Exhaustion of Local Remedies Rule in the Jurisprudence of the African Court on Human and Peoples' Rights

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ABSTRACT

For a case to be admissible before the African Court on Human and Peoples' Rights (African Court), the applicant must, inter alia, exhaust local remedies, subject to certain exceptions. This article considers the approach of the African Court to the question of exhaustion of local remedies as reflected in its jurisprudence between December 2009 and December 2018. The analysis shows that while the Court has adopted a flexible approach in most instances, thus facilitating access to the Court for victims of rights violations, it has also exercised its *proprio motu* power to consider the rule in a restrictive fashion. Consequently, in such instances, not only limiting access but also limiting opportunity for it to address rights claims.

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I. INTRODUCTION

The African Court on Human and Peoples' Rights (African Court), established under the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol),[1] includes a mandate to protect human rights on the African continent. This mandate includes an authorization for the African Court to exercise jurisdiction over cases and disputes relating to the interpretation and application of the African Charter on Human and Peoples' Rights,[2] the African Court Protocol, and any other relevant human rights instrument ratified by the states that have accepted its jurisdiction.[3] Where the Court finds a violation of "human or peoples' rights," it is required to "make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."[4] The Court is tasked with providing victims of human and peoples' rights violations with access to justice.

Those entitled to bring cases directly before the Court include: the African Commission on Human and Peoples' Rights (African Commission); a "State Party which had lodged a complaint to the Commission"; a "State Party against which the complaint has been lodged at the Commission"; a "State Party whose citizen is a victim of human rights violation"; "African Intergovernmental Organizations"; subject to a state party entering the relevant declaration under Article 34(6) of the African Court Protocol, nongovernmental organizations "(NGOs) with observer status before the [African] Commission"; and individuals.[5] However, bringing a case before regional or international bodies is subsidiary to available domestic remedies because these bodies do not replace national authorities' protection of human rights.[6]

Hence, the admissibility grounds under the African Court Protocol, as listed in Article 56 of the African Charter, includes the requirement to exhaust local remedies.[7] A local remedy, for purposes of Article 56 of the African

1. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *adopted* 10 June 1998 (e*ntered into force* 25 Jan. 2004) [hereinafter African Court Protocol].
2. African Charter on Human and Peoples' Rights, *adopted,* 27 June 1981, art. 21, O.A.U. Doc. CAB/LEG/67/3 Rev. 5,1520 U.N.T.S. 217 (*entered into force* 21 Oct. 1986) [hereinafter African Charter].
3. African Court Protocol, *supra* note 1, art. 3.
4. *Id.* art 27(1).
5. *Id.* art 5(1), (3). The declaration is to the effect that the state party recognizes the Court's competence to deal with complaints from NGOs with observer status with the African Commission and individuals.
6. Konaté v. Burkina Faso, No. 004/2013, Judgment on Merits, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ ¶ 78–79 (5 Dec. 2014).
7. African Court Protocol, *supra* note 1, art. 6(2); African Charter, *supra* note 2, art. 56. The admissibility requirements under Article 56 of the African Charter include: indication of the applicants even if anonymity is requested; compatibility of the complaint with the African Union (AU) Constitutive Act and the African Charter; not written in disparaging

Charter, is "any domestic legal action that may lead to the resolution of the complaint at the local or national level."[8] The application of the requirement to exhaust local remedies could limit victims' access to justice if interpreted too strictly, without consideration to the specific circumstances of each case. Research that considers the way in which the Court has interpreted and applied the exhaustion of local remedies rule in its jurisprudence from when it issued its first decision (in December 2009) up to the present (specifically, up to December 2018), does not exist. This article, therefore, considers the African Court's jurisprudence on the exhaustion of local remedies rule thus far, in order to establish whether interpretation and application of the rule has had the effect of negating the Court's ability to effectively protect human and peoples' rights in the continent or whether the Court has adopted a flexible approach that facilitates victims' access to justice.

II. THE RULE IN BRIEF

The principle of exhaustion of local remedies requires that, in the case of an alleged wrong, a state should have the opportunity to redress it within its domestic legal framework and system before questioning its international responsibility for the alleged wrong.[9] The first application of the principle took place in the context of diplomatic protection, but its application has been extended to the context of human rights protection.[10] Its original application in international law was also in a state-foreigner relationship and subsequently a state-state relationship; but it is now applied in the context of human rights protection, in state-individual relationships—mostly between individuals and their own state in respect to individual complaints or state-state relationships in respect to inter-state complaints.[11]

In the human rights protection context, its application is generally based on conventional provisions, with recognition of its status as a rule of customary international law. The requirement, in the human rights context, is based

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or insulting language; not based exclusively on news disseminated through mass media; exhaustion of domestic remedies; submission within a reasonable period after exhaustion of local remedies; not deal with cases already settled by the state concerned in terms of the United Nations (UN) Charter, AU Constitutive Act and the African Charter.

8. Anuak Justice Council v. Ethiopia, No. 299/05, 20th Activity Report, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 50 (May 2006).
9. A. A. Cançado Trindade, The Application of The Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights, 1 (1983).
10. Chittharanjan Felix Amerasinghe, Local Remedies in International Law, 3–4 (2d ed. 2004); Silvia D'Ascoli & Kathrin Maria Scherr, *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and Its Application in the Specific Context of Human Rights Protection*, (Eur. U. Inst., Working Paper No. 2007/02, 2007).
11. D'Ascoli & Scherr, *supra* note 10, at 10–11.

on the principle that "the full and effective implementation of international" human rights obligations is intended to improve the enjoyment of rights at the national level.[12] Generally, the effective protection of human rights is a rationale of the rule. Specifically as observed in the African regional human rights context, the purpose of the rule is to give states the first opportunity to address alleged human rights violations at the domestic level before submitting the cases to a regional or international body or before such bodies hold the state accountable.[13] The *main* interests protected in the application of the rule in the human rights protection context are those of victims of alleged human rights violations (contrast this with the main interest in the diplomatic protection context, "respect and protection of State sovereignty").[14]

While the rule can be invoked in international law, if a respondent state raises an objection related to it, in conventional human rights law, treaty bodies or courts are required to invoke it *proprio motu* and consider compliance with it even in the absence of a respondent state raising an objection based on it.[15] The rule as provided for under Article 56 of the African Charter is instructive in this regard. It requires that a finding on compliance with, *inter alia*, the rule be made before the relevant body can proceed with consideration of the communication. Hence, the African Court, for instance, in deciding on whether a case is admissible must, even if the respondent state does not raise an objection relating to the rule, consider compliance with the rule and make a finding confirming compliance with the rule, among other admissibility criteria, before proceeding with consideration of the merits of the case. This aspect is considered further below. Although consideration of the rule is usually considered a preliminary stage,[16] the African Court has held that an objection to the admissibility of a case on grounds of non-exhaustion

