

Litigation Capacities, Gaps and Opportunities for National Human Rights Institutions

*Baseline Study
of the Network of African National Human
Rights Institutions (NANHRI)*



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Cover photo: A full bench of the 11 judges of the African Court. AfCHPR.



About the Network of African National Human Rights Institutions

The Network of African National Human Rights Institutions (NANHRI) is a not-for-profit-organisation that brings together 44 National Human Rights Institutions (NHRIs) in Africa. The Secretariat of the Network is hosted by the Kenya National Commission on Human Rights in Nairobi, Kenya.

The Network supports the establishment and strengthening of the NHRIs across the continent in addition to facilitating coordination, cooperation amongst members and linking them to other key human rights actors at the regional and international level.

Vision

A continent with effective NHRIs; contributing to an enhanced human rights culture and justice for every African.

Mission

To support, through national, regional and international co-operation, the establishment and strengthening of NHRIs to more effectively undertake their mandate of human rights promotion, protection, monitoring and advocacy.

Values and Guiding Principles

To achieve its mission and vision, NANHRI is committed to the following: -

- Transparency
 - Accountability
 - Openness
 - Cooperation
 - Professionalism and
 - Gender Equality
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- Human Rights Commission of Sierra Leone;
- Kenya National Commission on Human Rights;
- National Human Rights Commission of Côte d'Ivoire;
- National Human Rights Commission of the Democratic Republic of Congo;
- and
- South African Human Rights Commission

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Foreword



*Justice Sylvain Oré, President
of the African Court of Human
and Peoples' Rights*

Access to organs mandated with the protection of human rights determines the extent to which human rights are realised. Thus the effectiveness of these organs is measured by the liberal nature of their referral procedures. This may explain the recurrence of related issues as they are important. And it is not the least merit of NANHRI to address this issue of the capacity of national human rights institutions to initiate legal proceedings.

I, therefore, welcome this initiative by NANHRI which, after adopting the NHRIs Guidelines for following-up implementation of decisions of regional human rights organs, has in this report examined actions inherent in judicial procedures that NHRIs may undertake at the national level in their monitoring or promotion of State compliance with the decisions of regional human rights bodies at continental and sub-regional levels.

With meritorious objectivity, this work emphasizes that the legal framework is necessary, but not sufficient as shown by the scarcity of referrals to the African Commission on Human and Peoples' Rights despite the existence of this opportunity. In the same sense, for NHRIs with quasi-jurisdictional competence, it is up to them to discharge the mandate conferred on them by the law, as per the Paris Principles.

A particularity that makes the institutional treatment of NHRIs at the regional level difficult is the disparity of their powers at the national level.

I would like to note, however, with satisfaction, the possibility for some NHRIs to institute legal proceedings at the national level, thus going beyond the basic requirements of the Paris Principles.

This report highlights the difficulties and benefits of the unique status of NHRIs being at the intersection of State body and a non-governmental institution, as

human rights defenders. This median position not only results in a permanent quest for independence, but carries with it legal difficulties.

This can be seen as an opportunity, in terms of judicial procedure, for NHRIs before the African Court on Human and Peoples' Rights. The report rightly identifies legal obstacles to the admissibility of requests that could be made by NHRIs, with consideration to the provisions of Article 5 of the Protocol establishing this Court. Reflections can continue at this level. Nevertheless, as stated in the document, there is an opportunity for creation of a formal framework for cooperation between the Court and NHRIs, using the option provided in Rule 45 (2) of its Rules of Procedure, not only because of their rich practical experience, but also because of the powers conferred on them by national legislation. The Court would no doubt welcome the resources offered by NHRIs as *amicus curiae* and other opportunities for cooperation.

In this regard, an advocacy strategy for the implementation of the concluding observations and judgments of regional human rights protection organs, outlining principles and strategic actions would be welcome.

This study reveals a little-known part of the work done by NHRIs to enforce the decisions of the human rights protection organs, that of an obstinate solicitation, independent monitoring and other avenues for reinforcement and advocacy.

In this, I consider that the study is necessary not only for the actors of the regional African human rights litigation, but also for the State and the non-state actors. It will be important for them to understand the impact of their decisions and support the NHRIs in their role of ensuring effectiveness in human rights promotion and protection, and for others, to be aware of their responsibility, as parties to the process and to act on the outcome of the court proceedings.



Justice Sylvain Oré,

President of the African Court on Human and Peoples' Rights

Preface



*NANHRI Executive Director
Gilbert Sebihogo*

In recent years, the African Court on Human and Peoples' Rights and the Africa Commission on Human and Peoples' Rights have tremendously contributed to shaping the human rights landscape on the continent.

Among other functions, the two institutions have delivered progressive decisions and advisory opinions on violations of human rights, especially in cases involving States and complainants or their actors.

Some of the decisions have been arrived at in favour of the complainants, while more others have been dismissed or delayed due to technicalities or insufficient evidence. It is noted that aggrieved parties do not understand alternatives available in addition to seeking redress at these apex institutions.

Further, parties do not seek arbitration and redress from these bodies for lack of national mechanisms, but rather consider these continental treaty bodies 'fair' actors free from State manipulation.

The African Court delivers binding decisions and advisory opinions; the African Commission gives non-binding advisory opinions and recommendations. In both cases, the State is expected to lead in taking appropriate measures for implementation of the outcomes and thus providing appropriate remedy.

States, through the relevant agencies, may or may not institute mechanisms of implementing the outcomes. In some cases, the state may commit, but take long to implement the recommendations or decisions, which further delays justice, therefore, violating the human rights of already vulnerable people.

It is for this and other reasons that we have developed this baseline for the National Human Rights Institutions in Africa to complement our earlier publication, *Guidelines on the Role of NHRIs in Monitoring*

Implementation of Recommendations of the African Commission on Human and Peoples' Rights and Judgments of the African Court on Human and Peoples' Rights¹.

With the involvement of the African NHRIs, other state and non-state actors, this baseline report has identified the gaps, challenges and opportunities which these state - but autonomous institutions - can seize to support the justice process.

One of the ways identified includes instituting independent investigations and delivery of the evidence to the African Court or African Commission with the aim of strengthening the cases before the two bodies to influence fair hearing and ultimate decisions. This report also explored the option of applying for enjoyment as amicus curiae or interested party, among other alternatives.

Beyond supporting the process at the continental level, the NHRIs still have a role to play in advising the State, and taking part in formulation of best approaches to implementing the outcomes.

It is our hope that this report will strengthen the collaboration of the national, sub-regional and continental bodies in enhancing the enjoyment of human rights for all.



Gilbert Sebihogo

Executive Director, NANHRI

¹ <https://www.nanhri.org/wp-content/uploads/2016/10/draft-13-English-Version.pdf>

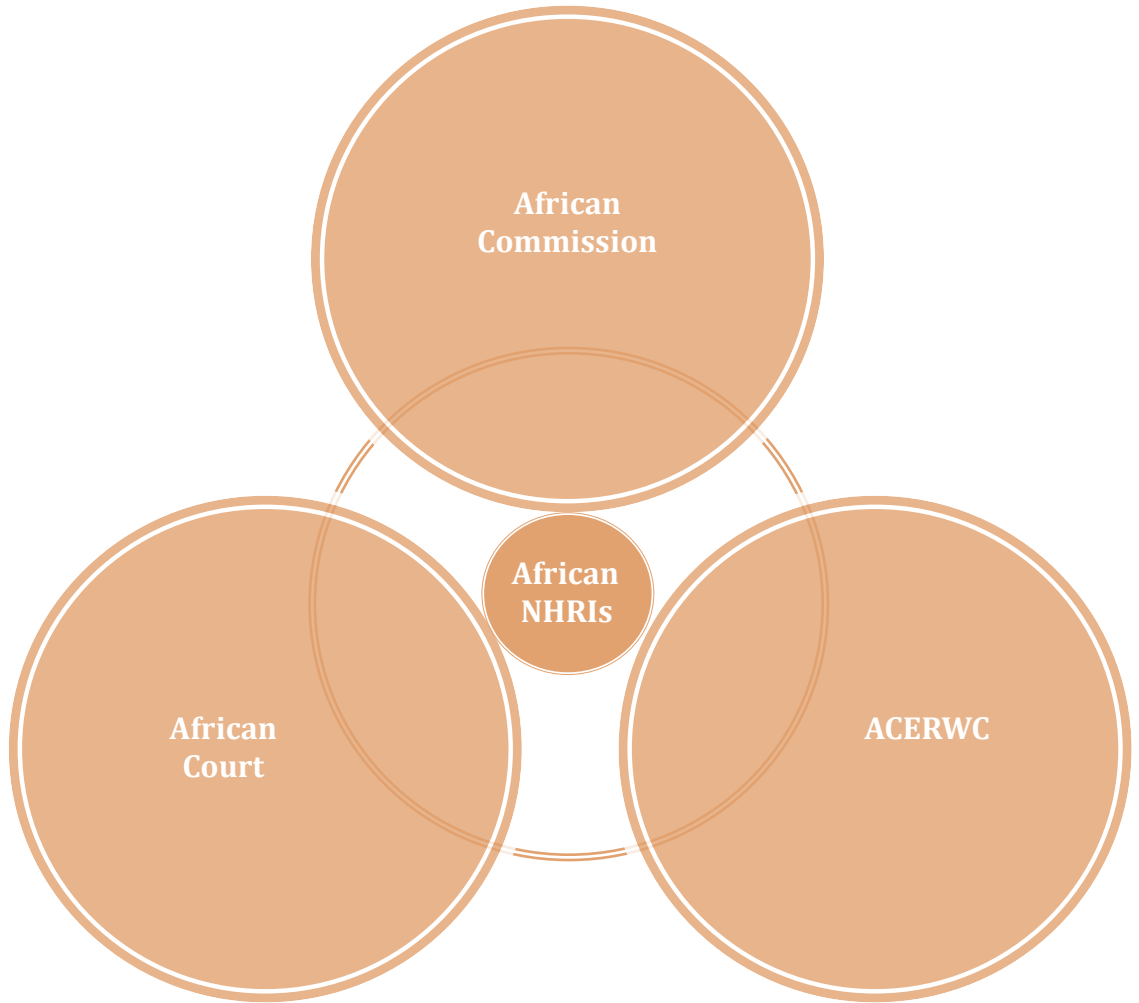
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Abbreviations

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
AfCHPR	African Court on Human and Peoples' Rights
ACmHPR	African Commission on Human and Peoples' Rights
ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AU	African Union
CNDHCI	Commission Nationale des Droits de l'Homme de Cote d'Ivoire
CNDHRDC	Commission Nationale des Droits de l'Homme de Republique Democratique du Congo
KNCHR	Kenya National Commission on Human Rights
NANHRI	Network of African National Human Rights Institutions
NHRI	National Human Rights Institution
SAHRC	South African Human Rights Commission



*How NHRIs can link and enhance the work of the human rights mechanisms in Africa.
Illustration by Secretariat.*

A. Introduction

The three regional human rights treaty bodies on the African continent, the African Commission on Human and Peoples' Rights ('African Commission'), the African Court on Human and Peoples' Rights ('African Court') and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) function in a number of ways including through the receipt of communications alleging violations of rights in the African Charter on Human and Peoples' Rights (ACHPR) and the African Charter on the Rights and Welfare of the Child (ACRWC). When pronouncing on these communications, in decisions and judgments, these three treaty bodies set out what States must do to implement their findings and to repair the prejudice.

