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Admissibility of complaints before the **African Court**

PRACTICAL GUIDE

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Cover: Seat of the African Court on Human and Peoples' Rights, Arusha, Tanzania, June 2016

FOREWORD

Ten years after the African Court on Human and Peoples' Rights was created, its role in promoting and protecting Human Rights on the continent is getting bigger and stronger. Up to date 30 States ratified the Protocol establishing the Court, which means, a majority of the African countries do recognize the authority of this judiciary body in interpreting and monitoring the implementation of the African Charter on Human and Peoples' Rights.

Up to now, around a hundred complaints have been received by the Court and about 30 judgments were given. Session after session, the Court has proved it is independent and impartial, through its capacity to sanction the States' responsibility when they violated their international compromises.

Considering as top priorities the struggle against impunity and the unconditional respect for Human Rights, the FIDH and its member organizations gave full support to the implementation of the Court and stood by its side through its first steps. This young institution represents a major development of the regional system of Human Rights, as it is a lighthouse of hope on a continent thirsty for Justice.

The Court is firstly and mainly dedicated to the Peoples, so that everyone is able to enjoy one's rights to life, to freedom of expression and reunion, to truth and justice, education, good health, regular standards of living in a sustainable and healthy environment, and to other Rights recognized by International Law. This is why it is essential that each and every citizen on the continent should have the possibility and the means to refer a case to the Court when his or her Human Rights are being violated.

At a time when the African continent is still characterized by numerous conflicts and crisis, especially linked to election processes, and when it is fighting against terrorists groups like never before, it is fundamental to replace the respect for Human Rights at the heart of the States' main issues. In this perspective, the African Court is a crucial instrument to protect the rights enshrined in the African Charter.

Nonetheless, today, the majority of the complaints filed before the Court are dismissed even before the allegations of violations have had a chance to be examined. This is mainly due to the complexity of the procedure, especially when it comes to the requirements for admissibility, thus hindering the possibility for the Court to become truly accessible for all.

The aim of this manual is to remedy this very difficulty by giving the keys to understand the rules and the jurisprudence of the Court and the Commission related to admissibility of the pleads, so as to acquire the necessary tools to know when and how a case in the African Court should be submitted. It is meant as a practical tool for lawyers and defenders to support the victims in their quest for justice and redress, when domestic remedies were exhausted and were not appropriate.

Finally, this manual also wishes to contribute in making the Court better known by the advocates in Africa, so that they can be a part of the Campaign, for the ratification of the Protocol by all the member States of the AU, and for them to accept direct individual or NGO referral through a Declaration under Article 34-6 of the Protocol. To date only 8 States made such a Declaration.

This year was declared "Year of Human Rights" by the African Union. Therefore the regional system created in order to make more effective the Rights guaranteed by the African Charter on Human and Peoples' Rights should be defended by the States more than ever, and made accessible to all, men and women, in Africa.

Karim Lahidji
President of the FIDH

INTRODUCTION

Supranational human rights litigation: an incentive to redress violations

The possibility of litigating at the supranational level can play a key role in advancing human rights. The potential of a State being brought before a supranational forum due to domestic rights violations can serve as an incentive to national systems to redress the violations in question prior to the commencement of such processes. When supranational litigation goes forward, it may serve as a powerful means for generating additional attention and pressure on States to reform and redress rights violations. When a positive judgment is reached, the judgment may serve to set standards concerning the positive steps the State in question must fulfill in order to redress the violations found, and as an ongoing source of pressure for further reforms in future. Positive judgments may also help to expand the jurisprudence of the African human rights system as a whole, setting standards for countries across the continent.

Central to the possibility of supranational litigation in Africa are the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, which stand as impressive and imposing monuments to the success of the human rights movement and the power of human rights values in Africa. Both bodies have taken strong positions in support of a broad range of rights, working for the development of human rights standards and struggling to ensure that human rights are better respected on the African continent.

At the same time, there is clearly more work that must be done, both in terms of developing clearer and more comprehensive and detailed human rights frameworks, and in ensuring implementation of human rights obligations in practice. In order to achieve these ends, litigation by numerous claimants is necessary. Such litigation serves to strengthen supranational human rights systems over time, as has been witnessed in both the Inter-American and European human rights systems; bringing cases to the systems, therefore, may serve not only to allow advocates to bring more pressure to address the situations with which they are concerned, but also to strengthen the human rights system with which they engage, helping all those concerned with advancing human rights claims in future.

The admissibility stage: important/essential

Whether one is submitting a case to the Commission or to the Court, a key, challenging phase of the process is the admissibility phase. In fact, the admissibility phase may be the principle hurdle to the successful progress of cases, with many cases declared inadmissible every year, and many more likely not even brought due to uncertainty as to admissibility requirements and fears the admissibility hurdle will prove impossible to overcome. A tough approach taken by the Commission to admissibility questions has compounded a host of other factors which prevent more extensive supranational rights litigation in Africa, including lack of awareness and information, lack of capacity and legal expertise, geographical distance and isolation, language barriers, lack of resources, and of course the many barriers posed by rights-hostile national regimes and inadequate remedial systems.

Despite the burdens it imposes, the admissibility phase remains essential, serving a number of purposes. Overarchingly, the admissibility phase is designed to ensure that the supranational body in question is the appropriate venue in which for the case to be heard. As such, the admissibility phase involves the examination of technical criteria, such as a listing of the authors, a prima facie examination of substantive criteria, such as compatibility with the Charter and an appropriate evidential base, and forum-choice criteria, including the exhaustion requirement and the requirement the matter not have been settled elsewhere.

The importance of the admissibility phase is immediately apparent. Loose a case at the admissibility stage, and the case will end there – with no possibility to proceed immediately to a merits investigation, the stage at which pressure will be increased and more easily brought to bear, and where a positive finding on the substance of the case in question becomes possible.[1] Success on admissibility, on the other hand, ensures that the case will proceed, ramping up pressure on the State and ensuring that core underlying issues of violation may be addressed. Success on admissibility, moreover, may already establish certain violations – where admissibility is based on exception to the rule of exhaustion, indicating an inadequate domestic remedial system – and is likely to indicate a good chance of success on the merits.

The exhaustion of domestic remedies requirement: important/essential

The exhaustion of domestic remedies requirement lies at the heart of the admissibility phase of proceedings, and has proven the most complicated

1. Where the case is dismissed due to failure to exhaust remedies, or a lack of provision of information, the case may be resubmitted after taking the necessary steps to remedy the reasons for dismissal.

and challenging component of obtaining success at that stage. The exhaustion requirement proves one of the most challenging components of supranational litigation in Africa in particular due to the fact that it will rarely be possible to make a clear and direct claim of exhaustion as such, such that one or more grounds for exception to the requirement must be claimed. While the African human rights system has played a prominent role, together with other supranational rights adjudications systems, in developing and sharpening the standards around exceptions to the rule of exhaustion, those standards remain in many areas underspecified, making exhaustion arguments complex, uncertain and contested.

Despite the complexities it introduces and the challenges it poses, the exhaustion requirement plays a crucial role in the structure of supranational rights adjudication. It does this by ensuring that national level systems will remain primary, directing rights advocates towards their national systems first in their attempts to obtain redress. When functioning well, the exhaustion phase should also work to promote the reform of national level legal systems, by ensuring that their failings may be considered and highlighted, and pressure brought for their improvement.

The positioning of the exhaustion consideration at the intersection between national and supranational rights supervision and remedial provision means that such consideration is subject to particular stress, however, which can lead to strong pressure for cases to be removed from the dockets of international adjudicators at this stage. While no case where local rights-progress is prevented by remedial failings should be removed from the docket of a supranational rights adjudicating body, the reality is that many are. It is thus particularly important that strong and legally-supported arguments be made at this stage, in order to ensure the best chances for a case to be accepted as admissible.

Why this manual?

This manual aims, in the first place and overarchingly, to educate claimants as to the processes, information and arguments necessary in order to be successful in bringing a case to the African regional human rights system. The goal is to help prospective litigants understand how to engage with the admissibility requirements in general and the exhaustion requirement in particular, in order to make African supranational bodies more accessible.

In addition, as noted, admissibility issues are in many areas complex and uncertain. As such, this manual aims to produce as much clarity as possible in a contested field, looking not only to the jurisprudence of the African system

but also to the jurisprudence of other human rights bodies, which the African Commission and Court have also consistently looked to and incorporated into their judgments. Given the legal complexity involved in questions of exception to exhaustion, issues which often come up in submissions to the African Commission and Court, the manual aims to categorize and explore potential grounds for exception in greater than usual detail, in order to clarify the underlying principles. ¬In the final analysis litigants should be aware that few guarantees can be offered in this particular area, however, until such time as jurisprudence and practice have further clarified themselves along consistent lines.

This manual, therefore, is conceived with the aim of playing some small part in the struggle to ensure more consistent, more frequent and higher quality litigation before the African regional human rights mechanisms, in the modest hope that such processes will help to strengthen the regional rights system and hence to promote the strength of rights on the continent as a whole.

For whom?

The primary addressees of this manual are victims of rights violations, rights advocates and civil society groups interested in bringing communications to the African regional rights system. Even with the aid of the manual, the admissibility stage is likely to prove challenging to navigate; the hope, however, is that the manual may provide some significant guideposts, and help to lessen that challenge. The African continent is of course home to extensive rights violations; it is also home to innumerable rights advocates and defenders working tirelessly to reform and redress those situations of violation. The aim of the manual is to encourage and enable increasing numbers of those rights advocates to bring rights appeals to the supranational level in future, providing those actors with another avenue of rights-advocacy, and strengthening the supranational system through increasing its visibility and accessibility.

It is hoped that this manual may also prove useful for experienced litigants, in Africa and beyond, in particular through the detailed consideration of exceptions to the rule of exhaustion laid out below. While as observed above a great deal of legal uncertainty persists in this area, such uncertainty will only gradually be dissolved as a framework of exceptions based upon clear rights-based reasoning becomes established, a process that will be aided by the increased attention to the admissibility phase this manual hopes to facilitate.

What methodology?

The manual has been composed with the aim of providing as informative and practical a guide as possible in a complex field. The information has been assembled through a review of the guiding legal texts of the African Commission and Court, including the African Charter, the Protocol, and the Rules of Procedure of both, and through an examination of relevant jurisprudence pertaining to the areas in question. Insofar as issues of exhaustion and exception thereto form matters of general human rights law, and issues faced across supranational rights systems, jurisprudence from the Inter-American, European and UN systems is also considered where it helps to cast further light on core questions.

How to use this guide?

This guide is intended to assist potential claimants in bringing cases to the African Commission and Court. The initial pages explain briefly the different procedures and rules governing submission to each body. The following pages explain in detail the requirements on admissibility laid out by Article 56 of the African Charter, which must be complied with whether claimants are submitting a case to the Commission or Court. The material encompassed therein may be used by individuals already involved in the pursuit of remedies for particular human rights violations. Human rights defenders, lawyers and organizations may wish to familiarize themselves with the material in question, moreover, as a first step in the case design process, as cases designed with the rules of admissibility of the African system in mind – ***and cases structured around widespread, systematic or ongoing violations in particular*** – are particularly likely to be successful before the African Commission and Court.

The Admissibility Requirements under Article 56 of the African Charter

The African Commission

Bringing a case to the African Commission involves three stages. The first stage, seizure, requires submitting a letter to the African Commission laying out the basis of the communication, including the names of those parties submitting the communication and those on whose behalf it is submitted, the nature of the violations in question and the articles of the African Charter violated. Claimants are best advised to provide at least a general outline of their admissibility contentions at the seizure stage.[2]

2. For more, see Af. Comm. H.P.R., 2010 Rules of Procedure, Rule 93(2); Rule 93(4) stipulates further that the Commission will reach out to claimants should an initial submission be incomplete.

The second stage, admissibility, involves satisfying the requirements under Article 56 of the Charter, dealt with in more detail below. The State will be given an opportunity to reply to claimants' admissibility submissions, after which one final submission may be made by claimants. Should a case be found admissible, the matter will proceed for consideration on the merits, which will proceed through a similar set of submissions.

Having initiated a case, authors of communications must meet the deadlines required by the process in order for their complaint not to be dropped.[3] Periods for submission are laid out in the Commission's Rules of Procedure. States too must meet such deadlines, failing which they will loose their opportunity to contest complainants' assertions. The core deadlines are:

➔ Following seizure, claimants will have 60 days to submit their admissibility briefs;
➔ States will then have 60 days to respond;
➔ Claimants will then have 30 days to reply to the points made by the State.

Rule 113 of the Commission's 2010 Rules of Procedure gives parties the opportunity to request a one-month extension per submission, to be granted at the Commission's discretion; exceptional circumstances, clearly including retaliation by the State concerned against victims or petitioners, may of course justify further extensions of timelines however.

Arguments before the African Commission are generally conducted through written pleadings with no necessity of appearing in person; hearings may be held at the request of a party or the initiative of the Commission however (for more see Rule 99 of the Commission's 2010 Rules of Procedure).

The African Court

Cases may be brought to the African Court in a number of circumstances, two of which are likely to be most prominent.[4] In the first place, where the State in question has ratified the Protocol for the Court, the matter may be referred to the Court by the Commission at any stage of proceedings, following a failure to comply with provisional measures or following a failure to respect the Commission's final judgment, in compliance with Rule 118 of

3. See, e.g., Union des Scolaires Nigeriens et al. v. Niger, App. No. 43/90, Af. Comm. H.P.R. (Apr. 27, 1994); Sana Dumbaya v. Gambia, App. No. 127/94, Af. Comm. H.P.R. (Nov. 3, 1994; Nziwa Buyingo v. Uganda, App. No. 8/88, Af. Comm. H.P.R. (Mar. 22, 1995); Committee for the Defence of Human Rights (in respect of Ms. Jennifer Madike) v. Nigeria, App. No. 62/91, Af. Comm. H.P.R. (Mar. 22, 1995); Monja Joana v. Madagascar, App. No. 108/93, Af. Comm. H.P.R. (Apr. 24, 1997); S.O.S. Esclaves v. Mauritania, App. No. 198/97, Af. Comm. H.P.R. (May 5, 1999).
4. See Protocol, Article 5.

the Commission's Rules of Procedure. In the second place, where a State has made a declaration under Articles 5(3) and 34(6) of the Protocol, cases may be submitted directly to the Court.

Submissions directly to the African Court should address both the admissibility and the merits of the case in question, in compliance with Article 56 of the Charter, as per Article 6 of the Protocol and Rules 34 and 40 of the African Court's Rules of Procedure. The matter will then be transmitted to the relevant State or States,[5] which will have 60 days to reply, though they may request an extension to be granted at the Court's discretion.[6] Should the Court determine that there is no merit in an application, likely due to its failure to comply with the admissibility requirements, the Court may dismiss the matter prior to a hearing;[7] the Court may also request additional admissibility information if it determines such to be relevant.[8]

Should the case survive these initial steps, it will proceed to hearings.[9] Following the conclusion of hearings, the Court will produce a judgment within 90 days.[10]

5. Pursuant to Rule 35(2).
6. Pursuant to Rule 37. Pursuant to Rule 52, the Court may also raise preliminary objections during this period of time.
7. Pursuant to Rule 38.
8. Pursuant to Rules 39(2) and 41.
9. See Rules 42-50.
10. Pursuant to Rule 59(2).

Where to submit a case:

1. **Cases may be submitted directly to the Court where the state in question has signed up to the optional jurisdiction of the Court*:**
   - ➜ The Court procedure is formal and may be preferable for lawyers;
   - ➜ Cases before the Court will definitely involve oral hearings;
   - ➜ Court judgments are binding as a matter of international law;
   - ➜ NGOs may only submit cases to the Court if they have had their observer status recognized by the African Commission (for more on this, see below). Cases may be submitted by members of those NGOs in their individual capacity on behalf of the victims in question however.

2. **In other instances, claimants may submit to the Commission:**
   - ➜ The Commission procedure is more informal and may be preferable for non-lawyers;
   - ➜ Cases before the Commission typically proceed through written submissions;
   - ➜ Commission judgments are recommendations; Commission judgments constitute authoritative interpretations of the Charter, however, which is binding on State parties.

3. **In either case, applicants must comply with the requirement of Article 56 of the Charter – further details as to which are laid out below.**

* By depositing a declaration under Article 34(6) of the Protocol

1 ADMISSIBILITY REQUIREMENTS

Admissibility of complaints
before the **African Court**

PRACTICAL GUIDE

◂ Training mission of FIDH and the Coalition for the African Court in Tanzania, visit tour of the African Court, Arusha, June 2016

The admissibility requirement, as laid out by Article 56 of the African Charter, contains 7 requirements. Article 56(5), the requirement of exhaustion, provides the most challenging component of the requirement, and for this reason is dealt with separately in an extensive section below. The other 6 components of the requirement are dealt with here.

Articles 56(1-4) contain relatively simple and straightforward requirements with which petitioners must comply, but which should not concern them at length.

1. ARTICLE 56(1): AUTHORS AND STANDING
→ COMMUNICATIONS MUST "INDICATE THEIR AUTHORS EVEN IF THE LATTER REQUESTS ANONYMITY"

Article 56(1) requires that the authors of a petition be indicated even if they are requesting anonymity. This article is in fact more ambiguous than indicated on its face, as it could be taken to refer to either the victims or the submitter of the communication. The safest and most comprehensive reading of the article is to take it to refer potentially to both victim and petitioner, when – as will generally be the case – the two are not the same.

At least two apparent purposes may be divined in the text. In the first place, specificity provides a level of evidential support towards the claims being advanced. In the second place, specificity helps to ensure that the Commission will be able to remain in contact with petitioners throughout what might be a lengthy process. As such, for practical as well as formal reasons, petitioners should ensure that they submit not only their names and the names of their organizations, but also reliable contact information.[1] Where the Commission has been unable to ascertain an address through which to correspond with complainants, it has understandably dismissed the cases in question.[2]

As the text specifies, petitioners may request anonymity – for victims, and potentially for petitioners as well, when they are not the same parties.[3] In such cases applicants' details will not be forwarded to the State, though they must still be provided to the Commission. Applicants may wish to request anonymity if they fear reprisals, for instance. All those involved in the process of

1. For more on this issue, see Frans Viljoen, Communications under the African Charter: Procedure and Admissibility, in THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE, 1986-2006 (Evans & Murray eds., 2nd ed. 2011) 93. See also Af. Comm. H.P.R., 2010 Rules of Procedure, Rule 93(2)(c).

