

# BRIEFING PAPER ON THE COMMUNICATIONS PROCEDURE UNDER THE 2020 RULES OF PROCEDURE OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLE RIGHTS<sup>1</sup>

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This briefing paper provides an overview of the new procedural framework of the African Commission on Human and Peoples' Rights (the Commission) for communications alleging violations of human rights under Article 55 of the [African Charter on Human and Peoples' Rights](#) (the Charter).

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## 1. INTRODUCTION

The Commission recently adopted the [Practice Directives](#) (2021 Directives)<sup>2</sup> on the temporal scope of the Commission's [Rules of Procedure, 2020](#) (2020 Rules);<sup>3</sup> the administrative seizure of communication; and the mandatory use of the new Online/Standardized Complaints Form (Complaints Form). Together, the 2020 Rules and 2021 Directives establish the Commission's new procedural framework for communications.<sup>4</sup>

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<sup>1</sup> The Briefing Paper was drafted by staff of Robert F. Kennedy Human Rights and is intended for informational purposes only. Special gratitude to Ayomide Johnson, Jessica Doumit and Kristi Udea for contributing to this paper. For more information contact Ikechukwu Uzoma, Africa Staff Attorney at [uzoma@rfkhumanrights.org](mailto:uzoma@rfkhumanrights.org).

<sup>2</sup> *Practice Directives*, Af. Comm'n on Human and Peoples' Rts., <https://www.achpr.org/legalinstruments/detail?id=76> (last accessed Nov. 15, 2021).

<sup>3</sup> The African Commission adopted the Rules of Procedure during its 27th Extraordinary Session from February 19 - March 4, 2020 and entered into force on June 2, 2020. *Rules of Procedure of the African Commission on Human and Peoples' Rights of 2020*, Af. Comm'n on Human and Peoples' Rts., <https://www.achpr.org/legalinstruments/detail?id=72> (last accessed Nov. 15, 2021) (hereinafter Rules of Procedure (2020)).

<sup>4</sup> The 2020 Rules use "complaint" and "communication" interchangeably. However, communication refers to every form of verbal or written interchange made with the African Commission, while complaints specifically refers to communication brought before the African Commission by state parties and non-state parties alleging the violation of a provision of the Charter.

Prior to the Commission's new procedural framework, the [Rules of Procedure, 2010](#) (2010 Rules)<sup>5</sup> was the guidance document for the operations of the Commission including in relation to the consideration of communications alleging human rights violations. The 2020 Rules made changes to key aspects of the Commission's procedure under the 2010 Rules. Some of those changes include enhancing the investigative powers of the Commission; requiring joint submission of admissibility and merits briefs; vesting the Secretary with the responsibility of determining seizure of communications; and elaborating on the role of National Human Rights Institutions (NHRIs) in the implementation of the Commission's decisions.<sup>6</sup>

In order to facilitate a smooth transition to the new procedural framework, the 2020 Rules provide that applicable provisions of previous rules of the Commission shall apply to "any recourse exercised against a decision or other measures pursuant to [those] previous Rules."<sup>7</sup> In essence, the 2020 Rules replace, but do not repeal the previous rules of the Commission.<sup>8</sup> Accordingly, the 2021 Directive was adopted, in part, to "resolve the complexities that could be occasioned by the parallel application of the 2010 and 2020 Rules of Procedure [and] [emphasis added] evade any prejudice to the Parties..."<sup>9</sup> The Parallel Application Procedural Framework (the Parallel Framework) entails the coexistence of the 2020 Rules and the previous rules of the Commission, with the previous rules having limited applicability.

Additionally, the 2021 Directives introduce the Complaints Form which the Commission requires all complainants to use in submitting new communications. The introduction of the Complaints Form significantly alters the process for filing communications familiar to persons that regularly engage with the Commission.

## **2. PARALLEL APPLICATION PROCEDURAL FRAMEWORK FOR COMMUNICATIONS BEFORE THE COMMISSION**

The Parallel Framework is built on the principle of non-retroactivity codified in the Charter<sup>10</sup> and the 2020 Rules.<sup>11</sup> The non-retroactivity principle entails that the 2020 Rules are not applicable to any communication filed at the Commission before its entry into force<sup>12</sup>. The previous rules of the Commission apply strictly to actions taken or required to be taken by the Commission in relation to communications submitted before the entry into force of the 2020 Rules.

The 2021 Directive describes the Parallel Framework as follows:

- All Complaints and Communications received on or after the entry into force of the new Rule of Procedure (2020) shall continue to be processed in their entirety and until finalization, in accordance with these new Rules; and

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<sup>5</sup> The African Commission adopted the 2010 Rules of Procedure during its 47th ordinary session from May 12 - 26, 2010. *Rules of Procedure of the African Commission on Human and Peoples' Rights*, Af. Comm'n on Human and Peoples' Rts.,

[https://www.achpr.org/public/Document/file/English/Rules\\_of\\_Procedure\\_of\\_the\\_African\\_Commission\\_on\\_Human\\_and\\_PeoplesRights2010\\_%20Legal%20Instruments%20\\_%20ACHPR.pdf](https://www.achpr.org/public/Document/file/English/Rules_of_Procedure_of_the_African_Commission_on_Human_and_PeoplesRights2010_%20Legal%20Instruments%20_%20ACHPR.pdf).

