

PROCEDURE FOR LODGING COMPLAINTS BEFORE HUMAN RIGHTS INSTITUTIONS: CONSIDERATIONS TO LITIGANTS

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Abstract

Human rights are promoted and protected through four different legal spheres. The first layer galvanizing human rights is at the international level, under the stewardship of the United Nations; second is at the regional level by the regional integration bodies; third is at sub-regional level by the regional economic communities; and the last is at the domestic level, by the national institutions. In all these layers, there are institutions which are formulated to facilitate the enforcement of human rights. Further, these bodies have mechanised and adopted different measures to promote and protect human rights; a few of which include: reporting procedure, inter-state communication, individual communication and complaints procedure, inquiry procedure, investigation; and Universal Periodic Review. Within such a setting, this article, selectively, sketches the practical and procedural aspects governing institutions with the overarching objective of upholding human rights law.

Key Words: *Human rights, Inquire procedure, Investigation*

1.0 Introduction

This article intends to provide some of the procedural and practical aspects surrounding human rights institutions. However, not all human rights institutions are presented. Only some international human rights institutions are targeted and Tanzania is taken as a case study. Due to the prevailing practical and procedural commonalities among human rights institutions, authors are of the view that the selected case studies serve for other human rights institutions that are not targeted in this study.

2.0 Overview of the International Human Rights System

Human rights law has evolved to be an important tool in shaping the relationship between individuals and their own states.²⁷⁹ The aftermath of the Second World War necessitated the emergence of global system for protecting human rights. It can safely be concluded that human rights is the realm of an international legal system. The enormity of the atrocities committed by the Nazi regime dramatically changed the nature of international world order. This unforgotten experience compelled states to cede some of their powers to accept the need to be under international scrutiny, on how they treat their individuals. To that effect, the process of promoting and protecting human

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279 See T Meron, *The humanization of international law* (Hague Academy of International Law and Nijhoff, (2006); T Buergenthal, 'The evolving international human rights system', 100 *American Journal of International Law* 4 (2006) at 783.

rights is championed by different intergovernmental committees, domestic and international courts, as well as different national and international institutions created to deal with human rights.²⁸⁰

In meeting its objectives, international human rights law signals states to internationally agreed norms. To that effect, international human rights law provides a safety net for individuals whose rights cannot be remedied at the domestic level.²⁸¹ International human rights law is closely linked with the emergence of the nation state. Given their legal character, international human rights norm is based on international human rights originating from treaties. Judicial rights serve as authoritative sources of claims.

With the established mechanisms, human rights are promoted and protected through different legal spheres. The first level is at international by the UN; second is at the regional level by the regional integration bodies; third is at the sub-regional level by the regional economic communities; and the last is at the domestic level, by the national institutions. In all these levels, there are institutions which are formulated to facilitate the enforcement of human rights. Further, these bodies have mechanised and adopted different measures to promote and protect human rights; a few of which include: reporting procedure, inter-state communication, individual communication/ complaints procedure, inquiry procedure, investigation; and Universal Periodic Review. While it can be witnessed that there are multiple institutions dealing with human rights at all levels of legal systems, the main challenge facing international human rights law is enforcement and compliance of their decisions. Normally, it would require political will of states to either enforce or comply with a decision of an international human rights institution.

2.1 Global level: UN Human Rights System

The UN was not designed to specifically deal with human rights. Preservation of peace and security around the globe is its paramount target. However, the UN commitment to uphold human rights is visible under the UN Charter.²⁸² Regardless of the UN not being a specifically human rights body, its role in human rights promotion and protection is derived from the UN Charter and from its treaty bodies.²⁸³

2.1.1 Charter-based Mechanisms

These mechanisms derive from the Charter of the UN since they are put in place by human rights bodies/ institutions that are established under the Charter. The principal organs of the UN are: the General Assembly, the Security Council, The Economic and Social Council, the Trusteeship Council,

²⁸⁰ For example, see: D Edward, 'Judicial Enforcement of International Human Rights' 27 *Akron Law Review* (1994). 281.; T Buergenthal, 'International and Regional Human Rights Law and Institutions: Some Examples of Their Interaction' 12 *Texas International Law Journal*, (1977) 321.; T Muller, 'Human Rights: International Protection, Monitoring, Enforcement' 48 *German Yearbook of International Law* (2005) 717. S MacBride, 'The Enforcement of the International Law of Human Rights' *University of Illinois Law Review* (1981), 385.

²⁸¹ F Viljoen, *International human rights law in Africa*, 2nd edn (Oxford: OUP UK, 2012).

²⁸² See the preamble and arts 1(3), 55 and 56 of the UN Charter.

²⁸³ F Viljoen, *International human rights law in Africa*, 2nd edn (Oxford: OUP UK, (2012) at 17.

the International Court of Justice and the Secretariat.²⁸⁴ The Economic and Social Council has been mandated to make recommendations for the purpose of promoting respect for, and observance of human rights and fundamental freedoms for all.²⁸⁵ In the Year 1964, it formed the Commission on Human Rights for the purposes of human rights promotion²⁸⁶ However, in 2006, the UN General Assembly made a resolution that had the effect of replacing the Human Rights Commission by the Human Rights Council.²⁸⁷ Unlike the Commission which had limited functions and powers, the Council has a wider range of functions as regards human rights promotion and protection, which seek to address situations of gross and systematic violations of human rights globally, recommending on feasible measures, and being guided by principles of universality, impartiality, objectivity and non-selectivity.