12. Nsongurua J. Udombana, *So Far, So Fair: The Local Remedies Rule In the Jurisprudence of the African Commission on Human and Peoples' Rights*, 97 Am. J. Int'l L. 1, 9 (2003).
13. This has been accentuated by the African Commission (*see, e.g.*, Social and Economic Rights Action Center (SERAC) v. Nigeria, No. 155/96, 15th Annual Activity Report, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 37–38 (Oct. 2001)); African Committee of Experts on the Rights and Welfare of the Child (ACERWC) (*see, e.g.*, Institute for Human Rights and Development in Africa (IHRDA) & Open Society Justice Initiative (On Behalf of the Children of Nubian Descent in Kenya) v. The Government of Kenya, No. 002/Com/002/2009, Decision, African Committee of Experts on the Rights and Welfare of the Child [Afr. C.E.R.W.C.] ¶ 26 (22 Mar. 2011) [hereinafter *Nubian*]; Michelo Hunsungule (On Behalf of Children in Northern Uganda) v. The Government of Uganda, No.1/2005, Decision, African Committee of Experts on the Rights and Welfare of the Child [Afr. C.E.R.W.C.], ¶ 24 (15–19 Apr. 2013).
14. D'Ascoli & Scherr, *supra* note 10, at 11.
15. Amerasinghe, *supra* note 10, at 75.
16. *See, e.g.*, Godfrey M. Musila, *The Right to an Effective Remedy Under the African Charter on Human and Peoples' Rights*, 6 Afr. Hum. Rts. L. J. 442, 445 (2006) (stating that "the question of exhaustion of local remedies, [. . .] is often the subject of inquiry at the preliminary stage").

of local remedies "was not of an exclusively preliminary nature," resulting in the Court joining its consideration with the merits.[17]

The exhaustion of local remedies rule is not rigid as conventional human rights law also makes provision for exceptions to the rule. The African Charter, for example, explicitly lists an exception to the exhaustion of domestic remedies in the case of undue delay in the domestic remedial procedure.[18] Similarly, undue delay and ineffectiveness are exceptions to the rule in respect to communications brought under the African Charter on the Rights and Welfare of the Child.[19] Additional exceptions exist as well in human rights jurisprudence (including that of the African Court considered below), to the effect that local remedies, which applicants must exhaust, should be available, effective, and sufficient. The recognition of exceptions to the rule thus calls for an analysis of the specific circumstances of each case.

III. THE AFRICAN COURT'S APPROACH

Article 6(2) of the African Court Protocol, read together with Article 56(5) of the African Charter, and reaffirmed in Rule 40(5) of the African Court's Rules, list exhaustion of local remedies as a requirement for admissibility of a case, "unless it is obvious that this procedure is unduly prolonged."[20] The African Court has dealt with the question of exhaustion of domestic remedies, not only in cases found inadmissible but also in admissible cases (in its judgment on the merits). The Court has made some important points in understanding the scope of exhausted remedies, as well as exceptions to the rule. Importantly, it has emphasized that the exhaustion of domestic remedies "is an exigency of international law and not a matter of choice."[21] The requirement, as the Court observed further, "is fundamental in the interaction between State Parties to both the Protocol and the [African] Charter, and their national courts, on the one hand, and this Court, on the other hand."[22]

17. Beneficiaries of the Late Norbert Zongo v. Burkina Faso, No. 013/2011, Judgment on Merits, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 55 (28 Mar. 2014), [hereinafter *Zongo*].
18. African Charter *supra* note 1 art. 56(5). *See also* African Court on Human and Peoples' Rights, Rules of Court, *adopted* 2010, Rules 34(4), 40(5) [hereinafter African Court].
19. African Committee of Experts on the Rights and Welfare of the Child (ACERWC), Revised Guidelines for the Consideration of Communications Provided for in Article 44 of the African Charter on the Rights and Welfare of the Child, *adopted* October 2014, Section IX 1(d). *See* Centre for Human Rights, A Guide to the African Human Rights System 63 (2016); *Nubian, supra* note 13, ¶ 31 where the ACERWC confirms this exception.
20. African Court, *supra* note 18, Rule 40(5).
21. Diakité Couple v. Republic of Mali, No. 009/2016, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] ¶ 53 (28 Sept. 2017); *see also* Chacha v. United Republic of Tanzania, No. 003/2012, Ruling on Admissibility, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶¶, 142–144 (28 Mar. 2014).
22. Mkandawire v. Republic of Malawi, No. 003/2011, Judgment on Merits, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 37 (21 June 2013).

Since the exhaustion of local remedies requirement is not a matter of choice, "applicants" must take all necessary steps to exhaust or attempt to exhaust domestic remedies and not just question their effectiveness based on isolated incidents.[23] Where there is a contention that an applicant has not exhausted local remedies, the burden of proof lies on the applicant to show otherwise. Stated differently, applicants must "show proof of an end of action before domestic Courts."[24]

For applicants in a specific case comprised of individuals and NGOs, it is relevant in some instances for the state contending non-exhaustion of local remedies, to make a distinction between steps taken by the individual applicants and those taken by the NGOs. This distinction is important since some domestic legal systems restrict standing for NGOs that are not "victims" to bring certain claims and cases before certain domestic courts, thus negating any objection raised in relation to an NGO complying with the rule. Therefore, whether an NGO is required to personally exhaust local remedies would depend on whether domestic laws grant standing to NGOs to bring cases before the relevant states' courts. If domestic law does not make such provision, then the requirement is not applicable to the NGO. This was the situation in *Beneficiaries of the Late Norbert Zongo v. Burkina Faso*, where the applicants were comprised of individuals and an NGO (Burkinabé Human and Peoples' Rights Movement).[25] Burkina Faso did not make a distinction when contending that the applicants had not exhausted local remedies, despite its domestic laws recognizing standing only for victims in cases before criminal courts; and thus, the relevant NGO did not have standing to bring an action for damages, as it was not a direct victim.[26] The Court held that in terms of Article 56(5), the requirement to exhaust local remedies applies where such remedies exist.[27] It found the state's objection to be invalid since domestic law prevents the NGO from bringing a case

23. *Diakité*, *supra* note 21, ¶ 53; *Chacha*, *supra* note 21, ¶ ¶ 142–44; Kouma v. Republic of Mali, No. 040/2016, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 52 (21 Mar. 2018).
24. Omary v. United Republic of Tanzania, No. 001/2012, Ruling on Admissibility, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 125 (28 Mar. 2014). Note that the Court held in African Commission on Human and Peoples' Rights v. Republic of Kenya, No. 006/2012, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 94 (26 May 2017) that, in principle, the rule does not "require that a matter brought before the Court must also have been brought before the domestic courts by the same Applicant," as what is crucial is for applicants to show that "the Respondent has had an opportunity to deal with [the] matter through the appropriate domestic proceedings." The exhaustion of domestic remedies requirement is "presumed to be satisfied" once this is proven, even if "the same Applicant before [the] Court did not itself file the matter before the domestic courts."
25. *Zongo supra* note 17, ¶ 1. Aspects of the case relating to exhaustion of local remedies are considered further below.
26. *Id.* ¶ ¶ 107–08, 110.
27. *Id.* ¶ 109.

before Burkina Faso courts.[28] The Court's jurisprudence also points out that, where there are several applicants in a case, one applicant's failure to exhaust local remedies does not automatically validate a state's objection to admissibility of a case on the grounds of non-exhaustion of local remedies.[29]

In relation to criteria that the Court should consider in making a compliance assessment with the requirement to exhaust local remedies, the African Court has clarified that in addition to the exception in Rule 40(5), it should also consider, as indicated in the jurisprudence of the African Commission and other human rights courts, the "availability, effectiveness and sufficiency of local remedies."[30] The African Court has drawn from comparative jurisprudence on exhaustion of local remedies from the African Commission, Inter-American Commission of Human Rights (Inter-American Commission), and European Court of Human Rights (European Court) in developing its jurisprudence on exhaustion of local remedies and expanding on these criteria and the exceptions to the rule. The Court has addressed the question of the nature of remedies that applicants must exhaust, the criteria of availability, effectiveness, and sufficiency of domestic remedies and the "unduly prolonged" exception among other exceptions. This article discusses the Court's jurisprudence on these and other aspects in the sub-sections that follow.