<sup>6</sup> In the 2020 Rules, the Commission hinges its decision on admissibility on the submissions of the parties and not on the report of the Rapporteur(s), as in the 2010 Rules. The Secretary is also empowered to consider and seize communication as opposed to the Commission in the 2010 Rules.

<sup>7</sup> Rule 141(2) of the Rules of Procedure (2020), *supra* note 3.

<sup>8</sup> The previous Rules of Procedure were adopted by the African Commission during its 2nd Ordinary Session on February 2 - 13, 1988, was revised initially during its 18th Ordinary Session on October 2 - 11, 1995, and revised once again during its 47th Ordinary Session from May 12 - 26, 2010.

<sup>9</sup> Para. 1 of Practice Directive I, *Practice Directives*, *supra* note 2.

<sup>10</sup> "...No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender." African Charter on Human and Peoples' Rights at art. 7(2) (hereinafter The Charter).

<sup>11</sup> Rule 142 of the Rules of Procedure (2020), *supra* note 3.

<sup>12</sup> "Entry into force," similar to "commencement", is the date when a law or legislation becomes applicable or enforceable.

- All Complaints and Communications received at the Commission prior to the entry into force of the Rule of Procedure (2020) shall continue to be processed in their entirety and until finalization in accordance with the relevant provisions of the Rules of Procedure 2010.<sup>13</sup>

The 2020 Rules came into force on June 2, 2020, 90 days after their adoption during the 27th Extraordinary Session of the Commission.<sup>14</sup> Consequently, June 2, 2020 is the priority date for the operation of the Parallel Framework. This implies that the Commission will apply the 2020 Rules to all Communications received on or after June 2, 2020, and the 2010 Rules to Communications received before June 2, 2020.<sup>15</sup> It is important to note that while the 2021 Directives specifically refers to the 2010 and 2020 Rules, a joint reading of the transitional<sup>16</sup> and non retroactivity<sup>17</sup> provisions in the 2020 Rules suggest that actions or measures taken by the Commission regarding any communication filed prior to June 2, 2020 should be in accordance with the Rules of Procedure in force when the communications were submitted. This should apply to communications that predate the 2010 Rules.

For the purposes of this Briefing Paper, the two parts of the Parallel Framework: the rules applicable to communications submitted before June 2, 2020 and the rules that apply to communications submitted after June 2, 2020 shall be referred to as the “Pre-2020 Rules Procedure” and the “2020 Rules Procedure,” respectively.

### 3. THE 2021 DIRECTIVES AS A COMPONENT OF THE 2020 RULES PROCEDURE

The 2020 Rules<sup>18</sup> empowers the Commission to issue practice directions on specific matters. When issued, practice directions interpret, supplement and/or clarify complexities in the Rules of Procedure. The Commission adopted the 2021 Directives to serve the purpose “...of interpreting and supplementing the Rules of Procedure (2020), to further enhance the capacity of the...Commission...to fulfill its protection mandate under...the Charter...” and “...to facilitate the implementation” of the 2020 Rules.<sup>19</sup> Accordingly, the 2021 Directives form part of the 2020 Rules Procedure under the Parallel Framework and are complementary to the 2020 Rules.

The 2021 Directives consists of three sections. The first describes the two parts of the Parallel Framework that clarify that the Commission shall apply the 2020 Rules only to communications submitted after June 2, 2020. The second section restates the provision of the 2020 Rules<sup>20</sup> that grants the Secretary of the Commission the primary responsibility for the consideration and seizure of communication on behalf of the Commission.<sup>21</sup> In the final section, the Commission addresses its preference for clearly written and concise communications, and introduces the Complaint Form.

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<sup>13</sup> Para. 5 of Practice Directive I, *Practice Directives*, *supra* note 2.

<sup>14</sup> *Supra*, note 3.

<sup>15</sup> Para. 5 of Practice Directive I, *Practice Directives*, *supra* note 2.

<sup>16</sup> Rule 141 of the Rules of Procedure (2020), *supra* note 3.

<sup>17</sup> *Id.* at Rule 142.

<sup>18</sup> *Id.* at Rule 140.

<sup>19</sup> Practice Directives, *supra* note 2.

<sup>20</sup> Rule 115(5) of the Rules of Procedure (2020), *supra* note 3.

<sup>21</sup> The directive also provides that the 60 day time period prescribed for the Commission to communicate its decision on seizure, after receipt of Article 55 communications, shall apply to communications received under Article 48 and 49. Also, the requirement that the Commission is to decide by absolute majority whether to be seized of a Complaint, where seizure was declined during the intersession period, applies to communications under Article 48 and Article 49 of the Charter. Para. 4 of Practice Directive II, *Practice Directives*, *supra* note 2.

#### 4. THE COMPLAINT FORM

The Complaint Form is a downloadable and editable six page document available in the working languages<sup>22</sup> of the Commission. All communications under the 2020 Rules Procedure must use the Complaint Form.<sup>23</sup> Divided into five (5) parts, the Complaint Form requests information on the following:

- Personal Information of the Complainants:

The first section of the Complaint Form requests contact details of the person(s)/organization(s) submitting the complaint<sup>24</sup> and includes a reminder highlighting the importance of notifying the Commission immediately in writing if any of the alleged victims wish to change representation. The Complaint Form then provides boxes to indicate whether it is being submitted by a victim or on behalf of the victim(s), the latter of which requires identifying information for each victim. Where the complainant is acting based on the knowledge and consent of the victim(s), the Complaint Form requests proof of the victim's consent.<sup>25</sup> If not authorized, then the complainant is required to provide an explanation of why proof of representation cannot be obtained and why it is still appropriate to proceed.

