

A Practice Manual



EQUALITY NOW appreciates the support received from an
anonymous donor and the Sigrid Rausing Trust.

© 2017 Copyright. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission of the publisher. For information regarding permission, write to Equality Now.

EQUALITY NOW
P O Box 2018 00202 Nairobi, Kenya
Email: equalitynownairobi@equalitynow.org
www.equalitynow.org

Design & Layout: James Chunguli

TABLE OF CONTENTS

FOREWORD AND APPRECIATION	vi
1. BACKGROUND TO THE MANUAL	1
2. INTRODUCTION - WOMEN'S RIGHTS LITIGATION AT THE AFRICAN COMMISSION	2
2.1 A Synopsis of Women's Rights Issues in Communications	2
2.2 The Jurisdiction of the African Commission in Entertaining Complaints Arising from the Maputo Protocol	6
3. ADMISSIBILITY REQUIREMENTS.....	8
3.1 <i>Locus Standi</i>	9
3.2 Authorship.....	9
3.3 Compatibility with the OAU Charter and African Charter	11
3.4 Nature of Language	12
3.5 Sources of Information	13
3.6 Exhaustion of Local Remedies.....	14
3.7 Submitted within Reasonable Time	19
3.8 Not already Settled	20
4. PROCEDURE FOR FILING AND CONSIDERATION OF COMMUNICATIONS	22
4.1 Preliminary Matters	22
4.1.1 Seizure of the Commission.....	22
4.1.2 Representation of Parties	22
4.1.3 Order of Consideration of Communications	23
4.1.4 Joinder and Disjoinder of Communications	23
4.1.5 Working Groups and Rapporteurs on Communications.....	23
4.1.6 Provisional Measures.....	24
4.2 Admissibility.....	27



4.2.1 Preliminary Objections.....	27
4.2.2 Submissions of Observations	27
4.2.3 Decision on Admissibility	28
4.3 Hearings on Communications	28
4.3.1 Hearings.....	28
4.3.2 Witnesses and Experts	30
4.3.3 Amicus curiae briefs	31
4.3.4 Non-participation of a Member of the Commission in the examination of a Communication	31
4.4 The Evidentiary Practice of the Commission	32
4.5 Amicable Settlement of Complaints.....	33
4.6 Consideration and Decision on the Merits	35
4.6.1 Proceedings.....	35
4.6.2 Decision on the Merits.....	35
4.6.3 Review of Decisions on Communications.....	36
5. THE AFRICAN COMMISSION'S COMMUNICATIONS RECOMMENDATIONS (REMEDIES)	37
6. FOLLOW UP AND IMPLEMENTATION OF THE AFRICAN COMMISSION'S DECISIONS	40
6.1 Nature of the Commission's Decisions	40
6.2 Follow-Up On And Implementation Of Commission's Recommendations	40
7. DEVELOPING A LEGAL AND ADVOCACY STRATEGY FOR COMMUNICATIONS BEFORE THE AFRICAN COMMISSION.....	43
7.1 Summary of Litigants' Guidelines in Submitting a Communication.....	43
7.2 Advocacy Strategy	44
8. BIBLIOGRAPHY.....	47



FOREWORD AND APPRECIATION



We have developed this manual following requests from lawyers who have benefited from training on *using the African Protocol on the Rights of Women when litigating on human rights violations experienced by women*. Equality Now and the Solidarity for African Women's Rights (SOAWR) coalition have convened trainings for lawyers since July 2011 and in the past five years have enhanced the capacity of over 400 lawyers from 31 countries¹ in litigating on women's rights. This manual will therefore lend further support to these and other lawyers who would like to bring cases to the African Commission on Human and Peoples' Rights.

Equality Now (www.equalitynow.org) and SOAWR's (www.soawr.org) prime mission is to contribute to the realization of an enabling environment where women and girls are living their lives and aspiring to their dreams without fear of violence and discrimination. And in the case of Africa, we would like to see women and girls fully enjoying their rights as provided for in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa². We are therefore optimistic that this tool will go a long way in helping with the safeguarding of the human rights upheld in the African Women's Rights Protocol and the African Charter on Human and Peoples' Rights.

This publication will not have been possible without the generous support received from an anonymous donor and the Sigrid Rausing Trust. We are very grateful for their valuable support.

We would like to acknowledge the authors of the publication Sofia Rajab Leteipan and Mariam Kamunyu, both advocates of the high court of Kenya and experts on litigating on women's rights cases, who did a fabulous job in completing it within the strict deadline given to them.

Faiza Jama Mohamed

Director, Africa Office

Equality Now – SOAWR Secretariat



We are therefore optimistic that this tool will go a long way in helping with the safeguarding of the human rights upheld in the African Women's Rights Protocol and the African Charter on Human and Peoples' Rights.

¹ Benin, Burkina Faso, Cape Verde, Cameroon, Congo, Cote d'Ivoire, Democratic Republic of Congo, Djibouti, Gabon, Guinea, Guinea Bissau, Kenya, Lesotho, Liberia, Malawi, Mali, Mauritania, Mozambique, Namibia, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, South Sudan, Sudan, Tanzania, Togo, Uganda, Zambia and Zimbabwe

² https://www.au.int/en/sites/default/files/treaties/7783-sl-protocol_to_the_african_charter_on_human_and_peoples_rights_on_the_rights_of_women_in_africa_12.pdf



1. BACKGROUND TO THE MANUAL

The African Commission on Human and Peoples' Rights ('African Commission' or 'the Commission') is a quasi-judicial body within the African human rights system established by the African Charter on Human and Peoples' Rights ('African Charter' or 'the Charter'). The Commission has two main mandates, one protective in nature and the other promotional in scope. The promotional mandate entails state reporting, the Commission's special mechanisms and a variety of interventions all aimed towards promoting human rights in Africa.

The Commission's protective mandate is the subject of this manual specifically its Individual Communications ('Communications' or 'Complaints') procedure. Violations of human rights are submitted to the attention of the African Commission by way of Communications.

This Manual outlines the procedure for bringing such Communications, as a guide to human rights defenders and litigants who are desirous of making use of this important mechanism of obtaining redress for such violations.

Through the work of Equality Now training lawyers on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) and the utilization of the Communications procedure at the African Commission, it became

evident and necessary to provide lawyers and other litigants with more practical knowledge and a nuanced understanding of the real practicalities in litigating human rights claims at the African Commission.

The goal of the Manual is to go beyond theory, to examine the full spectrum of the litigation process, while unpacking best practices, peculiarities, discrepancies et cetera in the application of the rules of procedure. The Manual is intended to demonstrate in part the nexus between the framing of violations in a communication, evidentiary requirements and the remedies provided by the Commission with a view to identify opportunities for successful communications and mitigate the challenges in litigating human rights claims in the Communications procedure. Where applicable, the manual will offer litigants practical tips towards effectively submitting and pursuing a Communication at the African Commission.

In particular, the Manual explains the following aspects of litigation before the African Commission:

- 1) Admissibility Requirements
- 2) Procedure for filing and consideration of Communications
- 3) Review of Communications



2. INTRODUCTION – WOMEN'S RIGHTS LITIGATION AT THE AFRICAN COMMISSION

2.1 A Synopsis of Women's Rights Issues in Communications

There has been minimal litigation on women's rights at the African Commission. This is reflective of women's exclusion in representation, public life and other spheres. *Stefiszyn* notes that the overview of women's participation in the AU structures reveals that women are absent or inadequately represented within the main policy-making mechanisms. While writing on the Commission she also highlights this lacuna in litigation noting that the majority of decisions which have been seized by the African Commission to date, reflect one of the main criticisms of international law from a feminist perspective in that it is designed to protect members of society from public violations, whereas the majority of violations against women occur in the private sphere.³

This therefore necessitates an exploration of the factors that have led to the scarce decisions dealing with or related to women rights issues.

The most popular criticism leveled is that women's rights NGOs have failed to submit Communications on women's rights issues for the attention of the Commission.⁴ One of the reasons for the



dearth of submission of Communications on the Maputo Protocol is due to the lack of clarity and the attendant perception around the Commission's ability to entertain complaints under the Maputo Protocol.⁵ These views will be probed further to examine the reasons for the same if at all this is the case.

Some scrutiny must first be leveled against the African Charter itself, which is the main framework on which Communications are grounded. The Charter is sparse in specifically addressing women and their rights. Two provisions lend themselves most easily to supporting a cause of action. The first reference is to the non-discrimination clause in Article 2 that provides for the enjoyment of rights without distinction on the basis of sex. The second, Article 18(3), provides:⁶

³ Stefiszyn, K 'The African Union: Challenges and Opportunities for Women' African Human Rights Law Journal 5 (2005) 358-386

⁴ R Murray 'A feminist perspective on reform of the African human rights system' African Human Rights Law Journal 2 (2001) 208

⁵ F Viljoen 'An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' 16 Wash. & Lee J. Civil Rts. & Soc. Just. 11 2009-2010 39

⁶ Article 18(3) African Charter.



The state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

In addition to inappropriately categorizing women with children, this provision is in fact not a stand-alone provision but is a sub-article within Article 18 that primarily addresses the family as well as a State's duty towards the family in upholding morals and traditional values. The consequent inference serves to further reinforce the popular but improper notion that women's rights issues fall in the private realm as "family" or "community" matters even where these issues are in that nature of human rights violations.

The text of the Charter itself would however not provide a significant challenge if the Commission itself had a conscious desire to advance the protection of women's rights. This is for the reason that treaties are often deemed to be living documents to be interpreted and utilized contextually for the advancement of the purpose for which they were developed.

Accordingly, this then leads us to consider the Commission's practice with regards to handling litigation on women's rights issues. The overall conclusion to be made is that the Commission has not effectively utilized its Communications mechanism to advance women's rights and has consequently not developed substantial jurisprudence in this regard. The following excerpt, from a piece based on research

on the Commission's practice on Communications and women, concisely captures this view:⁷

The story we encounter is one in which women are silenced and gender is erased even when it screams to be employed as a central analytical category. If we examine the first narratives emerging from the rulings of the African Commission on Human and Peoples' Rights (ACHPR), there is no attempt to articulate in a meaningful way the specific abuses of which women are victims. Violations of women's rights are reductively interpreted, primarily with reference to rape, and the victims are voiceless and invisible.

An illustration will suffice to corroborate this indictment of the Commission. In *Malawi African Association, Amnesty International & others v Mauritania*⁸ there were allegations of appalling gross and systemic human rights violations ranging from extra judicial killings and detentions to horrific incidences of torture and sexual violence against a specific population. In the Commission's decision, the description of the facts includes: 'As for the women, they were simply raped.'⁹ The callous referencing to sexual violence aside, the Commission noted that the government of Mauritania did not dispute any of the facts except on the issue of slavery and did not produce any evidence to counter these facts. It is therefore astonishing that the Commission failed to find a violation of Article 18(3) or even ascribe the said sexual violence as a violation of women's rights. Instead, they found that the 'acts

⁷ M Prandini Assis 'Women in the rulings of the African Commission on Human and Peoples' Rights' available at <http://www.publicseminar.org/2015/05/women-in-the-rulings-of-the-african-commission-on-human-and-peoples-rights/> (last accessed 17 August 2016).

⁸ *Malawi African Association, Amnesty International & others v Mauritania* Communication No. 54/91-61/91-96/93-98/93-164/97_196/97-210/98 (2000).

⁹ As above, at para 20.



[including torture and rape] were proof of widespread utilization of torture and of cruel, inhuman and degrading forms of treatment and constitute a violation of Article 5.¹⁰ Article 5 prohibits torture, cruel, inhuman or degrading treatment.

This illustration depicts several critical losses from a women's rights perspective in terms of a missed opportunity to demand accountability for sexual violence as well as a failure to establish crucial jurisprudence in a straightforward case (straightforward because the alleged rapes were not denied).

Similarly in *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v Sudan*¹¹ there were several incidences of rape in the Darfur region that could even be deemed as gross and systemic. Just like in the Communication against Mauritania, the Commission found a general violation of Article 5 on torture but failed to expound or articulate on the numerous and specific violations of women's rights which were presented not only by the complainants but also captured in the Commission's own fact-finding report on the human rights situation in Darfur that is relied on in its decision. Admittedly, the complainants did not allege a violation of article 18(3) on discrimination against women. However, as the Commission made several findings of rape it could have made a determination of a violation under article 18(3) and expounded on the gross and systemic incidences of sexual violence that were evident in this case. This approach would have been consistent with their protective mandate and failing to do so amounts to a missed

opportunity in expanding jurisprudence on women's rights violations.

Yet another instance demonstrates a scenario where the Commission dismissed what was arguably a meritorious women's rights Communication on the basis of a technicality. In *Echaria v Kenya*¹² the complainants claimed a violation on the basis of Article 18(3) among others. The alleged violation stemmed from a national court decision that had the implication of affecting all subsequent matrimonial divisions in Kenya to women's disadvantage by failing to recognize their indirect contribution to the acquisition of matrimonial property; one of the prayers included a request for the State to enact legislation to clarify the issue of division of matrimonial property. The Commission dismissed the Communication by finding that it did not satisfy the admissibility requirement in Article 56(5) of being submitted within reasonable time after exhaustion of local remedies. This decision is criticized because one, neither the Charter nor the Commission's Rules of Procedure define "reasonable time". Secondly, the respondent State itself had not contested the complainant's satisfaction of this requirement. Finally, the Commission could have simply requested the complainants to furnish reasons for the supposed delay as opposed to finding the Communication inadmissible on this basis only.

The foregoing missed opportunities serve to assess the Commission's overall lack of zeal to advance women's rights via its Communications procedure. These lapses notwithstanding, a few positive developments can also be observed. The Commission has pronounced itself significantly on women's rights violations in two Communications.

¹⁰ As above, at para 118.

¹¹ *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v Sudan* Communication No. 279/03-296/05 (2009).

¹² *Priscilla Njeri Echaria* (represented by Federation of Women Lawyers, Kenya and International Center for the Protection of Human Rights) v Kenya Communication No. 375/09 (2011).





The first is *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt*.¹³ This Communication concerned the sexual assault and violation of women journalists and others during a protest. The women had thereafter sought domestic remedy in futility leading them to proceed to the Commission. In a landmark decision, the Commission found a violation of Article 18(3) based on among other reasons the conclusion that the violations were perpetrated on the victims on the basis of their gender. Also noteworthy, is that the Commission found that a State can be found to be in violation of the Charter for the actions of non-State actors if it was: complicit in the alleged violations, has sufficient control over those actors, or fails to investigate those violations. This decision is celebrated for substantively discussing gender based and sexual violence as well as discrimination against women. Further, by this decision, the Commission strengthened the standards in holding States accountable for sexual violations. It also serves as crucial precedent and jurisprudence that may guide and influence other women's rights Communications.

Another positive development can be observed more recently in *Equality Now and Ethiopian Women Lawyers Association v Ethiopia*.¹⁴ This Communication was submitted on behalf of Woineshet who at age thirteen had been repeatedly abducted, raped and forced to sign a "marriage contract" by her abductor. *Woineshet* had failed to obtain justice as the national courts had arbitrarily reversed the conviction of her abductor and his accomplices despite clear evidence of violation of Ethiopia's own laws on account of the abductions, the rapes and the forced child marriage. The Commission found a violation of inherent dignity under Article 5 as well as other grounds and in a momentous move ordered Ethiopia to pay US\$150,000.

While this decision favored the complainant, the Commission adopted a narrow interpretation of gender-based discrimination. The Commission found that violations of Article 2 and 18(3) of the Charter on the basis of discrimination had not been established.

In coming to a finding of whether or not discrimination had occurred, the Commission erroneously interpreted its decision in the *Egyptian Initiative for Personal Rights* case to illustrate that gender discrimination is only present in situations where there is clear differential treatment against women as compared to men in a similar situation, holding that discrimination could only be found where the alleged violation was compared to males in similar or in the same circumstance. In cases of violence against women and harmful cultural practices there will often be no obvious comparator.

¹³ *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt* Communication No. 323/06 (2011).

¹⁴ *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia* Communication No. 341/2007 (2016).



Furthermore, one could argue that a specific comparator was needless in this instance, because girls on account of their gender suffer the violations of rape and child marriage by abduction disproportionately and that patriarchal harmful cultural practices and attitudes had prevented *Woineshet* from obtaining justice. Further criticism has been leveled on the Commission's narrow consideration of discrimination wherein ESCR-Net argues:¹⁵

As such, the finding is not as progressive as certain comparative jurisprudence in which courts have adopted a broader approach in analyzing indirect discrimination through a consideration of, among other factors, relevant statistical information, evidence outlining the specific context of vulnerable or disadvantaged groups requiring special protection (such as children), and less strict evidential rules allowing for a shifting burden of proof (i.e. where an applicant alleging indirect discrimination establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent state, which must then show that the difference in treatment is not discriminatory).