State parties are also required under the ACHPR and the ACRWC to submit reports on the measures they have taken to implement the provisions of the instruments to the African Commission and the ACERWC respectively. The two treaty bodies then issue Concluding Observations which set out action the State should take to address concerns raised.

All three bodies have recognised the challenges in identifying the extent to which States have actually complied with their decisions and judgments and with the Concluding Observations. Research elsewhere has noted the important role played by national actors in particular in monitoring what action States have taken and subsequently reporting such to the treaty bodies.

The role of national human rights institutions (NHRIs) is critical. In light of this in 2016 the Network of African National Human Rights Institutions (NANHRI) adopted Guidelines for NHRIs in monitoring these decisions, which aim to provide a practical tool to assist institutions in these tasks.¹ Among the functions that NHRIs have is the potential to take action at the national level including through litigation.

The first focus of this Baseline Study, therefore, is to consider the national level litigation activities that NHRIs can undertake to monitor or encourage compliance with the findings of the African human rights bodies by the State. This is dealt with in Part I of the Baseline Study.

The second aspect of this work is to look at the litigation opportunities for NHRIs at the regional level. Practically, all of the communications submitted to the African Commission, the African Court and the ACERWC have been made by individuals or civil society organisations. This Baseline Study, therefore, explores the reasons

¹ NANHRI, *The role of NHRIs in Monitoring Implementation of Recommendations of the African Commission on Human and Peoples' Rights and Judgments of the African Court on Human and Peoples' Rights*, NANHRI, Kenya, 2016.

why NHRIs have not used these avenues before the African bodies as well as *amicus curiae* and other interventions. This is dealt with in Part II of the Baseline Study.

The Baseline Study also looks at, in brief, the sub-regional mechanisms and these are dealt with in a separate section below.

B. Background and context

This Baseline study examines existing capacities, gaps and litigation opportunities for NHRIs with regard to monitoring and influencing the decisions, Concluding Observations and recommendations of regional institutions, specifically the African Commission, the African Court and the ACERWC. It looks at capacities within selected NHRIs to conduct this kind of litigation and explores in detail the kinds of benefits presented by this type of intervention.

The NHRIs that are the focus of this study are:

- *Commission Nationale des Droits de l'Homme de Côte d'Ivoire (CNDHCI)*
- *Commission Nationale des Droits de l'Homme du République Démocratique du Congo (CNDHRDC)*
- Kenya National Commission on Human Rights (KNCHR)
- The Human Rights Commission of Sierra Leone (HRCSL)
- South African Human Rights Commission (SAHRC)

These five NHRIs of five countries were selected based on several criteria: language representation, a mixture of Francophone and Anglophone; regional balance; the existence of decisions adopted by regional bodies against the respective State; and the level of the NHRI's engagement with the regional bodies including through attendance at the sessions of the African Commission and participation in activities organised by NANHRI.

In respect of litigation to progress the implementation of decisions of the African Court and recommendations from the African Commission and the ACERWC, it is important to link NHRI mandates to litigation processes and explore existing procedures in these five countries. For each country, the study examines the following:

- Mapping out what role the particular NHRIs have played, if any, so far in monitoring decisions, Concluding Observations and recommendations of the regional human rights mechanisms.
- What role NHRIs have played, if any, in mediating between State authorities

and victims of human rights violations.

- The possibility within their existing mandates to bring a communication, or submit an amicus brief, to the regional human rights bodies and the challenges and obstacles that may have prevented them from doing so.
- The procedure that NHRIs could follow right from the institution of the petition to its hearing and implementation.
- The possibility, within their existing mandates, to file a case at the national level to ensure compliance with a decision of a regional human rights mechanism.
- The role of the original applicants that initially filed cases before regional bodies and their representatives will be explored in the litigation processes led by NHRIs before national courts.

C. Methodology

The following methods were adopted in gathering information for this study.

a. Desk-based research

Information published by the specific NHRIs identified for the study was obtained, as well as legislation and case law at the national level; African Commission, African Court and ACERWC documentation. In particular, the considered documents and data were based on:

1. The mandates of the chosen NHRIs with respect to complaints handling, as well as the monitoring and reporting functions, through consideration of constitutional provisions and legislation as well as national case law;
2. The powers of the respective NHRIs to undertake litigation at the national level (relevant law, experiences and examples) including ability and experience in submitting amicus/third party interventions;
3. The powers of the respective NHRIs to undertake litigation at the sub-regional and regional level.
4. Other ways in which the NHRI had engaged with the African bodies.

The documentation from the three regional bodies was explored to understand their approach to NHRIs, including relevant resolutions, concluding observations on the State reports of the respective countries; communications that had been adopted in relation to those States, among others.

b. Interviews with stakeholders in selected countries and with selected experts

Semi-structured interviews were undertaken with a number of individuals, in collaboration with in-country researchers.² These included representatives of NHRIs, civil society organisations (CSOs) and government officials, as well as members of the three African bodies. These interviews have been kept anonymous and are identified by way of a letter and a number.

c. Collection of data through questionnaires

Where it was not possible to conduct interviews, a questionnaire was sent to relevant individuals and stakeholders. The questionnaires posed the same questions as the interviews.

d. Limitations of the study

We are very grateful to those who participated in the Study. Whilst all NHRIs in the Study were approached directly and we engaged with other stakeholders, we recognise, however, that where we were unable to obtain information through documents and never receive responses to our requests for interviews or questionnaires there may be gaps as a result.

D. Mandate of the African Commission, African Court and ACERWC

1. Mechanisms for engagement with NHRIs

a. African Commission on Human and Peoples' Rights

In line with the obligation of States under Article 26 of the ACHPR to establish or improve 'appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter', an NHRI has been recognised by the African Commission 'as an essential partner in the implementation of the Charter at the national level',³ and it has reiterated the importance of it being able to engage directly with these bodies. Consequently, an NHRI can apply for affiliated status before the African Commission if it meets certain criteria, namely that it is:

'duly established by law, constitution or by decree; that it shall be a national institution of a state party to the African Charter; that the national institution should conform to the Principles relating to the Status of National Institutions, also known as the Paris Principles, adopted by

² We would like to thank the following in country researchers for their assistance: Augustine Marrah (Sierra Leone); Maurice Ndri (Côte d'Ivoire), Dr Juniour Mumbala Abelungu (Democratic Republic of Congo) and Gertrude Angote Nyausi (Kenya).

³ Resolution on the Granting of Observer Status to National Human Rights Institutions in Africa, ACHPR/Res.31, October 1998.



African Commission on Human and Peoples' Rights during the 64th Ordinary Session. Photo: ACHPR.

the General Assembly of the United Nations under Resolution 48/134 of 20th December 1993, that a National Institution shall formally apply for affiliate status before the African Commission.⁴

In turn, the NHRI will then be invited to and be represented at the sessions of the African Commission; 'participate, without voting rights, in deliberations on issues which are of interest to them and to submit proposals which may be put to the vote at the request of any member of the Commission'.⁵

An NHRI with affiliate status will need to submit a report every two years on its activities in the promotion and protection of the rights in the ACHPR.⁶ It will also 'assist the Commission in the promotion and protection of human rights at national level'.⁷

Of those in this study, all except the commission in the DRC have obtained this status. Although some of the NHRIs in the Study stated that they attended and participated in sessions of the African Commission, some very recently,⁸ this never applied to all members of the NHRI,⁹ and some CSOs contacted considered that NHRIs never played as much a role as they could do in engaging with the African Commission,

⁴ Resolution on the Granting of Observer Status to National Human Rights Institutions in Africa, ACHPR/Res.31, October 1998.

⁵ *Ibid* 4.

⁶ *Ibid* 4.

⁷ *Ibid* 4.

⁸ KNCHR Annual Report 2014/2015 page 41 available at <http://www.knchr.org/Portals/0/AnnualReports/Annual%20English%20FINALE%20COPY.compressed.pdf?ver=2016-05-31-172234-997> (accessed on 19th July 2018). Response to questionnaire, CNDHCI, July 2018. Interview C.1. Final Communique of the 62nd Ordinary Session of the African Commission on Human and Peoples' Rights available at http://www.achpr.org/files/sessions/62nd_os/info/communique62/en_final_communique_62os.pdf (accessed on the 19th July 2018)

⁹ Interview C.3.

noting that they had ‘very little interaction’ with it,¹⁰ citing only statements at the opening ceremony and on occasion during the sessions.¹¹

As to why some NHRIs may not attend the sessions of the African Commission or considered that they were prevented from more engagement with the body, this was attributed to lack of resources, noting, for example, that they often receive funding to attend GANHRI meetings in Geneva, Switzerland, but not the African Commission’s sessions.¹²

NHRIs can also interact with the African Commission in other ways, regardless of whether they have affiliate status or not. These include, in some cases,¹³ submission of shadow reports, corresponding with the Commission, promoting the African Commission in the country,¹⁴ and meeting with members of the Commission when they visit their States.¹⁵ There is evidence that some of the NHRIs in this study have engaged with the State in the drafting of the Article 62 reports to the African Commission.¹⁶ In addition, further activities include, for example, in 2012 the SAHRC being granted the African Commission award for its commitment to the realisation of human rights.¹⁷ It has also undertaken joint initiatives on the Marikana Mine and had a more profile role at the African Commission, by giving the statement on behalf of NHRIs at the opening ceremony of the session.¹⁸

b. *African Court*

There is nothing expressly in the Protocol establishing the African Court, nor in the Rules of Court which talks about NHRIs and how they may interact with it.