A. Nature and Scope of Local Remedies that Applicant's Must Exhaust

In relation to the nature of local remedies that applicants must exhaust, the Court has made it clear that, "in principle," the remedies "are *primarily judicial remedies* as they are the ones that meet the criteria of availability, effectiveness and sufficiency that has been elaborated in jurisprudence" *and* "are the most effective means of redressing human rights violations."[31] The Court supported its view with jurisprudence from the following: the African

28. *Id.* ¶ ¶ 110, 112. *See also* Association pour le Progrès et la Défense des Droits des Femmes Malienne (APDF) v. Republic of Mali, No. 046/2016, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ ¶ 39–44 (11 May 2018), where the Court held that the domestic remedy of filing a constitutional petition against the challenged law was not available to the NGO applicants, as "human rights NGOs are not entitled to seize the Constitutional Court with applications concerning the unconstitutionality of laws" under the applicable domestic law.
29. *Zongo supra* note 17, ¶ 111.
30. *See*, for example, *Konaté*, *supra* note 6, ¶ 77; Actions Pour la Protection des Droits de L'Homme (APDH) v. Republic of Côte d'Ivoire, No. 001/2014, Judgment on Merits, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 93 (18 Nov. 2016) [hereinafter *APDH*].
31. Mtikila v. United Republic of Tanzania, No. 009/2011 & 011/2011, Judgment on Merits, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 82.1, 82.3 (14 June 2013). *See also Omary*, *supra* note 24, ¶ 99; *Mkandiwire*, *supra* note 22, ¶ 38.1; African Commission on Human and Peoples' Rights v. Libya, No. 002/2013, Judgment on Merits, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 67 (3 June 2016) [hereinafter *Libya*]. Emphasis added.

Commission (the remedy referred to in Article 56(5) is a "remedy sought from courts of a judicial nature" and the Court should consider criteria of availability, effectiveness, and sufficiency); the Inter-American Court (not all remedies are applicable in every situation and adequate local remedies are those suitable to address a right infringement); and the European Court (local remedies should be available and sufficient both in theory and practice).[32] The Court has further endorsed the African Commission's view that "the remedies that need to be exhausted are ordinary remedies" (that is, those of common law that are accessible to people seeking justice).[33] Therefore, the remedies that an applicant must exhaust are "ordinary judicial remedies."[34]

The Court found the review application remedy (brought before the Court of Appeal of Tanzania against the Court of Appeal's own decision) and the constitutional remedy (the filing of a constitutional petition before the High Court of Tanzania for vindication of rights, after a Court of Appeal decision), to be "exceptional" and "extraordinary" judicial remedies that applicants are not obliged to exhaust.[35] The Court considered these remedies in, inter alia, the cases of *Thomas v. Tanzania*, *Abubakari v. Tanzania, Jonas v. Tanzania*, and *Onyachi v. Tanzania*.[36] The *Onyachi* case concerned the

32. *Mtikila*, *supra* note 31, ¶ 82.1.
33. Thomas v. United Republic of Tanzania, No. 005/2013, Judgment on Merits, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 64, n9 (20 Nov. 2015).
34. Abubakari v. United Republic of Tanzania, No. 007/2013, Judgment on Merits, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 64 (3 June 2016); Werema v. United Republic of Tanzania, No. 024/2015, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 40 (7 Dec. 2018); Makungu v. United Republic of Tanzania, No. 006/2016, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 41 (7 Dec. 2018); Isiaga v. United Republic of Tanzania, No. 032/2015, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 45 (21 Mar. 2018).
35. *Thomas*, *supra* note 33, ¶ 65; *Abubakari*, *supra* note 34, ¶ 68; Onyachi v. United Republic of Tanzania, No. 003/2015, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 56 (28 Sept. 2017); Guehi v. United Republic of Tanzania, No. 001/2015, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 51 (7 Dec. 2018); Werema, *supra* note 34, ¶ ¶ 40–41; *Makungu*, *supra* note 34, ¶ 46; Evarist v. United Republic of Tanzania, No. 027/2015, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 34 (21 Sept. 2018); William v. United Republic of Tanzania, No. 016/2016, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 42 (21 Sept. 2018); Paulo v. United Republic of Tanzania, No. 020/2016, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 43 (21 Sept. 2018); *Isiaga*, *supra* note 34, ¶ ¶ 46–47; Kemboge v. United Republic of Tanzania, No. 002/2016, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 33 (11 May 2018); Ramadhani v. United Republic of Tanzania, No. 010/2015, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 39 (11 May 2018); Viking v. United Republic of Tanzania, No. 006/2015, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 52 (23 Mar. 2018); Mango v. United Republic of Tanzania, No. 005/2015, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 47 (11 May 2018).
36. *Thomas*, *supra* note 33; *Abubakari*, *supra* note 34; *Onyachi*, *supra* note 35; Jonas v. United Republic of Tanzania, No. 011/2015, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 44 (28 Sept. 2017).

respective applicants' conviction and sentence to thirty years imprisonment for armed robbery, which the applicants alleged violated various fair trial rights. The Court considered an "appeal before the High Court" and an "appeal before the Court of Appeal" as the usual remedies in Tanzania in respect to cases of this nature.[37] In regards to the constitutional remedy, the Court held that, after an applicant has accessed the highest domestic court (in this case, the Court of Appeal of Tanzania), requiring the applicant to file a constitutional petition before a High Court (a lower court), would be an unreasonable and "impractical and extra-ordinary measure" not required to achieve exhaustion of remedies.[38] The Court's decision was also influenced by the fact that the High Court only entertains a constitutional remedy for the redress of human rights violations "where other remedies are not available," thus rendering the requirement extraordinary.[39] The extraordinary nature of a review application as a remedy is based on the fact that "it is not granted as of right," its exercise is only in exceptional circumstances and subject to restrictive conditions stated in law.[40] An application for review is granted at the Court of Appeal's discretion.[41] Also, "the remedy must, as much as possible, be considered by the same judges who delivered the Judgment being appealed against."[42] Accordingly, the Court has considered—in *Nganyi v. Tanzania*, (discussed further below)—it unacceptable for Tanzania to argue that the applicants should have made use of the constitutional or review application remedies before approaching the Court.[43] It is evident from the Court's approach that it is not the labeling of the remedy as extraordinary per se that determines whether an applicant must exhaust it, but the fact that it is unreasonable, among other concerns.

The Court also found the review remedy under the Rwandan legal system to be an "extraordinary remedy"; hence not "an effective and efficient remedy" that applicants must exhaust.[44] In *Umuhoza v. Rwanda*, based on the grounds for hearing applications for review, which related to "bias or

37. *Abubakari, supra* note 34, ¶ 66; *Thomas, supra* note 33, ¶ 63.
38. *Thomas, supra* note 33, ¶ ¶ 60–65; *Abubakari, supra* note 34, ¶ ¶ 62–73, 77.
39. *Abubakari, supra* note 34, ¶ 70.
40. *Id.* ¶ 72.
The basis for entertaining an application for review are:

> a) The decision was based on a manifest error on the face of the record resulting in the miscarriage of justice; or
> b) A party was wrongly deprived of an opportunity to be heard;
> c) The Court's decision was a nullity; or
> d) The Court had no jurisdiction to entertain the case; or
> e) The Judgment was procured illegally, or by fraud or perjury.