Overall, in light of the lapses and missed opportunities, the Communications procedure has not been utilized effectively to the advancement of women's rights.



Litigant's tip:

Litigants are urged to intensify submission of Communications on women's rights violations on the basis of Article 2 and 18(3) of the Charter guided by the Commission's previous jurisprudence.

2.2 The Jurisdiction of the African Commission in Entertaining Complaints Arising from the Maputo Protocol

Article 27 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol) provides that "*The African Court on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application or implementation of the Protocol*", and further provides in Article 32 that "*pending establishment of the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights shall be seized with matters of interpretation arising from the application and implementation of the Protocol*". The application of these provisions has sparked wide debate as to whether the Commission can currently be seized of complaints arising from the Maputo Protocol.

In one interpretation, it is submitted that the letter of the Protocol excludes jurisdiction of the Commission, and confers jurisdiction to the African Court to exclusively interpret the Protocol. It is argued that the Commission was conferred an interim period of jurisdiction

¹⁵ <https://www.escri-net.org/caselaw/2016/equality-now-and-ethiopian-women-lawyers-association-ewla-v-federal-republic-ethiopia>



as an interim measure, so as to ensure that no legal gap existed between the coming into force of the Protocol and the coming into operation of the African Court. In this instance however, the Commission would maintain jurisdiction in the scenarios as follows;

Violation giving rise to a Cause of Action arose before the court was in operation	Commission has jurisdiction
Violation giving rise to a Cause of Action arose before , but continued when the court was in operation	Commission has jurisdiction
Violation giving rise to a Cause of Action arose after the court was in operation	African Court has jurisdiction

An obvious lacuna would be created wherein the jurisdiction of the Commission to entertain complaints under the Maputo Protocol is ousted, and a violation of the Maputo Protocol occurs in a State that has neither ratified the Court Protocol nor signed a declaration under Article 34(6) allowing the Court to receive cases directly from NGOs with observer status and individuals before it.

A contrary, but stronger view, is that the Commission maintains jurisdiction over violations under the Protocol. Following the complimentary mechanisms between the Commission and the Court, envisaged in Article 5 (1) (a) of the Protocol establishing the African Court on Human and Peoples' Rights, providing the Commission with standing before the Court, Viljoen¹⁶ argues that "the

reference to the African Court should be understood as an attempt to clarify that the Court indeed has jurisdiction over complaints submitted to it by the Commission arising from the Protocol on that basis". He proceeds to submit "the need to make this competence explicit came about because the Protocol to the African Charter establishing the Court, which was adopted before the Maputo Protocol, understandably does not include the Protocol as part of the Court's substantive jurisdiction".¹⁷

Therefore, where a State has not ratified the Protocol establishing the Court, a litigant may still take complaints to the Commission under its complaints procedures.

The complementarity relationship between the Court and the Commission provides that the Commission can at any stage of a Communication or in respect to serious or massive violations of human rights, seize the Court with the examination of a communication.¹⁸ Therefore, if a litigant institutes a Communication at the Commission anticipating the transfer of the communication to the Court, a litigant must draft their pleadings/application in compliance with the Court's procedure¹⁹, in that the seizure letter, admissibility and merit submissions, requests for reparations and an indication of evidence to be adduced should be submitted simultaneously.



Litigants Tip:

A litigant must articulate clearly a request to the Commission of transfer of communication to the Court premised on the aforementioned rules.

¹⁶ F Viljoen 'An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' 16 Wash. & Lee J. Civil Rts. & Soc. Just. 11 2009-2010 39

¹⁷ As above.

¹⁸ This complementarity relationship is governed by the Protocol establishing the Court, Rule 29 of the Court's Rules of Procedure and Rules 118-122 of the Commission's Rules of Procedure.

¹⁹ Rule 34 on Commencement of Proceedings



3. ADMISSIBILITY REQUIREMENTS

Before the Commission can consider the substance of a Communication, it must satisfy itself that the matter is one which has been properly brought before it.

The admissibility requirements are meant to ensure that the Commission performs its functions efficiently and judiciously. Indeed, these requirements are enshrined in the African Charter from which the Commission's mandate is derived.

Under Article 56 of the Charter, Communications must be considered by the Commission if they:

- i) Indicate their authors even if the latter request anonymity;
- ii) Are compatible with the Charter of the Organization of African Unity or with the African Charter;
- iii) Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity;
- iv) Are not based exclusively on news disseminated through the mass media;
- v) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
- vi) Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter; and



- vii) Do not deal with cases which have been settled by these States involved in accordance with the principle of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the African Charter.

These requirements are reiterated in the Rules of Procedure of the African Commission on Human and Peoples' Rights and have been further clarified and elaborated in a number of Communications considered by the Commission.

Litigants must bear in mind that the requirements in Article 56 are cumulative; a Communication must comply with all the conditions in order to be found admissible.

We consider these admissibility criteria in greater detail below.



3.1 *Locus Standi*

The Commission has over the years acknowledged the utility²⁰ and adopted the principle of *actio popularis*²¹, allowing a broad range of actors to submit complaints, without them necessarily having any affiliation with the alleged act in violation of the Charter or affiliation with the victims, suffered directly or interested in the outcome of a Communication. The Commission as a matter of practice has allowed the submission of communications by NGOs and individuals who were acting on behalf of victims.²²

A promising practice from the jurisprudence of the Commission emanates from the case of *Odjouoriby Cossi Paul v Benin*²³, wherein in noting that the Complainant had not put his case across logically, appointed INTERIGHTS and the Institute for Human Rights and Development in Africa as pro bono representatives to do so on his behalf.

3.2 Authorship

The Charter prescribes that the identity of the author(s) of the Communication must be clearly indicated.²⁴ In terms of Rule 93 (2) (a) of the Rules of Procedure of the African Commission on Human and Peoples' Rights, the Communication must contain the name, nationality and

signature of the person or persons filing it; or in cases where the Complainant is a non-governmental entity, the name and signature of its legal representative(s).

Where the victim is not the complainant, the victim's name must also be clearly stated in the Communication.²⁵ Nevertheless the jurisprudence of the Commission indicates that a Communication need not state the names of the victims (where they are not the complainants), in respect of allegations of widespread or serious violations of human rights recognizing the practical difficulties in compiling a complete list of names of all the victims.²⁶

Notwithstanding the above, the complainant is entitled to request that their identity not be disclosed, provided this request is expressly indicated in the Communication.²⁷

Anonymity of victims in Communications may be of significant importance in communications alleging violations of women's rights. Protections from backlash and stigmatization, including strict safeguards of confidentiality and anonymity are essential particularly in cases of sexual and gender based violence.²⁸ Anonymity of victims as it applies both to the general public, is important as victims of sexual and gender

²⁰ See *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria*, Communication No.155/96(2001) at para 49.

²¹ A latin expression referring to the general capacity of persons or institutions to instigate proceedings.

²² *Krishna Achutcan and Another (on behalf of Aleke Banda) v Malawi*, Communication No.64/92 (1995) wherein the Complainant submitted a communication on behalf of his father in law, and *Amnesty International submitted on behalf of Orton and Vera Chirwa*, Communications No.68/92 and 78/92 (1995).

²³ Communication No.199/07 (2004) at para 10.

²⁴ Article 56 (1), African Charter on Human and Peoples' Rights.

²⁵ Rule 93 (2) (e). Commission Rules of Procedure.

²⁶ See, for instance, *Malawi African Association v Mauritania*, Communication No. 54/91 (2000); *Amnesty International v Mauritania*, Communication No. 61/91 (2000); *Ms. Sarr Diop, Union Interfricaine des Droits de l'Homme and RADDHO v Mauritania*, Communication No. 98/93 (2000); *Collectif des Veuves et Ayants-droit v Mauritania*, Communication No. 164/97 2(2000); *Association Mauritanienne des Droits de l'Homme v Mauritania*, Communication No. 210/98 (2000).

²⁷ Rule 93 (2) (b), Commission Rules of Procedure. For instance, in *Purohit and Moore v The Gambia*, Communication No. 241/01 (2003), the Communication explicitly indicated that the victims of the violation wished to remain anonymous and in *Samuel T. Muzerengwa & 100 Others v Zimbabwe*, Communication No. 306/05 (2011), the Commission noted that the authors of the communication are identified and do not seek anonymity.

²⁸ *Rule-of-Law Tools for Post-conflict States: National Consultations on Transitional Justice* (United Nations publication, Sales No. 09.XIV.2), p. 20., 'Analytical study focusing on gender-based and sexual violence in relation to transitional justice' Report of the Office of the United Nations High Commissioner for Human Rights.



based violence risk being ostracized from their communities owing to giving accounts of the atrocities committed against them.

Unlike other international mechanisms²⁹, the Commission does not provide protective measures for victims and witnesses. It is therefore incumbent upon a litigant or an organization undertaking litigation of the Communication, to take into account protection of victims and witnesses during the lifespan of a communication.

In interpreting Article 56(1) of the Charter and Rules 93(2)(b) and (e) of the Rules of Procedure, the Commission has held conflicting views on the issue of anonymity of victims in communications, for example in one instance holding that communications should simply indicate the names of those submitting and not those of all the victims of the alleged violations,³⁰ and in another requiring the Complainants to furnish it with the names of the victims on whose behalf they were acting.³¹

The Communication must also indicate an address for receiving correspondence from the Commission and, if available, a telephone number, facsimile number, and

email address.³² In *Ibrahima Dioumessi v Guinea*, the Communication was declared inadmissible, on the basis that the Commission was unable to send the complainants notifications.³³ The Commission held a similar position in *Committee for the Defence of Human Rights v Nigeria* where the Communication was dismissed after sending letters of reminder to the Complainant that had gone unanswered. The Commission interpreted this long silence on the part of the Complainant as "loss of contact" with the Complainant.³⁴ The Commission has to be assured of an author's continued interest in the communication and to be able to request supplementary information if the case requires it.³⁵

Lastly, the author of a Communication need not be a citizen of a State Party to the African Charter in cases where the complaint is brought on behalf of a victim (s) who meets this criterion.³⁶



Litigants Tip:

Where the identity of a victim needs to be protected, the litigant should request the Commission for anonymity.

²⁹ The Rules of Procedure and Evidence of both ad hoc international criminal tribunals for Rwanda and the former Yugoslavia contain specific provisions on the protection of victims and witnesses (See Rules 69, 75 and 81(B) of the Rules of Procedure and Evidence of the ICTY, Rev. 43, 24 July 2009; Rules 34, 65(C), 69, 75, 77 of the Rules of Procedure and Evidence of the ICTR, adopted on 29 June 1995; as amended on 14 March 2008.), as do the equivalent rules of the International Criminal Court, (50 See Rules 17, 19, 74(5), 76, 87 and 88 of the Rules of Procedure and Evidence of the ICC, ICC-ASP/1/3, New York, 3-10 Sept. 2002. See also, Articles 54(3)(f), 57(3)(c), 64(2) and (6), 68 and 93(1)(j) of the ICC Statute, A/CONF.183/9 of 17 July 1998, entered into force 1 July 2002.) Special Court for Sierra Leone, (See Rules 26bis, 34, 65(D), 69 and 75 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended on 7 March 2003.) as discussed in Redress 'Ending Threats and Reprisals Against Victims of Torture and Related International Crimes: A Call to Action' December 2009 available at <http://www.redress.org/downloads/publications/Victim%20Protection%20Report%20Final%2010%20Dec%2009.pdf>

³⁰ *Malawi African Association v Mauritania*, Communication No. 54/91 (2000); *Amnesty International v Mauritania*, Communication No. 61/91 (2000); *Ms. Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO v Mauritania*, Communication No. 98/93 (2000); *Collectif des Veuves et Ayants-droit v Mauritania*, Communication No. 164/97 2(2000); *Association Mauritanienne des Droits de l'Homme v Mauritania*, Communication No. 210/98 (2000) at 79.

³¹ *Purohit and Moore v The Gambia*, Communication No. 241/01 (2003).

³² Rule 93 (2) (c), Commission Rules of Procedure. In *Dioumessi and Others v Guinea*, Communication No. 70/92 (1995), the Commission found a communication to be inadmissible on the ground that it failed to indicate the author's address. Similarly, in *Joana v Madagascar*, Communication No. 108/93 (1996), the Commission found the Communication inadmissible after several unsuccessful attempts to reach the Communication's author. See, further, *Bariqa v Nigeria*, Communication No. 57/91 (1994).

³³ See, in this regard, *Ibrahima Dioumessi and Others v Guinea*, Communication No. 70/92 (1995).

³⁴ See in this regard, *Committee for the Defence of Human Rights v Nigeria*, Communication No. 62/91 (1995).

³⁵ See in this regard, *Monja Joana v Madagascar*, Communication No. 108/93 (1997).

³⁶ In *Baes v Zaire*, Communication No. 31/89 (1995) (Communication brought by a Danish national on behalf of a citizen of the then Zaire).



3.3 Compatibility with the OAU Charter and African Charter

As has been discussed in the previous chapter, a Communication must be compatible with the OAU Charter and the African Charter.³⁷ The compatibility principle connotes that the violations as espoused in a communication should relate to human and peoples' rights as related to the Charter, and not limited to the rights expressed in the Charter. It is arguable that in the application of Article 60 and 61 of the Charter wherein the Commission is mandated '*to draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights*', and take into consideration '*the principles of law (from) other international conventions, laying down rules expressly recognized by member states of the Organization of African Unity*', therefore any human rights instrument which is binding upon the respondent State may be used in support of a communication before the Commission.³⁸ Therefore, litigants submitting communications to the Commission on women's rights should be able to invoke provisions of the Maputo Protocol in elaborating violations therein.

The case of *Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt*,³⁹ for example that was based on the violation of rights of female journalists would have provided an important opportunity to ground a communication on the Maputo Protocol.⁴⁰



The Communication must concern the violation of a right, by a State that is a party to the African Charter, and in respect of acts or omissions occurring after the Charter entered into force in relation to that State Party.⁴¹ The Communication must also be in respect of acts or omissions occurring in a territory controlled by the State Party.

To this end, the Communication must include an account of the act or situation complained of, specifying the place, date and nature of the alleged violations.⁴²

In terms of Rule 93 (2) (g), it should also specify the name of the State (s) alleged to be responsible for the violation of the African Charter, even if no specific reference is made to the article(s) alleged to have been violated. Nevertheless, as a matter of practice, and having regard to the jurisprudence of the Commission, it is prudent to indicate which articles of the Charter have been violated by the acts or omissions complained of.⁴³ The Commission requires a certain degree of

³⁷ Article 56 (2), African Charter. See also, *Kevin Mgwanga Gunme and Another v Cameroon*, Communication 266/03.

³⁸ Gumedze Sabelo 'Bringing communications before the African Commission on Human and People's Rights' (2003) 3 *African Human Rights Law Journal* 119.

³⁹ Communication No.323.06 (2011) at para 87.

⁴⁰ The Complainants made a reference in their arguments to Article 1 of the Maputo Protocol

⁴¹ See, for instance *Ihebereme v United States of America* Communication No. 2/88 (1998), *Prince J N Makoge v United States of America* Communication No. 5/88 (1988) and *George Eugene v United States of America* Communication No. 37/90 (1990).

⁴² Rule 93 (2) (d), Commission Rules of Procedure.

⁴³ See, for instance, *Centre for the Independence of Judges*



specificity, to permit the Commission to take meaningful action.⁴⁴

The Commission will not consider a Communication brought against non-State Parties to the African Charter.⁴⁵ However, a Communication may be brought against a State in respect of its acts or omissions, even if the government in question has since been replaced by another.⁴⁶



Litigants Tip:

Litigants should indicate which articles of the charter have been violated in the communication in addition to citing violations under the Maputo Protocol



Commission has assigned the meaning “to speak slightly of...or to belittle” and “to abuse scornfully or to offend the self respect or modesty of”....The language must be aimed at undermining the integrity and status of the institution and to bring it into disrepute.⁴⁸ At the same time, the rule does not prohibit complainants from candidly setting out alleged violations, provided that this is done in a civil manner.⁴⁹

3.4 Nature of Language

The Communication should not be written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity.⁴⁷ The essence of this rule is to ensure that State Parties to the Charter are not unduly or unfairly ridiculed by natural or legal persons who bring complaints before the Commission. In defining disparaging and insulting language, the

The Commission notes the “subjective” nature of statements that could be disparaging or insulting to one person may not be seen in the same light by another person, however cautions complainants to be respectful in the phrases they choose to use when presenting their communications.⁵⁰ The Commission has opined that a complainant’s use of words such as

⁴⁴ *Ligue Camerounaise des Droits de l'Homme v Cameroon*, Communication No. 65/92 (1997) at para 14. The Commission has also addressed the issue of specificity in *Centre for the Independence of Judges and Lawyers v Algeria* Communications No. 104/94 (1994) noting that the report submitted by the Centre for the Independence of Judges and Lawyers did not give specific places, dates and times of alleged incidents sufficient to permit the Commission to intervene or investigate.