One of the challenges here is that the Court will principally see itself, as a judicial organ, as engaging with only the parties to the litigation before it. Despite this, it does not mean there is not capacity for engagement. As the Commemoration of the 10 year anniversary of the Court showed, the Assembly of the AU ‘congratulates the Court ... for the laudable role it has played, in collaboration with other relevant stakeholders,

¹⁰ E.g. Interview A.1, Interview A.2, Interview A.3.

¹¹ Interview A.2.

¹² Ibid 11. Response to questionnaire, KNCHR, July 2018.

¹³ Interview C.1.

¹⁴ Response to questionnaire, CNDHCI, July 2018.

¹⁵ For example, the KNCHR with the Special Rapporteur on Access to Information during her country visit to Kenya in 2015, KNCHR Annual Report 2015/16 page 36 available at http://www.knchr.org/Portals/0/AnnualReports/Annual_Report_2015_2016.pdf?ver=2017-09-20-163245-917 (access on 19th July 2018). See also Response to questionnaire, CNDHCI, July 2018 with respect to a mission by Soyata Maiga from 23-28 May 2016; and Commissioner Kayitesi from 26 September – 5 October 2016.

¹⁶ E.g. the CNDHCI in Cote d’Ivoire with respect to the 2016 Article 62 report: ‘this report was prepared and validated through a participatory mechanism... Consultations were also organised with civil society and the National Human Rights Commission of Cote d’Ivoire (CNDHCI); 2016 State report, para 6.

¹⁷ <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/177-sahrc-receives-african-commission-award-for-its-commitment-to-the-realisation-of-human-rights>: ‘SAHRC receives African Commission Award for its commitment to the realisation of human rights’, 10 October 2012.

¹⁸ 49th session. <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/162-sahrc-condemns-the-violence-in-marikana-calls-for-an-investigation>.

particularly...national human rights institutions’,¹⁹ and that it was recommended at the symposium that the Court ‘develop constituencies at the national level such as NHRIs and CSOs which can undertake follow-up on compliance with its decisions and also rely on them for their advocacy work’.

Rule 45(2) of the Rules of Court provide:

‘The Court may ask any person or institution of its choice to obtain information, express an opinion or submit a report to it on any specific point.’

The Court could in theory, make use of this Rule to request for information from an NHRI.

General engagement with respect to the African Court, cited by the NHRIs in this Study, include advocacy around ensuring the State adopts an Article 34(6) declaration;²⁰ advocating for the implementation of a particular judgment;²¹ and the CNDHCI also has ‘regular exchanges’ on contemporary issues with the President of the Court when he is in the country’.²²

c. ACERWC

The ACRWC, in a similar format to the ACHPR, provides that the mandate of the ACERWC includes that it ‘encourages national and local institutions concerned with the rights and welfare of the child’ and ‘cooperate with other African, international and regional Institutions and organisations concerned with the promotion and protection of the rights and welfare of the child’; and ‘interpret the provisions of the present Charter at the request of a State Party, an Institution of the Organization of African Unity (currently the African Union) or any other person or Institution recognized by the Organization of African Unity, or any State Party’.²³ No further reference is provided in the Committee’s Rules of Procedure, and where one might expect them to be included, such as among the list of those who can, for example, be invited to submit reports or expert opinions with respect to State reporting,²⁴ they are omitted. There is no separate section in its Rules to outline its cooperation with NHRIs, in the same way as it has with other entities including CSOs. In addition, the ACERWC has produced a number of ‘working documents’ to assist those engaging

¹⁹ Declaration on the Commemoration of the Tenth 10th Anniversary of the Operationalisation of the African Court on Human and Peoples’ Rights, Assembly/AU/Draft.Decl. (XXVIII).

²⁰ Ibid 14.

²¹ E.g. the Court’s judgment in November 2016 on the reform of the independent Electoral Commission, à s’appropriier l’arrêt de la Cour africaine (novembre 2016) sur la réforme de la Commission Electorale Indépendante et à plaider auprès des Autorités pour sa mise en œuvre effective

²² Ibid 14.

²³ ACRWC, Article 42(a)(i) and (iii) and 42(c).

²⁴ ‘The Committee may invite the RECs, the AU, Specialised Agencies, the United Nations organs, NGOs and CSOs, in conformity with Article 42 of the Children’s Charter, to submit to it reports on the implementation of the Children’s Charter and to provide it with expert advice in areas falling within the scope of their activities’, Rule 69, ACERWC Rules of Procedure. See also Rule 75: ‘The Committee shall transmit, as it may consider appropriate, to the RECs, Specialized Agencies, United Nations organs, NGOs, CSOs and other competent bodies, reports and information received from States Parties that contain a request or indicate a need for technical advice or assistance,’ although an NHRI could here be an ‘other competent body’.

with it, including guidance for CSOs submitting shadow reports. There is no reason in theory why NHRIs could not use these, however, something more specifically tailored to their particular circumstances would at least give some greater recognition to their different status.

Indeed, as one interviewee told us ‘currently NHRIs are treated the same as CSOs... and they should not be the same’.²⁵ The ACERWC is considering adopting a similar process to that of affiliate status before the African Commission.²⁶

Interaction with the Committee by NHRIs in general terms has included, for example with respect to Côte d’Ivoire, submitting information around the evaluation of the initial and periodic State report;²⁷ and popularising and following implementation of the Concluding Observations.²⁸

2. Decisions and Judgments on Communications

All three bodies can adopt decisions (African Commission, ACERWC) or judgments (African Court) which consider the extent to which a State has violated provisions of the ACHPR or ACRWC. For the African Commission and ACERWC these findings are made in decisions adopted on communications which themselves contain a section at the end whereby the treaty body will set out a list of ‘recommendations’ on what the State should do to remedy the violations.

The African Court has set out reparations in either the judgment itself or in a separate ruling on reparations.

These recommendations and reparations can be extremely varied, and include, for example, among the cases before the States in this study, declaring null decisions of the Supreme Court;²⁹ paying compensation;³⁰ ‘harmonise its legislation with its international human rights obligations’;³¹ ‘guarantee the independence of the tribunals and improve on the appropriate national institutions charged with the promotion and protection’ of human rights’;³² ‘facilitate the safe return of the complainant to the Republic of Kenya if he so wishes’;³³ and restore rights of ownership to the Endorois and restitute their ancestral land.³⁴ Some of these are very specific, others much more general.

25 Interview A.3.

26 Ibid 25.

27 Ibid 14.

28 Ibid 14.

29 Communication 302/05 against the DRC, before the African Commission.

30 Ibid 29. Communication 276/03 against Kenya, before the African Commission. Communication 281/03 against DRC, before the African Commission.

31 Communication 259/02 against DRC, before the African Commission. Communication 281/03 against DRC, before the African Commission.

32 Ibid 30.

33 Communication 232/99 against Kenya, before the African Commission.

34 Communication 276/03 against Kenya, before the African Commission.

This has implications on the manner in which and ability of a body to monitor their implementation.

3. Concluding Observations

The African Commission adopts other reports, documents and findings in relation to specific States. These are: Concluding Observations on Article 62 reports, resolutions, and reports on missions.

For each of these they contain specific recommendations that the State is called upon to address. Again, as with the content of the communications, they can vary in their nature and specificity.

4. Overview

Consequently, an analysis of the desk-based research and responses to interviews and questionnaires indicates that whilst NHRIs do undertake activities to encourage State implementation of decisions or Concluding Observations, they do not necessarily consider using their national litigation capacities, where they exist, to do so. Their activities tend more towards awareness raising; advocacy and engagement with the authorities.³⁵

As to whether the NHRIs have a strategy for responding to decisions and Concluding Observations, the CNDHCI noted that each of its operational divisions followed up on decisions and Concluding Observations according to the themes for which they were responsible.³⁶ The KNCHR said its strategy involved ‘continuous engagements with State and non-State actors’, through a variety of forms including: ‘advocacy meetings; assist the State in development of action plans; following up with the relevant agency on the status of implementation of recommendations; [the] strategic plan have (sic) prioritized following up on decisions and concluding observations; dissemination of information education communication material; parliamentary engagement to advocate for implementation of decisions and concluding observations.’³⁷ The Commission in Sierra Leone stated that it had a strategy, a directorate that monitored and produced a report, but was limited by insufficient staffing.

When asked if the NHRIs themselves and civil society would like NHRIs to have more interaction in general with the three regional bodies, there was a positive response: ‘They serve as important platforms towards advocating for greater respect for human rights in’ the country.³⁸ They also provide an opportunity to share good practices;³⁹

³⁵ *Ibid* 14.

³⁶ *Ibid* 35.

³⁷ *Response to questionnaire, KNCHR, July 2018.*

³⁸ *Ibid* 37. *Ibid* 13.

³⁹ *Ibid* 14.



Representatives of African NHRIs in a group photo during a workshop on monitoring and reporting on African human rights treaties in Naivasha, Kenya, on June 20-21, 2018.

and can act as a ‘negotiation room between the victims and government’;⁴⁰ and to provide ‘support for consistent follow-up from the complainant community’, and provide legal advice on how best to manage the implementation process.⁴¹ We were also told that the NHRI could do much more to gather information from the local communities and victims on the extent of implementation.⁴²

⁴⁰ Interview B.1.

⁴¹ Ibid 40.