2. See, e.g., Ibrahima Dioumessi et al. v. Guinea, App. No. 70/92, Af. Comm. H.P.R. (Oct. 7, 1995).

3. The rules of procedure stipulate specifically that victims may request anonymity; see Af. Comm. H.P.R., 2010 Rules of Procedure, Rule 93(2)(b). Where the petitioners are separate from the victims, and also have reason to fear for their safety, there is strong reason to understand the potential of anonymity should apply to them as well however.

submitting communications should be aware that such procedures are unlikely to be full-proof, however, particularly where individual instances of violation are alleged, as the fact pattern itself may well indicate to the State which parties are involved in bringing the communications against it. Complainants should hence proceed with a realistic weighing of the risks of reprisal should a communication be brought forward, in full recognition of the limited power of supranational bodies to prevent such reprisals.

While the text does not explicitly so state, the article is interpreted with a degree of flexibility in cases where large numbers of claimants are involved. In such cases, one must instead state with clarity the particular group on behalf of which the case is brought. Litigants have also found it useful to bring forward representative individuals from the group in question in such instances to operate as named representatives, an approach those bringing cases involving violations of the rights of large numbers of individuals or groups as such may wish to consider.

The African human rights system has explicitly adopted a liberal approach to standing – meaning that a communication may be lodged by anyone, not only by the direct representatives of a victim or a victim's immediate relatives. Such a broad principle of standing helps to promote access to justice by enabling claims to be brought forward even when victims might have limited ability to do so.

In *Centre of the Independence of Judges and Lawyers v. Algeria*, the Commission found the communication inadmissible on the grounds that it "does not give specific places, dates, and times of alleged incidents sufficient to permit the Commission to intervene or investigate. In some case, incidents are cited without giving the names of the aggrieved parties."[4] The Commission further stipulated that the reason for the victim requirement is to provide the Commission "with adequate information with a certain degree of specificity concerning the victims."[5] The core problem with the case however, as the Commission observed, was that it consisted of a general human rights report, that had been sent to the Commission as if it were a communication.[6]

Potential case postures:

1. **Case brought directly by a victim** e.g.: "I, Ms. , submit this communication to the Commission/Court on behalf of myself."

4. App. Nos. 104/94-109/94 & 126/94, Af. Comm. H.P.R. (Apr. 27, 1994), para. 6.
5. Id. para. 5.
6. Id. para. 1.

2. **Case brought by a victim on behalf of themselves and others** e.g.: "I, Ms., submit this communication to the Commission/Court on behalf of myself, my husband, my daughter-in-law and my deceased son"; "I, Ms. , submit this communication to the Commission/Court on behalf of myself and the other individuals affected by the use of violence against protestors by the police on October 10, 2010."
3. **Case brought by lawyers or NGOs on behalf of an individual** e.g.: "We, the Institute for Human Rights in Africa and The Center for African Rights, submit this communication to the Commission/Court on behalf of Ms. ."
4. **Case brought by lawyers or NGOS on behalf of multiple victims** e.g.: "We, the Institute for Human Rights in Africa and The Center for African Rights, submit this communication to the Commission/Court on behalf of Ms. and others affected by the ongoing violence, forced displacement and arbitrary detention conducted in relation to the XYZ mining project."

In accordance with the terms of Article 5(3) of the Protocol, the African Court only accepts direct applications from NGOs with observer status before the Commission. For this reason NGOs may wish to register with the African Commission as soon as reasonably possible if they have not done so, even if they are not contemplating immediate submission to the Court or such is not possible, in order to obtain the possibility to make submissions in future. Individuals may always make submissions, so lack of observer status will in effect only have the consequence of preventing the complaint to be filed formally in the name of the NGO in question.

Process to obtain observer status

1. **Submit an application at least 3 months before a session:**
   → The Application should be sent to the Secretary of the Commission.
2. **The application should contain:**
   → Proof of legal existence or evidence of the State's having adopted laws, policy or practice infringing the right to freedom of association;
   → A list of the association's members and its constituent organs;
   → Sources of funding and the organization's last financial statement;
   → A statement of the organization's purpose, objectives and field of action, plan of action, and past and current activities.
3. **According to its rules, the Commission will then reach a decision at its next session; in practice, the process often takes much longer.**
4. **In addition to the potential ability to submit cases to the Court, observers are able to interact more closely with the work of the Commission at its sessions.**[7]

7. For more, see African Commission Resolution 33 on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organizations Working in the field of Human and Peoples' Rights.

2. ARTICLE 56(2): JURISDICTION
➔ COMMUNICATIONS MUST BE "COMPATIBLE WITH THE CHARTER OF THE ORGANISATION OF AFRICAN UNITY OR WITH THE PRESENT CHARTER."

The language of Article 56(2) is somewhat confusing, and has been compellingly dissected by Viljoen.[8] The heart of the requirement that remains however is the requirement that the communication concern a party to the African Charter (*ratione personae*); that the communication involve violations of the Charter (*ratione materiae*); and that the violations have been committed within the period of the Charter's application (*ratione temporis*).

Ratione personae

The requirement of ratione personae is relatively straightforward – the communication must be brought against a State party to the Charter. Following general principles of international law, it is the State itself that bears responsibility – such that changes of government have no bearing on State responsibility. A communication may be brought against one State party, or several, if they are all involved in acts contributing to the same situation of rights violations. The communication must name the State party or parties against which it is brought.[9] All 54 AU member States have ratified the African Charter, except South Sudan; Morocco, however, is not a member of the AU nor the Charter system, having withdrawn from both. As of March 2016, 30 States had ratified the Protocol to the African Court,[10] and eight States had accepted the ability of individuals and NGOs to petition the Court directly.[11]

Communications that have been declared inadmissible on this grounds include *Simon B. Ntaka v. Lesotho,[12] Dr. Kodji Kofi v. Ghana,[13] Committee for the*

8. See id. at 94-5.
9. See Af Comm. H.P.R., 2010 Rules of Procedure, Rule 93(2)(g): "The Secretary shall ensure that Communication addressed to the Commission contain the following information… The name of the State(s) alleged to be responsible for the violation of the African Charter, even if no specific reference is made to the article(s) alleged to have been violated"; African Court, 2010 Rules of Procedure, Rule 34(2): "Any application addressed to the Court shall give clear particulars of the Applicant and of the party against whom such application has been brought."
10. Those States are Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Comoros, Cote d'Ivoire, Congo, Gabon, Gambia, Ghana, Kenya, Lesotho, Libya, Malawi, Mali, Mauritania, Mauritius, Mozambique, Niger, Nigeria, Rwanda, Senegal, South Africa, Tanzania, Togo, Tunisia, Uganda and Western Sahara.
11. Those States are Benin, Burkina Faso, Cote d'Ivoire, Ghana, Malawi, Mali, Rwanda and Tanzania. Rwanda however withdrew its special declaration allowing direct access of individuals and NGOs to the Court in February 2016; a decision of the Court on this matter is pending.
12. App. No. 33/89, Af. Comm. H.P.R. (Oct. 26, 1988), para. 3.
13. App. No. 6/88, Af. Comm. H.P.R. (Oct. 26, 1988), para. 3.

Defence of Political Prisoners v. Bahrain,[14] *International Lawyers Committee for Family Reunification v. Ethiopia,*[15] *Dr. Abd Eldayem A.E. Sanussi v. Ethiopia,*[16] *Coordinating Secretary of the Free Citizens Convention v. Ghana,*[17] *Iheanyichukwa A. Ihebereme v. USA,*[18] *Prince J.N. Makoge v. USA,*[19] *Gatachew Abede v. Ethiopia,*[20] *Mohemed El-Nekheily v. OAU,*[21] *Centre for the Independence of Judges and Lawyers v. Yugoslavia,*[22] *Union Nationale de Libération de Cabinda v. Angola,*[23] *Austrian Committee Against Torture v. Burundi,*[24] *Centre Haïtien des Libertés Publiques v. Ethiopia,*[25] *Austrian Committee Against Torture v. Morocco,*[26] *International PEN v. Malawi, Ethiopia, Cameroon & Kenya,*[27] *Commission Française Justice et Paix v. Ethiopia,*[28] *Association Internationale des Juristes Démocrates v. Ethiopia,*[29] *André Houver v. Morocco,*[30] *Wesley Parish v. Indonesia,*[31] *George Eugene v. United States,*[32] and *International PEN v. Morocco.*[33]

Ratione materiae

The substantive requirement entails the necessity that claimants make plausible claims that articles of the Charter have been violated. In addition, the substantive jurisdiction of the African Commission and Court covers the provisions of the Protocol to the African Charter on the Rights of Women, as well as any other international human rights instrument ratified by the State in question. In order to make plausible claims of violation, claimants should attest a fact pattern that demonstrates the potential of such violation,[34] and are best advised to stipulate particular provisions of the Charter that they believe have been violated. In this regard, it is worth pointing out that violations may concern not

14. App. No. 7/88, Af. Comm. H.P.R. (Oct. 26, 1988), para. 3.
15. App. No. 9/88, Af. Comm. H.P.R. (Oct. 26, 1988), para. 3.
16. App. No. 14/88, Af. Comm. H.P.R. (Oct. 26, 1988), para. 3.
17. App. No. 4/88, Af. Comm. H.P.R. (Oct. 26, 1988), para. 3.
18. App. No. 2/88, Af. Comm. H.P.R. (Oct. 26, 1988).
19. App. No. 5/88, Af. Comm. H.P.R. (Oct. 26, 1988).
20. App. No. 10/88, Af. Comm. H.P.R. (Oct. 26, 1988).
21. App. No. 12/88, Af. Comm. H.P.R. (Oct. 26, 1988).
22. App. No. 3/88, Af. Comm. H.P.R. (Oct. 26, 1988).
23. App. No. 24/89, Af. Comm. H.P.R. (Apr. 14, 1989), para. 3.
24. App. No. 26/89, Af. Comm. H.P.R. (Nov. 4, 1989), para. 3.
25. App. No. 21/88, Af. Comm. H.P.R. (Nov. 4, 1989), para. 3.
26. App. No. 20/88, Af. Comm. H.P.R. (Nov. 4, 1989), para. 3.
27. App. No. 19/88, Af. Comm. H.P.R. (Nov. 4, 1989), para. 3.
28. App. No. 29/89, Af. Comm. H.P.R. (Nov. 4, 1989), para. 3.
29. App. No. 28/89, Af. Comm. H.P.R. (Nov. 4, 1989), para. 3.
30. App. No. 41/90, Af. Comm. H.P.R. (Apr. 28, 1990), para. 4.
31. App. No. 28/90, Af. Comm. H.P.R. (Apr. 28, 1990), para. 3.
32. App. No. 37/90, Af. Comm. H.P.R. (Apr. 28, 1990), para. 4.
33. App. No. 42/90, Af. Comm. H.P.R. (Apr. 28, 1990), para. 4.
34. Claimants must provide "an account of the act or situation complained of, specifying the place, date and nature of the alleged violation." Af. Comm. H.P.R., 2010 Rules of Procedure, Rule 93(2)(d).

only concrete acts of harm, but also legal or policy frameworks that deny or deprive rights, failures to take necessary positive steps, or inadequate remedial systems. Whether or not a violation has in fact occurred, as either a matter of law or fact, is the question that will be taken up in the merits investigation; as such, at the seizure and admissibility stages, only a plausible claim that a violation or violations may have occurred is necessary.

Communications that have been declared inadmissible on this grounds include *Frederick Korvah v. Liberia*;[35] *Seyoum Ayele v. Togo,* where the Commission found the complaint inadmissible due to the vagueness of the allegations;[36] *Hadjali Mohamed v. Algeria*, where the Commission found the case inadmissible because "the communication does not state the complaints directed against the State concerned or the human rights violations suffered by the author of the communication or the procedures engendered by such violations";[37] and *Muthuthurin Njoka v. Kenya*[38].

Ratione temporis

The *ratione temporis* requirement stipulates that only violations which took place after the date of entry into force of the treaty for the country in question will be cognizable as violations under that treaty by the body in question. Where a violation preceded the treaty, however, but still has ongoing effects, claimants may argue for an exception on the basis on 'ongoing' or 'continuing' violation.[39] The precise boundaries of this exception to the ratione temporis requirement are unclear, but at the very least extend to situations the ongoing effects of which are still dramatically apparent, such as for example the stripping of legal rights, the displacement of people, or unresolved forced disappearance, not to mention of course communications pertaining to ongoing legislative states of affairs. A compelling case might also be presented that any instance of unredressed severe violation, entailing ongoing physical or psychological harm to the victim in question, should be understood to constitute an ongoing violation.

The extension of *ratio temporis* on the basis of finding of ongoing violation was recognized by the Commission in *Annette Pagnoulle v Cameroon,* where the Commission held in relationship to the ongoing effects of judgments that

35. App. No. 1/88, Af. Comm. H.P.R. (Oct. 26, 1988), para. 4.
36. App. No. 35/89, Af. Comm. H.P.R. (Apr. 27, 1994), para. 2.
37. App. No. 13/88, Af. Comm. H.P.R. (Apr. 27, 1994), para. 2.
38. App. No. 142/94, Af. Comm. H.P.R. (Mar. 22, 1995).
39. See, e.g., Blake v. Guatemala, App. No. 11.219, Int.-Am. Ct. H.R. (Jan. 24, 1998); Moiwana Community v. Suriname, App. No. 11,821, Int.-Am. Ct. H.R. (June 15, 2005); and Loucaides, The concept of 'continuing' violations of human rights, in PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE: STUDIES IN MEMORY OF ROLV RYSSDAL (Mahoney, Matscher, Petzold & Wildhaber eds., 2000).

occurred before the Charter came into effect that if "irregularities in the original sentence have consequences that constitute a continuing violation of any of the Articles of the African Charter, the Commission must pronounce on these."[40]

In *Dabalorivhuwa Patriotic Front v. South Africa*, the Commission expanded this jurisprudence by observing that it "has the competence to pronounce on violations which occurred prior to the Charter's application to the State Party in question, where there is evidence of continuing violation. In the present case… even though the violations occurred in 1994/1995 before the Respondent State became party to the Charter, the status quo has remained the same… Therefore the Commission holds that although the events complained of occurred before 1996, there is evidence of continuing violation."[41]

3. ARTICLE 56(3): TONE

→ COMMUNICATION MUST NOT BE "WRITTEN IN DISPARAGING OR INSULTING LANGUAGE DIRECTED AGAINST THE STATE CONCERNED AND ITS INSTITUTIONS OR TO THE ORGANISATION OF AFRICAN UNITY."

Article 56(3) contains an esoteric requirement of the African Charter, that communications not be written in disparaging or insulting language. The propriety of the requirement from a human rights perspective has been questioned by numerous commentators.[42] As the requirement persists, however, it is important that complainants bear it in mind, and avoid the use of language that could be taken as disparaging, such as for example disparaging description of the governing regime or the use of a mocking tone, and instead stick to a dispassionate account of the facts.

In *Ligue Camerounaise des Droits de l'Homme v. Cameroon*, the Commission declared the case inadmissible in part on the basis that "The communication contains statements such as: 'Paul Biya must respond to crimes against humanity', '30 years of the criminal neo-colonial regime incarnated by the duo Ahidjo/Biya', 'regime of torturers', and 'government barbarisms'. This is insulting language."[43] In *Ilesanmi v. Nigeria*, the Commission observed that "To say an institution or person is corrupt or that he/she has received bribes from drug dealers, every reasonable person would lose respect for that institution

40. App. No. 39/90, Af. Comm. H.P.R. (Apr. 24, 1997), para. 15.
41. App. No. 335/06, Af. Comm. H.P.R. (Apr. 23, 2013), paras. 75-6.
42. See Chidi Odinkalu, The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment, 8 TRANSNAT'L L. & CONTEMP. PROB. 359, 382 (1998); Frans Viljoen, Communications under the African Charter: Procedure and Admissibility, in THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE, 1986-2006 (Evans & Murray eds., 2nd ed. 2011) 109.
43. App. No. 65/92, Af. Comm. H.P.R. (Apr. 24, 1997), para. 13.

or person. In an open and democratic society individuals must be allowed to express their views freely… To expose vital State institutions to insults and disparaging comments like those expressed in the communication brings the institution to disrepute and renders its effectiveness wanting."[44]

Both of the findings in the above cases are extremely questionable from the perspective of freedom of expression, however, to put it mildly. The African Commission has fortunately recognized the need to rebalance its jurisprudence on this issue; thus, in Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa v. Zimbabwe the Commission held that "Article 56(3) must be interpreted bearing in mind Article 9(2) of the African Charter which provides that 'every individual shall have the right to express and disseminate his opinions within the law.' A balance must be struck between the right to speak freely and the duty to protect State institutions to ensure that while discouraging abusive language, the African Commission is not at the same time violating or inhibiting the enjoyment of other rights guaranteed in the African Charter, such as, in this case, the right to freedom of expression"[45] meaning, in effect, that the African Commission has recognized that the act of criticizing human rights abuses may well of necessity involve the use of strong and assertive language laying out the violations committed by the State in question.

4. ARTICLE 56(4): EVIDENTIAL BASE
→ COMMUNICATIONS MUST NOT BE "BASED EXCLUSIVELY ON NEWS DISSEMINATED THROUGH THE MASS MEDIA."