⁴⁵ See, in this regard, *International PEN v Malawi, Ethiopia, Cameroon, Kenya* Communication No. 19/88 (1989) (Communication dismissed on basis of being brought against non-State Parties).

⁴⁶ See, in this regard, *Civil Liberties Organization, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria* Communication No. 218/98 (1998), (Commission observing that governments remain responsible for acts of previous governments even where ‘the situation has improved’). See, *contra*, *Jean Yakovi Degli (au nom du Caporal N. Bikagni), Union Inter-africaine des Droits de l'Homme, Commission Internationale de Juristes v Togo* Communication Nos. 83/92, 88/93, 91/93 (1994) (finding a present government not liable in view of the fact that not only had the acts been committed under a previous administration, but also that the current government had ‘dealt with the issues satisfactorily’).

⁴⁷ Article 56 (3), African Charter. See also *Ligue Camerounaise des Droits de l'Homme v Cameroon*, Communication 65/92 (1997), *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Zimbabwe*, Communication 284/04 (2009) and *Uhuru Kenyatta and William Ruto (represented by Innocence Project Africa) v. Republic of Kenya*, Communication No. 464/14

⁴⁸ *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Zimbabwe*, Communication 284/03 (2009)

⁴⁹ See, for instance, *Ilesanmi v Nigeria* Communication No. 268/2003 (2005) (Communication which alleged, among other things, that the President of Nigeria had been bribed by drug dealers, found to be inadmissible for use of inappropriate language).

⁵⁰ See also, *Kevin Mgwanga Gunme and Another v Cameroon*, Communication 266/03.



“ulterior purpose”, “violator” “irrational” and “made in bad faith” would be nothing but mere allegations, depicting, as they perceive it, the perception of facts which form the basis of the allegations.⁵¹ That notwithstanding, it is not prudent for a litigant to write a communication in disparaging or insulting language as it would tend to distract from the issues.⁵²

In *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Zimbabwe*, The Commission determined that a balance must be struck between the right to speak freely and the duty to protect State institutions, underscoring the guarantee to right to freedom of expression noting that, “Article 56(3) must be interpreted bearing in mind Article 9(2) of the African Charter which provides that ‘every individual shall have the right to express and disseminate his opinions within the law’.”⁵³



The Commission has clarified that this does not mean that news reports may not be cited or relied upon in setting out Communications, but rather than either these reports be independently verified or that these reports be supplemental to information obtained from other credible and reliable sources.⁵⁵ The Commission has previously allowed Communications based on news disseminated through the mass media, where information of the alleged violations was supported by UN Reports as well as reports and Press releases of international human rights organizations.⁵⁶



Litigants Tip:

Litigants should use moderate and respectful language when drafting a communication alleging state violations

3.5 Sources of Information

Communications may not be based exclusively on news disseminated through the mass media.⁵⁴



Litigants Tip:

Each violation must be supported by proof of the violation.

⁵¹ E Ankumah *The African Commission on Human and Peoples' Rights: Practice and Procedures* (1996) 1

⁵² E Ankumah *The African Commission on Human and Peoples' Rights: Practice and Procedures* (1996) 1

⁵³ *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Zimbabwe*, Communication 284/03 (2009) at 91

⁵⁴ Article 56 (4) of the African Charter on Human and Peoples' Rights

⁵⁵ See, in this regard, *Sir Dawda K. Jawara v The Gambia* Communications Nos. 147/95 and 149/96 (2000) at 24-26. The Commission reasons that it would be damaging if it were to reject a communication because some aspects are based on news disseminated through the mass media.

⁵⁶ See *Sudan Human Rights Organisation v The Sudan*, Communication 279/03 (2009) & *Centre on Housing Rights and Evictions v The Sudan*, Communication No. 296/05 at para 92-93, noting that it would be impractical to separate allegations contained in the Communications from the media reports on the conflict (situation in Sudan) and the alleged violations.



3.6 Exhaustion of Local Remedies

The Communication must only be submitted to the attention of the Commission after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.⁵⁷

The essence of the rule requiring exhaustion of remedies is to allow a State a fair opportunity to address the alleged violation, using available domestic mechanisms, before the jurisdiction of international bodies may be invoked. This has been explicitly supported by the Commission, which held that:⁵⁸

The requirement of exhaustion of local remedies is founded on the principle that a government should have notice of a human rights violation in order to have the opportunity to remedy such violations before being called before an international body.

This principle has arguably crystallized into a rule on admissibility owing to its consistent application by the Commission.⁵⁹ It also upholds the principle of complementarity that helps to define the interaction between international and domestic judicial bodies drawing from which an international body should seldom find itself as the court of first instance. Rather, international bodies such as the African Commission should be relied on where a domestic remedy is inaccessible or has failed. This principle is also informed by pragmatism as local remedies are 'normally quicker, cheaper,

and more effective than international ones.'⁶⁰

It must be emphasized that the rule is not meant to have the effect of curtailing access to supranational mechanisms of redress where it is evident that domestic remedies are either unavailable or would be unduly prolonged.

At this juncture the question as to what exactly amounts to a remedy must then be dispensed with. In this regard, the Commission has established a clear rule stating that a local remedy must satisfy three major criteria: The remedy must be available, effective, and sufficient:⁶¹

A remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is sufficient if it is capable of redressing the complaint.

It is also worth noting that the Commission has found that only legal remedies need to be exhausted and not a variety of non-judicial measures that may be envisioned or asserted by the State concerned in their defense. The Commission has held in *Cudjoe v Ghana* and reaffirmed in *Good v Botswana*⁶² that the internal remedy to which Article 56(5) refers entails a remedy sought from courts of a judicial nature. Having said that, it must be noted that if the law of your country provides otherwise e.g. exhaustion of administrative avenues

⁵⁷ Article 56 (5) African Charter.

⁵⁸ *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah v DRC* Communication No. 25/89 (1989), 47/90 (1990), 56/91 (1991) and 100/93 (1993) at para 36.

⁵⁹ For example see also *Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) v Zambia* Communication No. 71/92 (1997) at para 10 and *Anuak Justice Council v Ethiopia* Communication No. 299/05 (2006) at para 47 where this principle is applied in determining admissibility on the question of exhaustion of local remedies.

⁶⁰ *Anuak Justice Council v Ethiopia* Communication No. 299/05 (2006) at para 48.

⁶¹ *Dawda Jawara v The Gambia* Communication No. Communication Nos. 147/95 and 149/96 (2000) at para 31, 32.

⁶² *Alfred Cudjoe v Ghana* Communication No. 221/98 (1999) *Kenneth Good v Botswana* para 14 and Communication No. 313/05 (2010) at para 89.



such as review by a Minister, then such remedies need to be exhausted. In this case the advice to litigants is to be familiar with their legal context.

In practice, the admissibility condition for the exhaustion of local remedies attracts the closest scrutiny and has therefore been the subject of substantial interpretation.

In exploring greater detail, the Commission's jurisprudence elucidates a number of exceptions that exist with regard to the requirement to exhaust local remedies. These include where:

i) Local remedies are non-existent;

Where a remedy is non-existent, the complainant is not required to exhaust local remedies. The non-existence of remedies may manifest in various ways. In one instance, the right that has allegedly been violated may exist in the African Charter but not in the Constitution or laws of the respective State. In such an instance, the complainant may validly plead that a local remedy is non-existent.

In a second scenario, the State might have enacted legal barriers that render local remedies "non-existent" or of a nature that do not require exhaustion. This is the case for a provision whose effect is to invalidate the right of appeal by expressly ousting the jurisdiction of the courts from reviewing executive decrees or decisions of special tribunals. Such provisions have been subject to interpretation in a number

of Communications against Nigeria.⁶³ For instance in one of the cases the contested clause read:⁶⁴

The validity of any decision, sentence, judgment, ... or order given or made, ... or any other thing whatsoever done under this Act shall not be inquired into in any court of law.

In all of the referenced Communications against Nigeria, the Commission found that the ouster clauses render local remedies non-existent, ineffective or illegal.

In yet another scenario, local remedies may technically be available but the complainant is frustrated in their efforts to obtain them. For instance in a case against Zambia which concerned the illegal deportation of several West Africans, the Commission found that:⁶⁵

The mass nature of the arrests, the fact that victims were kept in detention prior to their expulsions, and the speed with which the expulsions were carried out gave the Complainants no opportunity to establish the illegality of these actions in the courts. For Complainants to contact their families, much less attorneys, was not possible. Thus, the recourse referred to by the government under the Immigration and Deportation Act was as a practical matter not available to the Complainants.

⁶³ *Civil Liberties Organization v Nigeria* Communication No. 129/94 (1995), *Civil Liberties Organisation v Nigeria* Communication No. 151/96 (1999), *Constitutional Rights Project (in respect of Rahab Wakumu & others) v Nigeria* Communication No. 60/91 (1995), *Constitutional Rights Project (in respect of Zamani Lakwot & others) v Nigeria* Communication No. 87/93 (1995), *Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria* Communication No. 101/93 (1995), *Civil Liberties Organisation v Nigeria* Communication No. 129/94 (1995).

⁶⁴ *Constitutional Rights Project (in respect of Zamani Lakwot & others) v Nigeria* Communication No. 87/93 (1995) at para 7.

⁶⁵ *Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) v Zambia* Communication No. 71/92 (1997) at para 10 and *Anuak Justice Council v Ethiopia* Communication No. 299/05 (2006) at para 14.



The Commission has subsequently upheld this view in a Communication against Angola also on illegal expulsions where they found that 'those expelled did not have the possibility to challenge their expulsion in court... In view of the foregoing... local remedies were not accessible to the Complainants.'⁶⁶

Notwithstanding the foregoing scenarios, a disclaimer to note is that procedural difficulties to obtain local remedies may not necessarily amount to a finding of the unavailability or non-existence of such remedies. In one Communication against Nigeria,⁶⁷ the complainants had not attempted the local remedies claiming it would have been futile to do so for three reasons: one, that there was a strict interpretation of standing thus making it impractical to seize the courts due to a large number of potential plaintiffs; two, their view that Nigerian courts did not generally regard economic and social rights as legally enforceable; and three, that the Nigerian judiciary process is weak and cases are unduly prolonged. The Commission declared the Communication inadmissible noting that the complainant could have made attempts to utilize the local remedies instead of making presumptions that the complaint would not be heard since Nigerian courts did not generally regard economic and social rights as legally enforceable.

ii) Local remedies are demonstrably ineffective;

According to established jurisprudence of the Commission, a remedy that has no prospect of success does not constitute

an effective remedy. For instance in the well-known case of *Jawara v The Gambia* the prospect of seizing national courts in order to seek redress was nil since their jurisdiction had been ousted via decrees. For this reason among others the Commission found the Communication admissible.⁶⁸

The Commission has also clarified that while a remedy may be effective for the general population, it may be ineffective with regard to a particular group of persons, in which case the affected group of persons need not exhaust local remedies. This was the case in *Purohit v The Gambia* where the Commission found that the remedies in that particular instance were not realistic for the vulnerable/poor and therefore not effective.⁶⁹

On the other hand, being "demonstrably" ineffective means that, mere doubts as to the effectiveness of a local remedy will not absolve the complainant from pursuing it. In this regard the Commission has established that:⁷⁰

It would be setting a dangerous precedent if it were to admit a case based on a Complainant's apprehension over the perceived lack of independence of a country's domestic institutions, in this case the Judiciary. The African Commission does not wish to take over the role of the domestic courts by being a first instance court of convenience when in fact local remedies remain to be approached.

⁶⁶ *Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme and Others v Angola* Communication No. 159/96 (1997) at para 12.

⁶⁷ *Socio Economic Rights and Accountability Project v Nigeria* Communication No. 300/05 (2008).

⁶⁸ *Dawda Jawara v The Gambia* Communication Nos. 147/95 and 149/96 (2000) at para 38.

⁶⁹ *Purohit and Moore v. The Gambia* Communication No. 241/01 (2003).

⁷⁰ *Bakweri Land Claims Committee v Cameroon* Communication No. 260/02 (2004).



A final issue is on the exhaustion of local remedies through third parties. The Commission's position is now that you can't seek exemption through someone else's attempt except in those cases when it is so trite. In those trite instances, you then need to plead the similarities of your case with the one that was unsuccessful in order to prove that you would also not be able to access a remedy. A similar view has been buttressed in a Communication where it was found that:⁷¹

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



Litigants Tip:

Guided by this jurisprudence, litigants must make genuine efforts to exhaust domestic remedies despite their apprehension; unless such remedies can be demonstrated as lacking any prospect of success and therefore wholly ineffective.

iii) Local remedies will be unduly prolonged;

The importance of this exception cannot be gainsaid as it is in fact captured in the express text of the Charter which states in Article 56(5) that 'Communications... shall be considered if they: are sent after exhausting local remedies, if any, unless it is obvious that the procedure is unduly prolonged'.⁷² This provision honors the longstanding maxim that justice delayed is justice denied.

For instance, in *Modise v Botswana*,⁷³ the Commission deemed that local remedies had been exhausted in view of the fact that the domestic legal action had been in abeyance for 16 years. Similarly, in *Mekongo v Cameroon*,⁷⁴ it was found that domestic remedies were unduly prolonged in circumstances where an appeal and petition for clemency had been pending for 12 years. In *Odjouoriby Cossi Paul v Benin*⁷⁵ an appeal which had been pending for over 5 years was unduly prolonged.

While it's largely on a case-by-case basis, there are factors that the Commission considers in determining that a matter is unduly prolonged:

- Nature of the claim/violation
e.g. Complexity of the case
- Situation of the Complainant
- Behavior of the state
- Provision of domestic law

⁷¹ *Obert Chinhamo v Zimbabwe* Communication No. 307/05 (2007) at para 84.

⁷² African Charter on Human and Peoples' Rights art 56(5).

⁷³ *John K. Modise v Botswana* Communication No. 97/93 (2000).

⁷⁴ *Embga Mekongo Louis v Cameroon* Communication No. 59/91 (1995).

⁷⁵ *Odjouoriby Cossi Paul v Benin* Communication No. 199/97 (2004).





Litigants Tip:

This exception to exhaustion of local remedies can also be pleaded alongside Article 7(1)(d) of the African Charter that provides for 'the right to be tried within a reasonable time by an impartial court or tribunal'.⁷⁶ In fact, the decisions of the Commission where they have found a Communication to be admissible on the basis of the matter being unduly prolonged at the domestic level often include a finding of violation of the said Article 7(1)(d).

iv) The Communication concerns serious and widespread violations

When serious and massive violations are alleged, the complainant is not required to exhaust local remedies for various reasons. One is that, where there is a serious human rights situation in a country, 'the government has been sufficiently aware to the extent that it can be presumed to know the situation prevailing within its own territory as well as the content of its international obligations'.⁷⁷ This knowledge on the part of the State therefore satisfies the rationale behind exhaustion of local remedies. As has been discussed, the main principle that underlies the requirement for exhaustion of local remedies is that a government should have notice of a violation in order to have an opportunity to remedy it before being brought before an international body.

Secondly, the Commission has drawn a distinction in its jurisprudence between instances where the victims are identifiable and the case of serious and massive violations where it may be impossible for the Complainants to identify all the victims. In the former case, the Commission demands the exhaustion of internal remedies but in the latter case the Commission has made an exception.

Third, in situations of serious human rights violations, internal remedies that could have been available may simply be non-existent or may not satisfy the criteria of effectiveness.

An exemption has also developed such that this sole criterion may not exempt the pursuit of local remedies. This is in recognition of the fact that the Commission does not have exclusive jurisdiction over cases of serious and massive violations.



Litigants Tip:

A litigant should prove how the local jurisdiction is limited to handle a case involving serious and widespread violations. For instance you could demonstrate how the operations of your country's judiciary deprives it of the capacity to deal with that instance of serious and massive violations. E.g. incapacity to deal with a class action of 20,000 victims based on case load, availability of presiding officers, stringent rules such as a requirement to list everyone's name in a massive class suit where it's impossible to do so et cetera

⁷⁶ African Charter on Human and Peoples' Rights art 7(1)(d). Art 7 provides that every individual shall have the right to have his cause heard and this comprises several factors including sub-article (1)(d) on reasonable time.

