

Using international and regional human rights mechanisms

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Objectives

Provide a brief overview of the nature of submissions that can be made to international and regional human rights mechanisms, with particular focus on African human rights bodies



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Background

Background/brief history of human rights within the African Union

- Anti-colonial struggle/ self determination
- Formation of the OAU
- No explicit human rights obligations
- Member states to have due regard to the UDHR
- OAU's main concern with human rights related to the decolonisation/self-determination, racial discrimination and rights of refugees
- AU brought new impetus to human rights on the continent
- What is the African human rights system?
- Norms – Hard law (treaties/ protocols); soft law (guidelines, declarations, resolutions, general comments, etc)
- Institutions
- Policy organs
- Human rights organs
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African human rights Treaties

- OAU Convention governing specific aspects of refugee (1969)
- African Charter on Human and Peoples' Rights (1981)
- African Charter on the Rights and Welfare of the Child (1990)
- Protocol on the Establishment of the African Court on Human and Peoples' Rights (1998)
- **Constitutive Act of the African Union** (2000)
- Protocol on the Rights of Women in Africa (Maputo Protocol) (2003)
- Convention on the Prevention and Combating Corruption (2003)
- Convention on the Conservation of Nature and Natural Resources (2003)
- African Youth Charter (2006)
- African Charter on Democracy, Elections and Governance (2011)
- African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development (2014)
- Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) (2014)
- Statute on the Establishment of Legal Aid Fund for the African Union Human Rights Organs (2016)
- Protocol on the rights of Older Persons (2016)
- Protocol on the rights of persons with disabilities (2018)



African Commission

Mandate (article 45)

- Promotion of human and peoples' rights: sensitization, public outreach, information dissemination through seminars, conferences, promotional visits.
Avenues for submissions include:
 - State reporting: Every 2 years – alternative or shadow reports through which CSOs are able to make submissions to the African Commission to highlight concerns relating to refugees, migrants, statelessness etc of the state
 - Special mechanisms : Special rapporteurs; working groups;
- Special procedures (Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons, and Migrant in Africa) – established since 2004, the Special Rapporteur is mandated to among others:
 - seek , receive, examine, and act upon the situation of refugees, asylum seekers and internally displaced persons in Africa;
 - undertake studies, research and other related activities to examine appropriate ways to enhance the protection of refugees, asylum seekers, and internally displaced persons;
 - undertake fact-finding missions, investigations, and visits to refugee camps and camps for internally displaced persons;
 - assist Member States of the African Union to develop appropriate policies, regulations and laws for the effective protection of refugees, asylum seekers, and internally displaced persons;



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African Commission

Avenues of engagement with the Special Rapporteur include:

- urgent appeals
- draft resolutions (general thematic resolutions; country specific resolutions)
- Requests for country visits/ fact finding missions
- Interpretation of the African Charter through advisory opinions at the request of the state parties, AU Organs or **CSOs**
and individuals – Rarely utilised



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African Commission cont'd

Communications /complaints procedure

- Communications are one of the major avenues for holding states accountable for human rights violations
 - By who?
 - May be submitted by victim(s) or another persons or institution (CSOs) on behalf of the victim(s)
 - CSOs don't need observer status before the African Commission nor even be registered in Africa to file a communication
 - *Actio popularis*: CSOs don't need to seek the consent of victim(s) in circumstances in which such consent is impracticable
- Against whom?
 - Only states which have ratified the Charter or relevant human rights instrument may be respondents



African Commission cont'd

Admissibility (article 56)

- A communication will only be declared admissible upon satisfaction of the following conditions:
 - Author's name indicated ((though anonymity may be requested)) compatible with the AU Constitutive Act and the African Charter (e.g. must allege a violation of the Charter or other relevant AU treaty))
 - must not be written in disparaging or insulting language
 - must not be based exclusively on media report
- Domestic remedies (**only judicial remedies that are available, effective and sufficient** - proceedings before a national human rights commission would not satisfy the exhaustion requirement - Cudjoe v. Ghana Communication 221/98.) must have been exhausted unless the domestic procedure has been unduly prolonged (Jawara v Gambia); give the state opportunity to remedy violations
- A remedy is 'available' if the petitioner can pursue it without impediment in practice.
- A remedy is 'effective' if it offers a reasonable prospect of success to relieve the harm suffered.
- A remedy is 'sufficient' if it is capable of producing the redress sought by the complainant. (Jawara v Gambia)
 - must be submitted within a reasonable time after exhausting local remedies (**6 months?**)
 - issues raised in the communication must not have been settled under other UN or AU procedures