(*Quoted in Abubakari, supra* note 34, ¶ 71.).
41. *Thomas, supra* note 33, ¶ 63; *Abubakari, supra* note 34, ¶ ¶ 71–72.
42. *Abubakari, supra* note 34, ¶ 71.
43. Nganyi v. United Republic of Tanzania, No. 006/2013, Judgment on Merits, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 95 (18 Mar. 2016).
44. Umuhoza v. Republic of Rwanda, No. 003/2014, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 73 (24 Nov. 2017).

technical and procedural errors," the Court held that "the review remedy would not [be] sufficient to redress the Applicant's complaints which concerned alleged substantive violation of the Applicant's human rights and not only allegations of bias or technical and procedural errors."[45] In finding that the applicant is not required to exhaust the review remedy, the Court also considered the fact that, in the exercise of the remedy, the Rwandan Office of the Ombudsman has exclusive and discretionary power in deciding whether there has been injustice or not.[46]

The Court's approach is thus similar to that of the African Commission, which has found that "a discretionary, extraordinary remedy" that is not able to vindicate a right does not require exhaustion (note however that, in the Commission's case, the remedy was also of an extra-judicial/non-judicial character).[47] It is thus possible that in some instances, a court could subject an extraordinary remedy to the exhaustion of local remedies rule if, for example, it is reasonable, not discretionary, and is capable of vindicating a right. Furthermore, an important implication to note in respect to the Court's approach to domestic review processes is that states would not be able to merely create review processes as a means to extend domestic remedy processes and delay the bringing of a case before a regional or international body.[48]

On parliamentary remedies, the Court is of the view that a parliamentary process, even if democratic, "cannot be equated to an independent judicial process for the vindication of rights under the [African] Charter."[49] This was evident in *Mtikila v. Tanzania*, which concerned a challenge to constitutional amendments in Tanzania that prohibited independent candidates from running for public office. The amendments required candidates to be a member of or be sponsored by a political party in order to run for public office. The state argued that its parliamentary process, which is connected to its constitutional review process, is a remedy that an applicant must exhaust.[50] The Court held that the parliamentary process referred to by the state is a political one that cannot be seen as an "available, effective and sufficient remedy" since it is not freely accessible to all, "is discretionary and may be abandoned anytime," and its outcome is dependent on the majority's will.[51] As the Court was satisfied with the question of exhaustion of judicial remedies, it was therefore of the view that local remedies in

45. *Id.* ¶ 71.
46. *Id.* ¶ 72.
47. Constitutional Rights Project v. Nigeria (In Respect of Akamu & Others), No 60/91, Judgdment on Merits, [Afr. Ct. H.P.R.], ¶ 8 (31 Oct. 1998).
48. Oliver Windridge, *A Watershed Moment for African Human Rights: Mtikila & Others v Tanzania at the African Court on Human and Peoples' Rights*, 15 Afr. Hum. Rts. L. J. 299, 303 (2015).
49. *Mtikila, supra* note 31, ¶ 82.3.
50. *Id.* ¶ 82.2.
51. *Id.* ¶ 82.3.

terms of Article 6(2) of the African Court Protocol read with Article 56(5) of the African Charter had been exhausted.[52] The Court's approach is not far from other observations relating to the unsuitability of requiring exhaustion of parliamentary procedures under the rule. Observers have stated, in the context of the exhaustion of local remedies rule in the human rights protection setting, that "[w]hile parliamentary procedures might end up providing redress to a complainant, such procedures were not sufficient to qualify as judicial or quasi-judicial remedies."[53]

In respect to administrative remedies, the African Court has found such remedies, where the decision of an administrative chamber of a supreme court was not subject to appeal, to be insufficient, not warranting exhaustion by the applicant.[54] This occurred in the *Actions Pour la Protection des Droits de L'Homme v. Côte d'Ivoire* (*APDH*) case relating to certain provisions of Côte d'Ivoire's law on the composition of its Independent Electoral Commission (IEC). The applicant challenged these provisions as being inconsistent with, *inter alia*, the state's obligations to establish an independent and impartial electoral body and protect the right to equality before the law and to equal protection of the law. The state argued in the case, that the applicant failed to exhaust local remedies as it, *inter alia*, did not make use of Ivorian administrative law, which makes provision for holding the state accountable for its legislative actions, a procedure that, the state argued, could result in the repeal or amendment of the law.[55] Contrary to this argument, the Court held that because the Administrative Chamber of the Supreme Court of Côte d'Ivoire hears "in the first instance and without appeal cases of annulment on the grounds of abuse of authority, against decisions emanating from the administrative authorities," it is "not competent to hear cases of unconstitutionality of laws."[56] It thus found the administrative remedy to be insufficient; therefore, the applicant is not required to exhaust it. It is clear from the Court's jurisprudence that courts must deal with the question of whether an administrative remedy passes remedial muster on a case-by-case basis, with the nature of an administrative remedy being a determining factor. The non-exclusion of all administrative remedies would be in line with some of the current UN and other regional human rights jurisprudence.[57]

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52. *Id.*
53. *See Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on Its Second Session*, ICESCR 61st Sess., Agenda Item 10, ¶ 92 U.N. Doc. E/CN 4/2005/52, (10 Feb. 2005).
54. *APDH*, *supra* note 30, ¶ 96–98.
55. *Id.* ¶ 86.
56. *Id.* ¶ ¶ 96–97.
57. *See* General Comment No. 9, *The Domestic Application of the Covenant, adopted* 3 Dec. 1998, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 19th Sess., ¶ 9, U.N. Doc. E/C.12/1998/24, (stating that "[a]dministrative remedies will, in many cases, be adequate"); Donna J. Sullivan, Overview of the Rule Requiring the Exhaus-

The Court has also considered whether bringing a case before an investigative judge by filing a civil suit, as done in Mali, is a local remedy that is available, effective, and sufficient, thus requiring exhaustion.[58] This question emerged in *Diakité Couple v. Mali*, concerning the failure of the relevant Mali authorities to respond to and punish the alleged aggression that the couple had suffered (robbery and vandalization of their home). In Mali, an investigation judge has the power to, "in accordance with the law, undertake all such acts of information as he deems useful to ensure manifestation of the truth."[59] However, the judge's order of refusal to undertake the investigative measure is appealable.[60] The African Court noted the benefit from such a process, being that "a complaint filed together with a civil suit enables the victim to get associated with the conduct of the procedure" as well as with the right of the victim "to directly request the investigating judge to commence an investigation."[61] The Court then held that "referral to the investigating judge is, in the Respondent's judicial system, an effective and sufficient remedy which the Applicants could exercise to obtain, or at least seek to obtain consideration of their complaint."[62] As the applicants had failed to exhaust this remedy, the Court held that they could not make a submission claiming that the remedy is unduly prolonged or insufficient to address their problem.[63] The Court stated that the applicants should have taken steps "to exhaust or at least endeavor to exhaust" the remedy before questioning its effectiveness.[64] The Court found that the applicants had not complied with the requirement, rendering the case inadmissible.[65]

B. *Proprio Motu* Consideration of Compliance with the Rule

As noted above, in the human rights context, courts and other human rights treaty bodies, can consider *proprio motu* whether an applicant, in relation to a complaint before it, has exhausted local remedies. The African Court's power and duty in this regard is accentuated in Rule 39 of the African Court's Rules.[66] While the Court can consider, *proprio motu*, compliance with rules

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tion of Domestic Remedies Under the Optional Protocol to CEDAW, Int'l Women's Rts. Action Watch Asia Pac. 5 (2008) (referring to UN and regional bodies' recognition and non-recognition of administrative remedies as falling within the rule).