⁷⁷ *Amnesty International and Others v Sudan* Communication Nos. 48/90, 50/91, 52/91, 89/93 (1999) at para 33.



v) The victim's life, safety or liberty would be endangered by the attempt to seek local remedies;

The Commission has acknowledged that an individual may be unable to pursue any domestic remedy following their flight for fear of their life.⁷⁸ In one Communication where the Complainant's client was in hiding and feared for their life, the Commission found that 'it would not be proper to insist in the fulfillment of this requirement [to exhaust local remedies]'.⁷⁹

This is also the case where the complainant's liberty is at stake. In *Alhassan Abubakar v. Ghana*, the complainant was a political prisoner who had escaped from an unlawful detention and was residing outside the country. The complainant managed to prove that his return to Ghana would lead to a further arrest and detention. In light of this the Commission found that:⁸⁰

Considering the nature of the complaint it would not be logical to ask the Complainant to go back to Ghana in order to seek a remedy from national legal authorities. Accordingly, the Commission does not consider that local remedies are available for the Complainant.

This exception also applies where the victim of the violation has since died.

vi) The victim is unable to obtain legal representation.

In this regard the Commission has established that exhaustion of local

remedies requires one to have access to the said remedies but if victims did not have legal representation it would be difficult to access domestic remedies.⁸¹

3.7 Submitted within Reasonable Time

The Communication must be submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter.⁸²

The Commission's Communication Procedure Information Sheet No.3 further elucidates:⁸³

The communication should be submitted to the Commission within a reasonable period from the time local remedies are exhausted. After the exhaustion of local remedies, or where the complainant realises that such remedies shall be unduly prolonged, he or she can submit the complaint to the Commission immediately. The Charter does not give a time limit but talks of reasonable time. It is always advisable to submit a complaint as early as possible.

Unlike the other two regional systems (Inter-American and European) the African Charter does not prescribe a time limit. According to *Viljoen*, this deviation by the drafters of the Charter from the rigid six-month rule is by design for reasons varying from the low level of awareness of the Communications procedure, the varying levels of

⁷⁸ *Rights International v Nigeria* Communication No. 215/98 (1999) at para 24.

⁷⁹ *Kazeem Aminu v Nigeria* Communication No. 205/97 (2000) at para 13.

⁸⁰ *Alhassan Abubakar v. Ghana* Communication No. 103/93 (1996) at para 6.

⁸¹ *Curtis Francis Doebller v Sudan* Communication No. 236/2000 (2003) at para 27.

⁸² Article 56 (6), African Charter; Rule 93 (2) (h), Commission Rules of Procedure.

⁸³ Available at http://www.achpr.org/files/pages/communications/procedure/achpr_communication_procedure_eng.pdf 6. (last accessed 11 August 2016).



difficulty African complainants may find themselves in as well as the slow pace of court processes in most African countries.⁸⁴ In essence, the open time limit was to enhance access to justice well suited to the context in Africa.

In the beginning, the Commission applied this open time limit with the requisite flexibility, but in more recent times, the Commission 'incorrectly and inappropriately imported the inflexibility of the other two regional systems into its findings'⁸⁵ where it concludes:⁸⁶

Going by the practice of similar regional human rights instruments, such as the Inter-American Commission and Court and the European Court, six months seem to be the usual standard. This notwithstanding, each case must be treated on its own merit. Where there is good and compelling reason why a Complainant could not submit his/her complaint for consideration on time, the Commission may examine the complaint to ensure fairness and justice.

In doing so, the Commission seems to lean towards a *de facto* six-month rule with the flexible time limit being relegated to an exception. Following this interpretation, the Commission has proceeded to hold arguably meritorious cases inadmissible on the singular basis of not being submitted within reasonable time.⁸⁷

Nonetheless, the Commission has been seen to exhibit flexibility in some instances. In *Shumba v Zimbabwe* the Commission

admitted a communication filed 16 months after the violation stating:⁸⁸

In several communications, the African Commission has admitted communications that have been brought before the African Commission more than 16 months after the violation is reported to have taken place or domestic remedies were exhausted.

The Commission can therefore be seen to somewhat depart from the initial *Majuru* decision and the factors that the Commission now uses in determining reasonable time include:

- Nature of the claim/violation
- Situation of the Complainant
- Behavior of the state
- Provision of domestic law



Litigants Tip:

Because the jurisprudence in this regard is evolving and therefore inconsistent; litigants wishing to submit communications that may possibly be deemed "out of time" will do well to canvass reasons for doing so.

3.8 Not already Settled

The final admissibility requirement is that the Communication must not deal with cases that have been settled by

⁸⁴ F Viljoen *International Human Rights Law in Africa* (2012) 320.

⁸⁵ As above, 320.

⁸⁶ *Michael Majuru v Zimbabwe* Communication No. 308/05 (2008) at para 109.

⁸⁷ See for instance *Majuru v Zimbabwe* above and *Priscilla Njeri Echaria v Kenya* Communication No. 375/09 (2011).

⁸⁸ *Gabriel Shumba v Zimbabwe* Communication No. 288/04 (2012) at para 44.



the States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the African Charter.⁸⁹

To this end, in terms of Rule 93 (2) (j) of the Commission's Rules of Procedure, the Communication must contain an indication that the complaint has not been submitted to another international settlement proceeding as provided in Article 56 (7) of the African Charter.

This requirement envisages cases that have been settled as well as those that are still being considered/pending in another African Union (AU) or United Nations (UN) international dispute settling mechanism; both are deemed inadmissible. The Commission has invoked this requirement in a few instances⁹⁰ where the Communications were deemed inadmissible on the grounds that a similar complaint had been lodged with the UN Human Rights Committee.

Further, the Commission clarifies in its Communication Procedure Information Sheet No.3 that 'submission of a complaint to an NGO or an Inter - Governmental Organisation... does not render a communication inadmissible'.⁹¹

This is also the case for complaints submitted to non-judicial bodies/organs such as UN Special Rapporteurs. Related to this, in *SHRO & COHRE v Sudan* the State argued that the matter had already been settled by virtue of resolutions that had been issued on the matter by the UN

Security Council and the Commission on Human Rights (present day UN Human Rights Council). The Commission found that while the role played by UN agencies and organs is important, 'these organs are not the mechanisms envisaged under Article 56(7). The mechanisms envisaged under Article 56(7) of the Charter must be capable of granting declaratory or compensatory relief to victims, not mere political resolutions and declarations.'⁹²

The Commission has also interpreted what it means for a matter to be "settled". In one Communication against Egypt, the State submitted that the communication should be declared inadmissible on the grounds that the Working Group of the United Nations Sub-Commission on the prevention and protection of minorities seized of the matter decided not to entertain the case. The Commission's finding clarified:⁹³

The decision of the United Nations sub-commission not to take any action and therefore not to pronounce on the communication submitted by the Complainant does not boil down to a decision on the merits of the case and does not in any way indicate that the matter has been settled.

Accordingly, the overall conclusion is that any Communication that has not been considered on the merits by another international adjudication body with a human rights mandate therefore satisfies the requirement in Article 56(7).

⁸⁹ Article 56 (7), African Charter.

⁹⁰ See in this regard, *Amnesty International v Tunisia* Communication No. 69/92 (1993) and *Mpaka-Nsusu Andre Alphonse v Zaire*, Communication No. 15/88 (1994).

⁹¹ Available at http://www.achpr.org/files/pages/communications/procedure/achpr_communication_procedure_eng.pdf 6. (last accessed 11 August 2016).

⁹² *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v Sudan* Communication No. 279/03-296/05 (2009) para 105.

⁹³ *Bob Ngozi Njoku v Egypt* Communication No. 40/90 (1997) para 56.



4. PROCEDURE FOR FILING AND CONSIDERATION OF COMMUNICATIONS

4.1 Preliminary Matters

4.1.1 Seizure of the Commission

The Communication must be addressed to the Chairperson of the Commission through the Secretary by any natural or legal person.⁹⁴

The Secretary must then ensure that the Communication meets the admissibility requirements under Article 56 (3) of the African Charter.⁹⁵ Where, for some reason, the Communication does not contain some of the required documents and information, the Secretary must request the Complainant to furnish the same.⁹⁶ Once the Secretariat is satisfied that all necessary information has been furnished, it must transmit the file to the Commission, which must make a decision on seizure on the Communication.⁹⁷

In order for the Commission to be seized with the communication, the communication must allege a *prima facie* violation of the provisions of the Charter.⁹⁸ As no oral arguments are made in this stage of a communication, litigants must ensure the communication contains information on compliance with admissibility requirements.



4.1.2 Representation of Parties

States Parties must be represented before the Commission by their representatives.⁹⁹ Natural or legal persons may either appear in person or be represented by their appointed representative before the Commission.¹⁰⁰

The Commission does not offer legal assistance to the complainants, but may play a facilitative role towards improving complainants' or victims' access to justice under its mechanism.¹⁰¹ In terms of Rule 104 (1), the Commission may, either at the request of the author of the communication or at its own initiative, facilitate access to free legal aid to the author in connection with

⁹⁴ Rule 93 (1), Commission Rules of Procedure.

⁹⁵ Rule 93 (2), Commission Rules of Procedure.

⁹⁶ Rule 93 (4), Commission Rules of Procedure.

⁹⁷ Rule 93 (5), Commission Rules of Procedure.

⁹⁸ S Gumedze 'Bringing communications before the African Commission on Human and People's Rights' (2003) 3 *African Human Rights Law Journal* 118

⁹⁹ Rule 94 (1), Commission Rules of Procedure.

¹⁰⁰ Rule 94 (2), Commission Rules of Procedure.

¹⁰¹ See Guidelines on the submission of communications, Information Sheet No 2 of the African Commission on Human and Peoples Rights and In *Odjoribiy Cossi Paul v Benin* Communication No.199/97 (2004) noting that the Complainant had not put his case across logically, the Commission facilitated INTERIGHTS and the Institute for Human Rights and Development in Africa to represent the Complainant in the proceedings.



the representation of the case. Free legal aid may only be facilitated where the Commission is convinced: i) that it is essential for the proper discharge of the Commission's duties, and to ensure equality of the parties before it; and ii) that the author of the Communication has no sufficient means to meet all or part of the costs involved.¹⁰² In case of urgency or when the Commission is not in session, its Chairperson may exercise the powers conferred on the Commission in this regard.¹⁰³ However, as soon as the Commission is in session, any action that has been taken in this respect must be brought to its attention for confirmation.¹⁰⁴

4.1.3 Order of Consideration of Communications

Unless otherwise decided, the Commission must consider Communications in the order in which they have been received by the Secretary.¹⁰⁵

4.1.4 Joinder and Disjoinder of Communications

Where two or more Communications against the same State Party address similar facts, are inter-related or reveal the same pattern of violation of rights, the Commission may join them and consider them together as a single Communication.¹⁰⁶ In Communications 27/89, 46/91, 49/91 and 99/93, *Organisation Mondiale Contre la Torture*

and Others v Rwanda, the commission joined four communications, which made reference to the expulsion from Rwanda of Burundi nationals who had been in Rwanda for many years for allegedly being a national risk due to their 'subversive activities', as well as the arbitrary arrest and extra judicial execution of Rwandans, mostly belonging to the Tutsi ethnic group. Similarly, the Commission enjoined Communications 54/91, 61/91, 98/93, 96/93, 164/97 and 198/97 that alleged cases of grave and massive violations of human rights with similar fact patterns attributed to the Mauritanian State.

This notwithstanding, the Commission may decide not to join the Communications if it is of the opinion that the joinder will not serve the interest of justice.¹⁰⁷

In addition, where the Commission decides to join two or more Communications, it may subsequently, where it deems appropriate, decide to disjoin the Communications.¹⁰⁸

4.1.5 Working Groups and Rapporteurs on Communications

The Commission must appoint a Rapporteur for each Communication from among its members.¹⁰⁹

The Commission may also establish one or more working groups from its membership to consider questions of

¹⁰² Rule 104 (2), Commission Rules of Procedure.

¹⁰³ Rule 104 (3), Commission Rules of Procedure.

¹⁰⁴ Rule 104 (3), Commission Rules of Procedure.

¹⁰⁵ Rule 95, Commission Rules of Procedure.

¹⁰⁶ Rule 96 (1), Commission Rules of Procedure.

¹⁰⁷ Rule 96 (2), Commission Rules of Procedure.

¹⁰⁸ Rule 96 (3), Commission Rules of Procedure.

¹⁰⁹ Rule 97 (1), Commission Rules of Procedure.



seizure, admissibility and the merits of any Communication(s) and to make recommendations to the Commission.¹¹⁰

The Commission must consider the recommendations of the Rapporteur(s) and/or the Working Group(s) in making a decision on a Communication.¹¹¹

4.1.6 Provisional Measures

Through its Rules of Procedure, the Commission had formalized its powers to indicate provisional measures in urgent cases so as to preserve the subject matter of a communication pending before it.¹¹² A provisional measure is a procedure roughly equivalent to an interim order in national systems.¹¹³ The purpose of provisional measures is to preserve the respective rights of either party to a Communication.¹¹⁴ The Commission may adopt such measures *proprio motu*, or upon request based on its discretion.¹¹⁵

In terms of Rule 98 (1) of the Commission's Rules of Procedure, at any time after the receipt of a Communication and before a determination on the merits, the Commission may, on its initiative or at the request of a party to the Communication, request that the State concerned adopt Provisional Measures to prevent irreparable harm to the victim or victims of the alleged violation as urgently as the situation demands. When



submitting a communication in such a case, it is advisable for a litigant to clearly state whether a communication should be treated as an 'emergency' in order to give directions to the commission.¹¹⁶ In *Constitutional Rights Project v Nigeria* the Commission requested a stay in the execution of individuals who were sentenced to death in Nigeria to avoid irreparable prejudice pending its consideration.¹¹⁷ In contrast, in *Tsatsu v Ghana*¹¹⁸, the Commission declined a request for provisional measures, as the complainant did not demonstrate the irreparable damage that would be caused if the provisional measures were not taken.¹¹⁹ Therefore irreparable damage or harm to the victims must be specifically pleaded and demonstrated by a litigant.

Where the Commission is not in session at the time that a request for Provisional Measures is received, the Chairperson, or in his or her absence, the Vice-

¹¹⁰ Rule 97 (2), Commission Rules of Procedure.

¹¹¹ Rule 97 (3), Commission Rules of Procedure.

¹¹² CA Odinkalu 'The role of case and complaints procedures in the reform of the African regional human rights system' *African Human Rights Law Journal* (2001) 1 235.

¹¹³ R Shabtai, T D Gill 'The World Court: What is and how it works' (1989) at 95.

¹¹⁴ J A Frowein 'Provisional Measures by the International Court of Justice- The *La Grand* Case

¹¹⁵ D Juma 'Provisional Measures under the African Human Rights System: The African Court's Order Against Libya' *Wisconsin International Law Journal* Vol.30, No.2 358

¹¹⁶ S Gumede 'Bringing communications before the African Commission on Human and People's Rights' (2003) 3 *African Human Rights Law Journal* 118

¹¹⁷ Communication No. 60/91 (1995) cited in Gumede at 139.

¹¹⁸ Communication No.322/06 (2006)

¹¹⁹ Communication No. 322/06 (2006) at para 18.



Chairperson, must take the decision on the Commission's behalf and must so inform members of the Commission.¹²⁰

It is not common practice, however in certain cases the Commission has heard oral arguments from the Complainants and the State on the question of provisional measures.¹²¹

After the request for Provisional Measures has been transmitted to the State Party, the Commission must send a copy of the letter requesting Provisional Measures to the victim, the Assembly, the Peace and Security Council, and the African Union Commission.¹²²

The Commission must request the State Party concerned to report back on the implementation of the Provisional Measures requested.¹²³ Such information must be submitted within fifteen (15) days of the receipt of the request for Provisional Measures.¹²⁴ In certain circumstances, the Commission has conducted oral hearings on the status of implementation of provisional measures.¹²⁵

There are divergent opinions on whether or not provisional measures are binding. However, consensus is growing among legal practitioners that by virtue of the principle of *pacta sunt servanda*¹²⁶ and

the application of Article 1 of the African Charter¹²⁷, provisional measures are binding, and States have an obligation to comply and implement them.¹²⁸ The Commission has asserted itself on the binding nature of provisional measures, holding that a State's willful ignorance of its obligations to institute provisional measures violated Article 1 of the Charter.

