

Exhaustion of Domestic Remedies

in the African Human Rights System



International Justice Resource Center

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I. African Commission on Human and Peoples' Rights

Similar to other international and regional human rights mechanisms, the African continental human rights bodies generally require complainants¹ to exhaust domestic remedies before submitting a claim to them.² This means that a person must attempt to use the available national legal protections to seek accountability or reparation for the violation, appealing as necessary until the claim can be pursued no further at the national level. If a person does not receive an adequate remedy from a national body, then he or she may submit a complaint against the State, for consideration by a supranational human rights body.

Although complaints submitted to the [African Commission on Human and Peoples' Rights](#) or to the [African Court on Human Peoples' Rights](#) must meet all of the admissibility requirements set out in Article 56 of the [African Charter on Human and Peoples' Rights](#), the African Commission has stated that exhaustion of domestic remedies is one of the most important conditions for admissibility.³ The exhaustion requirement is grounded in the principle that a government should have an opportunity to remedy human rights violations before being called before an international body.⁴ This section will explain how to satisfy this requirement in the African System.

1. Exhaustion of Domestic Remedies

Article 56(5) of the African Charter on Human and Peoples' Rights lays out the exhaustion requirements for communications submitted to the African Commission. The article specifically requires that complainants send communications "after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged."⁵ This rule does not require that complainants exhaust multiple remedies of the same type, although they do need to appeal to the highest authority. The African Commission follows the established principle in human rights law that when a complainant exhausts a remedy, she is not required to exhaust another remedy that would produce the same result or that has the same objective.⁶

¹ The term "complainant" is used throughout this guide to refer to the alleged victim(s) or their representatives submitting the allegations to the international body. However, committees often refer to victims in the cases as "author", "petitioner", "victim", or "applicant". For purposes of this guide, "complainant" covers all of these terms.

² See e.g., AfCHPR, *Peter Joseph Chacha v. Tanzania*, App. No. 003/2012, Judgment of 28 March 2014, para. 142, available at http://www.african-court.org/en/images/Cases/Judgment/Ruling_Appl_003_2012.pdf (stating that exhaustion of domestic remedies "is not a matter of choice. It is a legal requirement in international law").

³ ACommHPR, *Sir Dawda K. Jawara v. Gambia*, para. 30.

⁴ ACommHPR, *World Organisation against Torture and Others v. Zaire*, Communication Nos. 25/89, 47/90, 56/91, 100/93, Merits Decision, 19th Ordinary Session (1996), para. 36, available at http://www.achpr.org/files/sessions/18th/comunications/25.89-47.90-56.91-100.93/achpr18_25.89_47.90_56.91_100.93_eng.pdf; ACommHPR, *Rencontre Africaine pour la Defenese des Droits de l'Homme v. Zambia*, Communication No. 71/92, Merits Decision, 20th Ordinary Session (1997), para. 11, available at <http://www.achpr.org/communications/decision/71.92/>.

⁵ African Charter, art. 56(5).

⁶ ACommHPR, *Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Center for the Protection of Human Rights) v. Kenya*, Communication No. 375/09, Admissibility Decision, 50th Ordinary Session (2011), para. 54, available at <http://www.achpr.org/communications/decision/375.09/>.

The African Commission has limited the exhaustion requirement to include only remedies that are “available, effective and sufficient.”⁷ The Commission has held that Article 56(5) assumes that: 1) there are domestic procedures in place to deal with the allegation; 2) domestic courts can review the claim’s subject matter; 3) domestic courts can provide redress for the wrong being complained of; and, 4) therefore, the domestic remedies are available, effective, and sufficient to address the alleged violation.⁸ Accordingly, remedies that fail to meet these standards do not need to be exhausted.