⁴² Interview B.2.

E. Overview of NHRIs in our Study

1. Communications and State Reports before the African Commission

STATE	COMMUNICATION	LAST REPORT SUBMITTED	CONCLUDING OBSERVATIONS	NHRI AFFILIATE STATUS?
Côte d'Ivoire	Communication 318/06 - Open Society Justice Initiative v. Côte d'Ivoire, 27 May 2016, violations found of Articles 1, 2, 3, 5, 12, 13, 14, 15, 18 and 22	Initial and combined reports, July 4, 2012	Concluding observations adopted October 2012	Affiliate status obtained in April 2015
	Communication 400/11 – Réseau Ouest Africain des Défenseurs des Droits Humains et Coalition Ivoirienne des Défenseurs des Droits de l'Homme c. Côte d'Ivoire, 18 May 2016: Ruled inadmissible	Periodic Report, 2012 -2015, 28 June 2016	Website says adopted at 23rd extraordinary session in February 2018 but not yet available on website	
	Communication 289/2004 – Mr Brahim Koné and Mr Tiéoulé Diarra vs Côte d'Ivoire, 18 October 2013, lack of diligent prosecution.			
	Communication 246/02 : Mouvement ivoirien des droits humains (MIDH) / Cte d'Ivoire, July 29, 2008, violations of Articles 1, 2, 3, 7 and 13			
	Communication 262/02 : Mouvement ivoirien de droits de l'Homme (MIDH) / Côte d'Ivoire, May 22, 2008, violations of Articles 2 and 14			

	Communication 138/94 International PEN (on behalf of Senn and Sangare) / Côte d'Ivoire, 22 March 1995, inadmissible			
Democratic Republic of Congo	Communication 346/07 Mouvement du 17 Mai v Democratic Republic of Congo, 7 July 2017: violations of Articles 7(1)(a) and 13(1)	Periodic Report, 11, 12, 13, 2005 – 2015, submitted 5 October 2017	No Concluding Observations available	Although affiliate status was granted in December 2004 to <i>L'Observatoire National des Droits de l'Homme de la République Démocratique du Congo</i> , it has not yet been granted to <i>la Commission Nationale des Droits de la République Démocratique du Congo</i>
	Communication 393/10 — Institute for Human Rights and Development in Africa and Others v. Democratic Republic of Congo: Articles 1, 4, 5, 6, 7(1) (a), 7 (1) (c), 14, 22 and 26 violated. Recommendations included prosecution and punish those responsible; payment of damages; make apologies and construct memorial; exhume graves; rehabilitation of infrastructure and provide counselling and support.			
	Communication 433/12 Albert Bialufu Ngandu v. Democratic Republic of Congo, 24 February 2016: violation of Articles 7 and 13.			

	Communication 302/05 Maître Mamboleo M Itundamilamba v DRC, 2013: violations found of Articles 3, 7(1)(a) and (c) of the ACHPR and made a number of specific recommendations that the State had to do to remedy the violations.			
	Communication 285/04 Mr Kizila Watumbulwa v DRC, 2012: struck out.			
	Communication 259/02, Working Group on Strategic Legal Cases v DRC, 2011: violation of Articles 1, 4, 7(1) (a) and (c) but not Article 3. Recommendations made.			
	Communication 281/03, Marcel Wets'h'okonda Koso and others v DRC: violations found of Articles 7(1)(a), (b) and (d) and 26. Recommendations made.			
	Communication 227/99, DRC v Burundi, Rwanda and Uganda: violations of Articles 2, 4, 5, 12(1) and (2), 14, 16, 17, 18(1) and (3), 19, 20, 21, 22 and 23 and recommendations made.			
Kenya	Communication 232/99 John D Ouko v Kenya: violation of Articles 5, 6, 9, 10, 12(1) and (2) found. Urged to facilitate the safe return of the victim to Kenya if he so wished.	Combined 8 th -11 th Periodic Report, 2008 – 2014, 11 March 2015	Concluding Observations, adopted February 2016. Available	Affiliate status granted in December 2004
	Communication 157/96, Association pour la sauvegarde de la paix au Burundi v Kenya, Uganda, Rwanda, Tanzania, Zaire (DRC), Zambia: no violations found.			

	Communication 276/03, Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya: violations found of Articles 1, 8, 14, 17, 21 and 22. Recommendations made.			
	Communication 317/06 The Nubian Community in Kenya v The Republic of Kenya: violations of Articles 1, 2, 3, 5, 12(1) and (2), 13, 14, 15, 17(1), 18, 19, 22 and 24 found and recommendations made.			
Sierra Leone	Communication 223/98 : Forum of Conscience / Sierra Leone, 6 November 2000. Violation of Articles 4 and 7 found	Initial and Combined Reports, 1983-2013. Considered on March 1, 2013.	Adopted Feb 2016	Affiliate status granted in November 2000
South Africa	409/12 Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) / Angola and Thirteen Others, 30 April 2014: decided on merits	2 nd Periodic Report, 2003-2014	Concluding Observations available adopted June 2016	Affiliate status granted in October 2002
	335/06 Dabalorivhuwa Patriotic Front / Republic of South Africa, 18 October 2013, struck out			
	255/02 Garreth Anver Prince / South Africa, 7 December 2004, decided on merits			

2. Communications and State Reports before the ACERWC

The DRC is not yet a party to the ACRWC

STATE	COMMUNICATION	LAST REPORT SUBMITTED	CONCLUDING OBSERVATIONS
Côte d'Ivoire	None	Initial Report, June 2014. No periodic report	Not yet available on ACERWC website
Kenya	002/09 IHRDA and OSJI (on behalf of children of Nubian descent in Kenya) v Kenya: violations found of Articles 6(2), (3) and (4), 3, 14(2)(b), (c) and (g) and 11(3). Recommendations made.	Initial report, 2008-2011, June 2013.	Concluding observations on initial report adopted
Sierra Leone	None	Initial report 2002-2014. No periodic report	No concluding observations available on ACERWC website
South Africa	None	Initial Report Jan 2000 – April 2013	Adopted on initial report

3. Judgments of the African Court

This table includes judgments of the African Court decided on their merits.

STATE	CASE
Côte d'Ivoire	App.006/2011, Association Juriste d'Afrique v Côte d'Ivoire, 16 June 2011, inadmissible, but Court referred to the Commission
	App.001/2014, Actions pour la protection des droits de l'homme (APDH) v. Republic of Côte D'ivoire, Judgment on Merits, 18 November 2016. App.003/2017, Application for the Interpretation of the Judgment Of 18 November 2016 in the matter of Actions pour la protection des droits de l'homme (APDH) v. Republic of Côte D'Ivoire, Judgment of September 28, 2017
DRC	None
Kenya	App. No. 006/2012, African Commission on Human and Peoples' Rights v Kenya: violations found on Articles 1, 2, 8, 14, 17(2) and (3), 21. Ruling on Reparations awaited. Provisional measures also awarded.
Sierra Leone	None
South Africa	None

4. Judgments of sub-regional courts

This table contains only cases where violations were found.

STATE	CASE
Côte d'Ivoire	(ECOWAS Court of Justice) ECW/CCJ/JUD/03/13 Simone Ehivet and Michel Gbagbo v. Côte d'Ivoire, 22 February 2013. Decision on the merits. Violations of Articles 6, 7(1) and 12 of ACHPR.
DRC	None
Kenya	None
South Africa	None
Sierra Leone	Suit N°: ECW/CCJ/APP/20/13 Judgment N°: ECW/CCJ/JUD/11/15 Between: Mohammed El Tayyib Bah – Plaintiff / Applicant v Republic of Sierra Leone, 4 May 2015: violation of Article 7 ACHPR. Ordered to reinstate in position and payment of salaries, etc. due, and damages.
	Suit NO: ECW/CCJ/APP/38/16, H.E. VP Alhadji Samuel Sam-Sumana, judgment of 27 November 2017: Violation of Article 7 ACHPR. Ordered to pay all remuneration, prerequisites of office and other entitlement

F. PART I: NATIONAL LITIGATION

The extent to which NHRIs can undertake national level litigation to facilitate enforcement of regional body decisions depends on a number of factors which will be outlined below. The sense from the interviews and questionnaires was that few, either within the NHRI, or outside, had considered this as a possibility.

An analysis of the documentary information available on the NHRIs that were the subject of this study reveals that very few of them reference the documents of the African Commission, African Court or ACERWC on their websites.⁴³ If they are part of their considerations, this is not made visible on their websites. The SAHRC in contrast contains quite a bit of reference to relevant African Commission documents.

Some awareness of standards adopted by the various bodies is also apparent by the Sierra Leone Commission, which cites African Commission standards on the right to water in the 2016 Annual Report, and its commitment to popularise the African Commission's standards on pre-trial detention. Jamesina King's presence on the African Commission may provide some explanation for the interaction between the two institutions, including, for example, that Commissioners and staff of the Sierra Leone Commission attended the 59th session of the African Commission.⁴⁴

For some of the NHRIs in this study, South Africa, Sierra Leone, DRC and Kenya, there have been or still are members of the African Commission from those States and in the case of Sierra Leone and Kenya, the members sat as both members of their NHRI and the African Commission.⁴⁵ There are other examples among the membership of the African Commission who have been members of NHRIs in their home States.⁴⁶

In terms of communications decided by the African Commission, African Court and ACERWC against the five States in this study, as the table in section E reveals, there are relatively few. Consequently, it should arguably not be difficult for the NHRI to keep up to date with their adoption. Conversely, however, it can mean that there is unlikely to be any process to manage what happens once these decisions are adopted, it being unnecessary to put formalities in place when cases are only likely to be adopted infrequently.

⁴³ E.g. the CNDHCl makes brief mention of a visit to Geneva, <http://www.cndh.ci/?fichier=deteailart&idart=615&rub=152>.

⁴⁴ 2016 Annual report of the Sierra Leone Human Rights Commission.