- Facts of the Complaint:

This section of the Complaint Form requests details of the State responsible for the alleged violation(s). The Complaint Form notes that communications may only be submitted against States that have ratified the Charter. In this section, the Complaint Form requests an account of the alleged violation specifying the place, date, nature of the incident, and any person(s) involved in chronological order. Documentary evidence is requested if available. The complainant may state the articles of the Charter allegedly violated, the person(s) allegedly responsible for the violations, and any public authority that has taken cognisance of the alleged facts or situation.

- Prayers:

This refers to a list of remedies or reparations sought by the complainant for fulfillment by the respondent State in order to redress the human rights violation if the Commission finds that those violations occurred. Prayers drafted by the complainant may include requests for compensation, revision of legislation, and/or training of law enforcement agents.

- Schedule of Annexes:

This section requests a chronological annex of all documents attached to the Complaint Form. Documents submitted as annexes are excluded in the calculation of the overall 35-page limit for communications submitted to the Commission.<sup>26</sup> The Commission advises that copies, not originals, be submitted because these submitted documents will not be returned.<sup>27</sup>

- Solemn Declaration:

The final section of the Complaint Form requests the complainant's dated signature to attest to the credibility of the information provided. The Commission's instructions for using the forms are discussed in Section 6(I) below.

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<sup>22</sup> The working languages of the Commission are French, English, Arabic, and Portuguese. At the time of writing, the Arabic form was not available on the Commission's Website.

<sup>23</sup> Complaint Form is available at <https://www.achpr.org/announcement/detail?id=128> (last accessed Nov. 15, 2021).

<sup>24</sup> Specifically: Name, Nationality, Organisation (if applicable), Legal Representatives (if available), Relationship to Victim (if not the victim), Address, Fax, Email, and Phone Numbers.

<sup>25</sup> If the complainant is not authorized by the victim to submit the complaint, the complainant must explain and provide proof of why representation cannot be obtained, and why the complainant considers it appropriate to bring the complaint on behalf of the victim.

<sup>26</sup> Para. 6 of Practice Directive III, *Practice Directives*, *supra* note 2.

<sup>27</sup> "English Non-State Complaint Form," pg. 5, available at *African Commission on Human and Peoples' Rights Complaint Form*, <https://www.achpr.org/announcement/detail?id=128> (last accessed Nov. 15, 2021).

## 5. PROVISIONAL MEASURES

A complainant may submit a request for interim measures or temporary redress anytime after submitting the Complaint Form and before the Commission determines the merits of the communication.<sup>28</sup> Provisional Measures are suited for situations where a lack of timely response would result in irreparable harm to the victim of the alleged violation. In essence, these measures are ordered to prevent continuing violations or further deterioration of the situation without determining the merits of the communication. The Commission may also order Provisional Measures on its initiative.

If a request for Provision Measures is received during an inter-session period,<sup>29</sup> the Commission's Chairperson may decide on the request in consultation with the Working Group on Communications and inform the other members of the Commission.<sup>30</sup> In order to ensure that provision measures are implemented, the 2020 Rules mandate the respondent State Party to report back on the implementation of the Provisional Measures within fifteen (15) days of receipt of the decision on the measures.<sup>31</sup> Provisional measures do not constitute a prejudgement of the merits of the communication.<sup>32</sup>

## 6. ARTICLE 55 COMMUNICATIONS UNDER THE 2020 RULES PROCEDURE

As part of its protection mandate, the Commission considers communications alleging human rights abuses against State Parties<sup>33</sup> to the Charter. These Communications are typically complaints that describe the alleged human rights violations and request the intervention of the Commission. Communications could either emanate from a State Party<sup>34</sup> or other sources.<sup>35</sup> Article 55 of the Charter provides for communications other than those by State Parties (Article 55 communications).

The 2020 Rules provide that the Commission may receive Article 55 communications from natural or legal persons. Natural persons are human beings while legal persons are non-human entities established by legal processes, such as civil society or non-governmental organizations. It is important to note that neither the rules nor the Charter restricts the right to submit communications to citizens of African Countries. Any natural or legal person may submit a communication under Article 55 to the Commission.

- Procedure for Article 55 Communications under the 2020 Rules Procedure

Communications under Article 55 must allege human rights violations by a State Party to the Charter.<sup>36</sup> Communications must be in writing and should clearly<sup>37</sup> present facts as well as the provisions of the African Charter alleged to have been violated.<sup>38</sup> There is no stated time limit by which communications must be submitted to the Commission after the alleged violation. Accordingly, the complainant may decide the best time to submit their communications subject to seizure and admissibility requirements.

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<sup>28</sup> Rule 100(1) of the Rules of Procedure (2020), *supra* note 3.

<sup>29</sup> An inter-session period is the lapse of time between two sessions of the Commission.

<sup>30</sup> Rule 100(3) of the Rules of Procedure (2020), *supra* note 3.

<sup>31</sup> *Id.* at Rule 100(3).

<sup>32</sup> *Id.* at Rule 100(6).