58. *Diakité, supra* note 21, ¶ 42.
59. *Id.* ¶ 47.
60. *Id.* ¶ 48.
61. *Id.* ¶ 50.
62. *Id.* ¶ 51.
63. *Id.* ¶ 52.
64. *Id.* ¶ 53.
65. *Id.* ¶ 54.
66. African Court, *supra* note 18, Rule 39. *See Mkandiwire, supra* note 22, ¶ 37; Mkandawire v. Republic of Malawi, No. 003/2011, Joint Dissenting Opinion of Judges Gerard Niyungeko and El Hadji Guisse, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 13 (21 June 2013).

where a respondent state is silent on the question, an issue of contention arises where a respondent state explicitly indicates that an applicant has exhausted local remedies. Can the Court then make an assessment *proprio motu* and arrive at a different conclusion? An instructive case in this regard is *Mkandiwire v. Malawi*, where the African Court decided *proprio motu* that the applicant had failed to exhaust local remedies, thus rendering the case inadmissible.[67] Although the respondent state (Malawi) "did not raise any objection" relating to the failure of the applicant to exhaust local remedies, the Court felt that it was its duty to consider the question.[68] In the words of the Court:

> It, however, remains the duty of this Court to enforce the provisions of the Protocol and of the Charter. The Court is enjoined to ensure that an application meets, amongst others, the requirements for admissibility which are stipulated in the Protocol and the Charter. The law does not have to be pleaded. Failure by the Respondent to raise the issue of non-compliance with the requirements stipulated in the Protocol and the Charter cannot render admissible an application which is otherwise inadmissible. [. . .] State Parties ratify the Protocol on the understanding that local remedies would first be exhausted before recourse to this Court; the making of the declaration in terms of Article 34 (6) of the Protocol is also on this understanding.[69]

The case concerned an applicant seeking redress for his "dismissal as a lecturer by the University of Malawi."[70] The applicant had approached the Malawi Industrial Relations Court, High Court, and Supreme Court of Appeal. The Industrial Relations Court found the dismissal fair and lawful, and determined that the court had provided the applicant with the opportunity to be heard.[71] The High Court held that the applicant or the University could terminate the employment contract subject to three months notice or three months payment in place of the notice; and since the university had paid the applicant only for one month, the Court required it to pay the applicant for an additional two months.[72] The Supreme Court of Appeal confirmed the High Court's judgment, which dismissed the applicant's wrongful dismissal claim based on the manner in which he presented the case (that is, based on procedural incorrectness).[73] At the High Court, the applicant did not argue the merits of his claim for wrongful dismissal as determined in the judgment of the Industrial Relations Court. This is because he could only

67. *Mkandiwire*, *supra* note 22, ¶ 37; *Mkandiwire Joint Dissenting Opinion*, *supra* note 66, ¶ 1.
68. *Mkandiwire*, *supra* note 22, ¶ 37; *Mkandiwire: Joint Dissenting Opinion*, *supra* note 66, ¶ 12.
69. *Mkandiwire*, *supra* note 22, ¶ 37.
70. *Id.* ¶ 1.
71. *Id.* ¶ 39.2.
72. *Id.* ¶ 39.1.
73. *Id.* ¶ 39.3.

do so with the assistance of "licensed practitioners"; and despite the High Court advising him to seek assistance of a lawyer to do this, he declined.[74] The African Court held that the applicant, if unsatisfied with the Industrial Relations Court's decision, should have argued the merits of the wrongful dismissal claim at the High Court, and if still unhappy with the decision, should then have argued the merits before the Supreme Court of Appeal. However, he failed to do so, thus depriving both courts of the opportunity to address the wrongful dismissal claim.[75] The Court did not find any evidence that the applicant would have suffered prejudice by arguing the merits at the High Court and then, if not satisfied, arguing at the Supreme Court of Appeal.[76] Also considering its finding that there was no undue delay in disposing the case at the Supreme Court of Appeal, the Court dismissed the application for non-compliance with Article 6(2) read with Article 56(5) in relation to exhaustion of local remedies.[77] The Court supported its position with jurisprudence from the Inter-American Commission, which found non-exhaustion of local remedies in a case where the petitioners had wrongly approached the domestic court.[78]

A joint dissenting opinion, however, found the Court's approach to be problematic. While not disputing that the Court has the power, and in fact the duty to consider the question of exhaustion of local remedies *proprio motu*, it found no "convincing reasons" for the Court to ignore the position of the state (which has "good knowledge" of available remedies in its judicial system) and the African Commission (where the applicant had initially brought the case before withdrawing it so as to approach the Court) in determining that local remedies had been exhausted.[79] The dissent stated that the distinction between "an action for unlawful dismissal based on the rules of natural justice, which the Court seems to endorse" and "an action for unlawful termination of the contract of employment in terms of the contract itself" is very small to be a weighty consideration in deciding on the admissibility of a case by a human rights court.[80] This is so, especially in the absence of the Court assessing all of the facts of the exhaustion of local remedies inquiry, such as availability and effectiveness of the remedies. In addition, it is im-

74. *Id.* ¶ ¶ 39.2, 39.3.
75. *Id.* ¶ ¶ 39.2, 40.1.
76. *Id.* ¶ 39.2.
77. *Id.* ¶ ¶ 40.2, 41.
78. *Id.* ¶ 38.2.
79. Mkandawire: Joint Dissenting Opinion, *supra* note 66, ¶ ¶ 12–14. The state's position before the African Commission was that "it does not dispute that the complainant exhausted all available local remedies and that as a matter of fact his claims before Malawi Courts were duly entertained" (*Id.* ¶ 12). The African Commission had concluded that "there is no contention regarding the exhaustion of local remedies by the Complainant from the Respondent State"; therefore, "Article 56(5) has been duly complied with" (*Id.*).
80. *Id.* ¶ 15.

portant to take into consideration the fact that the Supreme Court of Appeal had indicated that *res judicata* rule would apply to the applicant's case of unlawful dismissal (implying no guarantee of the availability or effectiveness of the remedy).[81] The dissenting judges were thus of the view that the Court, instead of deciding "on a fragile basis," should have requested further information on the availability and effectiveness of the remedy.[82] They found the Court's approach incomplete and held that, under the circumstances, the application was admissible since the applicant exhausted local remedies, as recognized by the state and the African Commission.[83]

The Court's approach to exercising its *proprio motu* powers in *Mkandiwire* seems restrictive, as the Court should have at least, as the dissenting opinion indicates, requested further information, considering the position of the African Commission and the state on the applicant's compliance with the rule. In the absence of adequate information to support its overruling the African Commission and the state, the Court's approach in this case resulted in the rule being an unreasonable obstacle.