One year after it was established, the Council adopted “Institution Building Package” to provide for its procedures and mechanisms.²⁸⁸ Among others, it introduced the Universal Periodic Review (UPR), the Human Rights Advisory Committee, and Complaints Procedure. Unlike the Treaty-based mechanisms where one has to report to a committee on matters limited to its scope; under the Human Rights Council the scope is quite bigger as the basis of the UPR is wide.²⁸⁹ The reporting under UPR is to be done under established principles and objectives and is to be done every four years. Its contents are also provided in a prescribed manner.²⁹⁰

The complaints’ procedure is established to address consistent patterns of gross and reliably attested violations of human rights and all fundamental freedoms occurring in any part of the world and under any circumstances.²⁹¹ Before, the complaint is accepted; it must also fulfill the admissibility criteria which are more and less similar to those under the UN Treaty bodies.²⁹²

2.1.2 Treaty-based mechanisms

There are nine core treaties which guarantee human rights. These include; International Covenant on Civil and Political Rights (ICCPR), Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), International Convention on Elimination of all forms of Racial Discrimination (CERD), Convention on Elimination of all forms of Discrimination Against Women (CEDAW), Convention on the Rights of Persons with Disabilities (CRPD), International Convention for the Protection of all Persons from Enforced Disappearance (CED), International Convention of the Protection of the Rights of all Migrant Workers and Members of their

284 Article 7(1) of the Charter of the UN.

285 See Article 62(2) of the Charter of UN.

286 Through the powers it is given under art 68 of the UN Charter.

287 UN General Assembly Resolution A/RES/60/251.

288 Human Rights Council (HRC) Resolution 5/1 of 18th June 2007.

289 Para 1 of HRC Resolution 5/1 of 18th June 2007.

290 Human Rights Council Resolution 6/102 of 27th September 2007.

291 *Op. cit* para 85.

292 *Ibid*, para 87.

Families (CMW), International Covenant on Economic, Social and Cultural Rights (ICESCR) and Convention on the Rights of the Child (CRC). Each of these treaties provide for treaty bodies known as 'committees'. These committees are tasked with the monitoring of the member states' implementation of the treaty. They accomplish this task by receiving state reports, receiving inter-state communication, individual communication/ complaints, facilitating ad hoc conciliation, and inquiry procedures as elaborated below.²⁹³

2.1.3 State Reporting

After the state party signs and ratifies a treaty, it is supposed to submit an initial report within one year after the date of ratification, detailing the implementation level of that particular treaty. Briefly, the procedure involves drafting of the report by a Task force which involves Non-Governmental Organisations (NGOs), members of parliament, experts and universities. The nationals are given an opportunity to air out their views which are compiled and sent to the UN which then publishes it on the UN High Commission website. NGOs of that particular state then prepare another report which is quite objective. The reports are commonly known as 'shadow reports'. Then follow sessions between the NGOs and the committee members followed by a session between state representatives and the committee. The committee at the end makes recommendations and the respective state comes up with the implementation measures.²⁹⁴ After initially reporting, the state parties are required to send periodic reports to the respective committee which is sent every four to five years.²⁹⁵

It should be noted that the state parties to each of the treaties are required to send separate and distinct reports on the implementation of each of the nice treaties they have signed and ratified.²⁹⁶ Member states face it as a challenge as they have to prepare numerous reports for the Committees and for other international bodies of which they are members.²⁹⁷ It can be observed that the reporting procedure does have some weaknesses. For instance, there is no compelling force in the requirement to submit the reports by the state parties, they are just requested; further the committee is just supposed to consider the reports, consideration does not amount to making a decision or adjudication

293 See also 'Monitoring implementation of the international human rights instruments: an overview of the current treaty body systems': Background conference document prepared by the Office of the United Nations High Commissioner for Human Rights, fifth session of the Ad Hoc committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 24th January- 4th February 2005.

294 These measures could be constitutional, legislative, judicial reforms or policy programs.

295 See United Nations High Commissioner for Human Rights' report on strengthening the human rights treaty bodies, 'United Nations reform: measures and proposals', UN Doc. A/66/860, 26 June 2012; 'Compilation of guidelines on the form and content of Reports to be submitted by State Parties to the International Human Rights Treaty bodies', HRI/GEN/2/Rev.6, 3 June 2009.

296 Arts that provide for the reporting procedure under the 9 nine core treaties are; article 40 of ICCPR, art 16 of ICESCR, art 18 of CEDAW, art 29 of CED, art 44 of the CRC, art 19 of CAT, art 73 of the CMW, art 35 of CRDP & art 9 of the CERD.

297 These include the African Commission on Human and Peoples' Rights and the Committee of Experts of the Rights and Welfare of the Child to which the member states have to send implementation reports.

thus there is no binding element. Moreover, no steps are provided that the committee can use to enforce their decisions against the violating states. And lastly, it is not an independent and impartial mechanism.

2.1.4 Inter-state communications

These refer to communications between member states and are in a nature of a complaint by one state against another state with regard to human rights violations. The procedure is provided for under the nine core treaties and their respective protocols.²⁹⁸ Briefly, if a state party considers that another state party is not giving effect to the provisions of the covenant it may by written communications bring the matter to the attention of that state party. The receiving state is required within three (3) months to afford the state which sent the communication, an explanation or any other statement clarifying which includes reference to domestic measures taken to remedy the matter. However, the above procedure is not automatic, the two states involved must be parties to the covenant and the receiving state must have made a declaration recognising the competence of the committee to receive inter-state communication. After that, if the matter is not adjusted to the expected satisfaction of both the states involved within six (6) months after the receipt by the receiving state of the initial communication, either state shall the right to refer the matter to the committee by giving a notice to the committee and the other state.

The committee then deals with the matter only if it has ascertained that all the available domestic remedies have been invoked and exhausted unless the application of such remedies is unreasonably prolonged. The committee then holds closed meetings when examining such communications. The committee shall also make available its good offices to the state parties concerned with a view to a friendly solution of the matter. Thereafter the committee is required within twelve (12) months after the receipt of the notice to submit a report; if a solution is reached the report shall consist of the brief facts and the solution. If the solution is not reached, the report shall contain brief statement of facts, the written submissions and record of the oral submissions. In both circumstances the report shall be communicated to the state parties.

Where the matter is not resolved under inter-state communication procedure, the committee may with the prior consent of the state parties involved appoint an ad hoc conciliation commission.²⁹⁹ This procedure has some weaknesses, for instance; the reporting of one state by the other state to the human rights committee may turn out negative to the reporting state, further, the reporting of the state to the human rights committee is done after six (6) months of the violation which can be regarded as a very long period that may not be helpful where the violation of the human rights is very critical. Moreover, the fact that either state can send complaint communication to the committee

²⁹⁸ Art 41 of the ICCPR, art 10 of the Protocol to ICESCR, art 11 of the CERD, art 76 of CMW, & art 21 of CAT.

²⁹⁹ Art 42 of the ICCPR.

is not practicable since it would not be in the interest of the violating state to communicate to the respective committee. And lastly, the fact that the domestic remedies should be exhausted is not clear since local remedies could include administrative, legislative or judicial remedies.

2.1.5 Inquiry procedures

A state party may at any time declare that it recognizes the competence of the committee under this procedure.³⁰⁰ If the committee receives reliable information indicating grave or systematic violations by a state party of these rights, the committee shall invite the state party to cooperate in the examination of the information and submit observations with regard to the information concerned. The committee may then designate one or more of its members to conduct an inquiry and require them to report urgently to the committee; and where necessary and with the consent of the state party the inquiry may include a visit to the territory of the member state involved. After examination of the findings of such an inquiry, the committee shall transmit its findings to the state party concerned together with any comments and recommendations and the state party shall within six (6) months of receiving of the findings submit its observations to the committee. The committee may decide to include summary account of the results of the proceedings in its annual report. Then follows the follow-up to the inquiry procedure whereby the committee when necessary after the end of the period of six (6) month; invite the state party concerned to inform it of the measures it took in response to such an inquiry.

It is analysed that the inquiry procedure supplement the communication procedure since they enable the committee to address issues that fall outside the scope of the communication. Further, the conditions and formalities in submitting the information for the purpose of requesting an inquiry are far less difficult than those that apply to a communication procedure, for instance it is not necessary to identify the victims of the violations of human rights and to exhaust local remedies. However, there is a need to clarify the interpretation of “grave and systematic”³⁰¹ violations.

2.1.6 Individual Communication

All the nine human rights treaties and their respective protocols provide for individuals to access the respective treaty body established under the treaties.³⁰² Some treaties automatically allow individual access to the respective treaty bodies upon signing and ratification of the Treaty or the Protocols by a given state³⁰³, while other treaties require state parties to make specific declarations on the competence of the treaty bodies to receive individual complaint/ communications from the State parties.³⁰⁴ Such communications may be submitted by or on behalf of individuals under the jurisdiction of the

300 Art 11-12 of the Protocol to the ICESCR.

301 Art 11(2) of the Protocol to the ICSECR.

302 For the Committee on Migrant Workers the Individual Complaints' Procedure has not yet entered into force.

303 Art 1 of the Protocol to the ICCPR, art 1(1) of the Protocol to the ICCPR, art 1(1) of the Optional Protocol to the CRPD, art 1(1) of Optional Protocol to the CRC on a Communication Procedure.

304 Art 77 of CWM, art 22 of CAT, art 14 of CERD, art 31 of CED.

state party claiming to be victims of the violation of these rights and where the communication is submitted on behalf of the individuals or groups of individuals, it shall be with their consent unless the author can justify acting on their behalf without their consent. It can thus be noted that the *locus standi* has by far been extended and could mean to give effect to public interest litigations.

Further, there are admissibility criteria for an individual communication to be admitted; all the treaty bodies have similar admissibility criteria which are³⁰⁵, that it shall not consider the communication unless it has been ascertained that all the available local remedies have been exhausted unless such remedies are unreasonably prolonged.

It will further be inadmissible if it is not submitted within one year after the exhaustion of domestic remedies except where the author can demonstrate that it had not been possible to submit the communication before time, that the facts are a subject of the communication occurred prior to the entry into force of the protocol for the state party concerned unless those facts continued to that date, that the same matter has already been examined by the committee or has been or is being examined under another procedure of international investigation or settlement, that the matter is not compatible with the provisions of the covenant, that it is manifestly ill founded, that it is substantially or exclusively based on reports disseminated by mass media, that it is an abuse of the right to submit a communication or when it is anonymous. Further the committee may decline to consider a communication where it does not reveal that the author has suffered a clear disadvantage unless the committee considers that the communication raises a serious issue of general importance.

The overall procedure that the treaty bodies follow entails receiving the individual communication, ruling on its jurisdiction and admissibility, determination the matter on merits and pronouncement of their decision in form of recommendations. Enforcement takes the form of requesting the state party concerned to implement the decision, follow up activities and closely assessing the state reports of the state concerned in that particular complaint.³⁰⁶ The weakness this procedure has is that “views and recommendation” of the committee are not of a binding nature; they are at a risk of not being implemented by the state party.

305 Art 2 of the Protocol to the ICCPR, art 3-4 of the Protocol to the ICESCR, art 4(2) of the Optional Protocol to CEDAW, art 4 of CAT, art 14(7) of CERD, art 2 of the Optional Protocol to the CRPD, art 7 of the Optional Protocol to CRC on a Communication Procedure.

306 The procedures are elaborately provided / found on the Office of the High Commission of Human Rights Website: www.ohchr.org (Accessed on 18th October 2016).

2.2 Regional level: African human rights system

African regional human rights system is the youngest of the three fledging regional systems.³⁰⁷ In 1981, after the adoption of the African Charter on Human and Peoples' Rights (African Charter)³⁰⁸ by the Assembly of Heads of State and Government of the then Organization of African Unity (now the African Union) [AU], the Africa human rights system was formally established. It was the beginning of a prosperous era in the Continent, as it was being faced with hardships in government and economy. It was also at the time when the Continent was not fully liberated. The ashes of apartheid and post-colonial effects were felt with ease.

On the institutional point of view, the system was for many years devoted and limited to the African Commission on Human and Peoples' Rights (African Commission). With the institutional transformation within the OAU and later the AU, many relevant legal instruments and institutions were established to cater for the realisation of human rights in Africa. To date, African Commission;³⁰⁹ the African Court on Human and Peoples' Rights (African Court);³¹⁰ and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee),³¹¹ steer the African human rights system while the existence of the three mentioned institutions complement each other through their functions. Despite of its overriding challenges, the work of the African Commission since its establishment should be commendable.

On the side of the legal framework, the AU has adopted numerous key legal instruments which guarantee human rights in the Continent. Needless to say, the African Charter, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,³¹² and the African Charter on the Rights and Welfare of the Child,³¹³ have been instrumental in preserving human rights norms in Africa of which different human rights institutions have been applying them.

307 The three most active regional human rights systems complementing the work of the UN are: the European human rights system; the Inter-American system; and the African human rights system. The European human rights system came into being with the adoption by the Council of Europe of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), 4 November 1950. The Inter-American human rights system is shielded by the American Convention of Human Rights, adopted by the Organization of American States on 22 November 1969 and entered into force on 8 July 1978.

308 Adopted by the OAU Assembly on 28th June 1981 in Nairobi, Kenya.

309 Provided for under Part II of the African Charter.

310 Provided for under the Protocol to the African Charter on Human and Peoples' Rights Establishing the African Court on Human and Peoples' Rights (The Court Protocol) which was adopted on 9th June 1998 in Burkina Faso.

311 Provided for under the African Charter on the Rights and Welfare of the Child which was adopted by the Heads of States and the Government of OAU on 11th July 1990.

312 Signed on 11th July 2003 at Maputo, Mozambique by the AU in its second summit.

313 Adopted on the 26th ordinary session of the Assembly of Heads of state and Government of the OAU on 11th July 1990.

2.2.1 African Commission

The African Commission was established by the African Charter, which was adopted on 27 June 1981 and came into force on 21 October 1986.³¹⁴ The Commission, established by the African Charter,³¹⁵ is mandated to protect and promote human rights, as well as interpreting the African Charter upon receiving communications. The Commission comprises of eleven commissioners, elected by the Assembly of Heads of State and Government for six-year terms and serving in their personal capacity.³¹⁶

Consideration of individual and inter-state complaints falls under the Commission's protective authority.³¹⁷ In assessing its effectiveness, the Commission has adopted a number of landmark decisions advancing the jurisprudence in the African human rights system. The Commission receives communications ("cases") from individuals.³¹⁸ When filling a communication, conditions listed under article 56 of the African Charter must be fulfilled. Individual communications as provided under article 55 of the African Charter are considered within the framework of a written procedure.³¹⁹

Under Article 56 of the African Charter, local remedies must be exhausted in respect of a complaint in order for a case to be admissible, unless such remedies are unduly prolonged. Lack of follow-up by the Commission and the AU political organs contributes to the perceived futility of submitting a communication to the Commission. A study on the implementation of the recommendations of the Commission found that the lack of legal reasoning in many of the Commission's decisions and the long delay in delivering decisions did not impact on a state's compliance with the decision.³²⁰ The Commission will thus remain important in the individual complaints process under the African Charter as it will have the role of taking cases to the Court.

However, lately, the African Commission is facing a number of serious challenges threatening it to be unsuitable forum for litigants from Tanzania and other state parties. The most significant obstacle facing the Commission is extensive delays in making its decision. This is a result of the Commission being piled-up with plenty of cases. Non-obedience of the Commission's recommendations by states is a serious concern which requires an immediate

314 For a general understanding of the African Commission see: R Murray, 'African Commission on Human and Peoples' Rights' 13 *South African Journal on Human Rights*, (1997), 666.; MP Pedersen, 'Standing and the African Commission on Human and Peoples' Rights' 6 *African Human Rights Law Journal* (2006), 407.; SA Dersso, 'The jurisprudence of the African Commission on Human and Peoples' Rights with respect to peoples' rights' 6 *African Human Rights Law Journal* (2006) 358.

315 Art 30 of the African Charter.

316 *Ibid*, arts. 31-32.

317 *Ibid*, art 55-56.

318 *Ibid*, art 55 & 56.

319 Rules 102-120 of the Commission's Rules of Procedure, 2010.

320 F Viljoen and Louw L, 'State compliance with the Recommendations of the African Commission on Human and Peoples' Rights' 101 *American Journal of International Law* 1 (2007), 14-16.

intervention.³²¹ There also seem to be internal politics among the Commissioners and other people around the Commission.

2.2.2 The Children's Rights Committee

The African Children's Charter, the only specific regionally focused child right instrument in the world, provides for a supervisory body, the African Committee of Experts on the Rights and Welfare of the Child (Children's Rights Committee/Committee).³²² The Committee is composed of eleven independent members, nominated by the state parties and eventually being elected by the AU Assembly of heads of State and Government.³²³ Significantly, the African Children's Committee has a compulsory jurisdiction. States, by ratifying the African Children's Charter, are subjected to the competence of the Committee.³²⁴

The Committee's promotional and protective mandates are identical to that of the Commission. The committee receives individual and inter-state communications, it examines state parties' reports, and it may undertake facts finding mission.³²⁵ The work of the Committee is guided by the parent law, the African Children's Charter, Rules of Procedure as well as a set of Guidelines.

Looking closely on its protective mandate, the Committee receives communication from individuals, groups or NGOs recognised by the AU, by a Member State, or the United Nations relating to matters covered under the Charter.³²⁶ Section IX of the Committee's Communications Guidelines provides for the procedural and admissibility requirements to submit a claim before the Committee. The requirements include: the Communication is compatible with the provisions of the Constitutive Act of the African Union and the African Children's Charter; the Communication is not exclusively based on information circulated by the media or is manifestly groundless; the Communication should not raise matters pending settlement or previously settled by another international body or procedure in accordance with any legal instruments of the Africa Union and principles of the United Nations Charter; the Communication is submitted after having exhausted available and accessible local remedies, unless it is obvious that this procedure is unduly prolonged or ineffective; the Communication is presented within a reasonable period after exhaustion of local remedies at the national level. The Communication does not contain any disparaging or insulting language.

321 See F Viljoen & L Louw, 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' 101 *American Journal of International Law* (2007), 1-34.

322 Art 32 of the African Children's Charter. The African Charter on the Rights and Welfare of the Child was adopted at the 26th Conference of Heads of State and Government of the OAU on 11 July 1990 and entered into force on 29 November 1999. For a general understanding of the Committee, see: A Lloyd, 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the Gauntlet' 10 *International Journal of Children's Rights* (2002) 179.; D M Chirwa, 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' 10 *International Journal of Children's Rights* (2002), 155-157.

323 See arts 33-36 of the African Children's Charter.

324 *Ibid*, art 44.

325 *Ibid*, art 45(1).

326 *Ibid*, art 44.

Despite the Committee passing its infancy stage, it has not been extensively utilised. Individuals and NGOs need not always submit a communication/case before a committee. Apart from lodging a complaint in the form of a communication, individuals and NGO can refer a matter to the Committee for investigation.³²⁷ For example, Under the Same Sun (UTSS), an NGO based in Tanzania, approached the Committee to investigate the situation of children with albinism camped in Temporary Holding Shelters in the Lake Zone of Tanzania.³²⁸ Through its well-researched Report, the Committee concluded that “the shelters are no longer temporary and they are not serving the best interest of the children.” The Committee further observed that the shelters are “like detention centres than safe houses.”³²⁹

2.2.3 African Court on Human and Peoples’ Rights

The African Court is a fully-fledged regional human rights court established by African countries to cater for the realisation of human and peoples’ rights in Africa. The establishment of the African Court was heralded as one of the major steps in realising the rights of African citizens. In June 1998, Member States of the then OAU, adopted the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court (Protocol/African Court Protocol).³³⁰ The Protocol came into force on 25 January 2004, after it was ratified by more than 15 countries. The seat of the Court is in Arusha, Tanzania.³³¹

Mainly, the African Court is vested with jurisdiction of interpreting and applying the African Charter, the African Court Protocol and any other relevant human rights instrument ratified by a state party.³³² A wide range of cases have been presented to the Court, ranging from different aspects connected with elections, employment, unfair trial and mass-killings. So far, 30 states have accepted the Court’s jurisdiction. Under the Protocol, there is a declaration clause, giving states discretion to allow individuals and NGOs to access the Court directly.³³³ To date, seven states have made such a declaration, although Rwanda is recently attempting to withdraw its own declaration.³³⁴

327 *Ibid*, art 45, see also art 3 (1) (a) of the Guidelines on the Conduct of Investigations by the Committee.

328 ‘Report on Investigative Mission on the Situation of Children with Albinism in Temporary Holding Shelters – Tanzania’, African Children’s Committee, 2016, available at <http://www.acerwc.org/investigation/> (accessed on 24 June 2016).

329 ‘Report on Investigative Mission on the Situation of Children with Albinism in Temporary Holding Shelters –Tanzania’, African Children’s Committee (2016), 16. Available at <http://www.acerwc.org/investigation/> (accessed on 24 June 2016).

330 The Court was established by virtue of art 1 of the African Court Protocol.

331 For a general reflection on the African Court see: F Viljoen, *International human rights law in Africa*, 2nd edn (Oxford: OUP UK, 2012), 410; PN Barney, ‘Reflections on the African Court on Human and Peoples’ Rights’ 4 *African Human Rights Law Journal* (2004), 121; RM Eno, ‘Jurisdiction of the African Court on Human and Peoples’ Rights’ 2 *African Human Rights Law Journal* (2002), 223; E Nalbandian, ‘Challenges Facing African Court of Human and Peoples’ Rights’ *Mizan Law Review* (2007), 75; Mk Mbondenyi, ‘Invigorating the African system on human and peoples’ rights through institutional mainstreaming and rationalization’ 27 *Netherlands Quarterly of Human Rights* (2009), 451; NB Pityana, ‘Hurdles and pitfalls in international human rights law: the ratification process of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples’ Right’ 28 *South African Yearbook of International Law* (2003), 110-129.

332 Art 3(1) of the African Court Protocol.

333 See Article 5(3) and 34(6) of the Court Protocol.

334 Status of the Ratification Process of the African Court Protocol, available at http://en.african-court.org/images/Basic%20Documents/Statuts_of_the_Ratification_Process_of_the_Protocol_Establishing_the_African_Court.pdf (accessed on 10 October 2016).

The first eleven members of the African Court had been elected at the AU Summit held in Khartoum in January 2006, and they were sworn in June of that year. Yet, its first communication reached the Court only on 11 August 2008, leading to the first ruling of the Court on 15 December 2009 in the Matter of *Michelot Yogogombaye v. Senegal*.³³⁵ The Court concluded it had no jurisdiction to hear the case: the applicant requested a suspension of the proceedings brought in Senegal against Hissène Habré, the former Head of State of Chad, but the Court dismissed the petition because Senegal had not entered a declaration accepting the Court's jurisdiction to hear individual petitions as required under Article 34(6) of the Court Protocol.

It is already clear, however, that the jurisdiction of the Court is wide-ranging: it extends to 'all cases and disputes submitted to it concerning the interpretation and application of the Charter.' The Court has the competence to deliver advisory opinions at the request of any Member State of the AU, the AU or any of its organs, or any African organization recognized by the AU. The Court may receive complaints either from the Commission, from the State party which had lodged a complaint to the Commission, or from the State party against which the complaint has been lodged at the Commission; the State party whose citizen is a victim of human rights violation and African inter-governmental organizations also have access to the Court.³³⁶ Individuals or NGOs shall have direct access to the Court only exceptionally, when the defending State has made a specific declaration to that effect, as provided for in Article 34(6) and Article 5(3) of the Protocol.

The African Court has the mandate to receive the complaints or applications submitted to it by the African Commission, States Parties to the Protocol, African Intergovernmental Organizations, NGOs with observer status before the African Commission and individuals from States which have made a declaration accepting the jurisdiction of the Court.³³⁷ Being specifically to individuals, their accessibility to the Court is an exception to the general rule. Article 34(6) of the African Court Protocol requires states to make a declaration accepting its individuals to access the Court. The article reads as follows:

'At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration.'

So far, only seven (7) State Parties to the Protocol have made the declaration recognizing the competence of the court to receive cases from NGOs and Individuals. These are: Burkina Faso, Cote d'Ivoire, Ghana, Mali, Malawi, Rwanda and Tanzania.³³⁸ It means that very few individuals can access the Court. Perhaps, individuals in the Continent have rested their weight to

³³⁵ *Michelot Yogogombaye v. Senegal*, Appl. No. 001/2008.

³³⁶ Art 5 of the Court Protocol.

³³⁷ As per art 5 of the Protocol and Rule 33 of the Rules of the Court.

³³⁸ As per the information on the African Court website: en.african-court.org (Accessed on 9th October 2016).

the African Commission in order to access the Court. Speaking of direct accessibility to the Court, individuals still have to make sure all domestic remedies have been exhausted, even if their respective countries have made a declaration under article 34(6) of the Court Protocol.

2.3 Sub regional level: East African Community

The East African Community (EAC) is the Regional Inter-governmental Organisation of the Republics of Burundi, Kenya, Rwanda, Uganda and United Republic of Tanzania and recently South Sudan. It is provided for and governed by the Treaty for the Establishment of the East African Community (The Treaty).³³⁹ Human rights are reflected in the Community and the Treaty through; first, the enshrining of principles of human rights, rule of law, good governance and democracy as fundamental and operational principles of the community,³⁴⁰ Second, by the human rights issues arising out of the community progress and stages³⁴¹ and third, by the implicit jurisdiction on human rights given to the East African Court of Justice (EACJ).³⁴² The treaty provides for the EACJ under Chapter Eight of the Treaty and it has jurisdiction over the interpretation and Application of the treaty.³⁴³ The Court can be referred to by Partner States, the Secretary General and by legal and Natural Persons.

The EACJ does not have Jurisdiction on human rights per se since there has not been adopted any protocol extending the court's jurisdiction on human rights as required by the treaty,³⁴⁴ however, it can determine human rights matters by interpreting and applying the provisions of the Treaty which provide for the principles of good governance, democracy, rule of law and human rights.³⁴⁵ Individuals can access the EACJ for their human rights related complaints by using the same procedure available for references made for the interpretation and application of the treaty.³⁴⁶ The applicable procedures for access are provided for under the treaty and ³⁴⁷ the EACJ Rules of Procedures 2013.

Since the Court's inception, article 27(2) has been in question with respect to the EACJ's human rights mandate. Assessing the Court in the real sense, it can safely be concluded that the forum is not well-set to be a human rights judicature. Reading between the lines on article 27(2) of the EAC Treaty, it is clear that Partner States did not intend the EACJ to have human rights authority in its functions. The article reads as follows:

339 The Treaty was signed on 30th November 1999 and entered into force on 7th July 2000.

340 Arts 6 (d) and 7(2) of the EAC Treaty.

341 Customs Union and Common Market as per Art 2(2) of the Treaty, other relevant provisions and the relevant protocols.

342 Art 27(2) of the Treaty.

343 *Ibid*, art 27(1).

344 *Ibid*, art 27(2).

345 A. Possi, 'Striking a balance between community norms and human rights: Continuing struggle of the East African Court of Justice' 15 *African Human Rights Law Journal* 1 (2015), 192. (Available at <http://dx.doi.org/10.17159/1996-2096/2015/v15n1a9>); A. Possi, 'It's Official: The East African Court of Justice can now adjudicate human rights cases' in *AfricLaw*: Posted on 1st February, 2016. (Accessed on 9th October 2016), see also *Democratic Party v. The Secretary General of the EAC and others*, Appeal No 1/2014 in the EACJ Appellate Division; *James Katabazi and 21 others v. Secretary General of the EAC and Attorney General of the Republic of Uganda*, Reference No 1 of 2007 at the First Instance Division.

346 Arts 27(1) and 30 of the Treaty.

347 As above.

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

The Court, in the *Katabazi case*, began by acknowledging how an ‘ordinary meaning’ of Article 27 (2) of the EAC Treaty justifies the conclusion that the EACJ lacks jurisdiction in matters of human rights.³⁴⁸ The Court then abandons the ‘textual’ approach in favour of a ‘contextual’ one.³⁴⁹ The Court’s dictum observes how important it is to take into account those provisions of the EAC Treaty governing objectives, principles, and obligations of Partner States. Having done so, the Court comes to its groundbreaking conclusion, and which is:

‘While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27 (1) merely because the reference [before the Court] includes allegation[s] of human rights violation.’³⁵⁰

2.4.0 National Level: Human Rights Litigation in Tanzania

As of today, Human rights in Tanzania are guaranteed under the Constitution of the United Republic of Tanzania.³⁵¹ The Bill of Rights was incorporated in the Constitution vide the fifth constitutional amendment.³⁵² However, It was not operational until the year 1988 since time was required to abolish all the laws that were deemed to be repugnant to the Bill of Rights.³⁵³ The Institutions responsible for the protection of Human rights in Tanzania are twofold: the Commission for Human Rights and Good Governance (the Commission) and the Judiciary.

2.4.1 The Commission for Human Rights and Good Governance

The Commission is a constitutionally guaranteed body established in the year 2000 through the 13th Constitutional Amendment to the Constitution of the United Republic of Tanzania. It started working in the year 2001 which marked the enactment of the Commission for Human Rights and Good Governance Act.³⁵⁴ It deals with human rights violations and abuse of public power/authority.³⁵⁵ It has promotion, protection and advisory functions.³⁵⁶ Individuals have access to the body and can make complaints.³⁵⁷ The applicable procedure is provided for under the Complaints procedure Regulations of the year 2003. Its decisions are in form of recommendations however where there is a non-implementation, the commission can make application to the High Court for the implementation of its recommendations.³⁵⁸

348 See pp 14 -15 of the judgment.

349 For details regarding the issue of interpreting treaties, see, among others, Ian Brownlie, *Principles of Public International Law* (7th ed), Oxford University Press, 2008, pp. 630 – 636.

350 See pp 15 – 16 of the judgment.

351 Of the year 1977 as amended under part III.

352 Act no 5 of the year 1984 which came into force in the year March 1985.

353 Constitution (Consequential, Transitional and Temporary Provisions) Act, Act No 16 of 1984.

354 CAP 391 R.E 2002.

355 Article 130 of the Constitution and s.6 of the Act.

356 Art 130(1) of the Constitution and s. 6(1) of the Act.

357 See s.15 and 22 of the Commission for Human rights and Good Governance Act.

358 See s. 28 of the Act.

2.4.2 The Judiciary

Under article 30(3) of the Tanzanian Constitution, any person who claims that his rights have been or is being or is likely to be violated by any person in the United Republic of Tanzania may institute proceeding for redress in the High Court.³⁵⁹ However, even though the right to redress became guaranteed by the Constitution, there was no enactment of any law in 1984 that provided for the rules of procedure to be used to access the High Court for human rights violations. Until then the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance was amended to fill the *lacuna* to some extent.³⁶⁰ It provided the mandatory summoning of the Attorney General or his representative to appear as a party to the proceedings involving Human Rights violations.³⁶¹ Litigants faced several problems with the new requirement which necessitated the enactment of the Basic Rights and Duties Enforcement Act in 1994.³⁶² The Act seeks to provide for the procedure for enforcement of Constitutional basic rights, for duties and for related matters. However, it did not provide for the detailed procedures to follow in accessing the High Court, thus, the Basic Rights and Duties Enforcement (Practice and Procedure) Rules were brought in place by the Chief Justice in 2014.³⁶³ As of date, the procedure applicable is provided for under the Act and the Rules.³⁶⁴

3.0 Applicable Practice and Procedure

A complaint for redress on violation of human rights is brought by petition by way of originating summons.³⁶⁵ The contents of the petition are elaborately provided for in the Act.³⁶⁶ The petitioner is thereafter required to serve a copy of the petition on each person against whom redress is sought and where the redress is sought against the Government, a minister, Deputy Minister, Permanent Secretary, Commissioner of other Government servant then the copy of the petition should be served on the Attorney-General or his duly authorized representative³⁶⁷ within seven days after the filing of the petition.³⁶⁸ The respondent is required to file a response to the petition by way of counter-affidavit within fourteen days.³⁶⁹ The Respondent who intends to challenge the court's jurisdiction to hear the petition should do so by filing a notice of preliminary objection when filing a reply to the petition and such preliminary objection is heard by a single judge.³⁷⁰ At this stage, the judge is to decide the competence of the petition after the completion of the pleadings, where he decides that the application is vexatious or frivolous; any party aggrieved of

359 The redress became guaranteed together with the incorporation of the Bill of Rights in 1984 vide the 5th amendment of the Constitution.

360 The act was amended by Act NO 27 of 1991.

361 S. 17A (2) of the said Act as amended.

362 Act No 33 of 1994.

363 Government Notice No 304 of 2014.

364 Basic Rights and Duties Enforcement Act No 33 of 1994 & Basic Rights and Duties Enforcement (Practice and Procedure) Rules of 2014.

365 S. 5 of the Act and Rule 4 of the rules.

366 S.6 of the Act.

367 S.7 (1)(2) & (3) of the Act.

368 Rule 5(1) of the Rules.

369 Rule 6(1) of the Rules.

370 Rule 7(1) & (2) of the Rules.

the decision may refer the matter to a panel of three judges.³⁷¹ After the decision on the competence of the petition, both the petitioner and the respondent are to file written submissions.³⁷² The judge in-charge then assigns the application to a panel of three (3) judges which hears and determines the petition within ninety days after the assignment.³⁷³

4.0 Shortcomings

Having noted above; that the Rules made under the Act were enacted in the year 2014, exactly twenty years (20) after the enactment of the parent Act; the authors pinpoint a few of the shortcomings.³⁷⁴ Both the Act and the Rules provide for references made by the subordinate courts to the high court. Under the Act, if suppose any question involving human rights violations while dealing with other matters/ cases arises the presiding magistrate is supposed to refer the matter to the High Court for decisions unless the parties agree to the contrary or the magistrate is of the opinion that the question is merely frivolous or vexatious.³⁷⁵ It is not clear what the parties may agree to and this therefore seems a limitation to human rights protection as the discretion of the decision is given to the parties. It is also noted that as per the Act, the magistrate is just given the power to decide whether there involves a human rights' issue or not and not the discretion to decide on the human rights' matter itself.

Where the question arises before a Primary Court, the magistrate is required to refer the question to the Court of a resident magistrate which decides whether or not there involves a Human Rights' matter to be referred to the High Court.³⁷⁶ Again here, the Resident Magistrates' court only has the power to decide whether or not there involves a Human Rights' Matter to be referred to the High Court and not the Human Rights matter itself.

However, under the Rules where the question on human rights violation arises in any proceeding before the Primary Court, the magistrate shall within fourteen days from the date when the question arose prepare a statement containing the facts, the question raised and his opinion in respect of the question and refer the matter to the Court of Resident Magistrate or District Court.³⁷⁷ The court that has been referred with the matter is required within fourteen days to determine the matter and may refer the matter to the High Court if it deems appropriate.³⁷⁸ It is noted that the Rules have given the primary courts the power to form their opinion on whether or not there exists a human rights' violation in the question that is raised, something that the

371 Rule (1) & 9(2) Of the Rules.

372 Rules 13; the contents of the written submissions are stated under Rule 13(3) of the Rules.

373 Rule 15 of the Rules.

374 Also see JC Mashamba, 'The law and procedure on litigation of human rights in Tanzania: an appraisal of the new rules of procedure' 1 *LST Law Review* 2016 at 36..

375 S.9(1) of the Act.

376 S. 9(1) of the Act.

377 Rule 10(1)(a) of the Rules.

378 Rule 10(2) of the Rules.

Act did not provide for. Further, questions raised in the Primary Court can be referred to either court of Resident Magistrate or the District Court yet under the Act it could only be referred to the court of Resident Magistrate. Again, the court of the Resident Magistrate or the District Court is to decide on whether there exists a Human Rights question or not and it has the discretion to send the matter to the High court or not to send it there. therefore, the rules seem to give the Court of Resident Magistrate or District Court the jurisdiction to decide on the Human Rights matter itself.

As for where the question of human rights arises before the District Court or the court of Resident Magistrate, the Magistrate is required within fourteen days (14) from the date of the raising of the question, to prepare a statement containing facts, the question raised and his opinion on the question and refer it to the High Court.³⁷⁹ The Rules give the Court of Resident Magistrate and the District Court the power to opine on whether or not there exists a human rights question which the Act does not provide for. Furthermore, practice shows that before coming in of the Rules, the petition was made by filing of two documents namely; the petition and the Affidavit. However, after the coming in of the Rules, the petition is made by filing the originating Summons and the Affidavit.

5.0 Conclusion

This article has provided practical and procedural aspects with respect to individual's human rights claims before selected human rights bodies. In accessing these human rights institutions, the principles of complementarity and subsidiarity should be taken into account. Each of the above elaborated institutions has their own admissibility criteria which should be adhered to. Again, one should be able to appropriately "forum-shops" considering different factors like the nature of the decision of that particular body, the nature of the jurisdiction, expenses, and enforcement mechanisms. While the existence of multiple institutions of promoting and protecting human rights across the globe is applauded, enforcing their decision is the major obstacle they face. Member states normally tend to ignore the decision of human rights bodies, specifically those pronounced by quasi-judicial bodies. To curb such a mischief, international sanctions need to be imposed to a non-complying state. One encouraging element deserving a mention with respect to human rights litigation before international institutions is that the proceedings can take place through internet communication. This makes international human rights litigation to be cost efficient.

³⁷⁹ Rule 10(1)(b) of the Rules.