<sup>33</sup> "List of Countries which have signed, ratified/acceded to the African Charter on Human and Peoples Rights," Af. Union, <https://au.int/en/treaties/african-charter-human-and-peoples-rights>. Only Morocco is not a party to the Charter.

<sup>34</sup> Articles 47-49 of the Charter, *supra* note 10.

<sup>35</sup> Rule 115 of the Rules of Procedure (2020) clarifies persons who can file communications under Article 55 of the Charter. Specifically, Article 55 communications may be submitted "by any natural or legal person." Natural persons are individuals who are alleged victims or who represent alleged victims of human rights violations, while legal persons are non-governmental organisations who are legally permitted to file communications regarding alleged human right violation(s).

<sup>36</sup> Article 60 of the Charter, *supra* note 10.

<sup>37</sup> Rules 109 (2) and 115 (2) of the Rules of Procedure (2020), *supra* note 3.

<sup>38</sup> *Id.* at Rule 108(2).

The Commission requires the complainant to submit communications with a completed Complaint Form in any of the working languages of the Commission.<sup>39</sup> Further:

- The completed Complaint Form should not exceed 35 pages, and in font size 12 and single line spacing .
- The Complaint Form must be signed or stamped before it is submitted.<sup>40</sup>
- Supporting documentation and other annexes should be in the same language as the Communication to the extent possible. When not possible, the Commission requires the inclusion of a translated version of the document and a certificate indicating that the document was produced by a sworn translator.<sup>41</sup>

Victims may indicate their desire to be anonymous on the Complaint Forms. While the Commission may withhold the identity of the victim from the public, the identity of the victim must be shared with the State against which the communication is submitted.<sup>42</sup> Where the victim does not ask for anonymity and is represented, the victim shall be the complainant on record and their representative would be recognized.<sup>43</sup> In addition, an alleged victim must decide whether to submit the communication without legal assistance or with the help of a lawyer.<sup>44</sup> The 2020 Rules requires that when a legal representative has been engaged, the victim's name, together with sufficient proof that the victim consents to being represented by the legal representative, shall be indicated in the communication.<sup>45</sup>

A communication including supporting documentation may be submitted by post or electronic mail<sup>46</sup> to the Chairperson of the Commission through the Secretary.<sup>47</sup> When submitted electronically, the Commission does not require a paper version of the Communication Form to be sent by post except if the supporting documentation cannot be submitted electronically.<sup>48</sup> The 2020 Rules provide that upon submission, the Secretary would register the communications with a reference number, the names of the parties, the date of registration or notification.<sup>49</sup> Where different communications allege the same facts against the same State, the Commission may join them and consider them together as a single communication.<sup>50</sup>

- Seizure

Seizure is the first stage in the consideration of communications. A communication is seized by the Commission, when the Secretary makes a determination that it contains all necessary information required by the 2020 Rules.<sup>51</sup>

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<sup>39</sup> Only one of the working languages should be used in the Complaint Form. *Instructions, Af. Comm'n on Human and People's Rts*, <https://www.achpr.org/announcement/detail?id=128> (last accessed Nov. 15, 2021).

<sup>40</sup> "English Non-State Complaint Form," *supra* note 27.

<sup>41</sup> See *supra* note 39.

<sup>42</sup> *Supra* note 27.

<sup>43</sup> Rule 115(3) of the Rules of Procedure (2020), *supra* note 3.

<sup>44</sup> *Id.* at Rule 115(2)(e).

<sup>45</sup> *Id.*

<sup>46</sup> Email ([au-banjul@africa-union.org](mailto:au-banjul@africa-union.org)); phone ((220) 441 05 05, 441 05 06); and full mailing address (The Secretariat of the African Commission on Human and Peoples Rights; 31 Bijilo Annex Layout, Kombo North District, PO Box 673 Banjul, The Gambia) is available on the last page of the Complaints form, *supra* note 27.

<sup>47</sup> Rule 115(1) of the Rules of Procedure (2020), *supra* note 3.

<sup>48</sup> Para. 6(iii) of Practice Directive III, *Practice Directives*, *supra* note 2.

<sup>49</sup> Rule 88(2) of the Rules of Procedure (2020), *supra* note 3. Note that a complainant has no alternative forum for registering communications regarding human right violations under the 2020 Rules. However, according to Rule 99 of the 2020 Rules, where a violation is of a severe or excessive nature, such communication shall be brought to the attention of the Assembly and the Peace and Security Council of the African Union pursuant to Article 58 of the Charter and Article 19 on the protocol on peace and security.

<sup>50</sup> Communications submitted against the same state party regarding the same human right violation shall be joined. Where the Commission subsequently deem appropriate, it may disjoin communications that were initially joined together. *Id.* at Rule 97.

<sup>51</sup> *Id.* at Rule 115 (5).



To scale through the seizure stage, a communication must include three classes of information: First, it must contain information about the complainant and/or victim. Every communication must contain the name, nationality, and signature of the complainant.<sup>52</sup> Where the complainant is different from the victim, the name of the victim together with sufficient proof that the victim consents to being represented by the complainant or justification for not having proof of representation must be presented.<sup>53</sup> Communications submitted by a legal person such as a non-governmental organization must include the name and signatures of its legal representatives and the victim on whose behalf the communication is submitted. In addition, all communications must have the postal address, electronic mail address and phone number(s) of the complainant or their legal representatives.