C. Availability, Effectiveness, and Sufficiency

Local remedies requiring exhaustion are those that are available, effective, and sufficient. The African Court has held that states will not be in violation of their human rights obligations if they make provision for "effective and sufficient remed[ies] for victims" in their domestic laws.[84] It has gone further to explain what each criterion entails, drawing from both African and comparative jurisprudence. An available remedy is one that "can be pursued by the Applicant without any impediment"; an effective remedy is one that "offers prospects of success," and "is found satisfactory by the complainant or is capable of redressing the complaint"; and the remedy should be "sufficiently certain" in theory and in practice.[85]

The Court has thus elaborated on effectiveness, taking into consideration the ordinary meaning of effective—"that which produces the expected result"—that an effective remedy should be "measured in terms of its ability to solve the problem raised by the complainant[s]."[86] The remedy would lack the required effectiveness if it is not "sufficiently certain" in theory and in practice.[87]

81. *Id.* ¶ 16.
82. *Id.* ¶ 17.
83. *Id.* ¶ ¶ 18–19.
84. *Konaté, supra* note 6, ¶ 80.
85. *Konaté, supra* note 6, ¶ ¶ 96, 108; *APDH, supra* note 30, ¶ 94; *Mtikila, supra* note 31, ¶ 82.1; *Nganyi, supra* note 43, ¶ 89; *Libya, supra* note 31, ¶ 67.
86. *Konaté, supra* note 6, ¶ 92; *Zongo supra* note 17, ¶ 68; *APDH, supra* note 30, ¶ 94.
87. *Konaté, supra* note 6, ¶ 94; *Libya, supra* note 31, ¶ 66.

The Court has found that domestic remedies are not available and effective where remedies exist in law, but impediments also exist that prevent pursuance of the remedies. In particular, the Court found that secret detention and isolation and "not having access to a counsel or to a judge during" detention impedes the ability of an applicant to use remedies that are available in domestic law.[88] The Court found the above impediments, as well as a death sentence *in absentia*, to constitute "sufficient grounds for the Court to conclude that the Detainee has been prevented from legally seeking local remedies as prescribed" by the applicable law, thus making it impossible to fulfill the "exhaustion of local remedies" requirement, which cannot then be said to be available and effective.[89] The Court has also found that expulsion of an applicant from the respondent state's territory impedes the applicant's ability to, while outside the said territory, utilize remedies available within the respondent state's territory.[90] In addition, non-provision, by state authorities, of relevant records of proceedings and judgments to applicants to enable them to pursue an appeal impedes their ability to use remedies available in domestic law. In *Makungu v. Tanzania*, the applicant filed notices of appeal but could not proceed with the appeal due to "lack of the certified true copies of the records of proceedings and judgments" relating to the cases he sought to appeal.[91] The Court thus held that, despite the availability of domestic remedies, "the Respondent State's omission and failure to provide him [the applicant] with the necessary documents" impeded his ability to utilize the remedies.[92]

The Court has also considered whether an appeal to the *Cour de Cassation* (Court of Final Appeals) in the Burkina Faso judicial system was an effective and available remedy. In *Zongo*, the Court considered the effectiveness of the remedy.[93] The case related to Burkina Faso's failure to seek out, investigate, prosecute, and subject to trial perpetrators of the murder of Norbert Zongo and his companions, resulting in a violation of various rights. The Court found this remedial procedure to be effective, requiring exhaustion so as to ensure compliance with the rule. The Court added that an "appeal at the Cour de Cassation is not a waste of time and it can in certain circumstances lead to a change or change the substance of a decision; and without making such an appeal, one may not know what the Court would have decided."[94] This finding was based on the Court's application

88. *Libya, supra* note 31, ¶ 68.
89. *Id.* ¶ ¶ 69–70.
90. Anudo v. United Republic of Tanzania, No. 012/2015, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 52 (22 Mar. 2018).
91. *Makungu, supra* note 34, ¶ 44.
92. *Id.* ¶ ¶ 45, 47.
93. *Zongo supra* note 17, ¶ 56.
94. *Id.* ¶ 70.

of its understanding of effectiveness as stated above in the context of, *inter alia*, no doubt being cast on the *Cour de Cassation*'s ability "to bring about change in the situation," if it finds a violation of the law in the way the court, "whose ruling has been impugned," treated the matter.[95] The Court supported its view with jurisprudence from the European Court in relation to France (which has a legal system similar to that of Burkina Faso), where the European Court held that "'the Cour de Cassation' is among the local remedies to be exhausted in principle" to ensure compliance with the rule to exhaust local remedies.[96] As the Court still had to consider whether the domestic remedial process had been unduly prolonged (discussed further below), it did not find the case inadmissible on the basis that an effective remedy had not been exhausted, since the question of undue delay was a distinct issue that is not prejudged by the conclusion of effectiveness of the *Cour de Cassation* remedy.[97]

The Court further considered whether an appeal to the *Cour de Cassation* is an available remedy in *Konaté v. Burkina Faso*. The applicant argued that the time limit, given to applicants, of five days following an impugned decision to make an appeal to the *Cour de Cassation* was unreasonable due to delays in getting the full text of the court judgment, which forms the basis of the appeal, thus "render[ing] the process ineffective."[98] On the question of availability, since it was possible for an applicant to lodge a notice of appeal (even while in detention, through a letter to the relevant prison authority) and only submit arguments or briefs of submission in two months time, the Court did not find the five day limit to be an obstacle to lodging a notice of appeal; although it noted that it was a short time period.[99] The Court thus found that this was an available remedy.[100] It is evident from the Court's consideration of the relevance of an applicant having access to the court judgment when filing the brief of submission, that had the domestic law not made provision for the brief of submission to be filed at a later date, then in the absence of the court judgment, coupled with the short time frame, the Court would have likely found the remedial procedure to be unavailable.[101]

The Court also considered in *Konaté* whether, in the context of individuals seeking to have laws on the basis of which their convictions could be overturned, the domestic legal system makes provision for effective and sufficient (or adequate) remedies. It considered the question of effectiveness

95. *Id.* ¶ 69.
96. *Id.* ¶ 70.
97. *Id.* ¶ 71.
98. *Konaté, supra* note 6, ¶ 98.
99. *Id.* ¶ ¶ 101, 103–07.
100. *Id.* ¶ 107.
101. The Court did emphasize that "the issue of the brevity of the five-day time limit for appeals, and of the unavailability of the impugned court judgments are related." *Id.* ¶ 99.

and sufficiency of the appeal remedy by first setting out what the *Cour de Cassation* remedy entailed. It noted that the remedy is aimed at repealing, on the basis of "violation of the law, a judgment or a ruling delivered as a last resort," but without annulment of the law itself, as the *Cour de Cassation* is required rather to ensure other lower domestic courts' compliance with the law.[102] The Court also noted that individuals in Burkina Faso are not able to approach the Constitutional Council ("responsible for overseeing compliance of laws with the Constitution") to have laws on the basis of which they are convicted overturned, as the relevant constitutional provision is silent about individuals being able to bring cases before the Council.[103] This renders an appeal to the Council an unavailable remedy.[104] Since the applicant raised the question of the African Court finding the domestic law on which he was determined liable to be inconsistent with his right to freedom of expression—a question that the Court established was beyond the mandate of the *Cour de Cassation*—the applicant had no standing to approach the Constitutional Council. The African Court held that Burkina Faso's legal system does not provide him with effective and sufficient remedies to allow him to seek to overturn the laws he is contesting.[105] The Court also found an appeal to the Constitutional Council in this case to be an unavailable remedy.

It is evident from the Court's approach in *Zongo* and *Konaté* that a finding on the effectiveness of the *Court de Cassation* remedy is context specific. The issue of effectiveness of the remedy is influenced by, inter alia, whether the issue in a case falls within the mandate of the *Court de Cassation*. If within its mandate, then applicants are required to exhaust this remedy and if not, then they are not obliged to do so.

