The Advocates for Human Rights  
Web page: [http://www.theadvocatesforhumanrights.org/uploads/appendix\\_p\\_african\\_commission\\_shadow\\_report\\_template.pdf](http://www.theadvocatesforhumanrights.org/uploads/appendix_p_african_commission_shadow_report_template.pdf)  
Description: This template is intended to provide a guide for advocates seeking to prepare an alternative report to the African Commission on a particular State's fulfillment of its human rights obligations.

### **Shadow Report to South Africa's First Periodic Reports to the African Commission (2005)**

Author: University of Pretoria Centre for Human Rights  
Web page: [http://www.chr.up.ac.za/images/files/documents/ahrdd/southafrica/southafrica\\_ngo\\_shadow\\_report\\_2005.pdf](http://www.chr.up.ac.za/images/files/documents/ahrdd/southafrica/southafrica_ngo_shadow_report_2005.pdf)  
Description: This shadow report is an excellent example of an NGO shadow report submitted to the African Commission. It is recommended to civil society organizations as an example of best practices.

### **African Court on Human and Peoples' Rights: Ten Years On and Still No Justice (2008)**

Author: George Mukundi Wachira & Minority Rights Group International  
Web page: <http://minorityrights.org/publications/african-court-on-human-and-peoples-rights-ten-years-on-and-still-no-justice-september-2008/>  
Description: This guide provides a critical evaluation of the early years of the African Court, including a discussion of the political factors that went into the drafting of the Protocol Establishing the African Court and its impact on access to the Court by individuals and civil society. The article, however, was published in 2008, before the Court had considered its first case, and for that reason does not cover much of the Court's jurisprudence.

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### **African Court on Human and Peoples' Rights – Response to the Situation in Libya (2011)**

Author: Anna Dolidze  
Web page: <http://www.asil.org/insights/volume/15/issue/20/african-court-human-and-peoples%E2%80%99-rights-%E2%80%93-response-situation-libya>  
Description: This article describes the advocacy efforts of NGOs and the Commission's actions leading up to the Court's adoption of its first decision on provisional measures in March 2011. The article also provides information on provisional measures in general and the possibility of imposing sanctions against non-complying States.

### **Good Practices for CSO Participation at the African Commission (2014)**

Author: Pan-African Human Rights Defenders Network  
Web page: <http://civicus.org/index.php/en/expert-perspectives/2035-good-practices-for-cso-participation-at-the-african-commission-on-human-and-peoples-rights>  
Description: This guide offers five guiding principles for civil society organizations to consider when they advocate before the African Commission.

### **African Human Rights Law Journal**

Author: Multiple authors  
Web page: <http://www.ahrhj.up.ac.za/>  
Description: The African Human Rights Law Journal publishes peer-reviewed articles on a variety of human rights issues relevant to Africa. It is published biannually in March and October.

## Jurisprudence

### **African Human Rights Case Law Analyzer**

Web page: <http://caselaw.ihrda.org/>  
Description: The Case Law Analyzer is a comprehensive database of various legal instruments in the African Human Rights System. The database is searchable for decisions and judgments from the African Commission, African Court, Child Rights Committee, and other regional adjudicatory bodies in Africa.

### **World Courts**

Webpage: <http://www.worldcourts.com/>  
Description: An international case law database, World Courts offers an easy way to search cases from the African human rights system and beyond.

### **International Justice Resource Center**

Webpage: <http://www.ijrcenter.org/research-aids/jurisprudence-databases/>  
Description: The Jurisprudence & Document Databases webpage provides updated links to additional sources for researching human rights cases.