Secondly, the communication must name the State(s) allegedly responsible for the violation of the Charter.<sup>54</sup> Information on any public authority that is cognisant of the facts or the alleged violation must be reflected in the communication. Finally, the communication must present an account of the facts that gave rise to the violation(s) raised by the complainant.

It is the Secretary's responsibility to make the seizure determination on behalf of the Commission. Where the complaint has all required information, the Secretary is expected to communicate its seizure decision to the Complainant within 60 days from the receipt of the complaint.<sup>55</sup> Conversely, where some information is lacking, the Secretary sends a request to the complainant to provide the missing information. The prescribed period for making the determination on seizure will only begin to run from the date of the communication is completed with the necessary information.

The 2020 Rules grants the Commission power to decide by absolute majority whether to be seized of a communication denied by the Secretary or referred to the Commission by the Secretary.

- Admissibility & Merits

After seizure, the complainant is required to submit Admissibility and Merits Briefs. The Admissibility and Merits Brief is a document containing legal arguments establishing that the communication meets the Charter's admissibility requirements, and laying out the legal basis upon which the Commission should determine the communication in favour of the complainant/victim.

- Admissibility

The term admissibility, in relation to communications, practically means that the communication is of a nature that the Commission is bound to deliberate on and deliver a decision. In other words, after the Commission receives a communication and ascertains that it contains the required information (seizure), the Commission undertakes a second-level inquiry into whether it should deliberate on the complaints made in the communication based on the standards of the Charter.

There are seven criteria for admissibility under the Charter.<sup>56</sup> First, communications must indicate the names and personal information of the authors even if they desire to be anonymous. The Commission has held that a communication not submitted by “...an alleged victim...” or “...in the name of a specific victim...” was inadmissible for failing to meet the requirement under this criterion. Secondly, the communication must be compatible with the Charter. This implies that the communication should be based on the provisions of the Charter relating to the powers of the Commission, the rights alleged to have been violated, the applicability of the Charter to the State

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<sup>52</sup> *Id.* at Rule 115(2)(a).

<sup>53</sup> *Id.* at Rule 115(2)(E).

<sup>54</sup> A complainant must state the name of the State(s) alleged to be responsible for the violation of the African Charter, even if the complainant makes no specific reference to the provision of the Charter alleged to have been violated. *Id.* at Rule 115(2)(E).

<sup>55</sup> *Id.* at Rule 115(8).

<sup>56</sup> Article 56 of the Charter, *supra* note 10.

and other provisions of the Charter. In other words, to be admissible, communications must be within the scope of the Charter.

The third criterion relates to the tone of the communication. The Charter requires that communications are “not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union.” Communications will therefore be admissible if they are written in language that does not malign the State or its institutions but describes how the actions or inactions of the State led to the alleged violation of the Charter. In the past, the Commission has held that phrases such as “regime of torturers,” “government barbarisms,” and “criminal neo-colonial regime” were insulting.<sup>57</sup>

The fourth requirement focuses on the credibility of the source of the complaints and evidence in the communication. The Commission will hold that a communication is inadmissible if it is based “exclusively on news disseminated through the mass media.”<sup>58</sup> The Commission has held communications to be admissible under this criteria when the communication was based on “personal knowledge of the matter”<sup>59</sup> and contained “transcripts of the judicial process of the victim’s case in the Respondent State.”<sup>60</sup>

The next criterion is exhaustion of local remedies. This means that before communications can be submitted to the Commission, the alleged human right violation(s) raised in the communication must have been subjected to all available judicial review mechanisms within the Respondent State. The Commission has held that to determine exhaustion of local remedies, the Commission considers “...whether there are any judicial remedies at domestic level which could have been pursued...to compel the State...to facilitate access to justice for the right allegedly violated.”<sup>61</sup> There are a few exceptions to the rule on exhaustion of local remedies. These include circumstances where the judicial procedure within the Respondent State is unduly prolonged<sup>62</sup>; unavailable, ineffective or insufficient<sup>63</sup>; or in the context of widespread or systematic violations which the State is deemed to have knowledge of and should have redressed<sup>64</sup>.

Another requirement for admissibility is for communications to be submitted “within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter.”<sup>65</sup> This requirement has two components. The first implies that upon exhaustion of local remedies, the communication should be submitted to the Commission without unreasonable delay. A communication filed 22 months after exhaustion of local remedies was held to have not been submitted within reasonable time.<sup>66</sup> Generally, the Commission analyzes timeliness under the first

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<sup>57</sup> Ligue Camerounaise des Droits de l'Homme / Cameroon, App. No. 65/92, Af. Comm. H.P.R. (April 24, 1997) at para. 13, available at <https://www.achpr.org/sessions/descions?id=94>.

<sup>58</sup> Article 56(4) of the Charter, *supra* note 10.

<sup>59</sup> Desmond Nunugwo v. Nigeria, App. No. 653/17, Af. Comm. H.P.R. (August 17, 2020) at para. 45, available at <https://www.achpr.org/sessions/descions?id=290>.

<sup>60</sup> Romy Goornah (represented by Dev Hurnam) v. The Republic of Mauritius, App. No. 596/16, Af. Comm. H.P.R. (April 28, 2018) at para. 51, available at <https://www.achpr.org/sessions/descions?id=262>.

<sup>61</sup> *Supra* note 59.