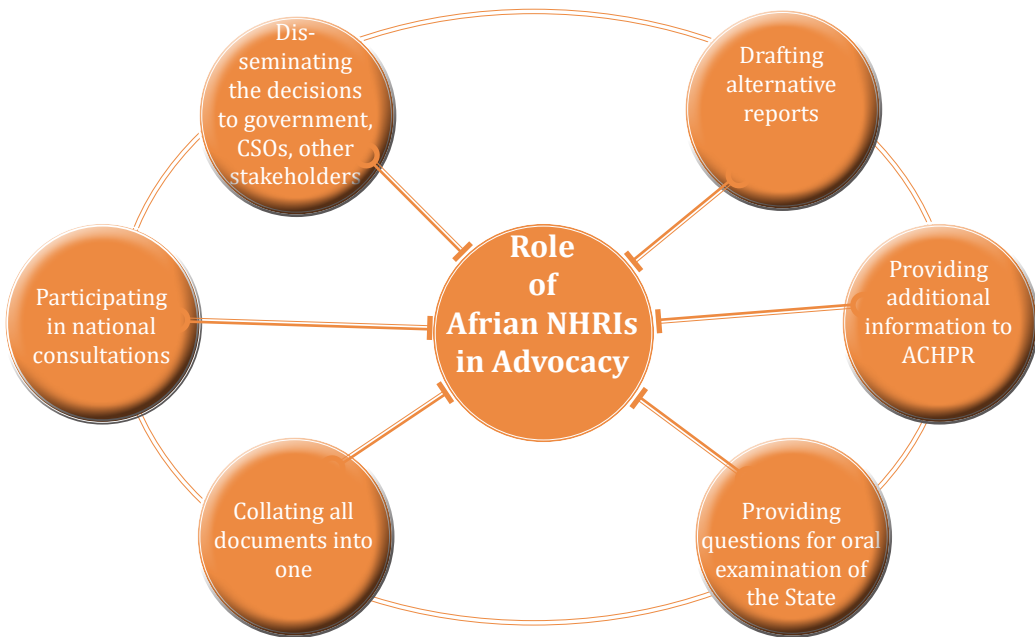
⁴⁵ Jamesina King, for Sierra Leone; and Lawrence Mute for Kenya.

⁴⁶ E.g. former Commissioner Med Keggwa in Uganda.

1. Advocacy around decisions and concluding observations

In addition to litigation, it is worth citing examples that the NHRIs gave in the Study on other activities they undertake to highlight the decisions and judgments and Concluding Observations adopted by the three regional bodies.

For example, several of the NHRIs undertook advocacy around Concluding Observations, including during the reporting process by promoting the ACHPR, participating in any national consultation process;⁴⁷ drafting alternative/shadow reports⁴⁸ or submitting additional information;⁴⁹ providing questions to the African Commission to ask during the oral examination of the State reporting process;⁵⁰ and after the adoption of Concluding Observations, transmitting them to the authorities;⁵¹ disseminating them to government departments;⁵² and among other stakeholders including civil society;⁵³ and collating them into one document.⁵⁴ They also popularise the decisions through media and other outlets.⁵⁵ Some NHRIs in our Study also considered they had an important role to play in the implementation of decisions and Concluding Observations as they could act as a 'source of information' to evaluate the State.⁵⁶



⁴⁷ Ibid 14.

⁴⁸ Ibid 37. Although other NHRIs noted they had not submitted shadow reports.

⁴⁹ Ibid 14.

⁵⁰ Ibid 14.

⁵¹ E.g. Ibid 14.

⁵² Ibid 37.

⁵³ Ibid 14.

⁵⁴ Ibid 14.

⁵⁵ Ibid 37.

⁵⁶ Ibid 14.

In terms of responses to decisions and judgments from the three regional bodies, again, NHRIs had undertaken advocacy work. This included: encouraging State authorities, in ‘sustained’ engagement with them, to implement decisions of the three bodies,⁵⁷ and judgments from the African Court;⁵⁸ advocacy meetings between the State and non-State actors;⁵⁹ gathering information around the extent to which the State has implemented;⁶⁰ and ‘monitoring’ that implementation;⁶¹ and offering ‘explanatory technical notes’ and legislative proposals to amend, in the case of Côte d’Ivoire, the law establishing the Independent Electoral Commission, the subject matter before the African Court, organising a workshop to this effect.⁶²

The Sierra Leone Commission provides technical advice to an inter-ministerial committee which, among other things, manages the process of responding to decisions and Concluding Observations.⁶³ The KNCHR offers support to government agencies in developing action plans for implementation of decisions and concluding observations,⁶⁴ as well as trainings of stakeholders, and parliamentary engagements.⁶⁵ The Sierra Leone Human Rights Commission, in relation to one decision by the African Commission,⁶⁶ has noted that it held ‘constructive engagements’ with the governments and other actors, undertook media campaigns and issued press releases calling for implementation of the decision which had resulted in some, but not full implementation.⁶⁷

The SAHRC also has noted its submission of reports on international and regional treaties to parliamentary portfolio committees.⁶⁸ It also meets quarterly with the Department of Justice and Department of International Relations to discuss implementation of decisions and concluding observations.⁶⁹

Some of the NHRIs noted a specific mechanism that existed at the State level for monitoring implementation of the decisions or Concluding Observations, although some cited national bodies such as the Inter-Ministerial Committees in Côte d’Ivoire, DRC and in Sierra Leone which monitors the application of international human

57 Ibid 14. Ibid 37 Ibid 9.

58 Ibid 14.

59 Ibid 14.

60 Ibid 37. Ibid 13.

61 Ibid 13.

62 Ibid 14. Ibid 13.

63 Interview C.2.

64 Ibid 37.

65 Ibid 37. See also Sierra Leone, Interview C.1.

66 Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) vs. Guinea, which called for ‘a Joint Commission of the Sierra Leonean and Guinean Governments be established to assess the losses by various victims with a view to compensate the victims’.

67 Human Rights Commission of Sierra Leone, Progress Report on the Implementation of Decisions of the African Commission on Human and Peoples’ Rights Relating to Sierra Leone, by Commissioner Rashid Dumbuya Esq., 2018.

68 Presentation by Advocate Bongani Majola, Chair, SAHRC, Seminar on the Implementation of Decisions of the African Commission on Human and Peoples’ Rights, Zanzibar, Tanzania, 4-6 September 2018.

69 Presentation by Advocate Bongani Majola, Chair, SAHRC, Seminar on the Implementation of Decisions of the African Commission on Human and Peoples’ Rights, Zanzibar, Tanzania, 4-6 September 2018.

rights instruments,⁷⁰ and to which the NHRI is, in the case of Sierra Leone, an advisor. The KNCHR noted the establishment of task forces to produce implementation frameworks, such as with respect to the Endorois and Ogiek decision and judgment.⁷¹ However, others noted that these task forces may not always be operational due to lack of funding.⁷² While there is no specific mechanism to implement decisions from regional mechanisms in DRC, the *Commission Nationale des Droits de l'Homme Republique Democratique du Congo* (CNDHRDC) can engage with relevant ministries under the framework of inter-institutional cooperation.⁷³

While these are positive examples of NHRI engagement, some CSOs cautioned against NHRI monitoring implementation if they lacked the necessary independence from government.⁷⁴

2. NHRI mandate to bring cases at national level

a. Côte d'Ivoire

In Cote d'Ivoire, the Law No. 2012-1132 of December 13, 2012 sets out the mandate of the *Commission Nationale des Droits de l'Homme de Côte d'Ivoire* (CNDHCI). The Commission has a broad mandate including ensuring the implementation of international instruments at the national level; receiving complaints of violations; undertaking non-judicial inquiries into these complaints; and challenge authority and holder of power.⁷⁵ In so doing, it has access to all sources of information that the Commission considers necessary to accomplish its mission; and can take all measures of instruction including hearing experts and require the communication of any useful document.⁷⁶

b. DRC

Article 6 of the 2013 Organic Law provides that the CNDH can, in addition to promoting respect to human rights including through awareness raising:

'investigate all cases of human rights violations; to guide complainants and victims and assist them in bringing to justice all proven violations of human rights; provide periodic visits to prisons and detention centers throughout the Democratic Republic of Congo; ...Ensure the implementation of national legal standards and international and regional legal instruments duly ratified by the Democratic Republic of Congo; to settle certain cases of human rights

70 Decree No.2017-303 of 17 May 2017, modifying Decree No.2001-365 of 27 June 2001. In the case of DRC, see also Décret n°09/35 du 12 août 2009 portant création, organisation et fonctionnement de l'Entité de Liaison de Droits de l'Homme en République Démocratique du Congo.

71 Ibid 37. Gazette Notice No 10944 dated 23rd October 2017, http://www.kenyalaw.org/kenya_gazette/gazette/download/Vol_CXIX_No_167_.pdf

72 Interview B.1.

73 Ibid 14.

74 Interview D.1. Interview A.4. Interview A.5.

75 Law No. 2012-1132 of 13 December 2012, Article 2.

76 Law No. 2012-1132 of 13 December 2012, Article 4. See also Chapter VI on seizure and procedure.

violations through conciliation; ...to promote and ensure the harmonization of national laws, regulations and practices with the international human rights instruments duly ratified by the Democratic Republic of Congo; to report on the status of implementation of national standards and international human rights legal instruments; Contribute to the preparation of reports submitted by the Democratic Republic of the Congo to international organizations, in fulfilment of its treaty obligations in the field of human rights; review domestic human rights legislation and make recommendations for its legislative order; formulate suggestions which may give rise to the sense of the duties indispensable for the collective promotion of human rights; issue opinions and make proposals to the Parliament, the Government and other institutions concerning matters relating to the promotion and protection of human rights and international humanitarian law and humanitarian action; develop networks and relations of cooperation with the institutions of the Republic, local, national and international organizations pursuing the same objectives.⁷⁷

Whilst CNDHRDC has the capacity to undertake domestic litigation, it has not yet done so.⁷⁸ As a relatively young institution without affiliate status before the African Commission, its engagement with the African Commission and other regional mechanisms has been limited.⁷⁹ CNDHRDC said it is awaiting accreditation from the African Commission.⁸⁰

c. **Kenya**

The KNCHR said it has a Redress Department which deals with its mandate under S.8(d), (i) and (j) of the KNCHR Act 2011, which enables it to conduct litigation, public inquires and alternative dispute resolution. It was able to take cases of public interest to domestic courts.