The availability of a remedy depends on whether or not a complainant can use it under the specific circumstances of his or her case “without impediment;” the effectiveness depends on whether the remedy offers “a prospect of success;” and sufficiency depends on whether the remedy is capable of redressing the violations alleged in the complaint.⁹ If the African Commission considers that a remedy is not available, effective, or sufficient, it will consider the exhaustion requirement satisfied, under the theory of constructive exhaustion of domestic remedies.¹⁰ Thus, a remedy may exist in theory, but may not need to be exhausted if it is unavailable, inadequate, or ineffective.¹¹

1.1 Available Remedies

In determining availability of a remedy, the African Commission will consider whether the complainant knows of the remedy and can pursue it “without impediment.”¹² This requires analyzing whether the remedy is actually available in practice, not merely in theory.¹³ The Commission will consider remedies to be unavailable when victims cannot turn to the courts because of a generalized fear for their life, the life of their relatives, or of their representatives; when complainants reside outside of the State allegedly responsible for the violations; when there have been “serious, massive and systematic” violations of human rights; or when domestic law does not guarantee the rights allegedly violated.¹⁴ Additionally, remedies are not available when domestic courts do not have jurisdiction as a result of policy changes that cannot be challenged.¹⁵

Practice Tip

At times, the African Commission has also considered a generalized fear for one’s life as a reason to support a finding that the remedies are not sufficient. Sufficient remedies are discussed in more detail below.

⁷ ACommHPR, *Sir Dawda K. Jawara v. Gambia*, paras. 30–31.

⁸ ACommHPR, *Article 19 v. Eritrea*, Communication No. 275/03, Merits Decision, 41st Ordinary Session (2007), para. 47, available at <http://www.achpr.org/communications/decision/275.03/>.

⁹ ACommHPR, *Gabriel Shumba v. Zimbabwe*, Communication No. 288/2004, Merits Decision, 51st Ordinary Session (2012), para. 57, available at <http://www.achpr.org/communications/decision/288.04/>; ACommHPR, *Michael Majuru v. Zimbabwe*, Communication No. 308/05, Admissibility Decision, 44th Ordinary Session (2008), para. 79, available at <http://www.achpr.org/communications/decision/308.05/>.

¹⁰ ACommHPR, *Gabriel Shumba v. Zimbabwe*, para. 49.

¹¹ *Id.* at para. 77.

¹² ACommHPR, *Sir Dawda K. Jawara v. Gambia*, para. 34.

¹³ *Id.* at para. 34.

¹⁴ ACommHPR, *Rights International v. Nigeria*, Communication No. 215/98, Merits Decision, 26th Ordinary Session (1999), para. 24, available at http://www.achpr.org/files/sessions/26th/comunications/215.98/achpr26_215_98_eng.pdf; ACommHPR, *John D. Ouko v. Kenya*, Communication No. 232/99, Merits Decision, 28th Ordinary Session (2000), para. 19, available at <http://www.achpr.org/communications/decision/232.99/>; ACommHPR, *Sudan Human Rights Organisation & Centre on Housing Rights and Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Communication No. 279/03-296/05, Merits Decision, 45th Ordinary Session (2009), paras. 97–98, 102, available at <http://www.achpr.org/communications/decision/279.03-296.05/>; ACommHPR, *Social and Economic Rights Action*

In *Monic Elgak, Osman Hummeida and Amir Suliman v. Sudan*, the African Commission stated that a remedy is not available when, given the circumstances of the case, the victims or their representatives face a general fear of persecution.¹⁶ However, in cases where the complainant is acting on behalf of victims, such as an NGO, fear of persecution will not be sufficient to waive the exhaustion of domestic remedies requirement as the representative could bring the case in domestic courts.¹⁷ In *Nixon Nyikadzino v. Zimbabwe*, the African Commission rejected a communication for failure to exhaust domestic remedies because even though the victim was not able to exhaust domestic remedies, the complainant, an NGO specialized in human rights litigation before domestic courts, did not attempt to exhaust domestic remedies.¹⁸

If a complainant resides outside of the State allegedly responsible for the violations because he or she was forced to flee or leave involuntarily, the Commission will not consider local remedies to be available even if they would otherwise be.¹⁹ In *Gabriel Shumba v. Zimbabwe*, the complainant had fled the country against his will because of threats to his life and that of his relatives. The African Commission, relying on prior communications, concluded that remedies existed under Zimbabwe law, the complainant's circumstances created impediments to pursuing those remedies that made them unavailable.²⁰ The African Commission emphasized that when a complainant cannot access the judiciary because of a generalized fear for his or her life or that of relatives, the remedies would be considered unavailable.²¹