Rule 56(4) stipulates that communications must be based on more than solely media information. The rule provides a limitation to the otherwise broad standing rule discussed above. This does not mean media sources may not be used; rather, they should be used as support for evidence obtained in other manners, for example through victim or witness testimony. While petitioners may well wish to bring a range of evidence at the merits stage, at the admissibility stage it is only necessary to establish that the communication does not rely solely on information acquired through media reports.[46]

44. App. No. 268/2003, Af. Comm. H.P.R. (May 11, 2005), para. 40.
45. App. No. 293/04, Af. Comm. H.P.R. (May 22, 2008), para. 52.
46. In the conduct of their case on the whole, petitioners may wish to rely on such evidence as affidavits, court judgments, expert testimony, photographs, medical, psychological or autopsy reports, and the reports of NGOs and international organizations (e.g. the AU, UN, EU, etc.). At the same time, it is important to recognize that while petitioners' cases will be strengthened the greater the strength of the evidence they accumulate, the burden lies on the State to provide that evidence to which it has superior access, with recognition of the fact that States may work to suppress evidence where it implies they may have been involved in rights violations.

In *Jawara v. Gambia*, the State claimed petitioners had not complied with Article 56(4); the Commission, however, observed that:

> "While it would be dangerous to rely exclusively on news disseminated from the mass media, it would be equally damaging if the Commission were to reject a communication because some aspects of it are based on news disseminated through the mass media. This is borne out of the fact that the Charter makes use of the word 'exclusively.' There is no doubt that the media remains the most important, if not the only source of information… The issue therefore should not be whether the information was gotten from the media, but whether the information is correct. Did the Complainant try to verify the truth about these allegations? Did he have the means or was it possible for him to do so, given the circumstances of his case?"[47]

In short, the Commission in *Jawara* narrowed the potential that an application might be found inadmissible under Article 56(4) to complaints based solely on extremely shaky, media-based evidential grounds – one might say to cases where the evidential base is manifestly ill-founded. This is appropriate for the admissibility stage, where evidential issues, that will be considered more fully in the course of a merits determination, should be interpreted in favor of the applicants.

5. ARTICLE 56(6): TIMELINESS
→ COMMUNICATION MUST BE "SUBMITTED WITHIN A REASONABLE PERIOD FROM THE TIME LOCAL REMEDIES ARE EXHAUSTED OR FROM THE DATE THE COMMISSION IS SEIZED WITH THE MATTER."

The timeliness requirement of Article 56(6) stipulates that communications must be submitted within a reasonable time after local remedies have been exhausted. As the plain language of the text makes clear, the requirement is intended to be applied when remedies are in fact exhausted – not when an exception to the exhaustion rule is invoked. This is because the purpose of the rule is to prevent legal decisions within a jurisdiction from being subject to challenge long after they have been delivered, in the interests of legal stability and certainty.[48] In cases where remedies have been exhausted, the European and Inter-American systems have traditionally allowed six-months in which cases may be submitted;[49] the African Commission however has stipulated a greater degree of flexibility, stating that it "treats each case on its own merit

47. App. Nos. 147/95-149/96, Af. Comm. H.P.R. (May 11, 2000), paras. 24-6.
48. See Plan de Sanchez Massacre v. Guatemala, App. No. 11,763, Int.-Am. Ct. H.R., para. 29.
49. ECHR Article 35(1) and IACHR 46(1)(d).

to ascertain the reasonableness of the time."[50] This of course applies relative to negative judgments; if the judgment is positive, but is not complied with, a more gracious period is called for. Similarly, if the domestic judgment calls on parliament to take action, claimants may be justified in waiting to see if action is taken before submitting their case, allowing for a longer period between judgment and regional submission.[51]

Where an exception to exhaustion is invoked, a sharp delimitation on the timeliness of the submission is unreasonable. This is the case for a variety of reasons. In the first place, there will often not be a sharp date to which the violation may be traced, as violations often consist of fact patterns extended in time. Second, the effects of the violation will often impact negatively on victims' lives in such a way as to make immediate recourse to legal redress impossible. Third, where an exception is invoked it means in essence that there are deficiencies with the national remedial system, which have prevented successful remedy of the violation on the national level. To allow the State to benefit and to punish the victim for the very fact that they were deprived of national remedies would run precisely contrary to the fundamental purposes of the exhaustion test and the admissibility inquiry. Fourth, in the vast majority of instances where exceptions to the rule of exhaustion are invoked, the type of violation in question is likely to be ongoing on the national level – whether in terms of the effects on the individual victim, and/or in terms of an ongoing pattern of violations in society at large. These grounds for exception to the six-month rule – never intended to apply in cases of exception to exhaustion – are well recognized in human rights jurisprudence.[52]

In *Majuru v. Zimbabwe*[53], the African Commission ruled the complaint inadmissible on timeliness grounds, due to the fact that the complainant seized the Commission 22 months after having fled Zimbabwe. The Commission reached this conclusion despite the applicant's assertions he was forced to flee the country; he was afraid of retaliation against his family if he spoke out; he was undergoing psychotherapy; he was indigent; and that there was a lack of remedial possibilities within Zimbabwe – a fact the complainant was able

50. See Article 19 and others v. Zimbabwe, App. No. 305/05, Af. Comm. H.P.R. (Nov. 24, 2010), para. 91. For more, see Priscilla Njeri Echaria v. Kenya, App. No. 375/09, Af. Comm. H.P.R. (Nov. 5, 2011). See also Sangonet v. Tanzania, App. No. 333/06, Af. Comm. H.P.R. (May 2010), which the Commission found inadmissible due to a delay of 11 years following exhaustion before submission of the case to the Commission.

51. For a related point, see Tanganyika Law Society, The Legal and Human Rights Centre & Reverend Christopher R Mtikila v. Tanzania, App. Nos. 009/2011 & 011/2011, Af. Ct. H.P.R. (June 14, 2013), para. 83.

52. See, e.g., Plan de Sanchez Massacre v. Guatemala, App. No. 11,763, Int.-Am. Ct. H.R., para. 29.

53. App. No. 308/05, Af. Comm. H.P.R. (Nov. 24, 2008). See also Darfur Relief and Documentation Centre v. Sudan, App. No. 310/05, Af. Comm. H.P.R. (Nov. 25, 2009); Dr. Farouk Mohamed Ibrahim v. Sudan, App. No. 386/10, Af. Comm. H.P.R. (Feb. 25, 2013).

to attest to substantially due to the fact that he had, before his flight from the country, been a member of the judiciary. As such, the holding appears to have contradicted a rights-based approach to the timeliness inquiry, and will hopefully not be followed in future cases.[54] It is also worth noting the holding does not follow the text of the Charter, which refers to the time remedies were exhausted, and not time of flight from a country.

In other jurisprudence the Commission has followed a more rights-based approach to timeliness, however; thus in *Interights (on behalf of Pan African Movement and Citizens for Peace in Eritrea) v. Eritrea & Ethiopia* the Commission observed that "bearing in mind its decision in relation to Article 56(5) compliance with the provisions of Article 56(6) of the African Charter by the Complainant is rendered inapplicable."[55] In *Obert Chinhamo v. Zimbabwe* the Commission observed that the "communication was received… ten months after the Complainant allegedly fled from the country… the Complainant is not residing in the Respondent State and needed time to settle in the new destination, before bringing his complaint to the Commission… given the circumstances in which the Complainant finds himself, that is, in another country, it would be prudent, for the sake of fairness and justice, to consider a ten months period as reasonable."[56]. The African Court case of *Beneficiaries of Late Norbert Zongo et al. v. Burkina Faso*[57] tends to confirm the rule that Article 56(6) will not apply when an exception has been found to Article 56(5), as in that case the fact that a substantial period had passed between dismissal of the case at the national level and submission to the supranational level was not held relevant, presumably on the basis that national level proceedings had been unduly prolonged such that appropriate remedies for exhaustion were never provided to claimants.

6. ARTICLE 56(7): AVOIDANCE OF CONFLICTING SETTLEMENTS → COMMUNICATION MUST NOT "DEAL WITH CASES WHICH HAVE BEEN SETTLED BY THOSE STATES INVOLVED IN ACCORDANCE WITH THE PRINCIPLES OF THE CHARTER OF THE UNITED NATIONS, OR THE CHARTER OF THE ORGANISATION OF AFRICAN UNITY OR THE PROVISIONS OF THE PRESENT CHARTER."

Article 56(7) of the Charter stipulates that "cases which have been settled by those States involved in accordance with the principles of the Charter of

54. The finding of a lack of timeliness followed a finding of lack of exhaustion, such that the precedent should perhaps best be considered void in cases where arguments for exception to the exhaustion requirement have been accepted.
55. App. Nos. 233/99 & 234/99, Af. Comm. H.P.R. (Nov. 24, 2003), para. 39.
56. App. No. 307/05, Af. Comm. H.P.R. (Nov. 28, 2007), paras. 88-9.
57. In the Matter of Beneficiaries of Late Norbert Zongo et al. v. Burkina Faso, App. No. 013/2011, Af. Ct. H.P.R. (Mar. 28, 2014).

the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter" shall not be considered.

The intents of this clause are clear – to prevent conflicting judgments and to promote efficiency by ensuring that the same case is not considered by multiple separate bodies. The precise meaning of the clause is more complicated than first glance may reveal however – as it is not clear what exactly should be understood to constitute 'the same case.' Clearly, the clause is intended to prevent the submission of exactly the same arguments and details to two different adjudicative bodies, and in this respect resembles *non bis in idem* clauses found in the protocols establishing the jurisdiction of other supranational rights determination bodies as well[58] – and hence should be understood, like those clauses, to apply not only to instances of settlement but also to instances where the matter is under consideration before another supranational human rights-based adjudicatory body. Where different facts or different legal arguments are utilized, however, or where, following failure of a State to follow through on a judgment, the matter is pursued at a new body, there are strong reasons to understand that the rule may be understood not to apply. Finally, the term 'settlement' is unclear and should perhaps best be understood to refer to resolution of the underlying issues. Where, on the other hand, political bodies or adjudicative bodies without a core rights focus have considered the issue in question, this should not be understood to prevent consideration unless all the rights issues in question have been appropriately considered and redressed. Communications that have been declared inadmissible on this grounds include *Mpaka-Nsusu Andre Alphonse v. Zaire*, where the Commission found the communication inadmissible as it "had already been referred for consideration to the Human Rights Committee established under the International Covenant on Civil and Political Rights,"[59] as well as *Amnesty International v. Tunisia.*[60]

In *Bob Ngozi Njoku v. Egypt*, the Commission observed that "the decision of the United Nations sub-commission not to take any action and therefore not to pronounce on the communication submitted by the Complainant does not boil down to a decision on the merits of the case and does not in any way indicate that the matter has been settled as envisaged under Article 56(7)."[61] In *Bakweri Land Claims Committee v. Cameroon*, the Commission considered a claim that had been considered by the 'UN Sub-Commission on Human Rights', but observed that "there has been no final judgment on the merits of [the] dispute by the UN Sub-Commission… This means that the provision of Article 56(7) incorporating the principle of *non bis in idem* does not apply in the present case as there has

58. See, e.g., Op-ICCPR, Article 5(2)(a).
59. App. No. 15/88, Af. Comm. H.P.R. (Oct. 8, 1988), para. 2.
60. App. No. 69/92, Af. Comm. H.P.R. (Apr. 7, 1993).
61. App. No. 40/90, Af. Comm. H.P.R. (Nov. 11, 1997), para. 56.

been no final settlement of the matter by the UN Sub-Commission."[62] In *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v. Sudan* the Commission observed that "while recognizing the important role played by the United Nations Security Council, the Human Rights Council (and its predecessor, the Commission on Human Rights) and other UN organs and agencies on the Darfur crisis, [the Commission] is of the firm view that these organs are not the mechanisms envisaged under Article 56(7). The mechanisms envisaged under Article 56(7) of the Charter must be capable of granting declaratory or compensatory relief to victims, not mere political resolutions and declarations."[63]

Admissibility requirements

1. **Article 56(1): Indicate the authors**
   - ➜ Names of victims and claimants
   - ➜ Contact details
2. **Article 56(2): Jurisdiction**
   - ➜ *Ratione personae*
   - ➜ *Ratione materiae*
   - ➜ *Ratione temporis*
3. **Article 56(3): Non-insulting language**
4. **Article 56(4): Evidence other than simply news sources**
   - ➜ Must be asserted at admissibility stage; may be presented later
5. **Article 56(6): Timeliness**
   - ➜ Must be presented promptly after exhaustion of remedies, unless good reasons for delay
   - ➜ In cases of exception to exhaustion, the timeliness requirement should not apply where harms are ongoing, the fault lies with the authorities, and/or the grounds for exception to exhaustion cannot be traced to a precise point in time
6. **Article 56(7): No conflicting settlements**
   - ➜ May have been presented to non-judicial resolution body, e.g. Special Rapporteur, Human Rights Council, etc.
7. **Article 56(5): Exhaustion (discussed below)**

62. App. No. 260/02, Af. Comm. H.P.R. (Dec. 4, 2004), para. 53.
63. App. Nos. 279/03-296/05, Af. Comm. H.P.R. (May 27, 2009), para. 105.


SIEGE
ORDRE DES AVOCATS

2 THE EXHAUSTION OF DOMESTIC REMEDIES REQUIREMENT ARTICLE 56(5)

Admissibility of complaints
before the **African Court**

PRACTICAL GUIDE

Judiciary mission of FIDH and OGDH in Guinea, Conakry, February 2011

ARTICLE 56(5): COMMUNICATIONS MUST BE "SENT AFTER EXHAUSTING LOCAL REMEDIES, IF ANY, UNLESS IT IS OBVIOUS THAT THIS PROCEDURE IS UNDULY PROLONGED."

A. RATIONALE FOR THE RULE

The requirement of exhaustion lies at the heart of the admissibility inquiry. A number of different rationales for the requirement of exhaustion may be adduced, among which the three most prominent are:

➔ that the State be given a first chance to address the matter in question;[1]

➔ that the international body in question not be made a court of first instance;[2]

➔ that exhaustion serves the purpose of enhancing the complementarity function of the international court.[3]

The first rationale, that the State be given a first opportunity to address the matter, reflects the interests of States. The rationale has a number of limitations, however. If a State is truly unaware of the violations in question, it is only reasonable that the State be informed. In many instances, however, such claims of a lack of awareness ring hollow – the violation or the systemic

1. See, e.g., Amnesty International and Others v. Sudan, App. Nos. 48/90, 50/91, 52/91 & 89/93, Af. Comm. H.P.R., para. 32; Free Legal Assistance Group and Others v. Zaire, App. Nos. 25/89, 47/90, 56/91 & 100/93, Af. Comm. H.P.R., para. 36; Article 19 v. Eritrea, App. No. 275/2003, Af. Comm. H.P.R., para. 77; Front for the Liberation of the State of Cabinda v. Angola, App. No. 328/06, Af. Comm. H.P.R., para. 43; Promoting Justice for Women and Children v. Democratic Republic of Congo, App. No. 278/2003, Af. Comm. H.P.R., paras. 59-60.

2. See, e.g., Promoting Justice for Women and Children v. Democratic Republic of Congo, App. No. 278/2003, Af. Comm. H.P.R., para. 58; Jawara v. The Gambia, App. Nos. 147/95 & 149/96, Af. Comm. H.P.R., para. 31; Malazi African Association and Others v. Mauritania, App. Nos. 54/91, 61/91, 96/93, 98/93, 164/97, 196/97 & 210/98, Af. Comm. H.P.R., para. 80; Michael Majuru v. Zimbabwe, App. No. 308/05, Af. Comm. H.P.R., para. 77; Obert Chinhamo v. Zimbabwe, App. No. 307/05, Af. Comm. H.P.R., para. 52; Bakweri Land Claims Committee v. Cameroon, App. No. 260/02, Af. Comm. H.P.R., para. 39.

3. See, e.g., Promoting Justice for Women and Children v. Democratic Republic of Congo, App. No. 278/2003, Af. Comm. H.P.R., para. 61; Nixon Nyikadzino v. Zimbabwe, App. No. 340/07, Af. Comm. H.P.R., para. 84.

pattern of which it is a part may be well documented, and the State itself may even be involved. Cognizant of this, the African Commission has recognized for example that in cases of large-scale violations, the State cannot claim to have been unaware of the violation in question.[4]

In addition, the possibility of State involvement in the crime in question presents an interesting puzzle. On the one hand, the State is always in a sense 'aware' of crimes that the State is involved in committing. On the other hand however, the relevant question is not whether some part of the State is aware, or even more than aware, directly involved – it is whether the matter has been brought to the attention of the appropriate remedial bodies of the State, so that they might attempt to address the harm being committed by other actors. As such complications attest, while notice may be a purpose of the rule of exhaustion as attested to by this first rationale, the rationale does not do a good job of explaining why the boundaries of the rule lay where they do.

The second rationale for exhaustion, that the international body not become a court of first instance, reflects the interests of the supranational human rights system. The central concern here is with capacity, as no international tribunal is capable of dealing with the sheer quantity of violations of human rights committed in the areas over which it has potential jurisdiction. This capacity concern is extremely important, constituting a recognition that international bodies must put careful thought into how exactly they use their time, resources and attention, as all will be in limited supply. Once again, however, in and of itself this rationale does not clearly delimit how the boundaries of the exhaustion rule should be defined – how exactly, in other words, should the parameters of the rule of exhaustion be structured, in order to ensure the attention and limited resources of the supranational body in question may be best utilized.

This question is most convincingly answered by the third rationale for admissibility, the rationale of complementarity,[5] which serves the interests of the effectiveness of the system as a whole. The complementarity rationale should be understood as the core rationale underlying the exhaustion requirement. The principle of complementarity stipulates that when a national body is capable of providing the necessary remedy, it should do so, without the international body getting involved. This serves the function of preserving the capacity of the international body, as well as ensuring that national systems are given

4. See, e.g., Amnesty and Others v. Sudan, App. Nos. 48/90, 50/91, 52/91 & 89/93, Af. Comm. H.P.R.; Free Legal Assistance Group and Others v. Zaire, App. Nos. 25/89, 47/90, 56/91 & 100/93, Af. Comm. H.P.R.; Article 19 v. Eritrea, App. No. 275/2003, Af. Comm. H.P.R.