This notwithstanding, an inherent shortcoming in granting provisional measures is an overreliance on goodwill in the part of the State to ensure compliance with provisional measures.¹²⁹ The Commission's recommendations for provisional measures are often not adhered to and blatantly disregarded by State parties with no attendant consequences.¹³⁰ In *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organization v. Nigeria* the communication alleged violations of rights to life, freedom of assembly and association, personal liberty, fair trial and freedom from cruel and degrading treatment, prompting the Commission to issue provisional measures to prevent the imminent threat of irreparable harm to stay the execution of the death penalty. Regrettably, Ken Saro-Wiwa and his co-defendants were nonetheless executed by the Nigerian

¹²⁰ Rule 98 (2), Commission Rules of Procedure. See, in this regard, *Open Society Justice Initiative (on behalf of Pius Njawe Noumeni) v Cameroon* Communication No. 290/04 (2006).

¹²¹ *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* Communication No. 284/03 (2009) at para 28.

¹²² Rule 98 (3), Commission Rules of Procedure.

¹²³ Rule 98 (4), Commission Rules of Procedure.

¹²⁴ Rule 98 (4), Commission Rules of Procedure.

¹²⁵ *Ahmed Ismael and 528 Others v The Arab Republic of Egypt* Communication No. 467/14 (2015) at 28

¹²⁶ Explained in Article 26 of the Vienna Convention on the Law of Treaties; every treaty in force is binding upon the parties to it and must be performed in good faith.

¹²⁷ That provides that member states shall recognize the rights under the Charter and shall undertake to adopt legislative or other measures to give effect to them. Additionally, the International Court of Justice Case of *LaGrand (Germany v United States of America)* judgment of 27 June 2001, available at <http://cij-icj.org>

¹²⁸ As discussed by Mukundi 474-475 in the application of Article 31(1) of the Vienna Convention.

¹²⁹ D Juma 'Provisional Measures under the African Human Rights System: The African Court's Order Against Libya' *Wisconsin International Law Journal* Vol.30, No.2 358

¹³⁰ G Mukundi 'Twelve Years of Elusive Enforcement' *African Human Rights Law Journal* (2006) 6 467. Other instances where States have failed to abide by requests for provisional measures include *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Zimbabwe* Communication No. 284/03 (2009), *Open Society Justice Initiative (on behalf of Pius Njawe Noumeni) v Cameroon* Communication No. 290/04 (2006), *Centre for Minority Rights Development and Minority Rights Group (on behalf of the Endorois) Communication v Kenya* Communication No. 276/03 (2009) and *Egyptian Initiative for Personal Rights and Interights v Egypt* Communication No. 334/06 (2011).



State.¹³¹ Similarly, in *Liesbeth Zegveld and Mussie Ephrem v Eritrea*¹³², 11 detainees and victims of human rights violations, whom the Commission had recommended to be released immediately, remained *incommunicado*. In *Amnesty International v Zambia*¹³³, the Commission issued a request for provisional measures against unlawful deportation of the Complainants, and even as the Commission considered the merits of the case and found that the deportations violated the African Charter, the provisional measures remained unenforced.¹³⁴ In contrast to the *Saro-Wiwa* case, is that of *Ahmed Ismael and 528 Others v The Arab Republic of Egypt*¹³⁵ wherein the Commission found that Egypt had complied with its provisional measures order to suspend death sentences of the victims in question.

Rule 118 (2) makes provision for the Commission to refer a communication to the African Court on Human and People's Rights in situations where it has made a request for provisional measures against a State Party and that State has not complied. The case of *African Commission on Human and People's Rights v Kenya*¹³⁶ demonstrates a proactive approach taken by the Commission in relation to non-compliance or unwillingness of a State party to comply with its recommendations

on provisional measures.¹³⁷ The case comprised an application to the African Court on Human and People's Rights based on Kenya's non-compliance with the Commission's provisional measures provided in *Centre for Minority Rights Development – Kenya and Minority Rights Group International (on behalf of the Ogiek Community of the Mau Forest) v Kenya* Communication 381/09.¹³⁸ Indeed, provisional measures by the African Court provide an additional bulwark to complement and reinforce the African Commission's protective mandate.¹³⁹ However, doubt has often been cast on whether the juridical status and the binding nature of African Court decisions induce better compliance.¹⁴⁰

In conformity with standard international practice¹⁴¹, and as provided under Rule 98 (5), the granting of such measures and their adoption by the State Party concerned must not constitute a prejudgment on the merits of a Communication.



Litigants Tip:

Litigants should specifically request provisional measures where necessary and requests should be "reasonable" as set out above.

¹³¹ G Naldi 'Interim measures of protection in the African system for the protection of human and people's rights' *African Human Rights Law Journal* (2002) 2 7, notes that in keeping with the *raison d'être* of interim measures, the Commission has an expectation that the Respondent States would stay proceedings until such a time as it pronounced the matter before it. In contrast with the current Rules of Procedure, Rule 111 of the former Rules of Procedure provided an additional ground for the consideration of interim (provisional) measures being the proper conduct of proceedings before it.

¹³² Communication No. 250/02 (2003) as discussed in G Mukundi 'Twelve Years of Elusive Enforcement' *African Human Rights Law Journal* (2006) 6 467.

¹³³ Communication No. 211/98 (1999).

¹³⁴ D Juma 'Provisional Measures under the African Human Rights System: The African Court's Order Against Libya' *Wisconsin International Law Journal* Vol.30, No.2 361.

¹³⁵ Communication No. 467/14 (2015).

¹³⁶ In the Matter of African Commission on Human and Peoples' Rights v Republic of Kenya Application 006/12.

¹³⁷ Guide to Complementarity within the African Human Rights System, Pan African Lawyers Union (PALU) (2014).

¹³⁸ Press Release on the upcoming Public Hearing of Application 006/2012 – *African Commission on Human and Peoples' Rights v. The Republic of Kenya*, from 27 to 28 November 2014, in Addis Ababa, Ethiopia last accessed on 22nd August 2016. See <http://www.achpr.org/press/2014/11/d235/>

¹³⁹ Guide to Complementarity (n 38 above)

¹⁴⁰ D Juma 'Provisional Measures under the African Human Rights System: The African Court's Order Against Libya' *Wisconsin International Law Journal* Vol.30, No.2 351

¹⁴¹ See G Naldi 'Interim measures of protection in the African system for the protection of human and people's rights' *African Human Rights Law Journal* (2002) 2 6 wherein Rule 86 of the UN Human Rights Committee is discussed.



4.2 Admissibility

4.2.1 Preliminary Objections

All Communications must comply with the requirements of Admissibility under Article 56 of the Charter, which are cumulative.¹⁴² Preliminary objections can therefore be on the basis of non-compliance with Article 56 of the Charter.¹⁴³

Nevertheless, under Rule 103, any party who intends to raise a preliminary objection at the stage of admissibility or before the Commission takes a decision on the merits of the Communication, must do so not later than thirty (30) days after receiving notification to submit on admissibility or on the merits.¹⁴⁴ The Commission must communicate the objection to the other party within fifteen (15) days.¹⁴⁵

A party who intends to respond to a preliminary objection raised by the other party must submit a written response not later than thirty (30) days after the Secretary to the Commission has transmitted the objection to that party.¹⁴⁶

Where no response to a preliminary objection is received within the stipulated period, the Commission must proceed with the consideration of the preliminary objection on the basis of the available information.¹⁴⁷

In addition, when the Commission receives a preliminary objection, it must first of all determine this objection be-

fore any other question relating to the Communication.¹⁴⁸

4.2.2 Submissions of Observations

In terms of Rule 105 (1), when the Commission has decided to be seized of a Communication pursuant to the present rules, it must promptly transmit a copy of the complaint to the Respondent State. It must simultaneously inform the Complainant of the decision on seizure, and request the Complainant to present evidence and arguments on admissibility within two months.¹⁴⁹

Upon receipt of the Complainant's observations on admissibility, the Secretary must transmit a copy to the respondent state and request the latter to make a written submission, containing its arguments and evidence on admissibility, within two months of its receipt of the Commission's request.¹⁵⁰ The Secretariat must, within a week of receipt of the state's submission, provide the Complainant with a copy.¹⁵¹

Upon receiving the observations of the Respondent State on Admissibility, the Complainant may comment on the observations within one month of receipt.¹⁵²

Under Rule 105 (4), in conformity with Rule 88(6), the Commission, while determining Admissibility may ask the parties to present supplementary observations in an oral hearing.

¹⁴² Rule 106, Commission Rules of Procedure.

¹⁴³ *Luke Munyandu Tembani and Benjamin John Freeth v Angola and 13 Others* Communication No. 409/12 (2013) wherein one of the respondent States challenged the jurisdiction of the Commission to determine a complaint filed against another sub-regional organ, and whether it has a mandate to proceed to issue an order against SADC and its member states.

¹⁴⁴ Rule 103 (1), Commission Rules of Procedure.

¹⁴⁵ Rule 103 (1), Commission Rules of Procedure.

¹⁴⁶ Rule 103 (2), Commission Rules of Procedure.

¹⁴⁷ Rule 103 (3), Commission Rules of Procedure.

¹⁴⁸ Rule 103 (4), Commission Rules of Procedure.

¹⁴⁹ Rule 105 (1), Commission Rules of Procedure.

¹⁵⁰ Rule 105 (2), Commission Rules of Procedure.

¹⁵¹ Rule 105 (2), Commission Rules of Procedure.

¹⁵² Rule 105 (3), Commission Rules of Procedure.



4.2.3 Decision on Admissibility

Once it has considered the positions of the parties, the Commission must make a decision on the admissibility of the Communication and the Secretary must inform the parties accordingly.¹⁵³ In accordance with the practice of the Commission, in the face of a State's failure to address itself to the complaint filed against it, the Commission will nonetheless take a decision on admissibility in accordance with its rules of procedure. This has been affirmed in *Institute for Human Rights and Development in Africa v Angola*¹⁵⁴, *Lawyers for Human Rights v The Kingdom of Swaziland*¹⁵⁵ among other communications.¹⁵⁶ Moreover, where a Respondent State does not expressly dispute a Complainant's assertion of compliance with admissibility standards, the Commission holds the view that the Respondent State agrees with the Complainant that they have been fulfilled.¹⁵⁷

Once a Communication has been declared admissible, the Commission shall inform the parties and defer the Communication to the next session for consideration on the merit.¹⁵⁸

The Commission's decisions on the inadmissibility of Communications must be notified to the parties and attached to its Activity Report.¹⁵⁹

Where the Commission has declared a Communication inadmissible, this decision may be reviewed at a later date, upon the submission of new evidence, contained in a written request to the Commission by the author.¹⁶⁰ It is not the practice of the African Commission to reconsider a decision declaring a communication admissible.¹⁶¹

4.3 Hearings on Communications

4.3.1 Hearings

The Communications procedure of the African Commission is essentially via the written medium such that decisions on admissibility and merits can be made solely on the basis of written submissions. Comparatively, this is the norm and practice of other international treaty monitoring bodies with a quasi-judicial function.

Nonetheless, the Commission also entertains oral hearings. Rule 99 (1) of the Commission's Rules of Procedure provides that at the initiative of the Commission or at the request of one of the parties, a hearing may be held on a Communication. In practice, these hearings are held for the admissions and merits stage but particularly for the latter.

¹⁵³ Rule 107 (1), Commission Rules of Procedure. The time taken for the Commission to take a decision in this respect has varied greatly. In one case a decision on admissibility was rendered in one month – see *Amnesty International v Zambia* Communication No. 212/98 (1999). In another case, *Peoples' Democratic Organization for Independence and Socialism v The Gambia* Communication No. 44/90 (1996), the decision on admissibility was only rendered after 5 years.

¹⁵⁴ Communication No. 292/04 (2008) at para 34.

¹⁵⁵ Communication No. 414/12 (2013) at para 35.

¹⁵⁶ See *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria*, Communication No.155/96 (2001) at para 40, *Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme and Others v Angola* Communication No. 159/96 (1997) at paras 9,10.

¹⁵⁷ *Nixon Nyikadzino (Represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe* Communication No. 340/07 (2012) at para 67.

¹⁵⁸ Rule 107 (2), Commission Rules of Procedure.

¹⁵⁹ Rule 107 (3), Commission Rules of Procedure.

¹⁶⁰ Rule 107 (4), Commission Rules of Procedure.

¹⁶¹ See *Leisbeth Zegveld and Mussie Ephrem v Eritrea* Communication No. 250/02 (2003) at para 45, in reference to the former Rule 118(2) of the African Commission Rules of Procedure. See also *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* Communication No. 276/03 (2009) at para 78 where the Commission declined to reopen arguments on admissibility of a communication upon request of the Respondent State.



During hearings, the Commission permits oral presentations by the parties on new or additional facts or arguments or in answer to any questions that it may have concerning all issues relating to the Communication.¹⁶² Though it must be emphasized that the Commission's decisions are mainly premised on written submissions.

During a hearing on a Communication or at any stage prior to the conclusion of the matter, the following may be considered:¹⁶³

- i) the verification of the facts;
- ii) initiation of a friendly settlement;
- iii) consideration on the merits; or
- iv) any other matter pertinent to the Communication.

A party requesting a hearing must do so at least ninety (90) days before the beginning of the session in which the Communication is going to be considered.¹⁶⁴ In the letter, the party enumerates why a hearing would be useful towards the determination of the Communication. The Rapporteur of the Commission, in consultation with the Bureau of the Commission, must decide upon the request.¹⁶⁵ The Secretary must inform both parties of the decision on the granting of a hearing within 15 days of this decision.¹⁶⁶

Where the request for a hearing is accepted, the notification of the hearing

must include the dates and venue of the session, and period of the session during which the hearing is likely to take place.¹⁶⁷

Litigants should take note that while a hearing may possibly be beneficial towards strengthening their arguments, it also has a few possible shortfalls. The first is that a hearing entails traveling to the Commission's seat for the respective session; the second is that the process will possibly take longer than it could have owing to the consideration of the request and arrangements for the hearing itself.

Hearings on Communications before the Commission must be held in camera (private).¹⁶⁸ The rationale of this rule is not explicitly stated in the Commission's Rules of Procedure. The rule however flies in the face of transparency, accountability and considerations such as public interest. The Commission itself has found that 'the publicity of hearings is an important safeguard in the interest of the individual and the society at large.'¹⁶⁹ This view must however not be used to undermine with the complainant's own request for confidentiality for instance where their security or reputation (e.g. stigmatization back home) is at risk.

In addition, unless the Commission decides otherwise, no person may be admitted, other than: i) the parties to the Communication or the representatives duly mandated; ii) any person being heard by the Commission as a witness or as an expert; iii) as well as the persons referred to in Rule 33 (2) or any person whom the

¹⁶² Rule 99 (2), Commission Rules of Procedure.

¹⁶³ Rule 99 (3), Commission Rules of Procedure.

¹⁶⁴ Rule 99 (4), Commission Rules of Procedure.

¹⁶⁵ Rule 99 (5), Commission Rules of Procedure.

¹⁶⁶ Rule 99 (6), Commission Rules of Procedure.

¹⁶⁷ Rule 99 (7), Commission Rules of Procedure.

¹⁶⁸ Rule 99 (8), Commission Rules of Procedure.

¹⁶⁹ *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria* Communication No. 219/98 (2001) para 36.



Commission may decide to invite under Article 46 of the African Charter.¹⁷⁰

When it considers it in the interest of the proper conduct of a hearing, the Commission may limit the number of parties' representatives or advisers who may appear.¹⁷¹

The parties must inform the Commission at least ten days before the date of the opening of the hearing of the names and functions of the persons who will appear on their behalf at the hearing.¹⁷² The Chairperson or his or her representative must preside over the hearing, and must verify the identity of any persons before he/she is heard.¹⁷³

Any member of the Commission may put questions to the parties or to the persons heard with the permission of the Chairperson.¹⁷⁴ Similarly, parties to the communication or their representatives may, with the permission of the Chairperson, put questions to any person heard.¹⁷⁵

The Secretary is responsible for the production of verbatim records of hearings before the Commission.¹⁷⁶ Such records are internal working documents of the Commission.¹⁷⁷ Nevertheless, if a party to the communication so requests, the Commission must provide a copy of such records unless, in the view of the Commission, doing so could create a danger to persons heard.¹⁷⁸

The State Party to the Communication must make an undertaking not to victimize or to take any reprisals against the Complainant and/or any person representing them or their family members, or witnesses because of their statements before the Commission.¹⁷⁹



Litigants Tip:

An oral hearing has various benefits particularly from the perspective of the victim getting their day in court and giving a human face to the violations especially for women's rights violations. From an evidence perspective, the hearing is also very useful in making clarifications particularly where one party has been misleading the Commission.