<sup>62</sup> Annette Pagnouille (on behalf of Abdoulaye Mazou) vs. Cameroon, African Commission on Human and Peoples' Rights, Comm. No. 39/90, (1997) available at <http://hrlibrary.umn.edu/africa/comcases/39-90b.html>

<sup>63</sup> *Supra* Note 59; See also Dawda Jawara v The Gambia (Comm 147/95-149/96) para 30-39 available at <https://www.achpr.org/sessions/descions?id=117>.

<sup>64</sup> **Anuak Justice Council v Ethiopia (Comm 299/05) [2006] (25 May 2006) para 60** available at <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2006/69>. The Commission also held that in such cases, it is impractical or undesirable for the complainant to seize the domestic courts in the case of each individual complainant. Please see Comms. 54/91, 61/91, 98/93, 164/97 to 196/97, 210/98 Malawi African Association et al/Mauritania, para.85 and 25/89, 47/90, 56/91, 100/92 Free Legal Assistance Group, Lawyers' Committee for Human Rights, UIDH, les Témoins de Jehovah / Zaire, para. 35-37.

<sup>65</sup> Article 56(6) of the Charter, *supra* note 10.

<sup>66</sup> Article 19 and others v. Zimbabwe, App. No. 305/05, Af. Comm. H.P.R. (Nov. 24, 2010) at para. 91, available at <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2008/95>. See also Sangonet v. Tanzania, App. No. 333/06, Af. Comm. H.P.R. (May 2010), available at <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2010/107> where the Commission found the communication inadmissible due to a delay of 11 years after exhaustion of local remedies.



part of this requirement on a case by case basis. The second component requires the complainant to submit their Admissibility and Merits brief within the timelines provided by the 2020 Rules. When necessary, a complainant could apply to the Commission for an extension of time to submit the briefs.<sup>67</sup>

Finally, communications must not involve cases that have been settled by the Respondent State in line with the principles of the United Nations or the African Union.

- Merits

The merits section of the Admissibility and Merits brief should clearly present the legal arguments in support of the communication and may include three or more main components: the facts of the complaint, the legal argument to establish the rights violation, and the remedies requested from the Commission. In addition, the brief may contain the procedural history which indicates when the communication was submitted, when the Commission responded, and if the Respondent State provided any response. Then, a detailed statement of facts should provide the context of the communication and if possible describe the country context in order for the Commission to understand and reflect on the political and social background of the situation. Following the facts, the legal argument should be based on the Charter and other international human rights standards applicable to the Respondent State and recognized by the Commission.

- Timelines

After seizure, the Secretary of the Commission sends a notice in writing to the parties within 60 days after the communication was received from the complainant.<sup>68</sup> The notice is usually accompanied with a request to the complainant to submit arguments and evidence on admissibility and merits within 60 days of receiving the Secretary's request. If a complainant submits the arguments as requested, the Secretary transmits the submission to the Respondent State within 14 days requesting the State to submit a response.

The Respondent State is expected to submit a response within 60 days of receiving the complainant's submission from the Secretary. Upon receipt, the Secretary sends the Respondent State's response to the complainant within 14 days and is expected to submit a rejoinder within 30 days from the date the Respondent State's response was received. No new issues can be introduced in the rejoinder, and upon receipt, the Secretary forwards the rejoinder to the Respondent State for information purposes only.<sup>69</sup>

- Oral Hearing

A complainant or the Respondent State may request oral hearings on the admissibility and/or merits of a communication that the Commission has seized.<sup>70</sup> A request for oral hearings may also be made by the Commission within 90 days prior to the day the communication is scheduled to be considered. It must include facts or legal issues intended to be addressed orally.<sup>71</sup> The Bureau of the Commission ( the Chairperson and Vice Chairperson) decides a party's request for oral hearings after informing the other party and consulting the Working Group on Communications. After a decision is made, the Secretary transmits its decision regarding the oral hearing request to both parties within 15 days.<sup>72</sup> During the hearings, the Commission permits oral presentations on additional facts or answers to questions regarding the admissibility or merits of the

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<sup>67</sup> Rule 98 of the Rules of Procedure (2020), *supra* note 3.

<sup>68</sup> *Id.* at Rule 115(8).

<sup>69</sup> *Id.* at Rule 116(2).

<sup>70</sup> *Id.* at Rule 102(1).

<sup>71</sup> *Id.* at Rule 102(2).

<sup>72</sup> *Id.* at Rule 102(4).

communication.<sup>73</sup> Also, if the Commission decides that the written or oral evidence or opinion of a witness or expert is likely to assist it in its examination of a communication, then the Commission may invite that witness or expert to testify during the hearings.<sup>74</sup>

## 7. DECISIONS ON ADMISSIBILITY AND ON THE MERITS

- Decision on Admissibility

After the Commission deliberates on the parties' submissions on admissibility, it adopts a decision and may defer the consideration of the merits.<sup>75</sup> If the Respondent State has not provided a response on the communication's admissibility, the Commission makes a default decision based on the complainant's submission.<sup>76</sup> Parties will be notified of the Commission's decision on admissibility, and will be required to maintain confidentiality until the Assembly of Heads of State and Government (the Assembly)<sup>77</sup> considers the decision.<sup>78</sup>