D. Unduly Prolonged

The African Court has stated that domestic remedy procedure "has to take place within reasonable time" and cannot be unduly (excessively or unjustifiably) delayed.[106] Therefore, it is important to consider two aspects: first, the prolonged nature of a remedy; and second, whether the prolongation was unwarranted. In addition, as held by the Court, the unduly prolonged exception in the African Charter is not limited "solely to remedies which have not yet been utilised" (thus, can also relate to remedies that have been utilized); and the reasonableness of the duration must be considered on

102. *Id.* ¶ 110.
103. *Id.* ¶ 112.
104. *Id.* ¶ 114.
105. *Id.* ¶¶ 109, 113.
106. *Zongo supra* note 17, ¶ 120; *Nganyi, supra* note 43, ¶¶ 90–91.

a case-by-case basis, taking into consideration the circumstances of each case.[107] This is a significant development in the Court's jurisprudence, as it allows for more flexibility in the assessment.

The Court found in *Zongo* a remedy procedure in domestic courts that lasted close to eight years (between 31 December 1998 and 21 August 2006—precisely "seven (7) years, eight (8) months and ten (10) days") to have been "unduly prolonged in terms of Article 56(5) of the [African] Charter."[108] An important issue raised in the case related to the determination of the length of a remedy procedure—whether, as argued by the state, it should be determined in relation to the specific remedy that had not been utilized or, as argued by the applicant, be determined in relation to the entire domestic procedure with respect to the case.[109] To answer this, the Court clarified what a "remedy procedure" means in terms of Article 56(5) of the African Charter. The Court was of the view that "the unduly prolonged nature of a procedure as addressed in Article 56(5) of the Charter applies to local remedies in their entirety as utilised or likely to be utilised by those concerned."[110] It held that nothing in the provision limits the procedure to only remedies that had not been utilized; and, in addition, determining the length of procedure for a remedy that has not been utilized would be a difficult exercise.[111] It then went on to state that the unduly prolonged determination of a domestic remedy procedure is case specific and depends "on the circumstances of each case."[112] The complexity of a case and the respondent state's diligence are important factors for the Court to consider. The state in *Zongo* failed to establish that this case was more complex than other murder cases where there was no eyewitness, which would justify the delays.[113] In determining when a domestic remedy procedure commenced, the issue before the Court must be taken into consideration. In this regard, the Court pointed out that the issue relates to the search, trial, and judgment of the perpetrators of the murder and not to the prosecution and trial of the main suspect, thus implying that the date on which the remedy procedure commenced should be when the judicial system of the state initiated proceedings in relation to the case.[114] The Court then calculated the duration of the domestic procedure from the date the police began investigations at the scene of the crime.[115] As the applicants had not made use of the *Cour de Cassation*, the end date was when the deadline for appeals to *Cour de Cassation* expired.[116] The Court

107. *Zongo supra* note 17, ¶ ¶ 90, 92; *Nganyi*, *supra* note 43, ¶ 92.
108. *Zongo supra* note 17, ¶ ¶ 105–06.
109. *Id.* ¶ 89.
110. *Id.* ¶ 90.
111. *Id.*
112. *Id.* ¶ 92.
113. *Id.* ¶ 93.
114. *Id.* ¶ 104.
115. *Id.*
116. *Id.* ¶ 105.

held that the applicants are not required to exhaust other available domestic remedies, as the domestic remedy procedure had been unduly prolonged and appealing to the *Cour de Cassation* would further prolong the case.[117] Thus, even if the *Cour de Cassation* could deal with the case swiftly, the case was already unduly prolonged. The Court then recognized the duration of domestic remedies as a key aspect of the right to have one's cause heard by competent national organs, stating that the "procedure in a case wherein a party is involved has to take place within reasonable time."[118] This aspect contributed to the Court's finding of a violation of this right in the case.

The Court has also found domestic proceedings of about ten years without finality to amount to undue delay.[119] This undue delay was evident in the *Nganyi* case relating to the alleged kidnap, arrest, and illegal extradition of the applicants to Tanzania, on the basis that they were connected to "dangerous elements" in the Kenyan military forces and administration police. The applicants did not dispute the availability of local remedies but argued that the remedies were "unduly prolonged."[120] With reference to Black's Law Dictionary, the Court clarified that the term "unduly" denotes "excessively" or "unjustifiably," implying that prolongation of a case will not be undue if there is a justifiable reason for the delay.[121] The Court noted the African Commission's view that consideration of undue prolongation should be case specific and the test to be applied is the "reasonable man's test" from common law.[122] Considering the circumstances of the case—the arrest and charge of the applicants in 2006 with no finality in the case by 2016, the lack of a justifiable reason for the delay, the delay in providing the applicants with court records, and the lack of legal counsel later in the proceedings—the Court found the state's contention relating to non-exhaustion of local remedies to be unfounded.[123]

The standard set by the Court in relation to the unduly prolonged exception is commendable. This is because the flexible approach, especially in calculating the duration of the domestic remedy procedure, would likely result in the granting of undue delay in more cases and thus, following admissibility of the cases, improve accessibility to the Court.

However, where applicants contribute to the delays in domestic proceedings, the Court did not find undue delays or negligence on the part of judicial authorities. In *Kouma v. Mali*, the applicants alleged undue delay in domestic proceedings of "two years and two months."[124] The Court however

117. *Id.* ¶ 106.
118. *Id.* ¶ 120.
119. *Nganyi*, *supra* note 43, ¶ 94.
120. *Id.* ¶ 88.
121. *Id.* ¶ 91.
122. *Id.* ¶ 92.
123. *Id.* ¶¶ 94–96.
124. *Kouma*, *supra* note 23, ¶ 34.

found that they contributed to the delay, due to their counsel's request "that the rights of his clients be reserved till production of a final medical report," which they had not submitted at the time of proceedings before the African Court.[125] The domestic court was thus "awaiting the Applicants' medical evidence so as to assess the harm and quantify the reparation."[126] The African Court held that "the expeditiousness of a procedure requires the necessary cooperation of the Parties in the trial to avoid undue delay."[127] It therefore found that domestic remedies had not been unduly prolonged, as the applicants "should have helped to speed up the proceedings by producing early enough, the evidence for reparation of the damages they are claiming."[128]

E. Lack of Opportunity to Exhaust Local Remedies

The African Court has dealt with the question of whether the local remedies rule is applicable where victims do not have the opportunity to exhaust local remedies. This situation arose in the *Libya* case, brought by the African Commission in relation to a detainee's secret detention and isolation, which allegedly violated his rights in the African Charter. Libya did not submit a reply to the application and hence did not submit observations on the issue of exhaustion of local remedies; only the applicant made observations.[129] The detainee had been held in secret detention and in isolation, which was unilaterally determined, with the detainee having no access to a lawyer or a judge during the period of detention.[130] He was also sentenced to death *in absentia*.[131] Considering these circumstances, the Court held that the detainee could not make use of provisions "applicable in seeking a remedy" and was in fact "prevented from legally seeking local remedies as prescribed by Libyan law," making it impossible for him to fulfill the condition regarding exhaustion of local remedies.[132] Due to the detainee's lack of possibility of using local remedies, the Court held that he could not therefore be expected to comply with the rule before approaching the Court.[133] The Court also concluded, without adequate substantiation, that local remedies in the case were "not available and [were] not effective," hence not applicable.[134]

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125. *Id.* ¶ ¶ 35, 44, 47.
126. *Id.* ¶ 46.
127. *Id.* ¶ 45.
128. *Id.* ¶ 47.
129. *Libya, supra* note 31, ¶ ¶ 65–66.
130. *Id.* ¶ 66.
131. *Id.* ¶ ¶ 68–69.
132. *Id.*
133. *Id.* ¶ 70.
134. *Id.*