4.3.2 Witnesses and Experts

Under Rule 100 (1) of the Commission's Rules of Procedure, the Commission must determine, at its own initiative, or at the request of one of the parties, when to call independent experts and witnesses of the parties to the Communication whom it considers necessary to hear in a given case. A request to call a witness by one of the parties must not be rejected unless the Commission has good reasons to believe that such a request constitutes an abuse of process.¹⁸⁰ The invitation to the hearing must indicate: i) the

¹⁷⁰ Rule 99 (8), Commission Rules of Procedure.

¹⁷¹ Rule 99 (9), Commission Rules of Procedure.

¹⁷² Rule 99 (10), Commission Rules of Procedure.

¹⁷³ Rule 99 (11), Commission Rules of Procedure.

¹⁷⁴ Rule 99 (12), Commission Rules of Procedure.

¹⁷⁵ Rule 99 (13), Commission Rules of Procedure.

¹⁷⁶ Rule 99 (14), Commission Rules of Procedure.

¹⁷⁷ Rule 99 (14), Commission Rules of Procedure.

¹⁷⁸ Rule 99 (14), Commission Rules of Procedure.

¹⁷⁹ Rule 99 (15), Commission Rules of Procedure.

¹⁸⁰ Rule 100 (1), Commission Rules of Procedure.



parties to the Communication; and ii) a summary of the facts or issues in relation to which the Commission desires to hear the witness or expert.¹⁸¹

Any such person may, if they do not have sufficient knowledge of the working languages of the Commission, be authorized by the Chairperson to speak in any other language to be interpreted in one of the Working Languages of the Commission.¹⁸²

The State Party to the communication must give an undertaking not to victimize or persecute the witnesses or experts, or carry out reprisals against them or their family members because of their statements or expert opinions given before the Commission.¹⁸³

4.3.3 *Amicus curiae* briefs

The Commission is also empowered to receive *amicus curiae* briefs on any Communication before it.¹⁸⁴ During the hearing of a Communication in which an *amicus curiae* brief has been filed, the Commission, where necessary must permit the author of the brief or the representative to address the Commission.¹⁸⁵ While there is no prescribed format to *amicus curiae* brief, the following format may be useful:

- State that it is *amicus curiae* brief and that it is filed in accordance to Rule 99(16) of the Commission's Rules of Procedure.

- Lay out the reason why the brief is being brought and why it should be admitted such as expertise in the subject matter or such other basis of interest.
- Proceed to make the relevant submissions on legal arguments.

In practice, the Commission does admit *amicus curiae* briefs most of which are usually in support of the complainant's arguments and acknowledges having considered such briefs in reaching its decision. This mechanism is quite useful as it has served to bolster the submissions of complainants and enrich the jurisprudence as persons or groups that often submit such briefs have relevant expertise such as human rights organisations. However, the Commission has clarified that it 'does not consider itself bound to pronounce on *amicus* briefs'.¹⁸⁶

4.3.4 Non-participation of a Member of the Commission in the examination of a Communication

In terms of Rule 101 (1) of the Commission's Rules of Procedure, a member of the Commission may not be present and take part in the consideration of a Communication if he or she: i) is a national of the State Party concerned; ii) has any personal interest in the case; iii) is engaged in any political or administrative activity or any professional activity that is

¹⁸¹ Rule 100 (1), Commission Rules of Procedure.

¹⁸² Rule 100 (2), Commission Rules of Procedure.

¹⁸³ Rule 100 (4), Commission Rules of Procedure.

¹⁸⁴ Rule 99 (16), Commission Rules of Procedure.

¹⁸⁵ Rule 99 (16), Commission Rules of Procedure.

¹⁸⁶ *Front for the Liberation of the State of Cabinda v Republic of Angola* Communication No. 328/06 (2013) at para 99.



incompatible with his or her independence or impartiality; iv) has participated in any capacity in any decision at the national level in relation to the Communication; or v) has expressed publicly opinions that might be interpreted as reflecting lack of impartiality with respect to the Communication.

The Commission without the participation of the member concerned must decide any question that may arise in this regard.¹⁸⁷

In addition, if for any reason, a Member of the Commission considers that he or she should not take part or continue to take part in the consideration of a Communication, he or she must inform the Chairperson of his or her decision to withdraw.¹⁸⁸

4.4 The Evidentiary Practice of the Commission

A pertinent matter in the procedural practice of the Commission has to do with the verification of facts, and this aspect calls into question the rules of evidence of the Commission. In light of its quasi-judicial nature, the Commission does not necessarily follow a strict evidentiary practice such as that in national courts. Having said that, a few basic rules can be observed:

- All alleged violations of rights must be “substantiated”. The complainant cannot merely allege a violation without demonstrating. In one Communication against Kenya the

Commission held a finding of some violations but declined to find a violation on one stating that:¹⁸⁹

Although the complainant has claimed a violation of his right to freedom from torture, he has not substantiated his claim. In the absence of such information, the Commission cannot find a violation as alleged.

- It is an established principle of the African Commission that where allegations of violations of provisions of the African Charter go uncontested by the Government concerned, the African Commission **“must decide on the facts as given”**. This principle also conforms to the practice of other international human rights adjudicatory bodies.¹⁹⁰
- Also, as was illustrated in the previous chapter on exceptions to the exhaustion of local remedies, the Commission does not require the names of the victims where serious or massive violations are alleged.

In addition, neither the African Charter nor the Commission’s Rules of Procedure are clear on the burden of proof with regard to matters alleged in Communications.

However, the jurisprudence of the Commission has provided some guidance in this respect. It appears, in keeping with

¹⁸⁷ Rule 101 (2), Commission Rules of Procedure.

¹⁸⁸ Rule 102, Commission Rules of Procedure.

¹⁸⁹ *John D Ouko v Kenya* Communication No. 232/99 (2000) at para 26.

¹⁹⁰ *Liesbeth Zegveld & Mussie Ephrem v Eritrea* Communication No. 250/02 (2003) at para 46.



the practice of many international courts and tribunals, as well as domestic courts, that the general rule is that 'he who alleges must prove'.

As such, if the allegations contained in the Communication are not contested by the Respondent State, the Commission has tended to treat those allegations as having been proven.¹⁹¹ On the other hand, where the Respondent State contests the allegations, the author of the Communication must definitively convince the Commission as to the veracity of the claims made therein.¹⁹² The State is equally required to submit specific evidence and responses refuting the allegations.

The foregoing standards apply to both written and oral submissions.

4.5 Amicable Settlement of Complaints

In terms of Rule 109 (1), at any stage of the examination of a Communication, the Commission, on its own initiative or at the request of any of the parties concerned, may offer its good offices for an amicable settlement between the parties.

The Commission's Rules of Procedure state that the amicable settlement procedure must be initiated, and may only continue, with the consent of the parties.¹⁹³ Similarly in practice, the Commission rarely initiates amicable settlements and instead "offers its good

offices" to parties who have expressed the intention to settle. It does this by acting as a conduit to relay documents and messages between the parties and also inquires on the progress towards amicable settlement.

In a few instances however, the Commission has been seen to take a more active role. In one Communication against Burkina Faso, the Commission made a decision directing that State to take the initiative in inviting the complainant for a friendly settlement of the case failing which the Commission would proceed to decide the case on its merits.¹⁹⁴ In another Communication against Mauritania, the government did not seriously contest the allegations brought against it and the Commission made a decision to send a mission to try and obtain an amicable settlement.¹⁹⁵

Where it deems it necessary, the Commission may entrust to one or more of its members the task of facilitating negotiations between the parties. This was the case in the mentioned Communication against Mauritania where the mission comprised of the Chair, two commissioners as well as the Secretary to the Commission.¹⁹⁶

The Commission may terminate its intervention in the amicable settlement procedure at the request of one or both parties, within a period of six months, renewable once, when an amicable settlement is not reached.¹⁹⁷

¹⁹¹ See, in this regard, *Commission Nationale des Droits de l'Homme et des Libertés v Chad* Communication No. 74/92 (1995); *Amnesty International and Others v. Sudan* Communication 48/90/ 50/91, 52/91, 89/93 (1999).

¹⁹² See *Katangese Peoples' Congress v Zaire*, Communication No. 75/92 (1995); *Dawda Jawara v The Gambia* Communication Nos. 147/95 and 149/96 (2000); *Africa Legal Aid v The Gambia* Communication No. 207/97 (2001); *Courson v Equatorial Guinea* Communication No. 144/95 (1997); and *Bob Ngozi Njoku v Egypt* Communication No. 40/90 (1997).

¹⁹³ Rule 109 (2), Commission Rules of Procedure.

¹⁹⁴ *Movement burkinabé des droits de l'Homme et des peuples v Burkina Faso* Communication No. 204/97 (2001) at para 31.

¹⁹⁵ *Malawi African Association, Amnesty International, Ms 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 No. 54/91-61/91-96/93-98/93-164/97_196/97-210/98 (2000) at para 33.

¹⁹⁶ Rule 109 (3), Commission Rules of Procedure and the above Communication.

¹⁹⁷ Rule 109 (4), Commission Rules of Procedure.



When the Commission receives information from parties that an amicable settlement has been reached, the Commission must ensure that such amicable settlement: i) complies with or respects the human rights and fundamental freedoms enshrined in the African Charter and other applicable instruments; ii) indicates that the victim of the alleged human rights violation or, his/her successors, as the case may be, have consented to the terms of the settlement and are satisfied with the conditions; and iii) includes an undertaking by the parties to implement the terms of the settlement.¹⁹⁸

When the Commission is satisfied that these requirements have been complied with, it must prepare a report which must contain: i) a brief statement of the facts; ii) an explanation of the settlement reached; iii) recommendations by the Commission for steps to be taken by the parties to ensure the maintenance of the settlement; and iv) steps to be taken by the Commission to monitor the parties' compliance with the terms of the settlement.¹⁹⁹

Where the terms of the amicable settlement are not implemented within six months, or when the terms do not comply with the requirements stated above, the Commission must at the request of the Complainant continue to process the Communication in accordance with the relevant provisions of the Charter and the relevant Rules.²⁰⁰

In practice, the Commission has used this mechanism well to settle a number of Communications. Amicable settlement is in fact very much in sync with the African conceptualization of non-contentious dispute resolution and it is therefore unusual that this mechanism hasn't been utilized as often as one would expect. The Commission has also been criticized for showing too much deference to States and too little regard to human rights in implementing this mechanism 'perhaps grasping at an easy way of finalizing cases'.²⁰¹



Litigants Tip:

Litigants are advised not to initiate the process of amicable settlement as it is likely to weaken your position.

Litigants should ensure that the Commission supervises and that the matter is settled within the Communications procedure. This may also be beneficial towards the complainant's case should the State fail to offer a suitable settlement.

Demand for the Commission to set a specific time from which you will consider that the process has failed. Usually it's 6 months renewable once.

¹⁹⁸ Rule 109 (5), Commission Rules of Procedure.

¹⁹⁹ Rule 109 (6), Commission Rules of Procedure.

²⁰⁰ Rule 109 (7), Commission Rules of Procedure.

²⁰¹ See generally Viljoen's assessment of the African Commission's amicable settlement practice in F Viljoen *International Human Rights Law in Africa* 309-310.



4.6 Consideration and Decision on the Merits

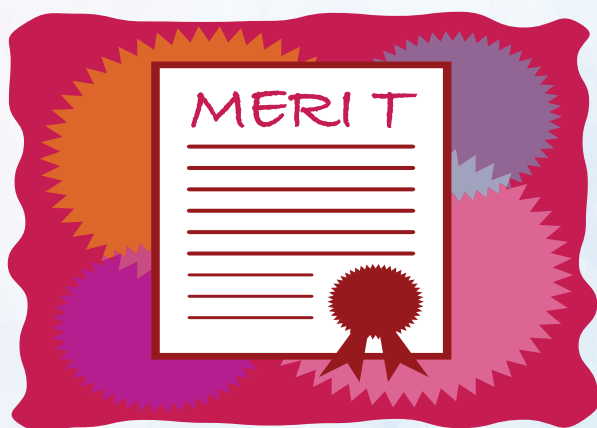
4.6.1 Proceedings

Once a Communication has been declared admissible, the Commission must set a period of sixty (60) days for the Complainant to submit observations on the merits.²⁰² These observations must be transmitted to the State Party concerned for the submission of its observations within sixty (60) days.²⁰³

Any written statements submitted by the State Party concerned must be communicated, through the Secretary, to the Complainant, who may submit any additional written information or observations within thirty (30) days.²⁰⁴ This time limit cannot be extended.²⁰⁵

4.6.2 Decision on the Merits

The Commission, after deliberation on the submissions of both parties, must adopt a decision on the merits of the Communication.²⁰⁶



The Commission has mostly found violations on the basis of the rights in the African Charter. It has also in some instances found a violation of States to undertake their obligation to give effect to the Charter under Article 1 that provides:²⁰⁷

The member states of the Organisation of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

It is also worth noting that the Commission can take a decision on merits irrespective of whether the State has responded to the Communication or not; and States have been known to ignore Communications. When it does so, the Commission bases its decision on the facts as given by the Complainant with due consideration to the substantiation of allegations.

The Commission must deliberate on Communications in private, and all aspects of the discussions must be confidential.²⁰⁸

The decision of the Commission must be signed by the Chairperson and the Secretary, must remain confidential and must not be transmitted to the parties until the Assembly authorizes its publication.²⁰⁹ The decision of the Commission must be posted on the Commission's website after

²⁰² Rule 108 (1), Commission Rules of Procedure.

²⁰³ Rule 108 (1), Commission Rules of Procedure.

²⁰⁴ Rule 108 (2), Commission Rules of Procedure.

²⁰⁵ Rule 108 (2), Commission Rules of Procedure.

²⁰⁶ Rule 110 (1), Commission Rules of Procedure.

²⁰⁷ Article 1 African Charter on Human and Peoples' Rights.

²⁰⁸ Rule 110 (2), Commission Rules of Procedure.

²⁰⁹ Rule 110 (3), Commission Rules of Procedure.



its publication is authorized by the Assembly.²¹⁰ The foregoing rule also to be found in the African Charter in Article 59 which requires for the report to be published upon the decision of the Assembly of Heads of State and Government. The report contains decisions of Communications amongst other things like resolutions.

Initially, the OAU Assembly (the AU's predecessor) always adopted the Commission's reports without much ado or debate. This has however changed for the worse in the recent past with the AU Executive Council delaying reports by as much as six months. In other instances, adopting a report that excludes some decisions perhaps ostensibly based on the lobbying of the respective States. The effect of this delay or omission is to leave the legal status of the decisions in legal limbo.²¹¹

4.6.3 Review of Decisions on Communications

In terms of Rule 111 (1) of the Commission's Rules of Procedure, once

the Commission has taken a decision on the merits, it may, on its own initiative or upon the written request of one of the parties, review the decision.

In determining whether to review its decision on the merits, the Commission must satisfy itself that: i) the request is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was not known to the Commission and the party requesting the review, provided that such ignorance was not due to negligence;²¹² and ii) the application for review is made within six months of the discovery of the new fact.²¹³

The Commission is also mandated to take into consideration any other compelling reason or situation that the Commission may deem appropriate or relevant to justify review of a Communication, with a view to ensure fairness, justice and respect for human and peoples' rights.²¹⁴

Nonetheless, no application for review may be made after three years from the date of the decision.²¹⁵

²¹⁰ Rule 110 (4), Commission Rules of Procedure.

²¹¹ For a more detailed synopsis of the implementation and enforcement of the Commission's decisions see M Evans & R Murray *The African Charter on Human and Peoples' Rights; The system in practice, 1986-2006* 207-214.

²¹² Rule 111 (2) (a), Commission Rules of Procedure.

²¹³ Rule 111 (2) (b), Commission Rules of Procedure.

²¹⁴ Rule 111 (2) (c), Commission Rules of Procedure.

²¹⁵ Rule 111 (3), Commission Rules of Procedure.



5. THE AFRICAN COMMISSION'S COMMUNICATIONS RECOMMENDATIONS (REMEDIES)

One of the final stages of the Communications procedure entails the Commission making a finding on the merits and issuing recommendations. Neither the African Charter nor the Commission's Rules of Procedure identify with any specificity the recommendations that may be made by the Commission in the exercise of its protective mandate.

Nonetheless, the Commission has over the years, through its decisions, made a range of recommendations that provide some guidance as to the possible reliefs it may render. The Commission has asserted its duty to make clear recommendations and espouse clear action that a government must take to remedy human rights violations when it concludes that a Communication finds a State in violation of the African Charter.²¹⁶ However the practice of the Commission has been widely criticized, with authors noting that the Commission often makes findings of violations without complimenting those findings with appropriate remedial measures.²¹⁷ A common approach adopted by the Commission is to make

pronouncements on violations without assigning any remedies as evidenced in *Amnesty International v Zambia*,²¹⁸ *Huri-Laws v Nigeria*²¹⁹ and *Forum of Conscience v Sierra Leone*²²⁰ among other Communications.