5. For an excellent discussion of the importance of the complementarity function of the rule of exhaustion, see Rosica Popova, Sarei v. Rio Tinto and the Exhaustion of Local Remedies Rule in the Context of the Alien Tort Claims Act: Short-Term Justice, But at What Cost?, 28 HAMLINE J. PUB. L. & POL'Y 517 (2007).

primacy of place. Where an appropriate national remedial body is unable to resolve the matter in question, however, the international body should step in.

The rationale of complementarity clarifies one of the core aims of the exhaustion rule – incentivizing States to remedy rights violations themselves, in order to avoid the matter coming up for determination at the international level. When combined with the efficiency rationale discussed above, moreover, the complementarity rationale helps to clarify those situations in which exceptions to the exhaustion requirement should be found – where the local remedial system fails to provide appropriate redress in one way or another. By carving out exceptions in such areas, supranational rights systems may not only help to limit the extent to which wrongs go unaddressed, but also may help to ensure that they devote attention to the problems with national remedial systems, thereby beginning to lay out a path towards those systems' improvement.

B. EXHAUSTING LOCAL REMEDIES

THE INTERNATIONAL LEGAL REQUIREMENT

The process of exhausting local remedies is relatively straightforward. Victims and their representatives should bring the matter in question to the local court system. The legal arguments at the national level need not be the same as at the international level, but the substance of the situation in question should be raised.[6] Should the court of first instance refuse to hear the case, claimants should appeal the matter; should no more appeals be possible, domestic remedies have been exhausted. If the court hears the matter but returns an inadequate judgment – which may include a partially positive judgment that nonetheless does not fully remedy the violation in question – the matter should be appealed to a higher court. The chain of appeals should be pursued until no more appeals are possible or a final judgment is reached, at which point local remedies will be exhausted.

The only remedies that must be exhausted in this context are those that are free, fair and impartial. This means in the first place that the only remedies that must be exhausted are those that are "determinable according to law," which is to say, those remedies that do not "rest on pure discretion exercised in a non-judicial manner";[7] in particular, "it is not necessary to resort to a merely

6. See, e.g., Lassad v. Belgium, App. No. 1010/2001, HRC (Mar. 17, 2006), para. 8.3; Ringeisen v. Austria, App. No. 2614/65, Eur. Ct. H.R. (July 16, 1971).

7. See Chittharanjan Amerasinghe, LOCAL REMEDIES IN INTERNATIONAL LAW 314 (2nd ed. 1996). See also Horvat v. Croatia, App. No. 51585/99, Eur. Ct. H.R., paras. 47-48; Hartmann v. Czech Republic, App. No. 53341/99, Eur. Ct. H.R., para. 66.

discretionary extraordinary remedy of a non-judicial nature, such as one whose object is to obtain a favour and not to vindicate a right."[8] This means that remedies such as applications for reinStatement, petitions and pardons are not remedial possibilities claimants must pursue, where they are based on discretion rather than awarded as a matter of right.

The rule of exhaustion further requires that only judicial remedies need be exhausted.[9] Judicial remedies are those provided by independent tribunals on a non-discretionary basis according to law, as stipulated above, which provide remedies as a matter of right and in a binding and enforceable manner. Where administrative bodies[10] or national human rights commissions meet all of these standards, such bodies may constitute appropriate domestic remedies as well.[11] Where such bodies fail to meet such standards, for instance due to their issuing non-binding recommendations, or due to a failure to issue their holdings according to clear legal rules, or due to other characteristics that give them a less-than judicial character, they do not constitute remedies that must be exhausted.[12]

In short, in other words, recourse to ordinary courts must always be exhausted,[13]

8. See Chittharanjan Amerasinghe, LOCAL REMEDIES IN INTERNATIONAL LAW 315 (2nd ed. 1996); citing De Becker Case, App. No. 214/56, Eur. Comm. H.R.; Lawless v Ireland, App. No. 332/57, Eur. Comm. H.R.; Greece v UK, App. No. 299/57, Eur. Comm. H.R.; Ellis v. Jamaica, App. No. 276/88, HRC, para. 9.1. See also Dr. Farouk Mohamed Ibrahim v. Sudan, App. No. 286/10, Af. Comm. H.P.R., paras. 59-60.

9. See, e.g., Cudjoe v. Ghana, App. No. 221/98, Af. Comm. H.P.R., para. 14; Article 19 v. Eritrea, App. No. 275/2003, Af. Comm. H.P.R., para. 70; CRP v. Nigeria, App. No. 60/91, Af. Comm. H.P.R., para. 10; Avocats Sans Frontieres v. Burundi, App. No. 231/99, Af. Comm. H.P.R., para. 23. For a clear Statement of the rule that the remedies in question must be of a judicial nature, see Amnesty International and Others v. Sudan, App. Nos. 48/90, 50/91, 52/91 & 89/93, Af. Comm. H.P.R., para. 31; and Dr. Farouk Mohamed Ibrahim v. Sudan, App. No. 286/10, Af. Comm. H.P.R., paras. 56. See also Priscilla Njeri Echaria v. Kenya, App. No. 375/09, Af. Comm. H.P.R., paras. 47-56.

10. Note that an administrative body is not the same as an administrative court, which is itself part of the regularly constituted judicial system.

11. See, e.g., Brough v. Australia, App. No. 1184/2003, HRC, para. 8.6; Gilberg v. Germany, App. No. 1403/2005, HRC (July 25, 2006), para. 6.5; ZT v. Norway, App. No. 238/2003, CAT Comm. (2006), para. 8.1; Cudjoe v. Ghana, App. No. 221/98, Af. Comm. H.P.R., para. 14; and Donna Sullivan, Overview of the Rule Requiring the Exhaustion of Domestic Remedies under the Optional Protocol to CEDAW 5 (2008).

12. See, e.g., Ejido 'Ojo de Agua' v. Mexico, App. No. 11,701, Int.-Am. Comm. H.R. (May 4, 1999), paras. 15-16; Reyes v. Chile, App. No. 12,108, Int.-Am. Comm. H.R. (Oct. 10, 2003); Colmenares Castillo v. Mexico, App. No. 12,170, Int.-Am. Comm. H.R. (Mar. 9, 2005), para. 36; John Dugard, Special Rapporteur on Diplomatic Protection, International Law Commission, UN Doc. A/CN.4/514, para. 14; cited in Donna Sullivan, Overview of the Rule Requiring the Exhaustion of Domestic Remedies under the Optional Protocol to CEDAW 5 (2008).

13. See, e.g., Cudjoe v. Ghana, App. No. 221/98, Af. Comm. H.P.R., para. 14; PS v. Denmark, App. No. 397/1990, HRC (July 22, 1992), para. 5.4; AH v. Sweden, App. No. 250/2004, CAT Comm. (2006), para. 7.2; Ragan Salgado v. United Kingdom, App. No. 11/2006, CEDAW Comm.; cited in Donna

except where grounds for exception exist, as detailed below. Where other judicial remedies exist, claimants might be required to exhaust these as well – but only where they meet the criteria above as well as falling outside the exceptions detailed below, including through providing fully appropriate remedies, and where the case will not be unduly delayed through such recourse.

While attempting to obtain redress through non-judicial means (for example, writing a letter to the authorities to ask them to conduct an investigation or refrain from a certain action) is not required under the rule, nor will it constitute exhaustion, to the extent any such avenues might provide relief claimants may wish to pursue them regardless. Such attempts should not prejudice opportunities on the supranational level; on the contrary, beyond the formal substance of the rule, supranational mechanisms may engage in a more subjective inquiry into the extent to which claimants attempted to obtain redress on the national level, and will look favorably on claimants who have clearly demonstrated every effort to do so. In other words, applicants are not required under the rule of exhaustion to take measures extraneous to the judicial remedial system, but any such measures taken will likely be looked on positively.

Specially constituted courts that lie outside the regular judicial system need not be exhausted where their proceedings are not free, fair and impartial.[14] This has consistently been found to be the case relative to military tribunals in particular. There are strong grounds for understanding that any military trial of a civilian, or trial by a special 'security' or 'emergency' tribunal, is inappropriate – as such bodies cannot be expected to strike a reasonable balance between security and human rights concerns, and since trial by such a body may in itself constitute a violation of a defendants' dignity right to be tried by a civilian court. Beyond these general grounds for considering trial by such bodies inappropriate, such bodies have consistently been found lacking in independence in reality.

Extraordinary remedies in general need not be exhausted either, except where they are fully compliant with the criteria relative to 'judicial' determination detailed above. Where extraordinary remedial bodies are set up for the specific

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Sullivan, Overview of the Rule Requiring the Exhaustion of Domestic Remedies under the Optional Protocol to CEDAW 5-6 (2008).

14. See, e.g., Gilboa v. Uruguay, App. No. 147/83, HRC; Santullo Valcada v. Uruguay, App. No. 9/77, HRC; Barbato and Barbato v. Uruguay, App. No. 84/81, HRC; Amnesty International and Others v. Sudan, App. Nos. 48/90, 50/91, 52/91 & 89/93, Af. Comm. H.P.R., para. 34; Jawara v. The Gambia, App. Nos. 147/95 & 149/96, Af. Comm. H.P.R., paras. 33-34; Constitutional Rights Project (in respect of Zamani Lakwot and six Others) v. Nigeria, App. No. 87/93, Af. Comm. H.P.R., paras. 7-8; Civil Liberties Organisation v. Nigeria; App. No. 129/94, Af. Comm. H.P.R.; Constitutional Rights Project, Civil Liberties Organisation, and Media Rights Agenda v. Nigeria, App. Nos. 140/94, 141/94 & 145/95, Af. Comm. H.P.R.; Aminu v. Nigeria, App. No. 205/97, Af. Comm. H.P.R.; Dr. Farouk Mohamed Ibrahim v. Sudan, App. No. 286/10, Af. Comm. H.P.R., para. 55.

purpose of providing for rights however (as, for example, in the case of bodies set up to provide remedies for large-scale historical wrongs) it seems likely that their exhaustion would be necessary – as well as, of course, desirable, in that it would presumably offer a more expeditious and effective means of achieving some remedy. Similarly, while constitutional actions form a core component of the remedy claimants will often seek to and should pursue on the national level when they are available (and when they are not an exception to the rule of exhaustion likely applies, as detailed below), such rule applies only to ordinary and not extraordinary constitutional actions – such as, for instance, the idea of a constitutional appeal as a form of remedy for irregularities in criminal investigation.[15]

Domestic remedies need not have been exhausted when the complaint is first submitted – instead, the relevant time at which they must have been exhausted is when the international body considers the question.[16] As such, claimants may wish to submit their case shortly before local remedies have been exhausted, where they are anticipating a negative final judgment; or, in cases in which claimants face delays, they may file their case at the first sign of such delay, in anticipation that delays will continue and as a way of prompting the national remedial system to take action. Should the national remedial system be prompted into action, claimants may ask the supranational body to suspend consideration; should delays continue on the national level, claimants will be able to receive supranational consideration sooner than they otherwise would.

A degree of uncertainty exists in the law relative to situations in which a positive judgment has been achieved on the national level, which has subsequently not been complied with. In *Interights (on behalf of Jose Domingos Sikunda) v Namibia,*[17] the Commission stipulated that proceedings to ensure enforcement of the judgment would be required on the national level. Such a holding has also been compellingly contested by jurists, however, on the grounds that it places "a very heavy burden on a complainant."[18] In such situations, the approach just recommended should perhaps be adopted – a submission should be

15. See, e.g., Gilberg v. Germany, App. No. 1403/2005, HRC (July 25, 2006), para. 6.5; Rodriguez v. Uruguay, App. No. 322/1988, HRC (July 19, 1994), para. 6.2; Dominguez Domenichetti v. Argentina, App. No. 11,819, Int.-Am. Comm. H.R. (Oct. 22, 2003), para. 45; Schiavini & Schnack v. Argentina, App. No. 12,080, Int.-Am. Comm. H.R. (Feb. 27, 2002), para. 53; cited in Donna Sullivan, Overview of the Rule Requiring the Exhaustion of Domestic Remedies under the Optional Protocol to CEDAW 6-7 (2008).
16. See, e.g., Ringeisen v. Austria, App. No. 2614/65, Eur. Ct. H.R. (July 16, 1971), paras. 85-93; Yildirim et al. v. Austria, App. No. 6/2005, CEDAW Comm., para. 11.3; Taright et al. v. Algeria, App. No. 1085/2002, HRC (Mar. 15, 2006), para. 7.3; Kuok Koi v. Portugal, App. No. 925/2000, HRC (Oct. 22, 2003), para. 6.4.
17. App. No. 239/2001, Af. Comm. H.P.R. (May 16, 2002).
18. Frans Viljoen, Communications under the African Charter: Procedure and Admissibility, in THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE, 1986-2006 (Evans & Murray eds., 2nd ed. 2011) 115.

made to the international body at the same time as national proceedings to ensure enforcement, in order to provide extra pressure in support of national enforcement while expediting the possibility of supranational review should enforcement not be promptly forthcoming (in fact, something very similar occurred in *Interights (on behalf of Jose Domingos Sikunda) v. Namibia*).

Where the claimant has not brought necessary appeals and these are still admissible, a case is clearly inadmissible on grounds of failure of exhaustion. A difficult situation pertains where appeals were available but not brought, and the claimant is now barred from bringing those appeals. If the claimant was adequately represented by legal council at the time, and the harm is not ongoing, the claim is likely barred at the international level as well, as the rule of exhaustion requires claimants to comply with domestic procedural requirements,[19] where they do not themselves fall afoul of human rights standards (see the section on exception due to procedural failures below). Where the claimant was not adequately represented however, due for example to indigence, or having been prevented from accessing council, or due to another problem attributable to the State in some way,[20] such factors should be taken into account on the national level, allowing a new appeal, failing which the matter should be admissible on the international level due to practical exhaustion in the present moment. While claims aimed at individual redress may be barred due to failure to act in a timely manner, claims aimed at systemic reform as well as claims aimed at ongoing harm will, by nature, never be.

EXHAUSTING REMEDIES IN PRACTICE IN AFRICAN COUNTRIES

The nature of every domestic remedial system differs, and hence a comprehensive unified account of how to exhaust national proceedings that will apply equally to all countries is impossible to provide. That said, the basic parameters at least are quite similar across countries, and hence some general guidelines may be laid out.

Depending on the nature of the case in question, legal proceedings may already have been initiated by the State, or it may be up to claimants to initiate them. Common areas in which State-initiated proceedings may violate human rights include criminal prosecutions, of course, as well as penalizations of freedom of expression, proceedings brought against the media or civil society associations, and the like. In such instances, national-level rights advocates should fight the charges in question as far as possible through the domestic court system. This

19. See, e.g., Ringeisen v. Austria, App. No. 2614/65, Eur. Ct. H.R. (July 16, 1971).
20. See, e.g., Lim Soo Ja v. Australia, App. No. 1175/2003, HRC (July 25, 2006), para. 6.2; Calle Sevigny v. France, App. No. 1283/2004, HRC (Oct. 28, 2005), para. 6.3; Gilberg v. Germany, App. No. 1403/2005, HRC (July 25, 2006), para. 6.5.

may include challenging factual evidence, challenging on a rights-basis the nature of the laws utilized, and bringing appeals to higher-level judicial bodies, and to constitutional bodies if and where available. If possible, claimants should pursue the case to the highest level of appeal that they can, thereby exhausting local remedies. In many cases however – laid out under various headings of exception below – successful conduct of the case in such a manner may be frustrated, for instance through lack of availability of constitutional-rights remedy or undue delay in proceedings; in such cases, a strong claim to admissibility at the supranational level may be made.

In other cases, the State may take rights-violating actions without initiating proceedings in the regular judicial system. In such instances, for example cases of arbitrary detention or proceedings before military tribunals, advocates should attempt to get the case in question transferred to an appropriate judicial review body. Where such proves impossible, however, once again a strong case for admissibility at the supranational level is available.

In yet other cases, rights-violations may have occurred, or may be occurring in an ongoing way, without an initiation of judicial proceedings by the State. Such instances may include extrajudicial killings that have not been investigated, legal and policy frameworks restricting rights, for instance restrictive regimes relative to the registration of civil society organizations, or ongoing harms to the right to health through pollution, for example. In such cases, advocates should attempt to prompt the national authorities into action, for instance by lodging complaints with prosecutorial authorities in the case of uninvestigated criminal acts, or by lodging a constitutional complaint in the case of ongoing or structural harms. If possible to pursue reform of such issues through the national remedial system, that system should be utilized to fullest extent; where not possible however, for any of the grounds explored in the section on exceptions below, for instance due to refusal to investigate or failure to take immediate action to address a situation of entrenched, repeated or ongoing harm, a strong case for admissibility to the supranational level may be made.

A brief overview of the legal systems in those countries that have accepted the ability of individuals to bring cases directly to the court helps to reveal the diversity of legal contexts in which potential applicants to the supranational rights systems in African may find themselves. The most significant issue here is whether the national remedial system allows individuals to bring constitutional challenges, that is, to seek not only individual remedy for rights violations but also systemic reform through a binding judicial decision. Where such is not allowed but necessary, claimants have a strong case for the admissibility of their case at the supranational level under an exception to the rule of exhaustion. In instances where legal reform is not necessary, claimants must attempt to obtain the remedies they seek from national judicial systems,

though their cases will still be admissible at the supranational level without exhaustion of remedies as such where an exception to exhaustion applies. Given that avenues for individual redress are both (i) at least generally available across States and (ii) possessing of a great deal of diversity on the basis of the particular wrong in question, this section addresses rather the important matter of whether or not, and if so through what means, judicial rights review is available in the countries in question. It should moreover be emphasized in this context that cases taking such form are to be broadly encouraged, as such cases offer much stronger possibility of broad positive effects extending beyond remedy to the individuals involved in the case in question.

The legal systems in English-speaking, common law-applying countries are in general more amenable to domestic rights claims, as the constitutions of these countries have typically permitted individuals to submit claims challenging the constitutionality of laws on rights-based grounds.