F. Remedial Processes with Known Outcomes

The Court has held that applicants are not required to go through judicial processes where the outcome is known.[135] In *Mtikila*, the Court held that there was no need for an NGO applicant "to go through the same local judicial process the outcome of which was known."[136] In the context of *Mtikila*, one of the applicants in the case had already gone through the same remedial process on the same issue.[137] In *APDH*, the state argued that the applicant failed to exhaust local remedies, as it did not approach the Côte d'Ivoire Constitutional Council to challenge the constitutionality of the law.[138] The Court noted that the Constitutional Council deals with laws relating to public freedoms.[139] Since the challenged law did "not relate to public freedoms," the Court held that the applicant could not approach the Council.[140] Notwithstanding this, in a previous case, the Council found the challenged law to be consistent with the state's constitution. Thus, in view of the Council's previous decision, the Court held that the applicant could not expect more from the Council regarding its prayer for the annulment of the challenged law, as the outcome was known.[141] The Court thus found it unnecessary for the applicant to exhaust this remedy.[142] The Court's approach, arguably, gives (NGO) applicants latitude in skirting the exhaustion of local remedies where applicants can show that a domestic remedy procedure's outcome is known based on, for example, a previous case on the same issue. In relation to *Mtikila* as well, the Court arguably set a precedent of "giving NGOs a wide-ranging scope to circumnavigate exhaustion of local remedies issues, since an NGO can use this precedent to join applications before the African Court where it can demonstrate that the individual applicant has done the work of taking the case through various national courts."[143]

G. Issues Not Explicitly Raised Before Domestic Courts

The exhaustion of domestic remedies rule "maintains and reinforces the primacy of the domestic system in the protection of human rights vis-à-vis the Court."[144] This implies that, in principle, the African Court is not a court

135. *Mtikila, supra* note 31, ¶ 82.3.
136. *Id.*
137. *Id.* ¶ 82.2.
138. *APDH, supra* note 30, ¶ 85.
139. *Id.* ¶ 99.
140. *Id.* ¶ 100.
141. *Id.* ¶ ¶ 101–03.
142. *Id.* ¶ 104.
143. *Windridge, supra* note 48, ¶ 303.
144. *Isiaga, supra* note 34, ¶ 44; Kenya, *supra* note 24, ¶ 93.

of first instance in relation to matters not raised in domestic proceedings.[145] However, the Court has found that it would be unreasonable to require applicants to exhaust domestic remedies in relation to allegations not explicitly raised in domestic proceedings but which "all form part of the 'bundle of rights and guarantees' that were related to or were the basis of their appeals"; thus, giving domestic authorities enough time to address allegations even if the applicants did not explicitly raise them.[146] In the *Abubakari* case, for example, not all of the complaints raised before the African Court had been raised before national courts in Tanzania.[147] However, the Court found that five of the issues in contention "were raised in passing or may be imputed from or form the basis of the factual narrative of the Applicant" and three others were not addressed at the domestic level.[148] The Court, however, concluded that "most of the complaints [. . .] had been raised before Tanzanian national courts, in one way or the other" and that the "complaints essentially relate to one and the same right, i.e. the right to a fair trial, which the Applicant has repeatedly demanded before the national courts."[149] States are "to guarantee [the right to a fair trial] *proprio motu* in all its aspects, without the Applicant having to specify the particular aspects."[150] Hence, the Court held that even if the applicant did not raise the issues in detail at the domestic level, it is not justifiable for the state to argue that all or some remedies have not been exhausted.[151] The state's contention that local remedies had not been exhausted, as some of the issues were not specifically raised at the domestic level, was thus dismissed. In the *Onyachi* case, despite observing that six of the applicants' allegations "were not explicitly raised in the domestic proceedings" and "are being raised for the first time" before the African Court, the Court did not require the applicants to exhaust local remedies in relation to the new allegations, stating that:

> these allegations happened in the course of the domestic judicial proceedings that led to the Applicants' conviction and sentence to thirty (30) years' imprisonment. They all form part of the "bundle of rights and guarantees" that were related to or were the basis of their appeals. The domestic authorities thus had ample opportunities to address these allegations even without the Applicants having raised them explicitly. It would therefore be unreasonable to require

145. *Isiaga, supra* note 34, ¶ 44.
146. *Onyachi, supra* note 35, ¶ 54. *See also, Guehi, supra* note 35, ¶ 50;
147. *Abubakari, supra* note 34, ¶ ¶ 74(iii).
148. *Id.* ¶ 74(ii).
149. *Id.* ¶ ¶ 75–76.
150. *Id.* ¶ 76. Similarly, in *Paulo, supra* note 35, ¶ 42, the Court held that "when alleged violations of the right to a fair trial form part of the Applicant's pleadings before domestic courts, the Applicant is not required to have raised them separately to show proof of exhaustion of local remedies."
151. *Abubakari, supra* note 34, ¶ 76.

> the Applicants to lodge a new application before the domestic courts to seek redress for these claims.[152]

The Court reiterated this position in *William v. Tanzania* and *Evarist v. Tanzania*, in response to the state's contention that the respective applicants failed to raise the question of legal aid during domestic proceedings, so are raising it for the first time in African Court proceedings.[153] On the above (quoted) basis, the Court overruled the objection, finding that the applicant had exhausted local remedies.[154]

The Court has thus adopted a flexible approach to the exhaustion of local remedies in relation to issues raised before, not requiring each and every issue to have been raised at the domestic level, although the issues must all fall within the broader theme raised at the domestic level. This is a non-obstructive approach to application of the rule, which facilitates access to justice. Through this approach, the Court is able to consider the alleged violations, that it would otherwise not be able to consider if it applied a rigid approach to application of the rule, which restricted issues raised before it only to those explicitly raised before domestic courts.

IV. CONCLUSION

The African Court's jurisprudence on exhaustion of local remedies has made significant inroads in terms of elaborating on the nature and scope of remedies that applicants must exhaust as well as exceptions to the rule. The Court has established criteria that applicants must consider including availability, effectiveness, sufficiency, and timeliness of local remedies. It has not only recognized that complainants must exhaust or attempt to exhaust local remedies, but also that the state and its authorities must not prevent them from doing so. The Court's approach includes references to jurisprudence on the rule from the UN and other regional bodies. The Court's jurisprudence illustrates that, although it has adopted a restrictive approach to the exercise of its *proprio motu* powers to consider the rule in one of the cases before it, in general, the Court has interpreted and applied the rule with (case-specific) flexibility and in favor of victims of human rights violations. The Court's approach is reflective of its recognition of the need to balance its application of the rule with the goal of ensuring access to justice for victims of human rights violations by providing them with an opportunity to seek redress before the Court, and of ensuring that states do not exploit

152. *Onyachi, supra* note 35, ¶ 54. *See also Viking, supra* note 35, ¶ 53.
153. *William, supra* note 35, ¶ ¶ 38, 43; *Evarist, supra* note 35, ¶ ¶ 31, 35.
154. *William, supra* note 35, ¶ ¶ 43–44; *Evarist, supra* note 35, ¶ ¶ 35–36. *See also Mango, supra* note 35, ¶ 46.

the requirement to the detriment of victims. The requirement has thus far not been predominantly applied in a way that has the effect of posing an unreasonable limitation on the Court's ability to effectively protect rights.