Where the Commission makes findings of violations of the Charter and gives recommendations for compensation, it sometimes falls short of determining the amount of compensation as demonstrated in *Civil Liberties Organization & Others v Nigeria*²²¹ and *Embaga Mekongo v Cameroon*²²². In contrast, in *Malawi African Association & Others v Mauritania*²²³ the Commission made elaborate recommendations against the Respondent State.²²⁴

Noting the discrepancies in awarding remedies and the lack of guidelines in framing remedies, it is recommended that litigants include envisaged remedies in their communications to guide the Commission in making appropriate remedies.²²⁵ *Mukundi* recommends to the Commission the adoption of unambiguous specification of remedies

²¹⁶ African Commission on Human and Peoples' Rights 'Account of internal legislation of Nigeria and the dispositions of the Charter of African Human and Peoples' Rights, 2nd extraordinary session, Kampala, 18-19 December 1995,' DOC II/ES/ACHPR/4, at 20 as cited in G Mukundi 'Twelve Years of Elusive Enforcement' *African Human Rights Law Journal* (2006) 6 473 discussing *Civil Liberties Organization & Others v Nigeria* Communication No. 218 of 1998.

²¹⁷ As above Mukundi 476.

²¹⁸ Communication No. 212/98 (1999).

²¹⁹ Communication No. 225/98 (2000).

²²⁰ Communication No. 223/98 (2000).

²²¹ Communication No. 218/98 (2001). In this communication the Complainants specifically pleaded damages for the sum of \$105M

²²² Communication No. 59/91 (1995). In this communication the Commission determined that the Complainant in fact suffered damages but the Commission was 'unable' to determine the amount of damages.

²²³ Communications No.54/91; 61/91; 93/98; 164/97; 196/97 and 210/98 (2000).

²²⁴ S Gumedze 'Bringing communications before the African Commission on Human and People's Rights' (2003) 3 *African Human Rights Law Journal* 146.

²²⁵ As above Gumedze recommends that litigants 'exercise common sense' in drawing up their envisaged remedies.



and specificity regarding time limits for implementation, noting that the lack of clarity may impede follow-up or implementation.²²⁶

In this regard, at the international level, the United Nations General Assembly has adopted 'Basic Principles and Guidelines on the Right to a Remedy and Reparation' (Basic Principles).²²⁷ These Basic Principles enumerate mechanisms for the implementation of existing legal obligations under international human rights law. They are recommended for both governmental and intergovernmental organizations and can therefore serve as a useful framework for drafting remedies in Communications. In fact, the preamble to the Basic Principles notes that the African Charter envisages the right to a remedy in Article 7.

The Basic Principles recommend that in proportion to the gravity of the violation and taking into account the circumstances of each case, remedies should include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.²²⁸

These Basic Principles can guide litigants; such remedies are not alien and have in fact formed recommendations issued by the Commission as illustrated in the following categories of remedies.

Restitution

Restitution aims at restoring the victim to their original position before the violation in as much as possible. The Commission has made recommendations towards restitution such as: to reinstate rights due to certain unfairly dismissed or forcibly retired workers,²²⁹ to recognize the citizenship of particular persons,²³⁰ to replace national identity documents,²³¹ and to allow the unhindered return of citizens to their States of nationality.²³²

Compensation

Compensation is awarded as a result of economically assessable damage that could be physical or mental. The Commission has issued recommendations to: compensate the victims of violations,²³³ or their widows and other beneficiaries.²³⁴ As already stated, the practice in this regard has been inconsistent.

Rehabilitation

These are remedies aimed at the medical or psychosocial care of victims. The Commission has previously made recommendations to ensure sufficient medical care and material assistance for particular victims of human rights violations.²³⁵

²²⁶ G Mukundi 'Twelve Years of Elusive Enforcement' *African Human Rights Law Journal* (2006) 6 476, 477.

²²⁷ 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' UNGA Resolution 60/147 16 December 2005 available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx> (last accessed 17 August 2016).

²²⁸ As above paras 18 - 23.

²²⁹ *Malawi African Association v Mauritania* Communication No. 54/91 (2000).

²³⁰ *John K. Modise v Botswana* Communication No. 97/93 (2000).

²³¹ *Malawi African Association v Mauritania* Communication No. 54/91 (2000).

²³² *Malawi African Association v Mauritania* Communication No. 54/91 (2000).

²³³ This is one of the most common recommendations made by the Commission by way of redress of human rights violations. Decisions containing this recommendation include: *Mekongo v Cameroon*, Communication No.59/91; *Odjouoriby Cossi Paul v Benin* Communication No. 199/97 (2004); *Curtis Francis Doebller v Sudan* Communication No. 236/2000 (2003); *Liesbeth Zegveld and Mussie Ephrem v Eritrea* Communication No. 250/2002 (2003); *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* Communication No. 204/97 (2001); *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* Communication No. 155/96 (2001); *Malawi African Association v Mauritania* Communication No. 54/91 (2000); *John K. Modise v Botswana* Communication No. 97/93 (2000); *Civil Liberties Organization, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria* Communication No. 218/98 (1998).

²³⁴ *Malawi African Association v Mauritania* Communication No. 54/91 (2000).

²³⁵ See for example *Purohit and Moore v The Gambia* Communication No. 241/01 (2003).



Satisfaction

The remedy of satisfaction can include measures on the cessation of the violation as well as remedies towards truth, justice and reconciliation. In this regard the Commission's practice has included recommendations: to enforce particular laws,²³⁶ to release certain detainees,²³⁷ to conduct fresh trials of particular accused persons,²³⁸ to ensure the prosecution of particular offenders,²³⁹ to establish domestic commissions of inquiry into violations of rights,²⁴⁰ to establish expert committees to review particular cases of violations,²⁴¹ to ensure the provision of information on particular risks to health and environmental safety,²⁴² as well as to carry out widespread decontamination of the environment in particular areas.²⁴³

Guarantees of non-repetition

These remedies entail the request for broad recommendations aimed

at structural reform, to ensure non-repetition of the violations in question. These have included recommendations: to repeal particular laws,²⁴⁴ to repeal certain penal sanctions,²⁴⁵ to improve the conditions of places of detention across the State,²⁴⁶ to improve judicial efficiency,²⁴⁷ and to consult widely with civil society groups during decision-making processes.²⁴⁸



Litigants Tip:

- Be as specific as possible in framing your remedies;
- Frame your remedies and relief in a manner that is realistic.
- Undertake advocacy at the domestic level e.g. if the remedy seeks legal reform, undertake advocacy with parliamentarians.

²³⁶ *Malawi African Association v Mauritania* Communication No. 54/91 (2000).

²³⁷ *Centre For Free Speech v Nigeria* Communication No. 206/97 (2004); *Liesbeth Zegveld and Mussie Ephrem v Eritrea* Communication No. 250/2002 (2003).

²³⁸ *Civil Liberties Organization v. Nigeria*, Communication No. 151/96 (1999).

²³⁹ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* Communication No. 155/96 (2001).

²⁴⁰ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* Communication No. 155/96 (2001); *Malawi African Association v Mauritania* Communication No. 54/91 (2000).

²⁴¹ *Purohit and Moore v The Gambia* Communication No. 241/01 (2003).

²⁴² *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* Communication No. 155/96 (2001).

²⁴³ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* Communication No. 155/96 (2001).

²⁴⁴ *Civil Liberties Organization v Nigeria* Communication No. 101/93 (1995) and *Purohit and Moore v The Gambia* Communication No. 241/01 (2003).

²⁴⁵ *Curtis Francis Doebbler v Sudan* Communication No. 236/2000 (2003).

²⁴⁶ *Civil Liberties Organization v Nigeria*, Communication No. 151/96 (1999).

²⁴⁷ *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso* Communication No. 204/97 (2001).

²⁴⁸ *Lawyers for Human Rights v Swaziland* Communication No. 251/2002 (2005).



6. FOLLOW UP AND IMPLEMENTATION OF THE AFRICAN COMMISSION'S DECISIONS

6.1 Nature of the Commission's Decisions

Similar to the previous discussion on the binding nature of provisional measures, there are divergent opinions on the nature of the Commission's decisions. The most compelling argument in support of the binding nature of the Commission's decisions is the principle espoused in the Vienna Convention; by a State signing and ratifying the Charter, it intends to be bound and adhere to obligations arising out of it.²⁴⁹ However many authors often criticize the findings of the Commission, arguing that they are not legally binding on State parties,²⁵⁰ and further observe that the lack of full judicial powers of attributes creates an additional challenge for implementation.²⁵¹

An express application of the common law doctrine of *stare decisis* may not apply to decisions of the Commission, however it is advisable for litigants to make use of past communications supporting their arguments when making submissions.

6.2 Follow-Up On And Implementation Of Commission's Recommendations

Under Rule 112 (1), after the consideration of the Commission's Activity Report by the Assembly, the Secretary must notify the parties within thirty (30) days that they may disseminate the decision.

In the event of a decision against a State Party, the parties must inform the Commission in writing, within one hundred and eighty (180) days of being informed of the decision in accordance with paragraph one, of all measures, if any, taken or being taken by the State Party to implement the decision of the Commission.²⁵²

Within ninety (90) days of receipt of the State's written response, the Commission may invite the State concerned to submit further information on the measures it has taken in response to its decision.²⁵³

Where no response is received from the State, the Commission may send a reminder to the State Party concerned to

²⁴⁹ Article 14 of the Vienna Convention on the Law of Treaties (1969).

²⁵⁰ E Enonchong 'The African Charter on Human and Peoples' Rights: Effective Remedies in Domestic Law?' *Journal of African Law* 46 (2002) 197.

²⁵¹ CA Odinkalu 'The Role of Case and Complaints Procedures in the Reform of the African regional human rights system' *African Human Rights Law Journal* 2 (2001) 226.

²⁵² Rule 112 (2), Commission Rules of Procedure.

²⁵³ Rule 112 (3), Commission Rules of Procedure.



submit its information within ninety (90) days from the date of the reminder.²⁵⁴

The Rapporteur for the Communication, or any other member of the Commission designated for this purpose, must monitor the measures taken by the State Party to give effect to the Commission's recommendations on each Communication.²⁵⁵ The Commission in seldom occasions has undertaken follow up missions to determine the status of implementation of its decisions.²⁵⁶ A common approach the Commission has adopted for follow up of its recommendations consists of requesting State parties to report on the status of implementation of the Commission's decisions when the country in question is due to submit a country report in line with their obligations under Article 62 of the charter. Noting the dismal compliance of State parties to the Charter submitting country reports, Gumedze argues that this is not an effective follow up mechanism because not every Member State to the Charter regularly submits country reports.²⁵⁷ Litigants may make use of this process nonetheless through submission of shadow reports to lay emphasis and put pressure on States to implement decisions of the African Commission.

The Commission has adopted an additional strategy to pass resolutions²⁵⁸ reaffirming the importance of implementation of its decisions and requesting State parties

to honour their obligations under the Charter. Undoubtedly, NGOs have, and can continue to play a critical role in developing and lobbying for the passing of such resolutions.

The Rapporteur may make such contacts and take such action as may be appropriate to fulfill his/her assignment including recommendations for further action by the Commission as may be necessary.²⁵⁹

In addition, at each Ordinary Session, the Rapporteur must present the report during the Public Session on the implementation of the Commission's recommendations.²⁶⁰

The Commission must also draw the attention of the Sub-Committee of the Permanent Representatives Committee and the Executive Council on the Implementation of the Decisions of the African Union, to any situations of non-compliance with the Commission's decisions.²⁶¹

Further, the Commission must include information on any follow-up activities in its Activity Report.²⁶²

A step-by-step account of the follow up process and proposed interventions for a litigant are as follows:

²⁵⁴ Rule 112 (4), Commission Rules of Procedure.

²⁵⁵ Rule 112 (5), Commission Rules of Procedure.

²⁵⁶ Gumedze notes after the decision in *Constitutional Rights Project v Nigeria*, the Commission revisited the issues raised in the communication after the lapse of two sessions and decided to undertake a mission to Nigeria for purposes of making sure that the violations of rights had been addressed at 145

²⁵⁷ Gumedze Sabelo 'Bringing communications before the African Commission on Human and People's Rights' (2003) 3 *African Human Rights Law Journal* 146

²⁵⁸ Resolution 97 on the 'Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by State Parties', passed at the 40th Ordinary Session in Banjul, the Gambia, from 15-29th November 2006. Additionally, the Commission passed Resolution 257 'Calling on the Republic of Kenya to Implement the Endorois Decision', passed at the 54th Ordinary Session in Banjul, the Gambia, from 22 October to 5th November 2013.

²⁵⁹ Rule 112 (6), Commission Rules of Procedure.

²⁶⁰ Rule 112 (7), Commission Rules of Procedure.

²⁶¹ Rule 112 (8), Commission Rules of Procedure.

²⁶² Rule 112 (9), Commission Rules of Procedure.



Action by the Commission	Timelines	Proposed Intervention of a Litigant
Dissemination of Decision after Consideration of Commission's Activity Report by the Assembly.	30 days	Reminder to the Commission to disseminate the decision
Rapporteur is appointed to monitor implementation measures of the Commission decision	Throughout the life of the communication	Regularly engage the Rapporteur to report on implementation of the decision.
Commission shall inform the concerned State party of its decision and request for information on implementation measures.	180 days	Collect and collate data on implementation of the Commission's decisions
Upon submission of the State's response, the Commission may request further information	90 days	A litigant may request the Commission to have an oral hearing on the implementation of its decision
Report of implementation of the decision by Rapporteur	Each ordinary session	A litigant should give status updates to the Rapporteur on implementation before each ordinary session.



7. DEVELOPING A LEGAL AND ADVOCACY STRATEGY FOR COMMUNICATIONS BEFORE THE AFRICAN COMMISSION

7.1 Summary of Litigants' Guidelines in Submitting a Communication

Seizure & Admissibility Stage

Prepare and submit a Communication to the Commission noting to include the following:²⁶³

1. Complainant details:
 - i. Indicate whether you are acting on your behalf or on behalf of someone else. If you are an NGO indicate this.
 - ii. Indicate whether you wish to remain anonymous
 - iii. List the following: Name, age, nationality, occupation and/or profession, address, telephone/fax no. and email address where available.
2. Government accused of the Violation (please make sure it is a State Party to the African Charter. You can also use provisions of the Maputo Protocol to support for women's rights violations).
3. Facts constituting alleged violation (Explain in as much a factual detail as possible what happened, specifying place, time and dates of the violation).
4. Urgency of the case (Is it a case which could result in loss of life/ lives or serious bodily harm if not addressed immediately? Here you can make a request for provisional measures. State the nature of the case and why you think it deserves immediate action from the Commission.).
5. Provisions of the Charter alleged to have been violated (if you are unsure of the specific articles, please do not mention any).
6. Names and titles of government authorities who committed the violation or were complicit via inaction for instance. (If it is a government institution please give the name of the institution as well as that of the head.).
7. Witness to the violation (include addresses and if possible telephone numbers of witnesses).
8. Documentary proofs of the violation (attach for example, letters, legal documents, photos, autopsies, tape recordings etc., to show proof of the violation).
9. Domestic legal remedies pursued (Also indicate for example, the courts you've been to, attach

²⁶³ Adapted from: The African Commission on Human and Peoples' Rights Information Sheet No.2 Guidelines for the Submission of Communications



copies of court judgments, writs of habeas corpus etc).

Where local remedies have not been exhausted, you must carefully demonstrate why based on the noted exceptions e.g. local remedies are unduly prolonged, non-existent or ineffective.

10. Other International Avenue (State whether the case has already been decided or is being heard by some other international human rights body; specify this body and indicate the stage at which the case has reached).
11. Finally, go through Article 56 of the African Charter again to counter check that your Communication satisfies the admissibility requirements. (Briefly enumerate demonstration of all requirements getting into more detail where challenge is expected e.g. always make comprehensive submissions on exhaustion of local remedies as per no.9 above.).

Merits Stage

Once the Communication is declared admissible, prepare merits submissions that may take the following format:

1. Context e.g. political context, socio-political context
2. Facts constituting alleged violation (Explain in as much a factual detail as possible what happened, specifying place, time and dates of the violation).

3. List the alleged violations. (Include evidence to support each violation)
4. Remedies. (On a case-by-case basis could include requests for: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Ensure they're specific e.g. for compensation, request for an amount showing how you arrive at that figure).