The legal system of Ghana under the 1992 Constitution permits constitutional challenges to laws as well as acts to be brought by any person to the Supreme Court (Article 2(1)).[21] Applicants should hence attempt to bring their claims to the Supreme Court before approaching supranational bodies; should the Supreme Court refuse jurisdiction or return an unsatisfactory verdict, the matter may be brought to the African Commission or Court, with local remedies exhausted.

Article 103(3) of the 1994 Constitution of Malawi grants the judiciary "jurisdiction over all issues of judicial nature and [the] exclusive authority to decide whether an issue is within its competence"; Article 5 thereof moreover declares that "any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid." The Constitution therefore provides the grounds upon which a power of judicial review may be understood, grounds upon which the High and Supreme Courts of Malawi have based constitutional rulings;[22] hence, advocates should approach the national courts seeking constitutional remedy before referring their case to the supranational level. The legal system of Malawi also contains an interesting and novel feature – the existence of a 'Law Commission' with the power to receive submissions from any person or body and to review and make recommendations for legal reform (Article 135). Malawi's Law Commission, as well as its Human Rights Commission, are commendable bodies, and may

21.See, e.g., Ahumah Ocansey et al. v. The Electoral Commission, Supreme Court of Ghana, Writ No. JI/5/2008 (Mar. 23, 2010).

22. See Janet Chikaya-Banda, Duty of Care: Constitutional and Law Reform, in Malawi, African Research Institute (Sept. 2012), 15; Malawi Law Society et al. v. Malawi, Malawi High Court, Civil Case 78/2002 (Oct. 22, 2002); Masangano v. Attorney-General, High Court of Malawi, Con. Case 15/2007 (Nov. 9, 2009).

well constitute targets of advocacy human rights victims and defenders may wish to approach before bringing their appeals to the supranational level. As observed above, however, for the purposes of exhaustion the key issue is appeal to judicial authorities, and hence it is the judiciary and the judiciary alone that applicants must approach before their case may be considered admissible at the supranational level.

The 1977 Constitution of Tanzania gives individuals the power to institute proceedings in the High Court where their rights are violated or likely to be violated (Articles 30(3-4)).[23] Advocates pursuing systemic reform must thus seek to bring their claims to the High Court before attempting to bring their case to the supranational mechanisms.

The situation in the French-speaking, civil law countries is more complicated, as the constitutions of these countries generally adopted the traditional French model of a Constitutional Council without the ability to consider legislative review claims submitted by individuals.[24]

The 1990 Constitution of Benin is an exception to this rule however, as Article 122 thereof grants individuals the ability to complain to the Constitutional Court relative to the constitutionality of laws. As such, claimants should attempt to exhaust this avenue when challenging legislation or the like before submitting claims to a supranational rights-review body, unless another grounds for exception to the rule of exhaustion applies.

The 1991 Constitution of Burkina Faso sets up a Constitutional Council with review powers, but individuals are not given the ability to make appeals to that body. The highest judicial body in Burkina Faso is the Cour de Cassation, which, as the African Court has noted, constitutes "an effective remedy, which… individual applicants should [access] so as to comply with the rule of exhaustion, at least where what is sought is a change in "the substance of a decision."[25] The Cour de Cassation does not, however, have the power to amend laws, as that power is reserved for the Constitutional Council, which individual applicants cannot access; as such, should applicants seek such a remedy, an exception to

23. See also Basic Rights and Duties Act, Cap 3 R.E. 2002, Section 4. See also Ephraim v. Pastory, High Court of Tanzania, (1990) LRC (Const) 757 (Feb. 22, 1990). While it is necessary to approach the High Court in order to seek a change in law, subordinate courts may be approached as well should the matter involve more isolated rights violation. See Ndyanabo v. Attorney-General, Court of Appeal of Tanzania, [2002] 3 LRC 541 (Feb. 14, 2002). See also Augostino Ramadhani, Judicial Review of Administrative Action as the Primary Vehicle for the Protection of Human Rights and the Rule of Law, Southern African Chief Justices Conference, Kasane, Botswana (Aug. 7-8, 2009).

24. That model has by now broken down in France itself however, where individuals may now challenge the constitutionality of laws.

25. In the Matter of Beneficiaries of Late Norbert Zongo et al. v. Burkina Faso, App. No. 013/2011, Af. Ct. H.P.R. (Mar. 28, 2014), paras. 69-70.

the rule of exhaustion will apply, such that they will be able to bring their case directly to the supranational level until such time as Burkina Faso amends its constitutional framework in order to allow individuals access to rights-based judicial review with the power to challenge or amend legal frameworks.[26]

While the 2000 Constitution of the Cote d'Ivoire also provides for a Constitutional Council, Article 96 thereof gives all individuals the ability to raise a claim that a law is unconstitutional before a court of any jurisdiction. It is unclear however whether individuals have in fact been able to access effective constitutional review in Cote d'Ivoire;[27] claimants should hence at least attempt to do so when they are seeking to challenge laws before making appeal to supranational human rights bodies.

The 1992 Constitution of Mali, like the Constitution of Burkina Faso, provides for a Constitutional Court to which individuals do not have access (Article 88 & 89), suggesting that relative to Mali as well applicants may apply directly to the supranational organs when they seek review of legislation or the like.

The 2003 Rwandan[28] constitution grants the Supreme Court the power to consider petitions concerning the constitutionality of laws (Article 145(5)). As such, claimants should attempt to exhaust this avenue when challenging legislation or the like before submitting claims to a supranational rights-review body. Whether or not a case would be found admissible before Africa's supranational rights fora will also depend of course on whether or not other grounds for exception from the rule of exhaustion may be successfully argued.

C. EXCEPTIONS TO THE RULE OF EXHAUSTION

Supranational rights bodies have carved out three broad grounds of exception to the rule of exhaustion, which apply where remedies are 'unavailable', 'ineffective' or 'insufficient'. These headings are loose and overlapping, and in and of themselves under-specified. Within each category, however, a number of more specific grounds for exception from the rule may be identified. These exceptions exist because, as the European Court has put it,

26. See Konate v. Burkina Faso, App. No. 004/2013, Af. Ct. H.P.R. (Dec. 5, 2014), paras. 109-14.
27. See Mouvement Ivoirien des Droits Humains (MIDH) v. Cote d'Ivoire, App. No. 246/02, Af. Comm. H.P.R. (May 2008); Ivorian Human Rights Movement (MIDH) v. Cote d'Ivoire, App. No. 262/2002, Af. Comm. H.P.R. (May 2008).
28. As noted above, while Rwanda initially submitted a declaration accepting the Court's review power, it submitted a note aimed at withdrawing its assent in February 2016. As of the time of completion of this manual, a decision by the Court on that matter was pending.

> "application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights… Accordingly, it has recognized that [the rule] must be applied with some degree of flexibility and without excessive formalism… the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case. This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate, as well as the personal circumstances of the applicant…"[29]

Key to success in arguing for exception to the rule of exhaustion is specificity in terms of the reasons why local remedies are unavailable. A general argument that the local judicial system lacks independence and cannot be trusted, in other words, is unlikely to succeed.[30] Instead, claimants should make specific arguments under the relevant grounds detailed below.

As Stated in the introduction, a great deal of uncertainty persists in the realm of exceptions to the rule of exhaustion. Given this uncertainty, it cannot be guaranteed that claimants who make arguments on the basis of the grounds detailed below will automatically succeed. That said, all of the grounds detailed below have been recognized within international human rights law, and recognition on the basis of all of the grounds has strong basis in a rights-based approach. Uncertainty persists, however, due to the fact that much of the detail of human rights law has grown up around legal systems in which the rule of law is strongly respected – in which, in other words, admissibility is generally able to be based on exhaustion of remedies rather than necessarily on exception to the exhaustion rule. In this context, in fact, the African Commission has done at least as much if not more than any other tribunal to expand the recognition of different grounds, thereby advancing access to justice and helping to incentivize the crucial reform of domestic remedial systems. The African Commission and Court will doubtless continue to play crucial roles in these areas in future.

The following section details several different grounds upon which cases may be considered exempted from the exhaustion requirement. Among these grounds, the grounds of **systematic violation** should be particularly emphasized – as

29. Aksoy v. Turkey, App. No. 21987/93, Eur. Ct. H.R. (Dec. 18, 1996), cited in Donna Sullivan, Overview of the Rule Requiring the Exhaustion of Domestic Remedies under the Optional Protocol to CEDAW (2008) 4. See also ZT v. Norway, App. No. 238/2003, CAT Comm. (2006), para. 8.1; Rosendo Radilla Pacheco v. Mexico, App. No. 777/01, Int.-Am. Comm. H.R. (Oct. 12, 2005), para. 20.
30. See Anuak Justice Council v. Ethiopia, App. No. 299/05, Af. Comm. H.P.R. (May 25, 2006), para. 58.

that grounds forms perhaps the most likely basis for acceptance of exception to the rule of exhaustion. It is a grounds, moreover, that not only presents an argument that may be included in the context of exhaustion, but which may also shape the case as a whole – suggesting that claimants should actively formulate their cases to respond to widespread and systematic violations, which will have the benefit not only of increasing the chances of admissibility but also of helping to ensure that the cases prepared address the most serious instances of violation and offer holistic pictures relative to those violations, hopefully ultimately leading to more widely significant outcomes.

Remedies are unavailable

→ Domestic immunity

Where it is impossible to challenge the matter in question through the domestic legal system, an exception to the exhaustion requirement exists. This may be the case for a number of reasons. In the first place, it might be the case that a certain matter of law or policy is directly immunized from challenge, either through ouster of the jurisdiction of the ordinary court system in favor of non-free, fair and independent courts, or through direct immunization by legal text or previous court judgment. Thus in *Constitutional Rights Project et al. v. Nigeria* the Commission held the case admissible under an exception due to the fact that the laws claimants sought to challenge "contain[ed] 'ouster' clauses… [that] prevent the ordinary courts from taking up cases placed before the special tribunals or from entertaining any appeals from the decisions of the special tribunals", furthermore observing that "The Legal Practitioners Decree specifies that it cannot be challenged in court and that anyone attempting to do so commits a crime. The Constitution (Modification and Suspension) Decree legally prohibited its challenge in Nigerian courts" and therefore concluded that:

> "The ouster clauses render local remedies non-existent, ineffective or illegal. They create a legal situation in which the judiciary can provide no check on the executive branch of the government … because there is no legal basis to challenge government action under these decrees… 'it is reasonable to presume that domestic remedies will not only be prolonged but are certain to yield no results."[31]

31. Constitutional Rights Project et al. v. Nigeria, App. Nos. 140/94, 141/94 & 145/95, Af. Comm. H.P.R., paras. 28-31. See also Amnesty International and Others v. Sudan, App. Nos. 48/90, 50/91, 52/91 & 89/93, Af. Comm. H.P.R., para. 35; Jawara v. The Gambia, App. Nos. 147/95 & 149/96, Af. Comm. H.P.R., paras. 33-34; Constitutional Rights Project (in respect of Zamani Lakwot and six others) v. Nigeria, App. No. 87/93, Af. Comm. H.P.R., paras. 7-8; Civil Liberties Organization (in respect of the Nigerian Bar Association) v. Nigeria, App. No. 101/93, Af. Comm. H.P.R.; Civil Liberties Organisation

One exception may apply in this area – if the legal act immunizing an area of challenge may itself be challenged, it may be necessary to do so. Such recourse should only be understood as necessary if it offers a genuine chance of success however.

Amnesty laws present another form in which domestic law may enshrine immunity – in this case, the immunity of particular individuals from criminal prosecutions. Once again, to the extent there is a genuine possibility to challenge such laws on the national level, such challenge will be considered necessary – an exception applying where there is no possibility to do so. Thus in *Zimbabwe Human Rights NGO v. Zimbabwe*, the Commission held that:

> "asking the Complainant to challenge the legality of the Clemency Order in the Constitutional Court of Zimbabwe would require the Complainant to engage in an exercise that would not bring immediate relief to the victims of the violations… To therefore ask victims in this matter to bring a constitutional matter before being able to approach domestic courts to obtain relief for criminal acts committed against them would certainly result into going through an unduly prolonged procedure in order to obtain a remedy."[32]

Where immunities are applied by law to particular State agencies, for example the security services, the matter may be considered directly admissible at the supranational level. Thus in *Abdel Hadi and others v. Sudan* the Commission stipulated that:

> "police officers in Sudan generally enjoy immunity which can only be lifted after a preliminary investigation… there is no established procedure or right to compel the Prosecution Attorney to commence an investigation where there is an allegation of wrongdoing by the police… The Commission considers the granting of such blanket immunities to police officers as an impediment to the exhaustion of local remedies since it is not disputed that there is no legal obligation on the part of the police hierarchy to lift the immunities of these officers on demand."[33]

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v. Nigeria, App. No. 129/94, Af. Comm. H.P.R.; Constitutional Rights Project and Civil Liberties Org. v. Nigeria, App. Nos. 143/95 & 150/96, Af. Comm. H.P.R.; Center for Free Speech v. Nigeria, App. No. 206/97, Af. Comm. H.P.R.; Aminu v. Nigeria, App. No. 205/97, Af. Comm. H.P.R.

32. Zimbabwe Human Rights NGO Forum v. Zimbabwe, App. No. 245/02, Af. Comm. H.P.R., para. 67; see also Malawi African Association v. Mauritania, App. Nos. 54/91, 61/91, 98/93, 164/97 & 210/98, Af. Comm. H.P.R., para. 85.

33. See, e.g., Abdel Hadi and Others v. Sudan, App. No. 368/09, Af. Comm. H.P.R., para. 47. See also Dr. Farouk Mohamed Ibrahim v. Sudan, App. No. 286/10, Af. Comm. H.P.R., paras. 57-58.

Immediate admissibility here may be understood to be grounded on the clear and egregious affront presented by such clauses to human rights principles, as well as the likelihood they will be found to be linked to ongoing rights violations.

→ Unavailability of constitutional review

An exception to the rule of exhaustion has been found to apply where domestic constitutional review is not available. Thus in *Konate v. Burkina Faso* the Court held that:

> "In the Burkinabe Legal system, the appeal to the Cour de Cassation is a remedy intended to repeal, for violation of the law, a judgment or a ruling delivered as a last resort… This appeal does not therefore allow for the law itself to be annulled but only applies to the Judgment in question… In such circumstances, it is clear that the Applicant in the instant case was not in a position to expect anything from the Cour de Cassation in relation to his request for the annulment of the Burkinabe laws… Indeed, in the Burkinabe judicial system, it is the Constitutional Council that is responsible for overseeing compliance of such laws with the Constitution, including in the provisions of the latter which guarantee human rights (Article 152 of the Constitution) In addition, Article 157 of the Constitution which provides for the institutions entitled to bring matters before the Constitutional Council for the purpose of determining the compliance of laws with the Constitution does not make reference to individuals. As a result, the Applicant could not seize the Constitutional Council in order to have the laws, on the basis of which he was convicted, overturned. On the basis of all the foregoing considerations, it could be said that the Burkinabe Legal System does not afford the Applicant in the present matter any effective and sufficient remedy to enable him to overturn the Burkinabe laws which he is complaining about. Consequently therefore, the Applicant did not have to exhaust the remedy at appeal or any other remedy for that matter, after his final conviction…"[34]

Basic reflection on the purpose of supranational rights systems in general, and the rule of exhaustion in particular, makes clear why. The aim of human rights systems is to ensure that the rights of individuals are respected and fulfilled

34. Konate v. Burkina Faso, App. No. 004/2013, Af. Ct. H.P.R. (Dec. 5, 2014), paras. 110-14. See also Brozicek Case, App. No. 10964/84, Eur. Ct. H.R., para. 34; Case of Padovani, App. No. 13396/87, Eur. Ct. H.R., para. 20; VK & AK (Kjeldsen) v. Denmark, App. No. 5095/71, Eur. Ct. H.R.; HP & EP (Pedersen) v. Denmark, App. No. 5926/72, Eur. Ct. H.R.; Bask Madsen v. Denmark, App. No. 5920/72, Eur. Ct. H.R.; Mouvement Ivoirien des Droits Humains (MIDH) v. Cote d'Ivoire, App. No. 246/02, Af. Comm. H.P.R., para. 49.

– requiring not just individual measures and abstentions, but also appropriate legal frameworks. In order to promote these ends, rights systems empower individuals to challenge existing, rights-violating frameworks. Where a domestic system does not grant individuals the power to challenge legislation and policy that violates rights, and to produce a change in law or policy where violation is found, that system will be minimally effective at promoting rights generally, and fails to respect the right to a remedy. Hence, supranational rights systems have promoted more effective domestic systems in this area by carving out an exception to the exhaustion rule.

Of course, in practice there may be ways of challenging legal and policy frameworks that do not reply upon claims of 'rights' as such. While it may be necessary to exhaust such remedies, where they comply with the principles discussed above, from a rights point of view it is also important that rights-based claims be enabled and facilitated. As such, the future may well see regional mechanisms finding increased exception to the rule of exhaustion in all those cases where explicitly rights-based, potentially law-changing claims are not allowed.