In cases where there have been "serious, massive and systematic" violations of human rights, the African Commission has stated that, although remedies may theoretically exist, they may be unavailable in practice given the number of people involved and the seriousness of the situation.²² For example, in *Malawi African Association and others v. Mauritania*, the African Commission noted that the exhaustion of domestic remedies requirement will not be "applied literally to those cases in which it is neither practicable nor desirable for the complainants or the victims to pursue such internal channels...[s]uch is

Center v. Nigeria, Communication No. 155/96, Merits Decision, 30th Ordinary Session (2001), para. 37, available at <http://www.achpr.org/communications/decision/155.96/>.

¹⁵ ACommHPR, *Sir Dawda K. Jawara v. Gambia*, para. 34.

¹⁶ ACommHPR, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan*, Communication No. 379/09, Merits Decision, 15th Extra Ordinary Session (2014), paras. 53–55, available at <http://www.achpr.org/communications/decision/379.09/>.

¹⁷ ACommHPR, *Nixon Nyikadzino (represented by Zimbabwe Human Rights NGO Forum) v. Zimbabwe*, Communication No. 340/07, Admissibility Decision, 11th Extraordinary Session (2014), paras. 79–82, available at <http://www.achpr.org/communications/decision/340.07/>.

¹⁸ *Id.* at para. 82.

¹⁹ ACommHPR, *John D. Ouko v. Kenya*, Communication No. 232/99, para. 19; ACommHPR, *Alhassan Abubakar v. Ghana*, Communication No. 103/93, Merits Decision, 20th Ordinary Session (1996), para. 6, available at <http://www.achpr.org/communications/decision/103.93/>.

²⁰ ACommHPR, *Gabriel Shumba v. Zimbabwe*, para. 49.

²¹ *Id.* at para. 58.

²² See ACommHPR, *COHRE v. Sudan*, paras. 97–98, 102; ACommHPR, *Free Legal Assistance Group, Lawyers Committee for Human Rights, Union interafricaine des droits de l'Homme, Les témoins de Jehovah v. Zaire*, Communication No. 25/89-47/90-56/91-100/93, Merits Decision, 18th Ordinary Session (1996), para. 37, available at <http://www.achpr.org/communications/decision/25.89-47.90-56.91-100.93/>.

the case where there are many victims.”²³ Under these circumstances, remedies will be considered unavailable and complainants will not be required to exhaust them.

The African Commission has not taken a position regarding whether a remedy will be considered unavailable simply because a person is indigent. However, in *Purohit and Moore v. The Gambia*, the Commission concluded that the remedies that existed were neither realistic nor available to the victims since these were only accessible to wealthy individuals and the victims were typically “picked up from the streets or from poor backgrounds” and were indigent.²⁴ The Commission determined that the remedies that existed were only available and effective to those who could afford them but, in this particular case, the victims could not.²⁵ The communication was deemed admissible given that the victims belonged to a category of people for whom remedies were not realistic.²⁶

1.2 Effective Remedies

Once the African Commission determines that a remedy is available, it will consider whether it is effective.²⁷ Effective remedies are those that offer a prospect of success.²⁸ If the courts are not independent and impartial, if the authorities know of a violation or violations and fail to act, if the victim cannot effectively appeal a ruling, or if the victim has been forced into exile, the African Commission is likely to find the remedies ineffective, even if available.