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African Commission cont'd

Exceptions to the exhaustion of local remedies

- A complainant however need not exhaust local remedy where the complaints fall into any of the following categories:
 - indigent (*Purohit v The Gambia*)
 - complaints involve serious or massive violations (*Free Legal Assistance Group v Zaire*)
 - If domestic legislation ousts the jurisdiction of national courts (*Media Rights Agenda v Nigeria*)
 - If the rights claimed are not guaranteed by domestic laws (*SERAC v Nigeria*)
 - Physical danger to the complainant (*Jawara v The Gambia; Abubarkar v Ghana*)
 - complaint involves 'impractical number' of potential plaintiffs (*African Institute for Human Rights and Development v Guinea*).
 - procedure for obtaining domestic remedy will be unduly prolonged (article 56(5) of the African Charter)



African Commission cont'd

Other submissions

- Amicus curiae/ third party interventions (with leave of the Commission)
- Follow-up on recommendations:
 - 180 days for the state to report back on the implementation of the decision
 - Request for Implementation hearings
- **Important jurisprudence**
 - Communication 318/06 – *Open Society Justice Initiative v Côte d'Ivoire* (article 5 of African Charter guarantees the right to nationality – dignity + recognition of legal status)



African Court

Access to the Court (standing): advisory opinion

- Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission
- Who may request?
 - Member states of the AU
 - Organs of the AU
- African Organisations recognised by the AU** (not the same as observer status before the Commission)
 - MOU with African Union Commission or observer status granted by Executive Council

- Material jurisdiction is quite wide and may cover interpretation of any human rights instruments including the OAU Refugee Convention



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African Court **cont'd**

Access to the Court (standing): Contentious cases

- Individuals and CSOs (with observer status before the African Commission) subject to the article 34(6) declaration
- 12 states have so far made this declaration, though 4 have subsequently withdrawn: current - **Burkina Faso, Gambia, Ghana, Guinea Bissau, Malawi, Mali, Niger, and Tunisia**; withdrawn- **Benin, Côte D'Ivoire, Rwanda, Tanzania**



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African Court cont'd

Admissibility

- Same as the Commission



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African Court cont'd

Other submissions

- Amicus curiae/ third party interventions - Less cumbersome than the African Commission
- Some key jurisprudence
 - *Anudo v Tanzania* – right to nationality not guaranteed in the African Charter but violation found on the basis of article 15 of the UDHR
 - *Penesis v Tanzania* – right to nationality may be deduced from article 5 of the African Charter's guarantee of the right to **dignity and recognition of legal status**. Grant of citizenship is a sovereign right of the state but once granted cannot be arbitrarily deprived. Burden of proof shifts to the state party once the applicant makes a *prima facie* case that they have legal status
- Opportunities with the African Court
 - Legal Aid: Free legal assistance is provided by the Court where the interest of justice requires
 - Pro bono council list



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African Committee on Children

- State reports – alternative/ shadow reports
- Submissions to special rapporteurs and working groups
- Communications many be submitted by Individuals, Groups ,CSOs
Against a member state of the Children's Charter
Jurisdiction
Only over children or persons who were children at the time the violation was committed
Interprets the African Children's Charter
- Admissibility: same as commission and Court (more flexible – best interest of the child)
Submission of Communications must follow the Guidelines for consideration of Communications
- Investigations – in country visits



Sub-regional courts

- ECOWAS Court – no need to exhaust local remedies
- East African Court of Justice – local remedies not required (does not have direct human rights jurisdiction but submissions may be made in terms of rule of law and compliance with EAC Treaty)



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UN Treaty bodies

- Committee on the Elimination of Racial Discrimination (CERD)
- Committee on Economic, Social and Cultural Rights (CESCR)
- Human Rights Committee (CCPR)
- Committee on the Elimination of Discrimination against Women (CEDAW)
- Committee against Torture (CAT)
- Committee on the Rights of the Child (CRC)
- Committee on Migrant Workers (CMW)
- Committee on the Rights of Persons with Disabilities (CRPD)



Charter based mechanism

- UPR

➤ Special procedures (special rapporteurs, independent experts, working groups)

➤ Human Rights Council complaints procedure -



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