➔ Lack of standing

If claimants do not have the ability to bring a case domestically, an exception to the exhaustion requirement applies. This may be the case because victims such as those in question simply do not have the legal ability to bring the sort of action in question in the State in question[35] or because courts do not have jurisdiction over or are otherwise unable to consider the matter in question.[36] It may also be the case because claimants have been stripped of legal status – thus in *Front for the Liberation of the State of Cabinda v. Angola* the Commission stipulated that:

> "The Complainant avers that it has no legal standing under Angolan law and its representatives would face arrest and possible execution under Angolan national security laws if they try to pursue legal remedies in Angola, adding that members of FLEC are considered terrorists in Angolan territory and hence any attempt to take the case before Angolan courts would be futile, if not impossible, and would subject members of the Complainant organisation to arbitrary arrest, detention or execution as terrorists… In the present Communication, the fact that the Complainant has no legal standing before Angolan courts, that most of its members live abroad and are considered terrorists

35. See Schiavini and Schnack v. Argentina, App. No. 12,080, Int.-Am. Comm. H.R. (Feb. 27, 2002), para. 52.
36. See Van Oosterwijck v. Belgium, App. No. 7654/86, Eur. Comm. H.R.

by the Government, leads to the conclusion that the chances of the Complainant exhausting local remedies have been practically rendered impossible by fear of prosecution."[37]

Alternatively, claimants may lack standing because the necessary basis to bring the case does not exist in the State in question – thus in *Noah Kazingachire and others v. Zimbabwe*, the Commission held that:

> "The relatives of the deceased persons were unable to sue for adequate compensation for the wrongful deaths since that remedy is not recognized under Zimbabwean law... There is no domestic recourse available to the Complainant... In view of the above, the African Commission decides to declare the Communication Admissible with respect to Article 56."[38]

→ No reasonable prospect of success

Where it would be technically possible to bring the case in question, but past jurisprudence has already made clear there would be no possibility of success, an exception to the rule of exhaustion has been found to apply. Thus in *Jessica Gonzalez and others v. United States* the Inter-American Commission held that:

> "a petitioner may be excused from exhausting domestic remedies with respect to a claim where it is apparent from the record before it that any proceedings instituted on that claim would have no reasonable prospect of success in light of prevailing jurisprudence of a State's highest courts."[39]

37. See Front for the Liberation of the State of Cabinda v. Angola, App. No. 328/06, Af. Comm. H.P.R., paras. 46, 51.
38. See Noah Kazingachire and Others v. Zimbabwe, App. No. 295/04, Af. Comm. H.P.R., paras. 52, 55-6.
39. Jessica Gonzales and Others v. United States, App. No. 1490/05, Int.-Am. Comm. H.R. (July 24, 2007), para. 49. See also Schmidt v. Costa Rica, App. No. 9178, Int.-Am. Comm. H.R.; Pressos Compania Naviera S.A. v. Belgium, App. No. 17849/91, Eur. Ct. H.R., para. 27; Brough v. Australia, App. No. 1184/2003, HRC (Mar. 17, 2006), para. 8.10; Gilberg v. Germany, App. No. 1403/2005, HRC (July 25, 2006), para. 6.5; Castano v. Spain, App. No. 1313/2004, HRC (July 25, 2006), para. 6.3; Maximino de Dios Prieto v. Spain, App. No. 1293/2004, HRC (July 25, 2006), para. 6.3; Isamu Carlos Shibayama and Others v. United States, App. No. 434/03, Int.-Am. Comm. H.R. (Mar 16, 2006), paras. 48-51; De Wilde, Ooms and Versyp Cases, App. Nos. 2832/66, 2835/66 & 2899/66, Eur. Ct. H.R. (June 10, 1971), paras. 37, 62; Van Oosterwijck v. Belgium, App. No. 7654/76, Eur. Ct. H.R. (Nov. 6, 1980), para. 37.

➔ Access to the courts is unavailable due to indigence

Supranational rights bodies have found an exception to the rule of exhaustion in cases where victims are indigent, and legal aid is not provided. Thus in *Lumley v. Jamaica* the Human Rights Committee:

> "No legal aid was available to the author to petition the Judicial Committee of the Privy Council, and that in the circumstances no further remedies were available to him. The Committee considers therefore that no obstacles exist to the admissibility of the communication."[40]

In order to understand when such an exception will apply, it is important to understand the sorts of instances in which the State is under an obligation to provide legal aid. Criminal defense provides a clear example. States may also have an obligation to provide legal aid in other instances as well, although international law in this area is still developing.

It is important to note here that it is the claimant's situation that should be looked to, not that of whatever organization has taken up their case and brought it to the supranational level. This is because only by looking to the first question can the supranational body hope to address any systemic issues within the country in question, and hence incentivize the country to correct violations of the right to a remedy produced by failure to provide necessary legal aid.

➔ Access to the courts is unavailable due to other barriers

Similarly, an exception to the exhaustion requirement may be found to exist where other characteristics of the victim, such as age, mental incapacity or language barrier prevent victims from accessing courts, and where despite an obligation on the State to provide some means to overcome the obstacle in question, the State does not do so. In *Purohit & Moore v. Gambia* the Commission considered a case involving whether or not a case should be considered admissible where legal aid is not provided to the allegedly intellectually disabled, holding that:

40. Lumley v. Jamaica, App. No. 662/1995, HRC, para. 6.2. See also Advisory Opinion OC-11/90, Int.-Am. Comm. H.R.; Currie v. Jamaica, App. No. 377/1989, HRC, paras. 6, 10; Henry v. Jamaica, App. No. 230/1987, HRC, para. 7.3; Gallimore v. Jamaica, App. No. 680/1996, HRC, para. 6.5; Michael and McLean v. Jamaica, App. Nos. 226/1987 & 256/1987, HRC, para. 13.3; Ellis v. Jamaica, App. No. 276/1988, HRC, para. 9.2; Little v. Jamaica, App. No. 283/1988, HRC, para. 7.3; Hibbert v Jamaica, App. No. 293/1988, HRC, para. 6.2; Wright v. Jamaica, App. No. 349/1989, HRC, paras. 7.3-7.4; Gordon v. Jamaica, App. No. 237/1987, HRC, para. 5.7; Champagnie, Palmer & Chisholm v. Jamaica, App. No. 445/1991, HRC, para. 5.2; Peter Joseph Chacha v. Tanzania, App. No. 003/2012, Af. Ct. H.P.R., Judge Ouguergouz dissent, para. 53.

"In the present matter, the African Commission cannot help but look at the nature of people that would be detained as voluntary or involuntary patients under the [Lunatics Detention Act] and ask itself whether or not these patients can access the legal procedures available (as Stated by the Respondent State) without legal aid. The African Commission believes that in this particular case, the general provisions in law that would permit anybody injured by another person's action are available to the wealthy and those that can afford the services of private counsel. However, it cannot be said that domestic remedies are absent as a general Statement; the avenues for redress are there if you can afford it. But the real question before this Commission is whether looking at this particular category of persons the existent remedies are realistic. The category of people being represented in the present communication are likely to be people picked up from the streets or people from poor backgrounds and as such it cannot be said that the remedies available in terms of the [Gambian] Constitution are realistic remedies for them in the absence of legal aid services. If the African Commission were to literally interpret Article 56(5) of the African Charter, it might be more inclined to hold the communication inadmissible. However, the view is that, even as admitted by the Respondent State, the remedies in this particular instance are not realistic for this category of people and therefore not effective and for these reasons the African Commission declares the communication admissible."[41]

→ The victim has been expelled

Where a victim has been expelled without opportunity to challenge that expulsion, or where a victim has been subjected to repeated deportation, an exception to the rule of exhaustion may be found. Thus in *Union Interafricaine des Droits de l'Homme and others v. Angola* the Commission held that "it appears that those expelled did not have the possibility to challenge their expulsion in court… In view of the foregoing, the Commission notes that local remedies were not accessible to the Complainants."[42] External displacement constitutes a clear ground for exception, as national remedies are rendered practically inaccessible to victims in such cases.

41. Purohit and Moore v. Gambia, App. No. 241/2001, Af. Comm. H.P.R., paras. 35-38. See also Donna Sullivan, Overview of the Rule Requiring the Exhaustion of Domestic Remedies under the Optional Protocol to CEDAW (2008) 21, citing ZT v. Norway, App. No. 238/2003, CAT Comm., paras. 8.1-8.3.
42. Union Inter-Africaine des Droits de l'Homme and Others v/ Angola, App. No. 159/96, Af. Comm. H.P.R., para. 12. See also Hammel v. Madagascar, App. No. 155/1983, HRC; Jesus Tranquilino Velez Loor v. Panama, App. No. 92/04, Int.-Am. Ct. H.R., para. 42; Rencontre Africaine pour la Defense de Droits de l'Homme v. Zambia, App. No. 71/92, Af. Comm. H.P.R., para. 11; Modise v. Botswana, App. No. 97/93, Af. Comm. H.P.R. (Nov. 6, 2000), para. 70.

➔ Remedies are practically unavailable

Displacement within a country may also ground an exception to the rule, as may a situation of displacement, violence, State of emergency or the like that practically renders accessing remedies impossible – thus in *Haregewoin Gabre-Selassie & IHRDA v. Ethiopia* the Commission held that:

> "The exception to the rule on the exhaustion of domestic remedies would therefore apply where the domestic situation of the State does not afford due process of law for the protection of the right or rights that have allegedly been violated. In the present Communication, this seems to be the case. The victims cannot access the courts to claim protection of their rights, either because they have been displaced or because they are being harassed, intimidated and persecuted, the prevalence of violence in the makes any attempt at exhausting local remedies by the victims an affront to common sense, good conscience and justice."[43]

The African Commission has also Stated that the only remedies that must be exhausted are those that are "normally accessible to people seeking justice,"[44] suggesting that the unavailability of remedies in fact – perhaps combined with an argument based on indigence – might also be found to ground an exception to the rule of exhaustion.

➔ The victim or claimants are in fear or under threat

Exception has also been found in cases where the victim, their potential lawyers or both would face a serious threat of harm should they pursue domestic remedies; thus in *Jawara v. Gambia* the Commission held that "there was terror and fear for lives in the country" and that therefore "it would be an affront to common sense and logic to require the Complainant to return to his country to exhaust local remedies."[45]

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43. See, e.g., Haregewoin Gabre-Selassie & IHRDA v. Ethiopia, App. No. 301/05, Af. Comm. H.P.R., paras. 111-2. See also Dr. Farouk Mohamed Ibrahim v. Sudan, App. No. 286/10, Af. Comm. H.P.R., para. 54.

44. Interights and others v. Mauritania, App. No. 242/2001, Af. Comm. H.P.R. (June 4, 2004), para. 27.

45. Jawara v. The Gambia, App. Nos. 147/95 & 149/96, Af. Comm. H.P.R. (May 11, 2000), para. 36. See also Philip v. Trinidad and Tobago, App. No.594/1992, HRC (Oct. 20, 1998), para. 6.4; Velasquez Rodriguez v. Honduras, App. No. 7920, Int.-Am. Ct. H.R. (July 29, 1988), paras. 66, 68, 78, 80; Galeas Gonzales v. Honduras, App. No. 11,627, Int.-Am. Comm. H.R. (Feb. 27, 2002), paras. 24-25; Plan de Sanchez Massacre v. Guatemala, App. No. 11,763, Int.-Am. Ct. H.R. (Mar. 11, 1999), para. 27; Akdivar v. Turkey, App. No. 21893/93, Eur. Ct. H.R. (Sept. 16, 1996), para. 74; Rosendo Radilla Pacheco v. Mexico, App. No. 777/01, Int.-Am. Comm. H.R. (Oct. 12, 2005), para. 21; Advisory Opinion OC-11/90, Int.-Am. Ct. H.R. (Aug. 10, 1990), paras. 34-35; EB v. S, App. No. 29/1978, HRC; Abubakar v. Ghana, App. No. 103/93, Af. Comm. H.P.R.; Aminu v. Nigeria, App. No. 205/97, Af. Comm.

While many of the cases in question involve individuals who have fled from their countries of origin, the logic would seem equally applicable in the case of claimants who remain within their countries but in fear of reprisal if they came forward – the logic underlying the possibility of requesting anonymity too, it should be noted. It is of course hard to quantify levels of threat; given the crucial importance of the right to a remedy, however, and the fact any interference with such right is a matter of the highest gravity, any level of threat should be impermissible – as testified to for instance by evidence of other attacks on lawyers in the country in question, or of retaliation against victims.

→ Communication with lawyers is prevented

Exception to the exhaustion requirement also applies in cases where the claimant is prevented from communicating in an appropriate manner with lawyers.[46] This exception may apply when law or practice denies appropriate communication, as well as in cases of secret or incommunicado detention.[47] Appropriate communication requires not only that the detained have access to lawyers at all appropriate stages of their detention, and the ability to communicate with them to the extent necessary, but also that all such communications are confidential. Where it is possible to remedy minor violations in this area through the national legal process, recourse to such process may remain necessary. Where the violations in question are such as to prejudice victims' right to a fair trial, however, the exception will apply.

Remedies are ineffective

→ Necessary investigations and prosecution have not taken place

In cases of suspected criminal activity the State has an obligation to investigate and, if sufficient evidence is uncovered, to prosecute those apparently responsible. Where the State fails to do so, an exception to the exhaustion requirement applies. Thus in *Article 19 v. Eritrea* the Commission observed that:

H.P.R.; IHRDA v. Guinea, App. No. 249/2002, Af. Comm. H.P.R., paras. 32-36; Rights International v. Nigeria, App. No. 215/98, Af. Comm. H.P.R., para 24; Ouko v. Kenya, App. No. 323/99, Af. Comm. H.P.R., para. 19; Front for the Liberation of the State of Cabinda v. Angola, App. No. 328/06, Af. Comm. H.P.R., paras. 49-51.

46. See, e.g., De Netto v. Uruguay, App. No. 8/1977, HRC, para. 13; Setelich v. Uruguay, App. No. 63/1979, HRC.

47. See, e.g., Bleier v. Uruguay, App. No. 30/1978, HRC; NH, GH and RA v. Turkey, App. Nos. 16311-13/90, Eur. Comm. H.R.; Jesús Tranquilino Vélez Loor v. Panama, App. No. 92/04, Int.-Am. Comm. H.R.

> "Whenever there is a crime that can be investigated and prosecuted by the State on its own initiative, the State has the obligation to move the criminal process forward to its ultimate conclusion. In such cases, one cannot demand that the Complainants, or the victims or their family members assume the task of exhausting domestic remedies when it is up to the State to investigate the facts and bring the accused persons to court."[48]

In practice, cases in this area often involve crimes committed by State agents, that the State is loath to punish; the exception is hence carved out precisely to force action in these cases. Where there is evidence the State may have been responsible, the argument for the exception to apply is correspondingly strengthened.

In some cases claimants may have evidence of having attempted to move the national prosecutorial process forward. Such evidence is positive, but should never be necessary, since the obligation to prosecute and punish is on the State. Civil procedure, in particular, never constitutes a replacement for necessary criminal action.

Of course, a certain degree of flexibility exists relative to the amount of resources put into investigations and prosecutorial discretion at the domestic level. In addition to cases involving the suspicion of government action, harms involving discrimination, the targeting of minorities or under-enforcement of particular sorts of laws, for example laws penalizing sexual harassment, are particularly likely to be motivated by illegitimate rationales and hence more likely to ground an exception to the rule of exhaustion.

48. Article 19 v. Eritrea, App. No. 275/2003, Af. Comm. H.P.R., para. 72. See also Espinoza and Others v. Peru, App. Nos. 10.941, 10.942, 10.044 & 10.945, Int.-Am. Comm. H.R.; Dr. Farouk Mohamed Ibrahim v. Sudan, App. No. 286/10, Af. Comm. H.P.R., para 48; Paloma Angelica Escobar Ledezma and Others v. Mexico, App. No. 1175-03, Int.-Am. Comm. H.R. (Mar. 14, 2006), para. 30; Raquel Natalia Lagunas and Sergio Antonio Sorbellini v. Argentina, App. No. 617-01, Int.-Am. Comm. H.R. (Mar. 2, 2006), para. 46; Chonwe v. Zambia, App. No. 821/1998, HRC (2000); Atachahua v. Peru, App. No. 540/1993, HRC (1996); Vicente et al. v. Colombia, App. No. 612/1995, HRC (1997); Bautista v. Columbia, App. No. 563/1993, HRC (1995); Paniagua Morales et al. v. Guatemala, App. No. 10,154, Int.-Am. Ct. H.R (Mar. 8, 1998); Genie Lacayo v. Nicaragua, App. No. 10,792, Int.-Am. Ct. H.R (Jan. 29, 1997); Blake v. Guatemala, App. No. 11,219, Int.-Am. Ct. H.R (Jan. 24, 1998); Bamaca Velasquez v. Guatemala, App. No. 11,129, Int.-Am. Ct. H.R (Nov. 25, 2000); McCann et al. v. United Kingdom, App. No. 18984/91, Eur. Ct. H.R. (Sept. 27, 1995); Mentes et al. v. Turkey, App. No. 21689/93, Eur. Ct. H.R. (Nov. 28, 1997); Aksoy v. Turkey, App. No. 21987/93, Eur. Ct. H.R. (Dec. 18, 1996); Aydin v. Turkey, App. No. 23178/94, Eur. Ct. H.R. (Sept. 25, 1997).

→ Remedies have been unduly delayed

An exception to the rule of exhaustion applies in cases of undue delay – as explicitly recognized in the text of article 56(5) of the African Charter. Thus in The Beneficiaries of Late Norbert Zongo et al. v. Burkina Faso the Court found, after sustained consideration, that domestic remedies had been unduly prolonged and hence there was no need for applicants to exhaust further remedies.[49] There is no precise time that constitutes undue delay – rather, a determination of undue delay will likely involve the consideration of several different factors. Where the delay is directly imputable to the State, a shorter period of time will suffice to ground the exception.[50] Determination of whether or not an exception applies will also likely involve an examination of whether serious efforts are being taken to move the case forwards, or on the other hand whether or not dilatory tactics are being employed.

In addition, in cases of serious or pressing matters or situations in which delay is likely to have a negative impact on the effectiveness of the relief sought, accelerated procedures are necessary, such that the period necessary to find undue delay will be shorter.[51] The adoption of provisional protection measures is of course a relevant factor in such cases.[52] Where the harm in question may be repeated or where it is ongoing, domestic remedies are likely best understood as clearly deficient hence grounding immediate exception, as detailed under the section on ongoing harm or possibility of repetition of harm below.