It can act as amicus, interested party or petitioner.⁸¹

For the KNCHR the mandate as stated on its website does not specifically mention litigation, but it provides that one of the main goals of the Commission is to investigate and provide redress for human rights violations. Its four strategic goals point to the application of human rights standards and the realisation of rights, which could be interpreted to include a litigation role. There are a number of examples where the Commission has undertaken litigation at the domestic level including a constitutional petition seeking to compel a public inquiry into extrajudicial killings by the police;⁸² and a petition seeking to nullify the approval and assent of the

⁷⁷ Loi organique n° 13/011 du 21 mars 2013 portant institution, organisation et fonctionnement de la Commission Nationale des Droits de l'Homme.

⁷⁸ Ibid 14. Interview D.1.

⁷⁹ Ibid 14.

⁸⁰ Ibid 14.

⁸¹ Article 22 of the Kenyan Constitution.

⁸² Petition No.127 of 2012 KNCHR v Attorney General and 2 others.

Presidential Retirements Benefits (amendment) Act No.10 of 2013 questioning the procedure that was adopted during the drafting of this Act.⁸³ In addition, there are also numerous instances of it intervening as *amicus curiae* at the national level before the Truth and Reconciliation Commission⁸⁴ and before the courts.⁸⁵ This complaints handling function has not been used to follow up on implementation of regional level decisions,⁸⁶ and although the ability of electronic submission of cases has been praised, criticisms such as the independence of the Commission have been cited.⁸⁷

However, it recognises that it 'has not used its standing to progress implementation of decisions taken by regional human rights mechanisms' because of a lack of legal framework permitting decisions of regional courts to be enforced in Kenya as decisions of national courts.⁸⁸ It notes, however, that 'this is a strategy that the [KNCHR] ought to pursue to enhance state compliance with decisions of regional human rights bodies and courts'.⁸⁹

The KNCHR was considered to be 'heavily involved in monitoring progress' of the Endorois decision, facilitated in part by the presence of one of the members of the NHRI also being a member of the African Commission who discussed with the government the practicalities of implementation.⁹⁰ But the engagement 'ebbs and flows' and is 'sporadic and not consistent' depending on the staff involved, their awareness of the regional mechanisms and how much they themselves have engaged with them.⁹¹

It was also reported that in Kenya, where the government and constitutional bodies have failed to comply with decisions of regional human rights mechanisms, then the Judicial and Legal Affairs Committee of Parliament may be in a position to engage with relevant authorities as its mandate includes oversight of constitutional affairs, the administration of law and justice and the implementation of constitutional provisions on human rights.⁹²

d. *Sierra Leone*

The Human Rights Commission of Sierra Leone has the power to receive complaints in relation to human rights violations; advise or mediate or investigate and conduct a

⁸³ Petition No.132 of 2013, *KNCHR v The Honourable Attorney General*.

⁸⁴ Petition No.286 of 2013 (*TJRC*).

⁸⁵ Petition 266 of 2013- *Baby A v AG*; Petition No.393 of 2013, *The National Conservative Forum v Attorney General*; Petition No.324 of 2013 *Hussein Khalid and others v The Honourable Attorney General*; Petition No.502 of 2013.

⁸⁶ Response to questionnaire, *KNCHR*, July 2018.

⁸⁷ NANHRI, *A Mapping Survey of the Complaint Handling Systems of African National Human Rights Institutions*, NANHRI, Kenya, 2016, para 2.2.9.

⁸⁸ *Foreign Judgments (Reciprocal Enforcement) Act, Cap 43 Laws of Kenya*. Available at <http://www.kenyalaw.org/lex//actview.xql?actid=CAP%2043> (accessed on 20th July 2018). Response to questionnaire, *KNCHR*, July 2018.

⁸⁹ *Ibid* 37.

⁹⁰ Interview A.4.

⁹¹ Interview A.4.

⁹² Interview, August 2018

formal hearing with witnesses.⁹³ When undertaking investigations it has the ‘power to issue or make orders or directions to enforce its decisions’ and the power to ‘refer to the High Court for contempt any person who refuses, without justifiable cause, to comply with a decision, direction nor order of the Commission within a specified time’.⁹⁴ The legislation gives it specific powers to submit *amicus* briefs, by appointing a legal practitioner ‘to intervene, with leave of the court, in legal proceedings in cases which involve human rights issues over which the Commission has competence but such intervention shall be restricted to issuing *amicus curiae* briefs dealing with the matter in question’.⁹⁵ This would appear to give the Sierra Leone Commission the ability to submit briefs to regional courts as well.

Its ability to use its own investigative powers to enforce decisions of the African regional bodies may be limited by S.16 of the Act which notes that :

*‘The Commission’s power of investigation under this Act shall not include the investigation of an matter (a) pending before, or already decided by a court of competent jurisdiction’.*⁹⁶

This is a principle common to all NHRIs. Whilst its complaints procedure has been praised for its flexibility and ‘elaborate’ nature, the Commission is unable to enforce its own decisions and there is a delay in managing the caseload.⁹⁷

The Commission said that it has not used its national standing, although it has acted as *amicus* in a case before another foreign court. As to whether it could use its mechanisms to enforce implementation of international or regional decisions, it was reported that:

‘The HRCSL has a directorate of complaint and legal services. It also has a monitoring directorate. If the HRCSL received any complaint relating to the implementation of a decision by an international treaty mechanism, then it would fall within the mandate of both directorates and they would have to collaborate’.

e. **South Africa**

Section 184 (as amended) of the Constitution of the Republic of South Africa provides for the South African Human Rights Commission (SAHRC) setting out its powers. The Human Rights Commission Act of 1994, gives further detail of the functioning of the SAHRC including that the Commission can ‘bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or a group or class of

⁹³ Human Rights Commission of Sierra Leone Act, 2004, No.9 of 2004, section 7(2).

⁹⁴ Human Rights Commission of Sierra Leone Act, 2004, No.9 of 2004, section 8(1)(b) and (c).

⁹⁵ Human Rights Commission of Sierra Leone Act, 2004, No.9 of 2004, section 12.

⁹⁶ Human Rights Commission of Sierra Leone Act, 2004, No.9 of 2004, section 16(a).

⁹⁷ NANHRI, A Mapping Survey of the Complaint Handling Systems of African National Human Rights Institutions, NANHRI, Kenya, 2016, para 2.2.18.

persons'.⁹⁸ This would appear to give it the power to intervene as *amicus* either domestically, or arguably, regionally or internationally. Specifically, it also 'must monitor the implementation of, and compliance with, international and regional conventions and treaties, international and regional covenants and international and regional charters relating to the objects of the Commission'.⁹⁹ In addition, it has the power to resolve disputes through mediation, conciliation or negotiation;¹⁰⁰ as well as undertake investigations 'on its own initiative or on receipt of a complaint, any alleged violation of human rights',¹⁰¹ with related ability to call witnesses and the production of documents, and enter and search premises.¹⁰²

The SAHRC must report to the National Assembly at least once a year¹⁰³ as well as 'make known to any person any finding, point of view or recommendation in the respect of a matter investigated by it'.¹⁰⁴

3. Needs and capacity gaps

There was support for NHRIs undertaking a role in general in monitoring implementation of decisions and Concluding Observations at the national level: 'There is a role here for NHRIs'.¹⁰⁵ This is for a number of reasons, including that 'NHRIs and the African Commission are partners',¹⁰⁶ or 'an ally that needs to be on board';¹⁰⁷ and NHRIs are considered to be 'closer to the ground and closer to the victim',¹⁰⁸ when compared, for example, with a CSO based outside of the country.

Where an NHRI operates as a tribunal, this study was told that it was 'feasible to use' this tribunal function to facilitate implementation of regional decisions.¹⁰⁹ It was not clear, however, whether it had actually ever been used.

It is worth noting that there is legislation in Mauritania which permits NGOs and non-victims to bring complaints on behalf of victims.¹¹⁰ This may open up space for the NHRI to have standing in such litigation. However, in other jurisdictions the ability to have standing at the national level to litigate is more challenging. For example, the Northern Ireland Human Rights Commission (NIHRC) recently applied for judicial review, regarding abortion laws in the country, and the Supreme Court rejected

98 South African Human Rights Commission Act 2013, s.13(3)(b).

99 South African Human Rights Commission Act, 2013, s.13(1)(b)(vi).

100 South African Human Rights Commission Act 2013, s.14.

101 South African Human Rights Commission Act 2013, s.13(3)(a).

102 South African Human Rights Commission Act 2013, ss.15-16.

103 South African Human Rights Commission Act 2013, s.18(1).

104 South African Human Rights Commission Act 2013, s.18(3) and (5).

105 *Ibid* 10.

106 *Ibid* 11.

107 *Ibid* 90.

108 *Ibid* 10.

109 *Ibid* 11.

110 *Ibid* 90.

jurisdiction on the basis, by a majority of four to three, that the NIHRC did not have standing to bring the application.¹¹¹

One issue appears to be that the NHRI does not necessarily know about the decision or Concluding Observations that have been adopted by the African Commission, African Court or ACERWC. Some saw NANHRI as playing a role in alerting them to this,¹¹² or ‘an assumption that the NHRI will look it up on the African Commission’s website’,¹¹³ or alternatively, that one would ‘imagine that the State should be informing the NHRI as it has the responsibility’.¹¹⁴ However, the websites may not be up to date.¹¹⁵ In addition, the extent to which they attend the sessions of the African Commission regularly may also impact on their level of awareness of how it operates and whether they follow activities at that level.¹¹⁶ The CNDHCI noted that it was informed by the secretariat of the mechanisms as well as by their members, the Ministry of Foreign Affairs and Ministries of Justice and Human Rights.¹¹⁷ This was also the case in Sierra Leone where the Attorney General could also inform the NHRI. Others external to NHRIs considered that the Ministry of Foreign Affairs and Attorney General Office, in Kenya, informs the NHRI.¹¹⁸ CNDHRDC noted that it would be informed by the mechanism or by the availability of information on the internet.¹¹⁹

Finally, as noted above, whilst NHRIs appear to see themselves as having a role to monitor implementation of these decisions and Concluding Observations, with some of them having developed units within their commissions and other mechanisms to do so, none had really considered the possibility of using national litigation, if available to them, to enforce implementation.