Litigants Practical Drafting Tips:

- Use of precedent: capitalize on the Commission's jurisprudence, noting a trend of the Commission relying on its own jurisprudence. In choosing the precedent, know the trends; a good litigant should be a good researcher.
- Cite sources of all the information that is relied on.
- Include regional and international laws as well as soft law to strengthen the arguments for the alleged violations. (Reference Article 60 & 61 of the Charter).

7.2 Advocacy Strategy

Litigation in the public's interest has been used as a tool to achieve social objectives, address systemic change and advance the protection and



promotion of human rights in Africa. Litigation often serves as a catalyst for reform²⁶⁴ and can help promote dialogue between State and non-State actors on how to shape social policy and remedy long-standing injustices.²⁶⁵ NGOs who engage the Commission's Communication Procedure often use this mechanism as an integral part of advocacy on human rights. Therefore structuring the communication, must take into account the wider policy goals intended to be achieved to guide a litigant to plan adequately for the phases before a communication is filed, when a communication is being considered and after the Commission takes a decision.

Before a Communication is Filed

- **Set Goals:** Outline the specific intended outcomes of the Communication
- **Conduct thorough factual and legal Research:** Conduct research on the factual patterns of the violations and legal frameworks protecting rights that have been infringed.
- **Assessment:** Has a right been infringed? Is the Commission the best forum to adjudicate on the matter?
- **Movement/coalition building:** Are there organizations that

you can partner with in the communication that can compliment your efforts?

- **Financing:** What are the anticipated costs and how will they be covered?

During the consideration of a Communication

- **Drafting Submissions:** prepare comprehensive, well-researched and clearly articulated submissions. Rely on the precedent of the Commission to bolster your arguments. Submit evidence to prove each violation.
- **Framing Remedies:** Frame appropriate and effective remedies that correspond to your goal.
- **Victim Participation:** Where appropriate, a litigant can request the Commission to allow a victim to give testimony orally.
- **Litigants Group:**²⁶⁶ participate in the litigants group meetings to provide a platform for the exchange of ideas and information on the Communications procedure and attendant matters.

²⁶⁴ N Naylor 'Dealing With Busybodies...Rules of Standing in Litigating Public Interest Case on Behalf of Women on the Continent' Discussion Paper, Workshop on Strategic Litigation for Women's Property Rights' Women's Legal Centre, South Africa.

²⁶⁵ 'A Guide to Public Interest Litigation' Kenyans for Peace with Trust and Justice (KPTJ), Africa Centre for Open Governance (AfriCOG) and the Katiba Institute

²⁶⁶ Is an informal coalition of organizations and lawyers who litigate before the Commission. The objective of the group is to strengthen networking and concerted efforts, information-sharing and capacity-building 'IHRDA at the NGO Forum and the 56th Ordinary Session of the African Commission on Human and People's Rights, April 2015 at <http://www.ihrda.org/wp-content/uploads/2015/05/IHRDA-NGO-Forum-56th-African-Commission-Session.pdf> last accessed on 31st August 2016.



- **Engaging the Commission:** litigants should develop working relationships and stay in close contact with the Commission Secretariat throughout the period of the Communication.

After a Communication is decided- Post Litigation Strategy

- **Publicity strategy:** develop media strategy on publicizing the decision and calling for its implementation.
- **Victim Participation:** develop strategies to involve victims in implementation activities.
- **Advocacy:** develop an advocacy strategy at the national level targeting civil society organizations and key State actors/duty bearers

on the implementation of the decision. For example one can target the national human rights institution, local parliaments, ministries etcetera whose mandate falls within the scope of the Commission decision.

- **Engaging the Commission:** develop working relationships with relevant rapporteurs and working groups towards monitoring and reporting on progress of implementation of the Commission decision.
- **NGO Forum:** use the NGO Forum platform to draft resolutions calling upon the concerned State to implement the Commission decision for adoption by the Commission to sustain public pressure for implementation.



8. BIBLIOGRAPHY

LIST OF CASES

African Commission on Human and Peoples' Rights

Africa Legal Aid v The Gambia Communication No. 207/97 (2001)

Ahmed Ismael and 528 Others v The Arab Republic of Egypt Communication No. 467/14 (2015)

Alhassan Abubakar v. Ghana Communication No. 103/93 (1996)

Alfred Cudjoe v Ghana Communication No. 221/98 (1999)

Amnesty International and Others v Sudan Communication Nos. 48/90, 50/91, 52/91, 89/93 (1999)

Amnesty International v Mauritania, Communication No. 61/91 (2000)

Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi Communications Nos.68/92 and 78/92 (1995)

Amnesty International v Tunisia Communication No. 69/92 (1993)

Amnesty International v Zambia Communication No. 212/98 (1999)

Anuak Justice Council v Ethiopia Communication No. 299/05 (2006)

Association Mauritanienne des Droits de l'Homme v Mauritania, Communication No. 210/98 (2000)

Ayele v Togo Communication No. 35/89 (1994)

Baes v Zaire, Communication. No. 31/89 (1995)

Bakweri Land Claims Committee v Cameroon Communication No. 260/02 (2004)

Bariga v Nigeria, Communication No.57/91 (1994)

Bob Ngozi Njoku v Egypt Communication No. 40/90 (1997)

Centre For Free Speech v Nigeria Communication No. 206/97 (2004)

Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf on Endorois Welfare Council v Kenya Communication No. 276/03 (2009)

Centre for Minority Rights Development - Kenya and Minority Rights Group International (on behalf of the Ogiek Community of the Mau Forest) v Kenya Communication 381/09

Centre for the Independence of Judges and Lawyers v Algeria Communication No. 104/93 (1994)

Civil Liberties Organization v Nigeria Communication No. 101/93 (1995)

Civil Liberties Organization v Nigeria Communication No. 129/94 (1995)

Civil Liberties Organization v Nigeria, Communication No. 151/96 (1999)



Civil Liberties Organization, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria Communication No. 218/98 (1998)

Collectif des Veuves et Ayants-droit v Mauritania, Communication No. 164/97 (2000)

Constitutional Rights Project (in respect of Rahab Wakumu & others) v Nigeria Communication No. 60/91 (1995)

Constitutional Rights Project (in respect of Zamani Lakwot & others) v Nigeria Communication No. 87/93 (1995)

Commission Nationale des Droits de l'Homme et des Libertes v Chad Communication No. 74/92 (1995)

Committee for the Defence of Human Rights v Nigeria, Communication No. 62/91 (1995)

Courson v Equatorial Guinea Communication No. 144/95 (1997)

Curtis Francis Doeblbler v Sudan Communication No. 236/2000 (2003)

Dawda Jawara v The Gambia Communication Nos. 147/95 and 149/96 (2000)

Egyptian Initiative for Personal Rights & INTERIGHTS v Egypt Communication No. 323/06 (2011)

Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia Communication No. 341/2007 (2016)

Embga Mekongo Louis v Cameroon, Communication No.59/91(1995)

Forum of Conscience v Sierra Leone, Communication No.223/98(2000)

Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah v DRC Communication Nos. 25/89 (1989), 47/90 (1990), 56/91 (1991) and 100/93 (1993)

Front for the Liberation of the State of Cabinda v Republic of Angola Communication No. 328/06 (2013)

Gabriel Shumba v Zimbabwe Communication No. 288/04 (2012)

George Eugene v United States of America Communication No. 37/90 (1990)

Huri-Laws v Nigeria Communication No.225/98 (2000)

Ibrahima Dioumessi and Others v Guinea, Communication No. 70/92 (1995)

Ihebereme v United States of America Communication No. 2/88 (1998)

Ilesanmi v Nigeria Communication No. 268/2003 (2005)

Institute for Human Rights and Development in Africa v Angola Communication No. 282/04 (2008)

International PEN and Others v Nigeria Communication Nos. 137/94, 139/94, 154/96 and 161/97 (1998)

International PEN v Malawi, Ethiopia, Cameroon, Kenya Communication No. 19/88 (1989)

Jean Yakovi Degli (on behalf of Caporal N. Bikagni), Union Interafricaine des Droits de l'Homme, Commission International de Juristes v Togo Communications Nos. 83/92, 88/93, 91/93 (1995)



John D Ouko v Kenya Communication No. 232/99 (2000)

John K. Modise v Botswana Communication No. 97/93 (2000)

Katangese Peoples' Congress v Zaire, Communication No. 75/92 (1995)

Kazeem Aminu v Nigeria Communication No. 205/97 (2000)

Kenneth Good v Botswana para 14 and Communication No. 313/05 (2010)

Kevin Mgwanga Gunme and Another v Cameroon, Communication No. 266/03 (2009)

Korvah v Liberia Communication No. 1/88 (1988)

Krishna Achutcan and Another (on behalf of Aleke Banda) v Malawi, Communication No. 64/92 (1995)

Lawyers for Human Rights v Swaziland Communication No. 251/2002 (2005)

Liesbeth Zegveld and Mussie Ephrem v Eritrea Communication No. 250/2002 (2003)

Ligue Camerounaise des Droits de l'Homme v Cameroon, Communication No. 65/92 (1997)

Luke Munyandu Tembani and Benjamin John Freeth v Angola Communication No. 409/12 (2013)

Michael Majuru v Zimbabwe Communication No. 308/05 (2008)

Malawi African Association v Mauritania Communication No. 54/91-61/91-96/93-98/93-164/97_196/97-210/98 (2000)

Monja Joana v Madagascar, Communication No. 108/93 (1997)

Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso Communication No. 204/97 (2001)

Mpaka-Nsusu Andre Alphonse v. Zaire, Communication No. 15/88 (1994)

Ms. Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO v Mauritania, Communication No. 98/93 (2000)

Nixon Nyikadzino (Represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe Communication No. 340/07 (2012)

Obert Chinhamo v Zimbabwe Communication No. 307/05 (2007)

Odjouoriby Cossi Paul v Benin Communication No. 199/97 (2004)

Open Society Justice Initiative (on behalf of Pius Njawe Noumeni) v Cameroon Communication No. 290/04 (2006)

Organisation Mondiale Contre la Torture and Others v Rwanda Communication Nos. 27/89-46/91-49/91-99/93 (1996)

Peoples' Democratic Organization for Independence and Socialism v The Gambia Communication No. 44/90 (1996)

Prince J N Makoge v United States of America Communication No. 5/88 (1988)

Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Center for the Protection of Human Rights) v Kenya Communication No. 375/09 (2011)



Purohit and Moore v The Gambia Communication No. 241/01 (2003)

Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) v Zambia Communication No. 71/92 (1997)

Rights International v Nigeria Communication No. 215/98 (1999)

Samuel T. Muzerengwa & 100 Others v Zimbabwe, Communication No. 306/05 (2011)

Socio Economic Rights and Accountability Project v Nigeria Communication No. 300/05 (2008)

Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v Sudan Communication Nos. 279/03-296/05 (2009)

The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria Communication No. 155/96 (2001)

Uhuru Kenyatta and William Ruto (represented by Innocence Project Africa) v. Republic of Kenya, Communication No. 464/14 (2014)

Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme and Others v Angola Communication No. 159/96 (1997)

Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Zimbabwe, Communication 284/03 (2009)

African Court on Human and Peoples' Rights

In the Matter of African Commission on Human and Peoples' Rights v Republic of Kenya Application 006/12

BOOKS

Ankumah, A *The African Commission on Human and Peoples' Rights: Practice and Procedures* (1996) (Martinus Nijhoff Publishers: Leiden).

Equality Now *A Guide to Using the Protocol on the Rights of Women in Africa for Legal Action* (2011) available at http://www.equalitynow.org/sites/default/files/Manual%20on%20Protocol%20on%20Women%20Rights%20in%20Africa_EN.pdf (last accessed 14 August 2016).

Evans, M & Murray, R *The African Charter on Human and Peoples' Rights; The system in practice, 1986-2006*. (2011) (Cambridge University Press: Cambridge).

Kenyans for Peace with Trust and Justice (KPTJ), Africa Centre for Open Governance (AfriCOG) & the Katiba Institute *A Guide to Public Interest Litigation* available at <http://kptj.africog.org/wp-content/uploads/2015/03/PIL-24032015.pdf> (last accessed 14 August 2016).

Pan African Lawyers Union (PALU) *Guide to Complementarity within the African Human Rights System* (2014).

Shabtai, R & Gill, TD *The World Court: What is and how it works* (1989). (Martinus Nijhoff Publishers: Leiden).



United Nations *Rule-of-Law Tools for Post-conflict States: National Consultations on Transitional Justice* (United Nations publication, Sales No. 09.XIV.2).

Viljoen, F *International Human Rights Law in Africa* (2012) (Oxford University Press: Oxford).

JOURNAL ARTICLES

Enonchong, E 'The African Charter on Human and Peoples' Rights: Effective Remedies in Domestic Law?' 46 *Journal of African Law* (2002) 197.

Frowein, JA 'Provisional Measures by the International Court of Justice- The *La Grand* Case.' 62 *Zaoerv* (2002) available at http://www.zaoerv.de/62_2002/62_2002_1_a_55_60.pdf (last accessed 7 August 2016).

Gumedze, S 'Bringing communications before the African Commission on Human and People's Rights' 3 *African Human Rights Law Journal* (2003) 118-148.

Juma, D 'Provisional Measures under the African Human Rights System: The African Court's Order Against Libya' 30 *Wisconsin International Law Journal* (2012) 361.

Mukundi, G 'Twelve Years of Elusive Enforcement' 6 *African Human Rights Law Journal* (2006) 465-493.

Murray, R 'A feminist perspective on reform of the African human rights system' 2 *African Human Rights Law Journal* (2001) 205-224.

Naldi, G 'Interim measures of protection in the African system for the protection of human and people's rights' 1 *African Human Rights Law Journal* (2002) 1-10.

Odinkalu, CA 'The Role of Case and Complaints Procedures in the Reform of the African regional human rights system' 2 *African Human Rights Law Journal* (2001) 225-246.

Stefiszyn, K 'The African Union: Challenges and Opportunities for Women', 5 *African Human Rights Law Journal* (2005) 358-386.

Viljoen, F 'An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' 16 *Wash. & Lee J. Civil Rts. & Soc. Just.* (2009-2010) 11-46.

PAPERS AND REPORTS

'Analytical study focusing on gender-based and sexual violence in relation to transitional justice' Report of the Office of the United Nations High Commissioner for Human Rights.

Assis, MP 'Women in the rulings of the African Commission on Human and Peoples' Rights' available at <http://www.publicseminar.org/2015/05/women-in-the-rulings-of-the-african-commission-on-human-and-peoples-rights/> (last accessed 17 August 2016).

Naylor, N 'Dealing With Busybodies...Rules of Standing in Litigating Public Interest Case on Behalf of Women on the Continent' Discussion Paper, Workshop on Strategic Litigation for Women's Property Rights' Women's Legal Centre, South Africa.

Press Release on the upcoming Public Hearing of Application 006/2012 - *African*



Commission on Human and Peoples' Rights v. The Republic of Kenya, from 27 to 28 November 2014, in Addis Ababa, Ethiopia last accessed on 22nd August 2016. See <http://www.achpr.org/press/2014/11/d235/>

REGIONAL AND INTERNATIONAL LAW

African Charter on Human and Peoples' Rights.

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

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

Vienna Convention on the Law of Treaties.

Rules of Procedure of the African Commission on Human and Peoples' Rights (2010).

SOFT LAW

United Nations 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' UNGA Resolution 60/147 16 December 2005 available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx> (last accessed 17 August 2016).

The African Commission on Human and Peoples' Rights Information Sheet No.2 'Guidelines for the Submission of Communications'.

The African Commission on Human and Peoples' Rights Information Sheet No.3 'Communications Procedure'.

The African Commission on Human and Peoples' Rights Resolution 97 on the 'Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by State Parties', passed at the 40th Ordinary Session in Banjul, the Gambia, from 15-29 November 2006.

The African Commission on Human and Peoples' Rights Resolution 257 'Calling on the Republic of Kenya to Implement the Endorois Decision', passed at the 54th Ordinary Session in Banjul, the Gambia, from 22 October - 5 November 2013.

WEBSITES

African Commission on Human and Peoples' Rights available at <http://www.achpr.org> and <http://www.achpr.org/communications/> (last accessed 1 August 2016).

ESCR-Net Caselaw Database available at <https://www.escr-net.org/caselaw> (last accessed 1 August 2016).

IHRDA African Human Rights Case Law Analyser available at <http://caselaw.ihrda.org> (last accessed 1 August 2016).





SOLIDARITY FOR
AFRICAN WOMEN'S RIGHTS
A force for freedom



MOUVEMENT DE SOLIDARITÉ
POUR LES DROITS
DES FEMMES AFRICAINES
Une force pour la liberté

EQUALITY NOW
P O Box 2018 00202 Nairobi, Kenya
Email: equalitynownairobi@equalitynow.org
www.equalitynow.org