If a remedy is formally available but the courts are subject to outside influence such that it offers no real prospect of a fair, successful trial, the Commission will deem the remedy ineffective. For instance, if the courts are not independent or impartial due to oversight of the executive branch of the government, which is responsible for the alleged violation, the African Commission will likely find the remedies ineffective.²⁹ However, if there is a chance that the courts are independent and impartial, the complainant should attempt to exhaust.³⁰

In some instances when authorities knew of a violation but failed to act, the Commission determined that the available remedies were ineffective. For example, when the State fails to investigate or prosecute those responsible for alleged violations despite having sufficient notice of the allegations, the Commission will consider the remedies ineffective, although available.³¹ This includes, the Commission has found, when the State has sufficient knowledge about a situation of ongoing human rights violations in its own territory based on, for example, media or UN reports outlining violations; in that case, a

²³ ACommHPR, *Malawi African Association and others v. Mauritania*, Communication Nos. 54/91-61/91-96/93-98/93-164/97-196/97-210/98, Merits Decision, 27th Ordinary Session (2000), para. 85, available at http://www.achpr.org/communications/decision/54.91-61.91-96.93-98.93-164.97_196.97-210.98/.

²⁴ ACommHPR, *Purohit and Moore v. The Gambia*, Communication No. 241/01, Merits Decision, 33rd Ordinary Session (2003), para. 37, available at http://www.achpr.org/files/sessions/33rd/comunications/241.01/achpr33_241_01_eng.pdf.

²⁵ *Id.* at para. 36.

²⁶ *Id.* at para. 35–38.

²⁷ ACommHPR, *Gabriel Shumba v. Zimbabwe*, para. 61.

²⁸ *See id.* at para. 57.

²⁹ ACommHPR, *Article 19 v. Eritrea*, para. 48; *see also* ACommHPR, *Constitutional Rights Project v. Nigeria*, Communication No. 60/91, Merits Decision, 17th Ordinary Session (1995), para. 10, available at <http://www.achpr.org/communications/decision/60.91/>.

³⁰ ACommHPR, *Nixon Nyikadzino (represented by Zimbabwe Human Rights NGO Forum) v. Zimbabwe*, paras. 83–91.

³¹ ACommHPR, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan*, para. 56.

communication may be admissible even when complainants do not take any domestic legal action.³² In these circumstances, the Commission has noted that it is not the victim's task to exhaust domestic remedies, but rather the State's obligation to investigate the violations alleged and to prosecute the persons involved on its own initiative and in accordance to international trial standards.³³

For example, in *Article 19 v. Eritrea*, the African Commission declared a communication admissible after concluding that although domestic remedies were available, they were ineffective given that the State had notice to remedy the situation and did not, allowing the victims to remain in detention without granting access to their legal representatives three years after their arrest.³⁴ The Commission stated that the continuous detention of the victims without access to legal representation or to the domestic courts as a result of the inadequacy of the State's criminal justice system resulted in remedies that even if available, were ineffective and/or insufficient.³⁵

With regard to appeals, the African Commission has stated that to be effective, an appeal must reasonably lead to a reconsideration of the case by a superior jurisdiction that provides all of the necessary guarantees of "good administration of justice."³⁶

1.3 Sufficient Remedies

As stated above, a remedy is considered sufficient if it can redress the violations alleged.³⁷ The African Commission has found remedies that fall short of fully remedying the violation are insufficient. This includes remedies that merely implement mitigating or alternative measures to address the violation and extraordinary remedies that are by nature discretionary and extrajudicial.³⁸ In the case of the former, the African Commission does not consider acquittal measures or measures to repeal a piece of legislation that will not directly affect the violations alleged as sufficient.³⁹

In the case of the latter, the African Commission has repeatedly stated that Article 56(5) refers to remedies that are of a judicial nature and not subject to the discretion of public authorities, thus a complainant is not required to pursue remedies that are extraordinary and of a non-judicial nature.⁴⁰

³² See ACommHPR, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan*, paras. 60–62; ACommHPR, *Article 19 v. Eritrea*, Communication No. 275/03, para. 81.

³³ ACommHPR, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan*, para. 62.

³⁴ ACommHPR, *Article 19 v. Eritrea*, Communication No. 275/03, para. 82.

³⁵ See *id.* at para. 81.

³⁶ ACommHPR, *Amnesty International and Others v. Sudan*, Communication Nos. 48/90-50/91-52/91-89/93, Merits Decision, 26th Ordinary Session (1999), para. 37, available at <http://www.achpr.org/communications/decision/48.90-50.91-52.91-89.93/>.

³⁷ ACommHPR, *Gabriel Shumba v. Zimbabwe*, