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THE CONFLICT IN SUDAN: COMMUNICATIONS PROCEDURE OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

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Executive Summary

This Rapid Response Analysis from the Public International Law & Policy Group is part of a series that examines the actual and potential roles of UN and African Union special procedures in relation to the conflict that erupted in Sudan on April 15, 2023.¹

The African Commission on Human and Peoples' Rights ("Commission") was established in 1987 pursuant to Article 30 of the African Charter on Human and Peoples' Rights ("African Charter"). The African Charter has been ratified by Sudan and over 50 other member states of the African Union ("AU"). The Commission is tasked with promoting and protecting human and peoples' rights and with interpreting the provisions of the African Charter.

Any individual, group, or organization may submit a complaint to the Commission under its communications procedure. The procedure is similar to a court proceeding, with the parties being given an opportunity to respond to each other's submissions and with the Commission sometimes holding a hearing before rendering a decision. If the Commission finds that a violation has occurred, its decision is not legally binding, but rather a recommendation to the respondent state. The process can be lengthy, although the Commission can take emergency provisional measures, and recent amendments have been introduced to the Rules of Procedure in an effort to accelerate the process.

As Sudan has not ratified the Protocol to the African Charter on the African Court of Human and Peoples' Rights, the Commission remains the principal legal and judicial organ in Africa able to address violations of the African Charter in Sudan. Decisions by the Commission addressing specific facts in Sudan, based on complaints and thorough fact-finding under an adversarial and quasi-judicial procedure, could also support and be supported by other actions taken by the Commission in relation to the Sudan conflict. Such decisions would also contribute generally to the Commission's growing body of jurisprudence on human and peoples' rights under the African Charter and, hopefully, to an emerging culture of human rights in Sudan.

¹ See <https://www.publicinternationalallawandpolicygroup.org/pilpg-sudan-rapid-response-analysis>.

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THE CONFLICT IN SUDAN: THE COMMUNICATIONS PROCEDURE OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

Statement of Purpose

This Rapid Response Analysis discusses the complaints mechanism established under the African Charter on Human and Peoples' Rights ("African Charter") and its relevance to the current conflict situation in Sudan.

Introduction: The African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights ("Commission") was established in 1987 pursuant to Article 30 of the African Charter.² Fifty-four member states of the African Union ("AU"), including Sudan, have ratified the African Charter.³

The Commission is made up of eleven individual experts who are nominated by the AU member states and then elected by the AU Assembly.⁴ Under Article 45 of the African Charter, the Commission is mandated to promote and protect human and peoples' rights, and to interpret the provisions of the African Charter at the request of AU member states or recognized institutions.

The Commission may consider complaints – referred to in the African Charter as "communications" – regarding alleged violations of the African Charter. Such communications may be submitted by state parties under Articles 46–54 or by others, including individuals and non-governmental organizations ("NGOs"), pursuant to Articles 55–59 of the African Charter. The latter procedure is discussed below.

The African Charter Communications Procedure

Any individual, group, or organization (other than a state party) may submit a complaint pursuant to Article 55 of the African Charter. Sudan ratified the African Charter in 1986, without submitting any reservations against the application of Article 55 in the Sudan context.

² Available at <https://achpr.au.int/en/charter/african-charter-human-and-peoples-rights>.

³ ACHPR, *State Parties to the African Charter*, available at <https://achpr.au.int/en/states>.

⁴ African Charter, Article 31; ACHPR, *Commission*, available at <https://achpr.au.int/en/commission/overview>.

The rules regarding the submission and consideration of complaints are set out in Articles 55–59 of the African Charter and are supplemented by the Commission’s Rules of Procedure.⁵ The Rules of Procedure were amended significantly in 2020 to streamline the process, provide for enhanced follow-up by the Commission after decisions on the merits finding violations, and allow for referrals to the African Court on Human and Peoples’ Rights in cases where the respondent state has ratified the Protocol Establishing an African Court on Human and Peoples’ Rights.⁶ As Sudan has not ratified the Protocol, cases involving Sudan cannot be referred to the African Court.⁷

The Commission has published Guidelines for the Submission of Communications (“Communications Guidelines”)⁸ and an Information Sheet on the Communication Procedure (“Communication Procedure”)⁹ on its website. In addition, helpful guides have been made available by NGOs.¹⁰ Such materials should be compared to the current Rules of Procedure, as they may not reflect certain changes made by the 2020 amendments.

Overview

The complaints procedure has three basic parts. First, the Secretary of the Commission determines whether the Commission will hear (or be “seized of”) the complaint based on whether the requisite initial information has been provided. The Commission then determines whether the complaint is admissible under the standards set out in Article 56 of the African Charter. Finally, if a complaint is found to be admissible, the Commission proceeds to consider the merits.

The Commission’s procedure is in some ways similar to a court proceeding. The parties are given an opportunity to respond to each other’s submissions, and

⁵ *Rules of Procedure of the African Commission on Human and Peoples’ Rights, 2020*, available at <https://achpr.au.int/en/rules-procedure>.

⁶ Protocol to the African Charter on Human and Peoples’ Rights - Establishment of an African Court on Human and Peoples’ Rights, available at <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and>.

⁷ Status List, available at <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and>.

⁸ African Commission, *Information Sheet No. 2, Guidelines for the Submission of Communications*, available at <https://achpr.au.int/en/guidelines-submitting-complaints>.

⁹ African Commission, *Information Sheet No. 3, Communication Procedure*, available at <https://achpr.au.int/en/communications-procedure>.

¹⁰ See, for example, Redress and Others, *Filing a Complaint Before the African Commission on Human and Peoples’ Rights, A Complainant’s Manual*, available at <https://redress.org/publication/filing-a-communication-before-the-african-commission-on-human-and-peoples-rights-a-complainants-manual/>; Amnesty International, *A Guide to the African Commission on Human and Peoples’ Rights* (2007), available at <https://www.amnesty.org/en/documents/IOR63/005/2007/en/>.

the Commission may conduct a hearing before rendering a decision. If the respondent state fails to respond to submissions on either admissibility or the merits within the 60-day time limit, the Commission proceeds to adopt a decision based on the information it has (Rules 118(1) and 120(2)). That state may no longer request a review of the decision if the Commission finds the complaint admissible (Rule 119(4)) and, subsequently, that a violation has occurred (Rule 122(4)), unless the state can show cogent reasons for its failure to make submissions. In addition, exceptional circumstances and the interests of justice must also require the Commission to consider the request.

Decisions of the Commission are not legally binding. Rather, these decisions have the status of recommendations to the respondent states. The process can be lengthy, potentially taking several years.

How and Where to File a Complaint

Complaints may be addressed to the Chairperson of the ACHPR and sent to the ACHPR's Secretary. Submission by email is sufficient, but it is advisable to also send a hard copy by mail. The contact details are:

Secretary, African Commission on Human and Peoples' Rights
P.O. Box 673
Banjul, The Gambia
Tel. +220 441 05 05
Email: au-banjul@africa-union.org

The Secretariat acknowledges receipt of complaints.¹¹

Initial Information Required¹²

- The name, nationality, and signature of the person(s) filing the complaint or, where filed by an organization, the name and signature of its legal representative;
- A statement as to whether the complainant wishes that his or her identity be withheld;
- The complainant's address for receiving correspondence from the Commission and, if available, a telephone number, facsimile number, and email address;
- A description of the place, date, and nature of the alleged violations;

¹¹ Communication Procedure, p. 6.

¹² Rules of Procedure, Rule 113(2).

- In cases where the complainant is not the victim, the name(s) of the victim(s), together with sufficient proof that the victim consents to being represented by the complainant or justification why proof of representation cannot be obtained;
- Any public authority that has reviewed the fact or situation alleged; and
- The name of the state alleged to be responsible for the violation of the African Charter, even if no specific reference is made to the Articles allegedly violated.

Where a complaint is incomplete, the Secretary will ask the complainant to provide the missing details.¹³ When the Secretary is satisfied that the necessary information has been provided, they will consider the submission.¹⁴ This decision must be communicated in writing to the parties within 60 days.¹⁵

Situations of Serious or Massive Violations of Human Rights

When the Commission considers that one or more complaints relate to special cases revealing a series of serious or massive violations of human rights, it shall bring the matter to the attention of the AU Assembly and the AU Peace and Security Council.¹⁶

Provisional Measures

At any time after the Commission has decided to consider a complaint, it may, on its own initiative or at the request of a party, issue provisional measures to be adopted by the state in question to prevent irreparable harm to the victim(s). The respondent state should report back on implementation within 15 days of receipt.¹⁷

Admissibility of the Complaint

After the Commission has decided to consider a complaint, the Secretary requests that the complainant submit arguments and evidence on the admissibility and merits of the complaint within 60 days.¹⁸ The complainant's submissions are then transmitted to the respondent state for a reply, again with a 60-day deadline,

¹³ Rules of Procedure, Rules 115(4).

¹⁴ Rules of Procedure, Rule 115(5).

¹⁵ Rules of Procedure, Rule 115(8).

¹⁶ Rules of Procedure, Rule 99.

¹⁷ Rules of Procedure, Rule 100.

¹⁸ Rules of Procedure, Rule 116(1).

and the state's reply is shared with the complainant for a possible rejoinder within 30 days.¹⁹

The Commission then considers whether the complaint is admissible. The requirements for admissibility of complaints are set out in Article 56 of the African Charter:

- The complaint must include the author's name, even if the author wants to remain anonymous.²⁰ No reason needs to be given when requesting anonymity.²¹
- The complaint must be compatible with the African Charter and the AU Charter.²² The complaint should cite provisions or principles of the African Charter that are alleged to have been violated.²³
- The complaint must not be written in disparaging or insulting language directed against the respondent state, its institutions, or the AU.²⁴
- The complaint must not be based exclusively on news disseminated through the mass media.²⁵ As an author must be able to investigate and ascertain the truth of facts before submitting a complaint,²⁶ it is also unlikely that a complaint can be based exclusively on social media. The complaint should be based at least in part on sources such as personal knowledge or witness statements of government documents (such as court decisions or official gazettes).²⁷
- Local remedies must have been exhausted, meaning that the complainant must have taken the matter to the highest court of the state in question, unless it is obvious that the procedure has been unduly prolonged.²⁸ However, under well-established jurisprudence of the Commission, exhaustion of local remedies is required only where the remedies are available (i.e., can be pursued without restraint), effective (i.e., offer a prospect of success), and sufficient (i.e., are capable of redressing the complaint).²⁹ In cases involving grave violations and

¹⁹ Rules of Procedure, Rule 116(2).

²⁰ African Charter, Article 56(1).

²¹ Communication Procedure, p. 5.

²² African Charter, Article 56(2).

²³ Communication Procedure, p. 5.

²⁴ African Charter, Article 56(3).

²⁵ African Charter, Article 56(4).

²⁶ Communication Procedure, p. 5.

²⁷ Amnesty International, *A Guide to the African Commission on Human and Peoples' Rights* (2007), p. 22, available at <https://www.amnesty.org/en/documents/IOR63/005/2007/en/>.

²⁸ African Charter, Article 56(5).

²⁹ See, for example, *George Iyanyori Kajikabi v. The Arab Republic of Egypt*, ACHPR Communication 344/07 (2021), paras. 75-89 (local remedies held not available and effective where authorities failed to investigate alleged misconduct of security forces and victims seeking to complain were harassed and threatened), available at <https://achpr.au.int/en/decisions-communications/george-iyanyori-kajikabi-arab-republic-egypt-34407>.

many victims, local remedies will be deemed unavailable, ineffective, and insufficient.³⁰

- The complaint is submitted within a reasonable time after the local remedies are exhausted or from the date the Commission is seized of the matter.
- The complaint must not deal with cases that have already been settled by the respondent state in accordance with the principles of the United Nations (“UN”) Charter, the AU Charter, or the African Charter.³¹ This embodies the principle of *res judicata* and means that a complaint will be inadmissible if a case involving the same parties and the same issues has already been settled by an international mechanism.³² A relevant international mechanism must be capable of granting declaratory or compensatory relief to victims, not merely political resolutions or declarations. As a result, consideration of a matter by the UN Security Council, the UN Human Rights Council, or other UN organs or agencies (including, e.g., the UN Special Procedures) will not render a complaint inadmissible.³³

The admissibility of complaints is decided by a simple majority of the members of the Commission.³⁴ The decision on admissibility is communicated to the parties, who must keep it confidential until the Commission’s activity report referencing the decision has been considered by the AU Assembly.³⁵

Where the respondent state has ratified the Protocol to the African Charter establishing the African Court on Human and Peoples’ Rights, the Commission

³⁰ *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, ACHPR Communication 279/03-296/05 (2009), paras. 100–102 (tens of thousands of victims in Darfur), available at <https://achpr.au.int/sites/default/files/files/2022-11/achpr452790329605eng.pdf>; *Malawi African Association and Others v. Mauritania*, ACHPR Communications 54/91, 61/91, 98/93, 164–196/97 and 210/98 (May 11, 2000), available at

https://www.escri-net.org/sites/default/files/Malawi_African_Assoc_v_Mauritania_ACHPR_Decision.html.

³¹ African Charter, Article 56(7).

³² *Patrick Okiring and Agupio Samson v. Republic of Uganda*, ACHPR Communication 339/2007 (2017), paras. 65–75 (matter was admissible where the complainants had withdrawn from another case before the East African Court before that case was decided), available at

<https://achpr.au.int/en/decisions-communications/patrick-okiring-agupio-samson-represented-human-3392007>.

³³ *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, ACHPR Communication 279/03-296/05 (2009), para. 105 (action by the UN Security Council, the UN Commission on Human Rights as predecessor to the UN Human Rights Council, and by a UN Special Rapporteur regarding the Darfur crisis did not render a complaint inadmissible), available at

<https://achpr.au.int/sites/default/files/files/2022-11/achpr452790329605eng.pdf>.

³⁴ African Charter, Article 55(2).

³⁵ Rules of Procedure, Rule 118(4).

may refer the case to the Court.³⁶ As noted above, Sudan has not ratified the Protocol.³⁷

Amicable Settlement

When the Commission considers a complaint admissible, it puts itself at the parties' disposal to assist in securing an amicable settlement. Settlement efforts are made only when both parties consent.³⁸

Decision (Recommendations) on the Merits and Follow Up

The Commission proceeds to consider the merits of admissible complaints that are not settled. The Commission may, at the request of a party or on its own initiative, take any further investigative measures it considers appropriate, including calling witnesses and experts. The Commission may also hold oral hearings and allow interventions by third parties.³⁹

Decisions on the merits of a complaint are to be taken within one year after the matter is “ripe” for decision.⁴⁰ This timing requirement was introduced by the 2020 amendments to the Rules of Procedure and may help accelerate the process. A decision on the merits has previously taken several years.⁴¹

Decisions remain confidential and are not transmitted to the parties until the Commission's activity report referencing the decision has been considered by the AU Assembly.⁴² Decisions are then transmitted to the parties and published.⁴³

Decisions finding that a violation has occurred are in the form of recommendations and are not legally binding on the respondent states. However,

³⁶ Rules of Procedure, Rule 130(1).

³⁷ Status List, *available at*

<https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and>

³⁸ Rules of Procedure, Rule 123.

³⁹ Rules of Procedure, Rules 101–106.

⁴⁰ Rules of Procedure, Rule 120(3).

⁴¹ See, for example, *George Iranyori Kajikabi v. The Arab Republic of Egypt*, ACHPR Communication 344/07 (2021) (13 years from filing of complaint to decision on merits), *available at*

<https://achpr.au.int/en/decisions-communications/george-iyanyori-kajikabi-arab-republic-egypt-34407>; *Agnès Uwimana-Nkusi & Saidati Mukakibi v. Rwanda*, ACHPR Communication 426/12 (2019) (seven years from filing of complaint to decision on merits), *available at* <https://achpr.au.int/index.php/en/decisions-communications/agnes-uwimana-nkusi-saidati-mukakibibi-rwanda-42612>.

⁴² Rules of Procedure, Rule 120(4).

⁴³ Rules of Procedure, Rules 120(5)–(6).

where a decision takes the form of a recommendation requesting that the respondent state take specific measures, the Rules of Procedure call for follow-up by the Commission, with reports to be included in the Commission's activity reports and possible referral to the AU for further action.⁴⁴

Conclusion: The Communications Procedure and the Current Conflict in Sudan

The Commission was focused on the human rights situation in Sudan well before the outbreak of the current fighting.⁴⁵ Currently, it is following the conflict in Sudan resulting from the violent confrontations between the Sudanese Armed Forces and the paramilitary Rapid Support Forces. Shortly after the current conflict was triggered in mid-April 2023, the Commission expressed its concern over indiscriminate bombings and reminded the conflict parties of their responsibility for violations of the African Charter and international humanitarian law.⁴⁶ In its resolution at the conclusion of its May 3, 2023 session, the Commission noted the serious violations of human and peoples' rights; urged the parties to agree on a ceasefire and promote a peaceful resolution; called on the Sudanese authorities to restore peace, strengthen guarantees of human rights, and protect civilians and their fundamental freedoms; and indicated that it would monitor related developments.⁴⁷

The current fighting has resulted in thousands of deaths, the destruction of homes, schools, hospitals and other essential services, massive displacement, as well as sexual violence, in acts which may amount to war crimes.⁴⁸ These many

⁴⁴ Rules of Procedure, Rule 125. See also Rachel Murray and Debra Long, *Monitoring the Implementation of Its Own Decisions: What Role for the African Commission on Human and Peoples' Rights?*, 21 African Human Rights Law Journal (2021) 836–52, available at https://www.researchgate.net/publication/358859479_Monitoring_the_implementation_of_its_own_decisions_What_role_for_the_African_Commission_on_Human_and_Peoples'_Rights.

⁴⁵ *Resolution on the Deterioration of the Human Rights Situation in Sudan Following the Coup d'Etat of 25 October*, ACHPR/Res.516(LXX) (March 25, 2022), available at <https://achpr.au.int/en/adopted-resolutions/516-resolution-deterioration-human-rights-situation-sudan-following>.

⁴⁶ African Commission, *The African Commission Condemns in the Strongest Terms the Indiscriminate Bombings and Shelling in Sudan* (April 21, 2023), available at <https://achpr.au.int/en/news/press-releases/2023-04-21/african-commission-condemns-strongest-terms-indiscriminate-bombing>.

⁴⁷ African Commission, *Resolution on the Human Rights Situation in Sudan*, ACHPR/Res. 555 (LXXV) 2023 (May 23, 2023), available at <https://achpr.au.int/en/adopted-resolutions/555-resolution-human-rights-situation-republic-sudan>.

⁴⁸ See, for example, OHCHR, *Sudan: Human Rights Situation, Türk Decries “Disastrous” Impact of War, Urges Accountability* (August 15, 2023), available at <https://www.ohchr.org/en/press-releases/2023/08/sudan-human-rights-situation>; Amnesty International, *“Death Came to Our Home”, War Crimes and Civilian Suffering in Sudan* (August 3, 2023), available at <https://www.amnesty.org/en/documents/afr54/7037/2023/en/>.

incidents implicate grave violations of key rights enshrined in the African Charter, including the right to life (Article 4), the right to dignity and freedom from exploitation and degradation (Article 5), and the right to liberty and security (Article 6). Unlike some other human rights treaties,⁴⁹ the African Charter does not allow for derogations in situations of emergency.

The fact that it may take many years before the Commission issues a decision on the merits may appear daunting. However, when complaints reveal the existence of a series of serious or massive violations, as appears to be the case in Sudan, the Commission may bring the matter to the attention of the AU Assembly and the AU Security Council as a matter of emergency under Article 58 of the Charter. It may also issue provisional measures to prevent irreparable harm as urgently as the situation demands.⁵⁰ For instance, on November 7, 2011, and following allegations of serious human rights violations in South Kordofan and Blue Nile states, the Commission issued provisional measures. It specifically requested the government of Sudan (headed at the time by former president Al-Bashir) to “intervene in the matter with a view to preventing irreparable harm being caused to the victims”.⁵¹ More recently, although in relation to a complaint filed against the Federal Democratic Republic of Ethiopia, the Commission issued provisional measures urging the state to cease all violations and ensure humanitarian access in Tigray.⁵²

The 2020 amendments to the Rules of Procedure were adopted to speed up new complaints proceedings, with enhanced follow-up when the Commission finds that violations have occurred. For instance, under Rule 125(1), and following a decision on the merits, parties are now required to inform the Commission, within 180 days, on all actions taken by the state party to implement the decision. Under Rule 125(4), if no response is received, the Commission may send a reminder with a 90-day time limit. Measures taken by the state are now monitored by a rapporteur (Rule 125(5)), who may request information from “interested parties” regarding the state’s compliance with the decision, as well as make

⁴⁹ For example, Article 4 of the International Covenant on Civil and Political Rights (ICCPR) provides that state parties to the Covenant may under certain conditions take measures derogating from certain of their obligations under the Covenant in times of public emergency threatening the life of the nation.

⁵⁰ Rules of Procedure, Rules 84-85 (Matters of emergency), Rule 99 (Situations of serious or massive violations of human rights), and Rule 100 (Provisional measures).

⁵¹ *See*

<https://redress.org/wp-content/uploads/2018/02/provisional-measures-for-transmittalpm-by-achpr-7november-2011.pdf>.

⁵² *See*

<https://www.legalactionworldwide.org/accountability-rule-of-law/complaint-filed-by-law-on-behalf-of-tigrayan-victims/?accept-cookies>.

recommendations to the Commission. Under Rule 125(2), the Commission may also request a national or specialized human rights institution (with affiliate status) to monitor or facilitate the implementation of the Commission's decision. A new Rule 126 further provides for the possibility of free legal representation for the complainant or victim, including from the Legal Aid Fund of the Human Rights Organs of the African Union.

While a complaints procedure might appear duplicative given the Commission's pre-existing engagement on the Sudan conflict, the complaints procedure differs in scope and purpose from the Commission's general monitoring activities. Namely, as a quasi-judicial process, it is based on fact-finding and is adversarial in nature. This can be distinguished from, for instance, the activities of working groups established by the African Commission, whose mandates focus primarily on research, advocacy, and coordination efforts. In addition, the Commission's ability to fulfill its broader mandate will be enhanced when it is provided with additional information and evidence in communications. Furthermore, as indicated above, complaints before the Commission will not be deemed inadmissible merely because a matter has also been considered by UN organs or agencies (including UN Special Procedures), meaning that complaints can be submitted in parallel.

The African Charter is the main human rights instrument in Africa, and the Commission remains the principal organ able to address violations in Sudan.⁵³ This alone may justify an appeal to the Commission. Decisions by the Commission addressing specific facts in Sudan, based on complaints and thorough fact-finding under an adversarial and quasi-judicial procedure, would enhance other actions taken by the Commission and human rights organizations to address the Sudan conflict. Such decisions would contribute generally to the Commission's growing body of jurisprudence on human and peoples' rights under the African Charter, and, hopefully, to an emerging culture of human rights in Sudan.

⁵³ See, e.g., Human Rights Watch, *African Rights Commission's Work More Important Than Ever* (November 2, 2022), available at <https://www.hrw.org/news/2022/11/02/african-rights-commissions-work-more-important-ever>.