Admissibility decisions may be reviewed if the Respondent State submits a new fact, but the State must request this review within sixty days from the date of when the decision was sent to the parties.<sup>79</sup> This new fact must be a decisive one, something not known to the State, and not due to the State's negligence.<sup>80</sup> Note that if a State failed to make a timely submission, then the State cannot seek review of a decision on admissibility unless there are cogent reasons for failing to submit on time and exceptional circumstances and the interest of justice require the request to be considered.<sup>81</sup>

If the Commission finds a communication inadmissible, then the decision can be reviewed if the complainant submits a new fact. The complainant must request this review within 180 days of discovering the new fact, and no later than three years from the date of when the decision was sent to the complainant.<sup>82</sup> Again, this new fact must be a decisive one, something not known to the complainant, and not due to the complainant's negligence.<sup>83</sup>

- Decision on the Merits

The Commission will adopt a decision on the merits after deliberating on submission by both parties.<sup>84</sup> The Rules provide that the Commission shall decide on a communication within one year from when the Communication becomes ripe for a decision on the merits.<sup>85</sup> The phrase 'ripe for a decision on the merits' is not defined by the Rules but appears to be similar to 'close of pleadings' under the [Rules of Procedure \(2020\) of the African Court on Human and Peoples' Rights](#) (Court).<sup>86</sup> Close of pleadings under the Court's Rules refers to a stage "when the Applicant replies to the Respondent State's Response to the Application or when the Court so decides". Compared to the Commission's procedure, a communication may be ripe for a decision on the merits when parties to a communication have exchanged all pleadings and the Commission requires no further information for its deliberations on the Communication.

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<sup>73</sup> *Id.* at Rule 102(11).

<sup>74</sup> *Id.* at Rule 101(1).

<sup>75</sup> *Id.* at Rule 118(1).

<sup>76</sup> *Id.* at Rule 118(2).

<sup>77</sup> The Assembly is the African Union's (AU's) supreme organ and comprises Heads of State and Government from all Member States. It determines the AU's policies, establishes its priorities, adopts its annual programme, and monitors the implementation of its policies and decisions.

<sup>78</sup> Rule 118(4) of the Rules of Procedure (2020), *supra* note 3

<sup>79</sup> *Id.* at Rule 119(2).

<sup>80</sup> *Id.* at Rule 119(3).

<sup>81</sup> *Id.* at Rule 119(4).

<sup>82</sup> *Id.* at Rule 119(1).

<sup>83</sup> *Id.* at Rule 119(3).

<sup>84</sup> *Id.* at Rule 120(1).

<sup>85</sup> *Id.* at Rule 120(3).

<sup>86</sup> Rule 46(1) Rules of Procedure (2020) of the African Court on Human and Peoples' Rights available via <http://www.african-court.org/wpafc/wp-content/uploads/2020/10/4-RULES-OF-THE-COURT-25-September-2020.pdf> (accessed November 15, 2021)

The Commission may issue a decision and defer the question of reparations and costs to be decided at a separate oral hearing.<sup>87</sup> If the State has not provided submissions on the merits in a timely manner, the Commission will adopt a decision by default with the information it has.<sup>88</sup> The decision will remain confidential and will not be sent to the parties until the Assembly of Heads of State and Government (Assembly)<sup>89</sup> considers the Commission's Activity Report<sup>90</sup> that references the decision.<sup>91</sup> Once the Assembly considers the decision, the decision will be sent within 30 days to the parties and published within 30 days of sending it to the parties.<sup>92</sup>

Either party may request a review of the decision on the merits if they can submit new decisive facts, but the request for review must be made within 180 days of discovering the new fact and not later than three years from when the decision was sent to the parties.<sup>93</sup> If a Respondent State did not make a timely submission on the merits, then they forfeit their right to seek review unless there are cogent reasons for failing to submit on time and exceptional circumstances and the interest of justice require the request to be considered. The Commission follows the same procedure for reviewing a decision on merits as reviewing a decision on admissibility.<sup>94</sup>

## 8. AMICUS CURIAE INTERVENTION

A third party with no direct interest in a communication may join as an amicus curiae<sup>95</sup>, or friend of the court, after the parties have to make a submission. The Commission may decide to invite an amicus curiae to intervene in a communication by making written or oral submissions in order to assist the Commission in deciding on a legal or factual issue.

For a party to join as an amicus curiae,<sup>96</sup> they are required to submit a request to the Commission in writing. The request must indicate the author(s), contact details, the communication(s) to which the request relates, and the contribution of the proposed amicus submission. The request must not be longer than 10 pages. If the Commission decides to grant an amicus curia status to a party, the Commission shall require the amicus curiae to file an amicus brief within thirty (30) days. After the Commission receives the amicus brief, it shall share the brief with the complainants and respondent and require them to file their responses within thirty (30) days.<sup>97</sup>

During the hearing of a communication in which an amicus curiae brief has been filed, the Commission may request the amicus curiae to testify during its hearings/deliberations.<sup>98</sup>

## 9. RECOMMENDATIONS FOR THE COMMISSION

The 2021 Directives are helpful for understanding the new communications procedure at the Commission especially with respect to the Parallel Framework and the use of the Complaint Form. As the Commission continues to operate, and refine its processes under the new framework, it

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<sup>87</sup> Rule 121 of the Rules of Procedure (2020), *supra* note 3

<sup>88</sup> *Id.* at Rule 120(2).

<sup>89</sup> The Assembly is the African Union's (AU's) supreme organ and comprises Heads of State and Government from all Member States. It determines the AU's policies, establishes its priorities, adopts its annual programme, and monitors the implementation of its policies and decisions.