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49. In the Matter of Beneficiaries of Late Norbert Zongo et al. v. Burkina Faso, App. No. 013/2011, Af. Ct. H.P.R. (Mar. 28, 2014), paras. 72-106. See also DeNegri and Arancibia v. Chile, App. No. 9755, Int.-Am. Comm. H.R.; Gargi and Solis v. Honduras, App. No. 7951, Int.-Am. Comm. H.R.; Lopez v, Argentina, App. No. 9635, Int.-Am. Comm. H.R., para. 16; Hunata v. Peru, App. No. 9425, Int.-Am. Comm. H.R.; Canchari v. Peru, App. No. 9449, Int.-Am. Comm. H.R.; Proano and Others v. Ecuador, App. No. 9641, Int.-Am. Comm. H.R.; Capote and Others v. Venezuela, App. No. 4348/02, Int.-Am. Comm. H.R., para. 72; Las Palmeras Case, App. No. 11,237, Int.-Am. Ct. H.R., para. 38; Weinberger v. Uruguay, App. No. 28/1978, HRC, para. 11; Izquierdo v. Uruguay, App. No. 73/1980, HRC, para. 4.1; Pietraroia v. Uruguay, App. No. 44/1979, HRC, para. 12; Hermoza v. Peru, App. No. 203/1986, HRC, para. 10.2; Hammel v. Madagascar, App. No. 155/1983, HRC, para. 17; Lubicon Lake Band v. Canada, App. No. 167/1984, HRC, para. 31.1; Fillastre and Bizouarn v. Bolivia, App. No. 336/1988, HRC, para. 5.2; Hendriks v. The Netherlands, App. No. 201/1985, HRC, para. 6.3; X (Orchin) v. UK, App. No. 8435/78, Eur. Comm. H.R.; Ventura v. Italy, App. No. 7438/76, Eur. Comm. H.R.; Selmouni v. France, App. No. 25803/94, Eur. Ct. H.R., paras. 78-81; Modise v. Botswana, App. No. 97/93, Af. Comm. H.P.R., para. 69.

50. See, e.g., Silvia Arce and Others v. Mexico, App. No. 1176/03, Int.-Am. Comm. H.R., paras. 26-28.

51. See, e.g., Antonio Bultrini, The European Convention on Human Rights and the Rule of Prior Exhaustion of Domestic Remedies in International Law, 20 ITALIAN YBK. INT'L L. 101, 108 (2010); Capote and Others v. Venezuela, App. No. 4348/02, Int.-Am. Comm. H.R., para. 72; Karen Noelia Llantoy Huaman v. Peru, App. No. 1153/2003, HRC, para. 5.2.

52. See, e.g., AT v. Hungary, App. No. 2/2003, CEDAW Comm., para. 8.4.

Of course, appeal to the African Commission itself constitutes a lengthy process, and so is unlikely to be able to afford immediate relief relative to such matters. As such, should the situation be pressing, claimants should not only initiate a case – which offers the long-term prospect of a detailed judgment – but should also ask for provisional measures, as detailed above.

Jurisprudence has held that the undue delay exception may apply prospectively as well[53] – that is, where evidence can be offered that the matter will take an unreasonably long amount of time to resolve, for example by demonstrating a consistent pattern of unduly delayed actions in the area in question, the exception may be held to apply. This grounds for the exception makes sense given the fundamental aim of the rule discussed above, that is, to promote and incentivize an effective domestic remedial system taken as a whole, not only to provide a remedy in the case in question.

➔ Clear flaws in the procedural process

An exception to the rule of exhaustion may also apply where there are clear procedural flaws in national proceedings.[54] This may be the case for example where proceedings do not allow for the submission of necessary evidential proof, or where there are unreasonably short deadlines for filing appeals. Thus in *Immaculate Joseph et al. v. Sri Lanka* the Human Rights Committee observed that:

> "With respect to the exhaustion of domestic remedies, the Committee notes the State party's argument that the authors did not exercise due diligence with respect to confirming through the Parliamentary order paper and then Supreme Court's registry whether an application under article 121 of the Constitution had been lodged, and accordingly filing a motion wishing to be heard. The Committee considers that, exceptional ex parte circumstances of urgency apart, when a Court hears an application directly affecting the rights of a person, elementary notions of fairness and due process contained in article 14, paragraph 1, of the Covenant require the affected party to be given notice of the proceeding, particularly when the adjudication of rights is final. In the present case, neither members of the Order nor the member of Parliament presenting the Bill were notified of the pending proceeding. Given not least that in previous proceedings the Court, on the information before the Committee, had notified members of Parliament in such proceedings, the authors thus cannot be faulted for failing to introduce an intervenor's motion before the Court. The Committee observes that there may

53. See De Becker v. Belgium, App. No. 214/56, Eur. Comm. H.R.

54. See, e.g., Dimitrijevic v. Serbia and Montenegro, App. No. 172/2000, CERD Comm. (2006), para 6.2; Article 19 v. Eritrea, App. No. 275/2003, Af. Comm. H.P.R. (May 30, 2007), para. 71.

> in any event be issues as to the effectiveness of this remedy, given the requirement that complex constitutional questions, including relevant oral argument, be resolved within three weeks of a challenge being filed, the challenge itself coming within a week of a Bill's publication in the Order paper. It follows that the communication is not inadmissible for failure to exhaust domestic remedies."[55]

This may also be the case where a State-provided legal representative provides an incompetent defense that the national judicial system does not remedy. Similarly, if national laws did not provide for defenses required by human rights standards – for example, the defenses of truth and reasonable publication in the context of defamation claims – or if they fail to respect the principle of individuality of criminal liability, or if they impose penalties on behavior that should be respected under human rights law, or create other similar problems, it may be possible to claim exception to the rule of exhaustion.[56]

Where the problems with national legislation or procedure can themselves be challenged, such challenge at the national level may be required. Where national legal proceedings do not allow for such challenge however, the case for exception is strong. Similarly, the case for exception is strong where the violation cannot be subsequently corrected and is of sufficient gravity to invalidate the holdings, or where a reasonable prospect of success has been foreclosed. The case for exception is also strengthened where the claimants in question are subject to ongoing harm, as for instance relative to criminal defendants. If the national legal system has been applying the rights-violating procedures on a regular basis, moreover, the grounds for the exception are further strengthened, for the reasons discussed below in the section on systemic violations.

Remedies are insufficient

Insufficiency of national remedies also provides a grounds for exception to the requirement of exhaustion.[57] Remedies are insufficient where, in a case of expulsion, the remedy in question would not suspend that expulsion;[58] where remedies for a wrongfully detained person do not include release;[59] and where

55. Immaculate Joseph et al. v. Sri Lanka, App. No. 1249/2004, HRC (Oct. 21, 2005), para. 6.2. See also Kornmann v. Germany, App. No. 2686/65, Eur. Comm. H.R.; Ndong and Others and Mic Abogo v. Equatorial Guinea, App. Nos. 1152 & 1190/2003, HRC, para. 5.4; Gelle v. Denmark, App. No. 34/2004, CERD Comm. (2006), para. 6.4.
56. Exception along these grounds is recognized by Article 46(2)(a) of the IACHR.
57. See, e.g., Airey v. Ireland, App. No. 6289/73, Eur. Ct. H.R., para. 19(a).
58. See, e.g., Becker v. Denmark, App. No. 7011/75, Eur. Comm. H.R.; X v. Denmark, App. No. 7465/76, Eur. Comm. H.R.
59. X v. Austria, App. No. 6701/74, Eur. Comm. H.R.

damages are appropriate but not available.[60] Remedies are also insufficient where *habeas* (that is, a procedure allowing a detainee to request review of the legality and conditions of their detention) is necessary (i.e. because individuals have been detained) but not available – thus for example in *Constitutional Rights Project v. Nigeria* the African Commission held that:

> "The very violation alleged in this case is that the victims are detained without charge or trial, thus constituting an arbitrary detention. The normal remedy in such instances is for the victims to bring an application for a writ of habeas corpus, a collateral action in which the court may order the police to produce an individual and justify his imprisonment … the government has prohibited any court in Nigeria from issuing a writ of habeas corpus, or any prerogative order for the production of any person detained under Decree No. 2 (1984). Thus, even the remedy of habeas corpus does not exist in this situation. There are consequently no remedies for the victims to resort to, and the communication was therefore declared admissible."[61]

Moreover, the remedies offered at the national level should comply with international standards on the right to a remedy, including by providing where necessary compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition.[62]

Moreover, echoing jurisprudence discussed above, remedies have been found insufficient where constitutional remedies are required but not available (the lack of such a remedy may be identified as creating a situation in which remedies are alternatively considered as either unavailable or insufficient, in other words).[63] This is the case not only because a rights-based approach requires that remedies be available as a matter of right and not only practically, but also because it is necessary that a remedial course of action be able to address systemic violations committed through law and policy, rather than just providing redress to the individual claimant in question. By creating an exception to the rule of exhaustion where such possibility is not offered on the national level, supranational rights bodies incentivize States to create such a possibility.

60. Lawless v. Ireland, App. No. 332/57, Eur. Comm. H.R., pp. 34-40; X v. Sweden, App. No. 1739/62, Eur. Comm. H.R.; X v. Austria, App. No. 3972/69, Eur. Comm. H.R.

61. Constitutional Rights Project v. Nigeria, App. No. 153/96, Af. Comm. H.P.R., paras. 8-10.

62. For more on necessary remedies, see Redress, Reaching for Justice: The Right to Reparation in the African Human Rights System (Oct. 2013).

63. See Ventura v. Italy, App. No. 7438/76, Eur. Comm. H.R.

Systemic violations

Exception to the rule of exhaustion has perhaps been found most clearly and consistently in the case of systemic violations. The strength of this exception is testified to by the various different rationales that have been offered in support. The African Commission has emphasized the fact that in such cases, the State should be understood to have had notice of the harm in question and an opportunity to put it right already – thus for example in *Haregewoin Gabre-Selassie & IHRDA v. Ethiopia* the Commission observed that:

> "Another rationale for the exhaustion requirement is that a government should have notice of human rights violation in order to have the opportunity to remedy such violation, before being called to account by an international tribunal. The African Commission is of the view that the Respondent State has had ample time and notice of the alleged violation to at least create conducive environment for the enjoyment of the rights of the victims. If it is shown that the State has had ample notice and time within which to remedy the situation, as is the case with the present Communication, the State may be said to have been properly informed and expected to have taken appropriate steps to remedy the violations alleged."[64]

The European human rights system on the other hand has emphasized the fact that such situations often involve administrative practice or legislative measures constituting a "prevailing condition, pattern or practice of violations,"[65] suggesting that official involvement, or clear failure to take action, may ground the exception.

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64. Haregewoin Gabre-Selassie and IHRDA v. Ethiopia, App. No. 301/05, Af. Comm. H.P.R., para. 113. See also Amnesty and Others v. Sudan, App. Nos. 48/90, 50/91, 52/91 & 89/93, Af. Comm. H.P.R., para. 33; Organisation Mondiale Contre la Torture and Others v. Rwanda, App. Nos. 27/89, 46/91, 49/91 & 99/93, Af. Comm. H.P.R., paras. 17-18; Free Legal Assistance Group and Others v. Zaire, App. Nos. 25/89, 47/90, 56/91 & 100/93, Af. Comm. H.P.R., para. 36; Article 19 v. Eritrea, App. No. 275/2003, Af. Comm. H.P.R., para. 77.

65. See, e.g., First Cyprus Case, Greece v. UK, App. No. 176/56, Eur. Comm. H.R., para. 16; Austria v. Italy, App. No. 788/60, Eur. Comm. H.R., p. 29; First Greek Case, Denmark, Norway, Sweden & the Netherlands v. Greece, App. Nos. 3321-2/67 & 3344/67, Eur. Comm. H.R.; Second Greek Case, Denmark, Norway & Sweden v. Greece, App. No. 4448/70, Eur. Comm. H.R.; Ireland v. UK, App. No. 5310/71, Eur. Comm. H.R., pp. 84-85; Donnelly & Others v. UK, App. Nos. 5577-5583/72, Eur. Comm. H.R.; Cyprus v. Turkey, App. No. 8007/77, Eur. Comm. H.R.; Aksoy Case, App. No. 21987/93, Eur. Comm. H.R.; Jose Vivanco & Lisa Bhansali, Procedural Shortcomings in the Defense of Human Rights, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS (Harris & Livingstone eds., 1998) 431; Cyprus v. Turkey, App. No. 8007/77, Eur. Comm. H.R.; Akdivar v. Turkey, App. No. 21893/93, Eur. Comm. H.R. (Sept. 16, 1996); Mentes and Others v. Turkey, App. No. 23186/94, Eur. Ct. H.R. (Nov. 28, 1997); Denmark v. Turkey, App. No. 34382/97, Eur. Ct. H.R.

There are other grounds for finding exception in such cases that have been emphasized by international rights bodies as well. Thus in *Amnesty International and others v. Sudan* the Commission observed that:

> "In cases of serious and massive violations, the Commission reads Article 56(5) in the light of its duty to protect human and peoples' rights as provided for by the Charter. Consequently, the Commission does not hold the requirement of exhaustion of local remedies to apply literally, especially in cases where it is "impractical or undesirable" for the Complainants or victims to seize the domestic courts. The seriousness of the human rights situation in Sudan and the great numbers of people involved renders such remedies unavailable in fact, or, in the words of the Charter, their procedure would probably be "unduly prolonged". For these reasons, the Commission declared the communications admissible."[66]

Such an emphasis on the severity and extent of the harms in question is understandable as these factors provide the most obvious criteria under which supranational bodies might prioritize their attention. Such cases, moreover, maximize the benefit that may be offered by supranational bodies, by allowing those bodies to consider multiple instances of violation, as well as multiple underlying issues, at the same time.

Other exceptions

➔ The injury occurred outside of the State's jurisdiction

International law has found exception to the requirement of exhaustion where the harm in question was committed outside the State's jurisdiction. As Meron has put it, "it would be very strange indeed if a State which interfered illegally with an alien, who did not – except for that interference – have any connection with it, should be allowed to derive any advantage from its illegal acts"[67] – in

66. Amnesty International and Others v. Sudan, App. Nos. 48/90, 50/91, 52/91 & 89/93, Af. Comm. H.P.R., paras. 38-39. See also Malawi African Association and Others v. Mauritania, App. Nos. 54/91, 61/91, 98/93, 164/97, 196/97 & 210/98, Af. Comm. H.P.R., para. 85; Free Legal Assistance Group and Others v. Zaire, App. Nos. 25/89, 47/90, 56/91 & 100/93, Af. Comm. H.P.R., paras. 37; Article 19 v. Eritrea, App. No. 275/2003, Af. Comm. H.P.R., para. 71.

67. Theodor Meron, The Incidences of the Rule of Exhaustion of Local Remedies," 35 BRIT. YBK INT'L L. 83, 96 (1959). See also Ivan Head, A Fresh Look at the Local Remedies Rule, 5 CANADIAN YBK. INT'L L. 142, 153 (1967); Clive Parry, Some Considerations Upon the Protection of Individuals in International Law, 90 RECUEIL DES COURS 688 (1957); Chittharanjan Amerasinghe, State RESPONSIBILITY FOR INJURIES TO ALIENS (1967) 185-87; Castor Law, The Local Remedies Rule in International Law (1961) 104; all quoted in Emeka Duruigbo, Exhaustion of Local Remedies in Alien Tort Litigation: Implications

other words, where a State commits a rights violation outside of its jurisdiction, the individual whose rights were violated should not be forced to exhaust remedies in the domestic system of the country which violated her rights.

→ Ongoing harm or possibility of repetition of harm

Systemic violations also typically involve ongoing violation and the possibility of repetition of injury, providing an additional ground upon which supranational intervention is justified as an attempt to prevent that harm. Systemic cases are not the only cases in which the harm in question may be repeated however, with the possibility of such repetition in an individual case having been found grounds for exception to the exhaustion requirement as well, as in the case of ongoing arbitrary detention for instance.[68] Failure to provide adequate protection when protection is due, as for instance in the case of measures pertaining to domestic violence or witnesses, may also ground such exception.[69]

The burden of proof

Burden of proof in matters of exhaustion is structured around the three briefs that are typically submitted on the matter.[70] First, claimants must make an initial submission, observing that remedies have been exhausted or arguing that an exception to the rule of exhaustion applies. Applicants should present at this stage the arguments and evidence they have as to the exhaustion of remedies or reasons why an exception to the rule of exhaustion should be found to apply. The burden then shifts to the State. In its argument, the State must show that remedies have not been exhausted. Any remedies it cites must comply with

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for International Human Rights Protection, 29 FORDHAM INT'L L. J. 1245, 1263 (2006).

68. See Chittharanjan Amerasinghe, LOCAL REMEDIES IN INTERNATIONAL LAW (2nd ed. 1996) 341 and De Sabla Claim, USA v. Panama, 6 UNRIAA 1933, for an example of the repetition of injury grounds in the diplomatic protection context and an argument as to why the same rationale should apply in the human rights context. It should also be noted that the Working Group on Arbitrary Detention does not require exhaustion prior to the submission of cases, which is understandable given that a finding of arbitrary detention almost inevitably will involve finding both inadequate domestic remedies and ongoing harm.

69. See, e.g., Goekce v. Austria, App. No. 5/2005, CEDAW Comm. (Aug. 6, 2007); Yildirim v. Austria, App. No. 6/2005, CEDAW Comm. (Aug. 6, 2007); cited in Donna Sullivan, Overview of the Rule Requiring the Exhaustion of Domestic Remedies under the Optional Protocol to CEDAW (2008) 16-7.

70. For more see, e.g., Austria v. Italy, App. No. 788/60, Eur. Comm. H.R., 39; Akdivar v. Turkey, App. No. 21893/93, Eur. Ct. H.R., para. 68; Selmouni v. France, App. No. 25803/94, Eur. Ct. H.R., para. 76; Velasquez Rodriguez, App. No. 7920, Int.-Am. Ct. H.R., para. 88; Advisory Opinion OC-11/90, Int.-Am. Ct. H.R., para. 41; Fairen Garbi and Solis Corrales v. Honduras, App. No. 7951, Int.-Am. Ct. H.R., paras. 84, 125-136; Godinez Cruz v. Honduras, App. No. 8097, Int.-Am. Ct. H.R., paras. 62-63, 76, 128-145.

the criteria above concerning judicial remedies. In addition, it must show that the availability of the remedy is clear not only in law but also in practice,[71] or in other words, that it is not only theoretically but also practically available.[72] Should the State be unable to point to any examples of the remedy having been successfully applied in the past, such lack will weigh heavily against the State's claims that the remedy is real and meaningful.[73] Claimants will then be able to make a second submission in rebuttal of States' arguments.