The ability of an NHRI to undertake litigation at the regional level depends on firstly whether it has standing before the regional bodies; and secondly, whether it has the legislative mandate to do so.

¹¹¹ *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland) Reference by the Court of Appeal in Northern Ireland pursuant to para 33 of Schedule 10 to the Northern Ireland Act 1998 (Abortion) (Northern Ireland), Judgment given on 7 June 2018, [2018] UKSC 27.*

¹¹² Interview A.2. See also Workshop Report, *Role of NHRIs in the Implementation of the Decisions of the African Commission on Human and Peoples Rights and the Judgments of the African Court on Human and Peoples Rights, Banjul, the Gambia, 20-21 October 2016, recommendations.*

¹¹³ *Ibid* 11.

¹¹⁴ *Ibid* 11.

¹¹⁵ *Ibid* 25.

¹¹⁶ Interview A.2. *Ibid* 14.

¹¹⁷ *Ibid* 14.

¹¹⁸ Interview, July 2018.

¹¹⁹ Response to questionnaire, CNDHRDC, August 2018.

G. PART II: REGIONAL LITIGATION BY NHRIs



NANHRI Executive Director Gilbert Sebihogo (front right) leads discussions with African Court Registrar Dr Robert Eno on possible areas of collaboration in supporting NHRIs. Dr Eno had paid a courtesy call to the Secretariat in June 2018. Looking on is Operations Manager James Kasombo (back right) and Programme Officer Gilford Kimathi. Photo: Secretariat.

1. Standing of NHRIs before African Commission, African Court, ACERWC

Article 44 of the ACERWC provides that the “Committee may receive communications, from any person, group or non-governmental organization recognized by the Organization of African Unity (now the African Union), by a Member State, or the United Nations relating to any matter covered by this Charter’ thereby enabling NHRIs, if they so wish, to bring communications. There are no known circumstances where it has done this.

Standing before the African Commission to submit communications is very open to individuals, NGOs and other organisations.¹²⁰ An NHRI can, therefore, submit a case to the African Commission. Yet this opportunity has been used on very few occasions.¹²¹ This is one of the principal focus of this study: to explore the reasons why there is a dearth of such cases. The findings of this study are set out below.

Under Article 5 of the Protocol the only entities which can submit cases to the Court are States, African intergovernmental organisations, the African Commission and NGOs and individuals, but only if the State has also made an additional declaration under Article 34(6) of the Protocol. NHRIs, therefore, do not appear on the face of the Protocol to have any formal standing before the Court and so far this restriction has not been tested in the same way as that of NGOs and individuals.

The African Court’s advisory jurisdiction is provided in Article 4 of the Protocol which permits ‘a Member State of the [AU], the [AU], any of its organs, or any African organization recognized by the [AU]’. The African Court has considered and rejected requests by NGOs whether they can be an ‘African organization recognized by the [AU]’ on the basis that observer status before the African Commission is not the same as being ‘recognised by the AU’.¹²² However, the Opinion determines that the provision is intended to apply to ‘those mandated to engage directly with the continental organization’¹²³ and for NGOs this is through the Executive Council’s ‘Criteria for Granting Observer Status and for a System of Accreditation within the African Union’,¹²⁴ or if the organization has a Memorandum of Understanding with the AU.¹²⁵ These rulings have implications for NHRIs, whether granted affiliate status by the African Commission or not, before utilizing this mechanism before the African Court. It is worth noting that the Malabo Protocol providing for an African Court of Justice and Human and Peoples’ Rights does explicitly list NHRIs among those who

¹²⁰ Article 55 of the ACHPR.

¹²¹ E.g. *Communication 74/92 Commission nationale des droits de l’Homme et des libertés v Chad*, 11 October 1995.

¹²² *Request For Advisory Opinion By The Socio-Economic Rights And Accountability Project (SERAP), No, 001/2013 Advisory Opinion* 26 May 2017.

¹²³ *Ibid*, para 55.

¹²⁴ EX.CL 195 (VII), Annex V of 1 to 2 July 2005.

¹²⁵ *Request For Advisory Opinion By The Socio-Economic Rights And Accountability Project (SERAP), No, 001/2013 Advisory Opinion* 26 May 2017, para 64.

are able to submit cases directly to the Court.¹²⁶

2. Benefits of NHRIs undertaking these roles

As several interviewees said, there is a benefit of the NHRI undertaking greater engagement with the treaty bodies and litigation in particular. They can provide an alternative source of information, recognising that sometimes information submitted by civil society organisations may not always be accurate.¹²⁷

There are still relatively few cases before the African Commission and ACERWC and the two institutions cannot solicit cases.

3. Use in practice

Indirectly, NHRIs can be involved in litigation through, for example, their materials being relied upon by the treaty bodies when coming to their decisions.¹²⁸ However, the extent to which proactively the treaty body will seek out information from the NHRI or conversely the NHRI specifically offered it, is not clear. In one instance where a report of an NHRI was used by a treaty body this had arisen because the report had been cited by one of the litigants in the submission and the treaty body then subsequently obtained a copy.¹²⁹ As it was reported ‘nothing is sent from NHRIs, so the [treaty body] looks for things’¹³⁰

NHRIs can, however, use their broader mandates to support and assist litigants who are taking cases to the regional bodies. If the NHRI is familiar with the African regional treaty body processes it can provide advice to both government and litigants.

a. Litigation

It would appear that few NHRIs had considered taking a case to the regional bodies, or had not discussed it as a possibility internally,¹³¹ although the Sierra Leone Commission stated that it had been considering this option. One NHRI questioned the lack of mutual understanding about what the African Commission and NHRIs were doing and how the NHRIs could intervene.¹³²

¹²⁶ Article 30 of the Protocol, as produced in Amnesty International, *Malabo Protocol. Legal And Institutional Implications Of The Merged And Expanded African Court*, 2016, AFR 01/3063/2016, Annex I.

¹²⁷ *Ibid* 25.

¹²⁸ *Ibid* 25.

¹²⁹ *Ibid* 25.

¹³⁰ *Ibid* 25.

¹³¹ Presentation by Advocate Bongani Majola, Chair, SAHRC, Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights, Zanzibar, Tanzania, 4-6 September 2018.

¹³² Presentation by Advocate Bongani Majola, Chair, SAHRC, Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights, Zanzibar, Tanzania, 4-6 September 2018.

The NHRI may be limited by its own statute, as is the case of the NHRI of Côte d'Ivoire, which never considered that it did not have the competence to take contentious cases.¹³³ This may apply to becoming actual litigants, but may not impact on its ability to act as *amicus*, for example. The NHRI noted, for example, that it had attended the hearings before the African Court in November 2016 where it was represented by the President of the CNDHCI.¹³⁴

it was reported that there are likely to be financial implications for an NHRI undertaking and sustaining a litigation.¹³⁵ Others considered that they did not have the necessary number of legal staff to take such litigation¹³⁶ or the finances to retain lawyers for this purpose.¹³⁷

Others cautioned against NHRIs undertaking litigation, although did not see this as a problem necessarily provided that they ensure the wishes of victims are taken into account, which may be more difficult if the NHRI is not independent.¹³⁸

The KNCHR had not taken a case to any of the regional bodies but 'concedes that it is important to support African human rights mechanisms and litigation is an important avenue for doing this'.¹³⁹ It has been seen to be particularly active in relation to the Endorois case before the African Commission, although the precise nature of its engagement was not entirely clear. For example, we were informed that when it attempted to be present at the hearing on implementation on the case there was a lack of clarity over what the procedure should be to determine their presence and what role (e.g. as observer) they should be playing.¹⁴⁰ CNDHRDC said it would not file petitions for unenforced decisions of the African Commission before the African Court as it prefers to undertake advocacy to encourage the government for implementation.¹⁴¹

As to whether NHRIs would consider litigation with other actors including civil society¹⁴² whilst some of the NHRIs said they would consider this as it was also a way of dealing with lack of resources within the NHRI,¹⁴³ others were more reticent.

With respect to litigation at the sub-regional level, NHRIs in our Study responded that they had not engaged in litigation before sub-regional bodies.¹⁴⁴ However, the

133 *Ibid* 14.

134 *Ibid* 14.

135 *Ibid* 11. *Ibid* 13.

136 *Ibid* 13.

137 *Response to questionnaire, CNDHRDC, August 2018.*

138 *Ibid* 90.

139 *Ibid* 37.

140 *Ibid* 90.

141 *Ibid* 137.

142 *Ibid* 37.

143 *Ibid* 13. *Interview C.3.*

144 *Ibid* 14. *Ibid* 37, the latter (KNCHR) also adding neither had it been involved in monitoring decisions from any sub-regional courts. *Response to questionnaire, CNDHRDC, August 2018. Interview C.1.*

Sierra Leone Commission noted that it was involved in monitoring implementation of an ECOWAS Court decision in relation to the Vice President, through media campaigns, engagement with relevant government departments and giving ‘personal assurances’ to the victim of his protection.¹⁴⁵

b. Submission of amicus briefs

The difficulties of obtaining information on whether NHRIs have submitted *amicus* briefs to the African Commission, African Court of ACERWC is that these processes are confidential; and *amicus* briefs, even if they are submitted are not posted on their websites. Any indication that they have been submitted may only appear in the decision or judgment itself.

This study found no instances of NHRIs in Africa submitting *amicus* briefs before these three regional bodies. Other NHRIs in other regions are doing so, however, and the Sierra Leone Commission said it had submitted an *amicus* brief in a British domestic court.