<sup>90</sup> In accordance with Article 59 of the African Charter and subject to Rule 63(2). Rule 120(4) of the Rules of Procedure (2020), *supra* note 3.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at Rule 120(6).

<sup>93</sup> *Id.* at Rule 122

<sup>94</sup> *Id.*

<sup>95</sup> Third party having no interest in the outcome of a Communication, and potentially able to assist the Commission in determining a factual or legal issue arising in a Communication.

<sup>96</sup> Rule 104(3) of the Rules of Procedure (2020), *supra* note 3.

<sup>97</sup> *Id.* at Rule 105(4).

<sup>98</sup> *Id.* at Rule 105(6).

would be useful to consider new and innovative approaches to enhance the efficiency of the procedure, and equitable access to the Commission.

- Practice Directives or Guidelines for pleadings other than the Complaints Forms:

Like the 2021 Practice Directives, a set of practical instructions on the form, length and content of pleadings<sup>99</sup> other than the Complaint Form would be helpful to prospective complainants and Respondent States. This is necessary, in part, due to the new requirement for complainants to submit one brief addressing the admissibility and merits of a communication. In addition, such directives will bring further clarity to the provisions of the 2020 Rules on preliminary objections which only addresses timelines for submitting objections, and Amicus Curiae interventions which provides for the length and content of the request brief for admission as Amicus Curiae but makes no provision as to the length of the substantive amicus brief.

Practice Directives on other pleadings would support the strong preference of the Commission for concise and unconvoluted submissions. To maximize the impact of the Complaint Form with respect to the length and form of their initial communication, the recommended Practice Directive would ensure that other pleadings are equally clear and concise. Logistically, streamlining the structure of pleadings could reduce the processing time for communications including with translations and deliberations.

- Develop (soft) guidance tools to further enhance understanding of the new procedural framework

Similar to the non binding guidance tools available on the Commission's website, which were developed in relation to the previous Rules of the Commission, information sheets or guidelines that elucidate the new procedural framework would be helpful to all parties intending to submit communications or intervene as third parties or amicus curiae. Such tools could include updated information sheets on the Communication Procedure<sup>100</sup> and Guidelines for Submitting Complaints<sup>101</sup>; checklists for seizure and admissibility requirements; flowcharts on the communications procedure<sup>102</sup> as well as frequently asked questions. Collaboration with other Inter Governmental or Non Governmental Organizations would be key in this regard.

- Offline Use of the Complaint Form

With the introduction of and mandatory requirement to use the Complaint Form, the communications filing process would wholly or partly depend on computer and internet access for completing, downloading, and/or submitting the Complaint Form. This is especially relevant for prospective complainants who may not have access to computers or reliable internet connection. While some sections of the Complaint Form have sufficient space for the information required, other parts such as the Facts and Prayers sections can only be edited and expanded using computer-based word processing programs. This effectively limits access to the Commission to complainants with a computer.

One approach to enhancing universal access and use of the Complaint Form is the development of a printable version of the Complaint Form that provides sufficient space or lines for complainants to handwrite or use a typewriter to complete the form. In addition, providing Supplementary Attachment Forms to accommodate further information that may not fit in the space provided on the

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<sup>99</sup> For example, Merits and Admissibility Briefs; Preliminary Objections; and Rejoinders.

<sup>100</sup> *Communications Procedures*, Af. Comm'n on Human and People's Rts., <https://www.achpr.org/communicationsprocedure> (last accessed Nov. 15, 2021).

<sup>101</sup> *Guidelines for submitting complaints*, Af. Comm'n on Human and People's Rts., <https://www.achpr.org/guidelinesforsubmittingcomplaints> (last accessed Nov. 15, 2021).

<sup>102</sup> See Section 10 below

aforementioned printable version of the form would increase access and use of the Complaint Form. Similar to the online form, the printable version of the form should be provided in all the languages of the Commission.

- Clarify timelines for decisions

The 2020 Rules provide that “the Commission shall decide on a communication within one (1) year from the time the Communication becomes ripe for a decision on the merits”<sup>103</sup> [emphasis added]. This provision is subject to multiple interpretations because the 2020 Rules do not define the phrase ‘ripe for a decision on the merits.’ Without a clear interpretation or guidance on how to compute the time, complainants will have no clue about the expected time for the decisions on their communications.

There are many approaches that the Commission could adopt to resolve the ambiguity. First, the Commission could define the phrase as the date on which the last submission is made and all parties have exercised their rights of reply. Secondly, the Commission could adopt a practice of informing the parties in writing once a communication becomes ripe for a decision on the merits. Finally, the Commission could develop a tracking system for decisions and indicate (on the system) when a communication is ripe for a decision.

- Make available Complaints Form in Arabic language

At the time of writing, the Commission had yet to make available on its website the Complaints Form in Arabic. The link created for the Arabic version of the form leads to English, French and Portuguese forms. This would unduly impact potential complainant who would prefer to communicate with the Commission in Arabic.

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<sup>103</sup> Rule 120(3) of the Rules of Procedure (2020), *supra* note 3.

**10. SUMMARY OF COMMUNICATIONS PROCEDURE**

Please note that this flowchart presents a broad overview of the Communications Procedure. For precise and additional information on the procedure, please refer to the text.