In sum, cases should only be found inadmissible on exhaustion grounds when the State has made a clear and strong case that there are available, effective and sufficient national judicial remedies. The resulting judgment should then produce a clear Statement of precisely what those remedies are. Claimants should then be able to have recourse to such remedies, resulting in the resolution of the violations complained of in a prompt manner at the national level; failing which, the matter may be brought once again to the supranational level, with remedies now exhausted.

The precise manner in which burden of proof is distributed relative to particular claims depends upon the party that has greater access to the information in question. In general, this will be the State, meaning that the burden should lie on the State to prove its claims. In particular, where the State has not conducted necessary investigations, claimants cannot be forced to supply the necessary missing information.

71. See, e.g., Vernillo v. France, App. No. 11889/85, Eur. Ct. H.R., para. 27; Vernillo v. France, App. No. 11889/85, Eur. Ct. H.R., para. 27; Akdivar and Others v. Turkey, App. No. 21893/93, Eur. Ct. H.R., para. 66; Dalia v. France, App. No. 26102/95, Eur. Ct. H.R., para. 38; Selmouni v. France, App. No. 25803/94, Eur. Ct. H.R., para. 75; Ramirez v. Uruguay, App. No. 4/1977, HRC, para. 5; Sankara v. Burkina Faso, App. No. 1159/2003, HRC, para. 6.5; Article 19 v. Eritrea, App. No. 275/2003, Af. Comm. H.P.R., para. 51; Rencontre Africaine pour la Defense de Droits de l'Homme v. Zambia, App. No. 71/92, Af. Comm. H.P.R., paras. 11, 13; Jawara v. Gambia, App. Nos. 147/95 & 149/96, Af. Comm. H.P.R., paras. 33-34.

72. See Velasquez Rodriquez v. Honduras, App. No. 7920, Int.-Am. Ct. H.R., para/ 81.

73. See, e.g., De Jong, Baljet & Van den Brink v. The Netherlands, App. Nos. 8805/79, 8806/79 & 9242/81, Eur. Ct. H.R., para. 39; Doran v. Ireland, App. No. 50389/99, Eur. Ct. H.R., paras. 55-69; Andrášik and Others v. Slovakia, App. Nos. 57984/00, 60226/00, 60237/00, 60242/00, 60679/00, 60680/00 and 68563/01, Eur. Ct. H.R.; Di Sante v. Italy, App. No. 56079/00, Eur. Ct. H.R.; Giummarra v. France, App. No. 61166/00, Eur. Ct. H.R.; Paulino Tomás v. Portugal, App. No. 58698/00, Eur. Ct. H.R.; Johtti Sapmelaccat Ry and Others v. Finland, App. No. 42969/98, Eur. Ct. H.R.; Slavgorodski v. Estonia, App. No. 37043/97, Eur. Ct. H.R.; Jawara v. Gambia, App. Nos. 147/95 & 149/96, Af. Comm. H.P.R., para. 35.

Summary

The following table summarizes grounds for exception to the rule of exhaustion laid out above. The organization of this list is not according to any official rule – the categories are in many cases overlapping, on top of which flexibility in the grounds for exception to the rule of exhaustion means different ways of presenting the relevant categories are possible. In addition, novel sorts of arguments for exception may come to be accepted in future – claimants should hence present novel arguments that accord with the basic principles underlying grounds for exception as explored in this section where they have them. At the same time, it is hoped that the division of headings laid out here may help claimants in preparing detailed, legally supported and diverse grounds of argumentation for exception to the rule of exhaustion where necessary.

Grounds for Exception from the Rule of Exhaustion:

1. **Remedies are unavailable**
   - ➜ Domestic immunity
   - ➜ Unavailability of constitutional review
   - ➜ Lack of standing
   - ➜ No reasonable prospect of success
   - ➜ Access to the courts is unavailable due to indigence
   - ➜ Access to the courts is unavailable due to other factors
   - ➜ The victim has been expelled
   - ➜ Remedies are practically unavailable
   - ➜ The victim or claimants are under fear or threat
   - ➜ Communication with lawyers is prevented
2. **Remedies are ineffective**
   - ➜ Necessary investigations and prosecution have not taken place
   - ➜ Remedies have been unduly delayed
   - ➜ Clear flaws in the procedural process
3. **Remedies are insufficient**
4. **Systemic violations**
5. **Other exceptions**
6. **The burden of proof**

3 OTHER ISSUES

Admissibility of complaints
before the **African Court**

PRACTICAL GUIDE

Credit: Agostino Pacciani, Tanzania, 2005

A. PROVISIONAL MEASURES

Provisional measures offer the possibility of requesting immediate relief, pending final judgment, in cases involving ongoing harm or the potential of harm before a final judgment, or where delay may otherwise prejudice the effectiveness of the remedy sought. Provisional measures are addressed by Rule 98 of the 2010 Rules of Procedure of the Commission, Article 27(2) of the Protocol and Rule 51 of the 2010 Rules of Court. The Commission issued provisional measures for instance relative to Sudan following a fact-finding mission in mid-2004, in which it suggested that Sudan reorganize its security forces, support human rights violation monitoring, facilitate the ability of the displaced to return to their homes, ensure the access of AU observers and ensure fair trial for political detainees. The Commission against issued provisional measures relative to the situation in Southern Kordofan in Sudan in November 2011. The Commission may also refer a matter to the Court for provisional measures under Rule 118(2) of its Rules of Procedure, if it feels this will add extra force to the measures it hopes to issue. Something similar occurred in *African Commission for Human Rights v. Libya*, in which the Court issued provisional measures following a general referral of the case.[1]

The award of provisional measures is based on a judgment considering both the likelihood and level of harm that may occur, on the one side, with any burden imposed considered on the other.[2] Many human rights cases contain strong grounds for the award of provisional measures. Provisional measures may be awarded, inter alia, in cases involving the imposition of the death penalty, ongoing massive and serious violations, deportation, displacement, arbitrary detention, arbitrary limitations on freedom of expression, appropriation and repurposing of land, harassment, corporal punishment, forced disappearance, torture or other cruel, inhuman or degrading treatment, the violation of cultural rights and infringements of the independence of the judiciary.[3]

1. App. No. 004/11, Af. Ct. H.P.R. (Mar. 25, 2011).

2. For more on provisional measures (also known as interim measures) offered by supranational rights bodies, see Jo Pasqualucci, Interim Measures in International Human Rights: Evolution and Harmonization, 28 VAND. J. TRANSNAT'L L. 1 (2005); Eva Rieter, IRREPARABLE HARM: PROVISIONAL MEASURES IN INTERNATIONAL HUMAN RIGHTS ADJUDICATION (2010); Dan Juma, Provisional Measures Under the African Human Rights System: The African Court's Order Against Libya, 30 WISC. J. INT'L L. 344 (2012).

3. See, e.g., Lubicon Lake Band v. Canada, App. No. 167/1984, HRC (Mar. 26, 1990); International Pen, Constitutional Rights Project & Interights (on behalf of Ken Saro-Wiwa Jr) v. Nigeria, App. Nos. 137/94, 139/94, 154/96 & 161/97, Af. Comm. H.P.R. (Oct. 31, 1998); Amnesty International v. Zambia, App. No. 212/98, Af. Comm. H.P.R. (May 5, 1999); Osbourne v. Jamaica, App. No. 759/1997, HRC (Mar. 15, 2000); Haitians and Dominicans of Haitian Origin in the Dominican Republic, App. No. 12,271, Int.-Am. Ct. H.R., Provisional Measures (Aug. 18, 2000); Constitutional Court v. Peru, App. No. 11,760, Int.-Am. Ct. H.R. (Jan. 31, 2001); Hugo Juarez Cruzat et al. v. Peru, App. No. 11,015,

Provisional measures have a complex relationship to the question of admissibility as, given the temporal urgency with which such measures will typically be sought, they will often constitute the first decision in a case, preceding the admissibility decision. In fact, it may be possible for a supranational rights body like the Commission or Court to issue provisional measures prior to any admissibility determination, and to maintain those orders in place while giving the national authorities time to resolve the matter in dispute such that the substance of the claim need not be determined on the international level. Where the provisional measures are not respected or where there are serious doubts as to whether they will be respected, such facts should constitute grounds upon which exception to the rule of exhaustion may in fact be based, as discussed below in the section on ongoing harm or possibility of repetition of harm as a grounds for exception.

B. RESUBMISSION

It is important to emphasize that the admissibility stage of proceedings constitutes a procedural step in proceedings before the African Commission or Court. A finding of inadmissibility does not bar the matter from future consideration; instead, claimants may address the matters in question, and submit the case again.[4] In finding under 56(5) that remedies have not been exhausted, the

Int.-Am. Comm. H.R. (Mar. 5, 2001); Detainees held by the United States in Guantanamo Bay, App. No. 259/01, Int.-Am. Comm. H.R., Precautionary Measures (Mar. 12, 2002); Interights et al. (on behalf of Mariette Sonjaleen Bosch) v. Botswana, App. No. 240/01, Af. Comm. H.P.R. (Nov. 20, 2003); Liesbeth Zegveld and Mussie Ephrem v. Eritrea, App. No. 250/02, Af. Comm. H.P.R. (Nov. 20, 2003); Interights (on behalf of Safia Yakubu Husaini and others) v. Nigeria, App. No. 269/2003, Af. Comm. H.P.R. (May 11, 2005); General Carlos Rafael Alfonzo Martinez v. Venezuela, App. No. 73/0315, Af. Comm. H.P.R. (Mar. 2006); Open Society Justice Initiative (on behalf of Pius Njawe Noumeni) v. Cameroon, App. No. 290/04, Af. Comm. H.P.R. (May 2006); Case of the Rochela Massacre v. Colombia, App. No. 11,995, Int.-Am. Ct. H.R. (May 11, 2007) (in which the precautionary measures were issued while the case was before the Commission); Centre for Minority Rights Development and Minority Rights Group (on behalf of Enderois Welfare Council) v. Kenya, App. No. 276/2003, Af. Comm. H.P.R. (Nov. 25, 2009); African Commission for Human Rights v. Libya, App. No. 004/11, Af. Ct. H.P.R. (Mar. 25, 2011).

4. See Af. Comm. H.P.R., 2010 Rules of Procedure, Rule 107(4) and Alberto T Capitao v. Tanzania, App. Nos. 53/90 & 53/91, Af. Comm. H.P.R., Second Decision on Admissibility, Eighth Activity Report 1994-5, Annex VI. Findings of inadmissibility under Articles 56(1), 56(3) and 56(4) should be easily addressable through the inclusion of the necessary extra details or modification of the language of the complaint. A finding under 56(6) that a matter was submitted in an untimely manner might bar a matter from further consideration, however – though it might be possible to resubmit on the basis of ongoing effects, if this had not been argued the first time. A finding under 56(7) that a matter had been settled by another body might also prevent further consideration, unless the settlement proved not to be genuine. Alternatively, ongoing consideration by another body might temporarily prevent consideration, which might become available again in future should the matter not be settled.

Commission should require States to state specifically which remedies are available; claimants may then attempt to exhaust those remedies, and resubmit the case after they have been exhausted, or problems with such remedies in fact have been demonstrated (e.g. through undue delay, or harassment in one form or another). In the alternative, new facts may also ground a resubmission.

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LA COUR AFRICAINE DES DROITS DE L'HO ET DES PEUPLES
AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
IN THE MATTER OF
ACCEPTED
THE UNITED REPUBLIC OF TANZANIA
(Submitted on 24 June 2016)
AFRICAN (BANJUL) CHARTER ON

4 KEY POINTS AND BASIC SUBMISSION OUTLINE

Admissibility of complaints
before the **African Court**

PRACTICAL GUIDE

The following short list enumerates various factors that claimants should consider when determining what issues to bring as cases to the African regional human rights system, and how to shape their cases:

1. Who is the claimant? If the claimant is an NGO, does it have the necessary observer status before the African Commission?

2. Has their country made an optional declaration under Article 34(6) of the Protocol enabling direct submissions to the African Court? If so, claimants may bring their case to the Court.[1] Otherwise, claimants from all African countries except Morocco and South Sudan may bring their case to the Commission.

3. Is the issue purely individual, or part of a broader systemic pattern of violations? Cases concerning broader situations of violation are more likely to qualify for exception from the exhaustion requirement, more likely to maintain their relevance over the extended period of time a case may require, and may lead to deeper and more profound positive changes. Even where the case is brought on behalf of an individual, the case will often involve numerous widespread and systematic problems, which should be emphasized.

4. Have remedies been exhausted, within the past six months or longer with good cause for the delay? If yes, the case is a strong one to bring to the regional mechanisms, as a finding of admissibility is highly probable.

5. Are there clear grounds for exception to the rule of exhaustion? If yes, such a case also presents a strong candidate for submission to the regional rights mechanisms, as it will enable them to consider the flaws in the domestic remedial system as well as the underlying violations.

In addition, in the course of making a submission, claimants should make sure that they consider the following:

1. Does the case involve pressing harm of one form or another? If so, provisional protection measures should be applied for.

2. Are the names of claimants listed, is the complaint written in non-insulting language, and does the complaint rely on more than simply news reports?

3. Has the case been settled, or is it being considered, by another international body?

1. As observed above, if claimants hope to bring a case as an NGO, they must have observer status before the Commission.

➜ If so, complainants must argue that the violations in question have not actually been addressed, or that the instant case is distinguishable.

4. Does the complaint articulate the wrongs in question in terms of the articles of the African Charter?
   ➜ Claimants should take their time here to think carefully through the entirety of the situation and enumerate all of the harms in question, including harms relating to the procedural process and the legal framework pertaining to the situation in question. The more detailed the account, the more likely success at every stage of the case and the stronger the ultimate impact of the case.

5. If exception to the rule of exhaustion is argued, does the complaint articulate with specificity the grounds for exception?

6. To the extent the case involves widespread or systematic violations, has this been noted?

7. To the extent the case involves ongoing violations and the possibility of recurrence, have all such potentials been noted?

Admissibility submission sections

1. Separate from submission – names of victims and representatives (if anonymity requested) and contact details

2. Submission

- ➜ Names of victims and representatives (if no anonymity requested) and name of State party against which case brought
- ➜ Basic factual details
- ➜ Articles of the Charter alleged violated
- ➜ Statements of compliance with Article 56(1), 56(2), 56(3), 56(4) and 56(7) of the Charter and provision of any details necessary
- ➜ Argumentation relative to Article 56(5) of the Charter – evidence of exhaustion or arguments for exception to the rule
- ➜ Argumentation relative to Article 56(6) of the Charter – demonstration of prompt submission following exhaustion of remedies or of reasonable grounds for delay, or reiteration of the grounds for exception to the timeliness requirement where exception to exhaustion
- ➜ Preliminary suggestion of remedies that may ultimately be requested (e.g. reforms to law, individual remedies, group remedies)

CONCLUSION

The above sections have laid out in basic detail the content of the requirements that must be satisfied in order for a case to be found admissible by the African Commission or Court. There are at least three reasons why a strong grasp of these criteria should form a centerpiece of any litigation effort. First, arguments on admissibility form one of the most challenging phases of litigation, such that ensuring a grasp of admissibility principles and arguments is key to the successful conduct of a case.

Second, where it has been impossible to follow the traditional route of exhausting domestic remedies, due to failings in the domestic remedial system, each argument on grounds of exception in fact constitutes an investigation into whether or not particular sorts of violation of the right to a remedy have been committed within the State in question. Findings of violations of the right to a remedy may be as important if not even more important that other findings of violation that may occur within the course of a case, as improved remedial frameworks may help to promote rights-based reforms more broadly within the jurisdiction in question.

Third, the strength of the systemic grounds for exception from the rule of exhaustion deserves particular emphasis, as a recognition of the strength of that grounds has implications not only relative to the argumentation included in submissions but also relative to the manner in which cases are structured.

It is hoped that this manual may prove a useful tool for new and experienced litigants within the African system alike. This in turn will hopefully help contribute to increasing numbers of meritorious applications being submitted to the African supranational rights mechanisms, strengthening the African regional rights system and, in turn, rights on the continent.

Cases are to be submitted at the seat of the Court, either by post, email or fax.

Registry of the African Court
P.O. Box 6274
Arusha, Tanzania
Fax: +255 732 97 95 03
Email: registry@african-court.org

FIDH LITIGATION ACTION GROUP

FIDH Litigation Action Group (LAG) is a network of around 60 lawyers, magistrates and academics working pro bono and acting as legal representatives of victims of serious human rights violations in legal proceedings in which FIDH is engaged, before national, regional and international courts.

The LAG is involved in more than 80 legal proceedings at national, regional and international levels in 35 countries to support nearly 700 victims of serious human rights violations. The LAG is managed and run by a manager and a coordinator, two lawyers based in Paris. Moreover, the LAG supports and accompanies lawyers' criminal strategies of victims at national and international levels and develop actions for the prosecution of perpetrators of the most serious crimes.

FIDH and its Litigation Action Group (LAG) experience in legal matters and victims' support, coordinated with its partner and member organisations in the countries, has developed all around the world and especially in Africa for the last 20 years. FIDH and its LAG have thus obtained the first conviction in France, on the ground of universal jurisdiction, of a Mauritanian torturer, the conviction of a Tunisian torturer and 13 Chilean torturers, as well as the conviction of the first responsible of the Rwanda genocide tried in France in March 2014.

In Africa, FIDH and its LAG represent more than 500 victims of the most serious human rights violation, especially in Guinea, Côte d'Ivoire, Mali and Central African Republic. FIDH was responsible for the opening of the ICC investigation on the situation in Central African Republic and the specific orientation of the investigation conducted by the ICC Office of the Prosecutor on massive sex crimes perpetrated in 2003-2004 in this country, that led to the arrest and trial of Jean-Pierre Bemba.

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FIDH
17, passage de la Main d'Or
75011 Paris
Tél : (33-1) 43 55 25 18
Fax : (33-1) 43 55 38 15
www.fidh.org