It was clear, however, that NHRIs could play an important role in this regard: ‘the NHRI has a much better understanding of the situation on the ground. There is no one better placed to know this’.¹⁴⁶ In addition, from a member of one of the treaty bodies, ‘we genuinely want to have third party intervention’. NHRIs themselves also thought that *amicus* briefs ‘present an important opportunity for the Commission to shape human rights discourse at the regional level’, with *amicus* briefs by the NHRI being able to ‘supplement or bolster arguments’.¹⁴⁷ However, it was also reiterated that in so doing, NHRIs should ensure they had the interests of the victims at the heart.¹⁴⁸

Pragmatically, *amicus* briefs would be less costly than litigation.¹⁴⁹

Neither were we presented with any challenges, beyond those faced by others wishing to submit *amicus* briefs, for NHRIs specifically. The restrictions of confidentiality result in only those who have some familiarity with cases, which may be pending before the three bodies then submitting a brief. It is possible, however, that the three bodies could encourage NHRIs to submit *amicus* briefs without breaching any confidentiality requirements. This is noted in the recommendations below.

¹⁴⁵ *Alhaji Sam Sumana (Former Vice President Of Sierra Leone) V The Republic Of Sierra Leone*, see Human Rights Commission of Sierra Leone, *Progress Report on the Implementation of Decisions of the African Commission on Human and Peoples’ Rights Relating to Sierra Leone*, by Commissioner Rashid Dumbuya Esq., 2018.

¹⁴⁶ *Ibid* 10. *Ibid* 11.

¹⁴⁷ *Ibid* 37.

¹⁴⁸ *Ibid* 42.

¹⁴⁹ *Ibid* 37.

4. Challenges faced by NHRIs in bringing cases and why they have not made use of available opportunities

The findings from this research and interviews suggest a number of reasons as to why NHRIs are not taking up the opportunity to litigate at the regional level.

a. *The independence of NHRIs*

Firstly, NHRIs are by their very nature, neither government, nor civil society. They sit in what can sometimes be an uneasy space between the two. Whilst this gives them opportunities to bridge what can be seen as quite distinct and separate actors, it also means when it comes to litigation which at the regional level is inherently adversarial, with State versus non-State, where the NHRI fits into this is uncomfortable.¹⁵⁰

As to whether NHRIs should litigate with others, whether that be the government or civil society, this again raises the same challenges. They are, arguably, supposed to be independent and indeed obtain their credibility and legitimacy from their independence from both government but also other actors. Therefore, while in theory NHRIs could join with others to litigate, this would impact on their independence.¹⁵¹ This was a viewpoint shared by a couple of both civil society representatives and the NHRI themselves. For the NHRI, if it was seen to be too close to civil society then there was a threat that the government may withdraw funding. This should not, however, stop the NHRI from providing support to any litigants. There appears to be some reluctance from some actors to increase this interaction between civil society and the NHRI.

For others, however, they did 'not anticipate any conflict of interest'.¹⁵²

Some sources noted the challenges of engaging with an NHRI, from a civil society perspective, if they were not perceived to be independent,¹⁵³ in particular if they contradicted the findings of victims and civil society.¹⁵⁴ However, we heard from others, including civil society, that there was still an important role that NHRIs could play even if they were not independent from government. As one source said 'the fact that it has contacts within government, this can be positive...so it is useful to have links with government'.¹⁵⁵ This does not mean that NHRIs should not be encouraged to acquire A-status, but rather 'the fact that it is not A-rated should not be used as an excuse not to engage with it'.¹⁵⁶

¹⁵⁰ Interview A.1. *Ibid* 74.

¹⁵¹ *Ibid* 10.

¹⁵² *Ibid* 25.

¹⁵³ *Ibid* 42.

¹⁵⁴ *Ibid* 42.

¹⁵⁵ *Ibid* 25.

¹⁵⁶ *Ibid* 25. *Ibid* 74.

b. Financial

Some NHRIs cited financial difficulties in undertaking this type of regional litigation,¹⁵⁷ particularly where the budget of the NHRI had been cut by the government in recent years, making travel difficult.¹⁵⁸ Even with limited financial resources, NHRIs with relevant technical expertise could potentially advise and provide technical assistance to applicants and NGOs wishing to petition regional human rights mechanisms. NHRIs could also act as *amicus* before regional bodies as part of their human rights protection mandate.

To initiate and sustain litigation, NHRIs could consider developing litigation programmes and including them in their multi-year strategic plans. This would allow them to specifically fundraise to support litigation before regional human rights mechanisms.

c. Human resources

As well as financial challenges, human resources were also a limitation, recognising that litigation required ‘intensive investment’,¹⁵⁹ or that they did not have the persons with the necessary experience, skills or competence.¹⁶⁰

d. Appropriate legislation

For some NHRIs it was the lack of legislation, which prevented them from undertaking litigation at the regional level.¹⁶¹

e. The lack of clarity regarding NHRI engagement with applicants and petitioners

Because of the lack of clarity on the role of NHRIs in regional litigation processes, evidence found indicated that applicants did not always know what to expect from NHRIs in their cases. This lack of clarity may have also created high expectations of what an NHRI could do, and could then lead to the disappointment of victims on how the NHRI could meaningfully engage with their case.¹⁶² The participation of individuals and involvement of members of vulnerable groups was reported as a concern by some interviewees. One applicant felt that while her views were taken into account in advocacy efforts at the international level, female voices were not heard during national level litigation and implementation processes.¹⁶³ In another

¹⁵⁷ Interview C.3.

¹⁵⁸ *Ibid* 37.

¹⁵⁹ *Ibid* 37. See also Sierra Leone, Interview.

¹⁶⁰ *Ibid* 14. Interview D.1.

¹⁶¹ *Ibid* 14.

¹⁶² *Ibid* 40. *Ibid* 42.

¹⁶³ *Ibid* 40.

case, the youth felt that they were held back from substantive engagement with the litigation process because of limited technical knowledge.¹⁶⁴

f. ***Reprisals against the NHRI***

Where the NHRI does undertake advocacy, even if this is not litigation, just as other human rights defenders do, it also risks reprisals for its activities. For example, the Sierra Leone Human Rights Commission has noted ‘blackmailing of the Commission’ in response to action it has taken to follow up implementation of decisions against the government.¹⁶⁵ Protection for NHRIs in such circumstances needs to be ensured.

H. Recommendations and capacity building of NHRIs to pursue this

The conclusions of this Baseline Study are that whilst there is a considerable amount of good will from both NHRIs and the treaty bodies in having greater engagement particularly around issues of litigation, this has not happened as much as it could have done, for the reasons outlined above. The following recommendations are suggested as to ways in which NANHRI could build the capacity of NHRIs to undertake more domestic or regional litigation.

a) Training

1. NHRIs need to be provided with training on strategic litigation. This should include training staff in NHRIs who may not be familiar with legal processes, how to draft a court submission; as well as training in litigating before regional human rights bodies.
2. Capacity building of NHRIs on specific thematic issues may also be helpful, as familiarity with a thematic issue will determine an NHRI’s decision to take part in litigation processes.
3. NANHRI could draw upon its broad network to provide lawyers and legal advice to NHRIs wishing to undertake strategic litigation.

¹⁶⁴ Ibid 42.

¹⁶⁵ Human Rights Commission of Sierra Leone, *Progress Report on the Implementation of Decisions of the African Commission on Human and Peoples’ Rights Relating to Sierra Leone*, by Commissioner Rashid Dumbuya Esq., 2018.

b) Sensitisation of NHRIs and their staff

1. NHRIs need to show a commitment to and interest in assisting the complainants to ensure implementation of these cases.
2. NHRIs need to be sensitised on the decisions and judgments of the African Commission, African Court and ACERWC.
3. Encourage NHRIs to include international and regional decisions and standards in their daily work and submissions, as well as national constitutional provisions and legislation.

c) Responsibilities of NHRIs

NANHRI can provide capacity building to:

1. Encourage NHRIs themselves to publish and disseminate the decisions and judgments from the regional bodies at the national level.
2. Encourage NHRIs to sensitise governments, parliamentarians and other decision-makers on these decisions and judgments.
3. Individual NHRIs could consider adopting Memorandum of Understanding with local civil society organisations to enhance their interaction and engagement.
4. Encourage NHRIs to engage with governments and litigants and victims to suggest measures that the State should adopt to implement the decisions.
5. Encourage NHRIs to develop internal guidance, mechanisms and a strategy on how they respond to regional decisions and concluding observations, including the extent of their involvement in regional litigation processes they plan to initiate, and complaints filed by others.
6. NHRIs should have a monitoring tool for keeping track of decisions and concluding observations adopted against the government.
7. Urge NHRIs to advise specific government departments on specific action they could take to fully implement decisions of regional human rights mechanisms.
8. Appeal to NHRIs to appraise the impact of violations on vulnerable groups within affected communities, and request them to tailor their engagement with the State and affected communities to take into account the intersection of vulnerability and various rights.
9. NHRIs should consult with vulnerable groups during any litigation and implementation processes and take their views into account. They should encourage the State and their partners to do the same.

d) Advocacy

1. Assistance and advocacy for those NHRIs who may require legislative amendments to enable them to undertake such litigation.
2. Support NHRIs and advocate for their independence and A-status.

e) Engagement between NHRIs and the African Commission, African Court and ACERWC

1. There is a need for NHRIs to reach out to the various treaty bodies, rather than presume it will come to it. Conversely, it is also important that the various treaty bodies seek the input of NHRIs, their reports, etc. where possible.
2. NANHRI with an NHI could consider taking test litigation to the African Court to determine, for example, the standing of an NHI to bring a request for an advisory opinion under Article 4, or a case under Article 5 of the Protocol Establishing the African Court. This could also, even if unsuccessful, provide further opportunities for advocacy around the roles of NHRIs in litigation at this level.
3. NANHRI and others should consider nominating individuals who sit on NHRIs applying to be members of the treaty bodies. This has had considerable success in the African Commission, and could be encouraged certainly before the ACERWC.
4. NANHRI should restart its conversation with ACERWC on how it can increase engagement. One way to pilot interaction could be through the State reporting and standard-setting processes.
5. The three regional bodies could encourage NHRIs to submit amicus briefs by considering the availability of information publicly on communications before it; or actively seeking briefs on particular issues.

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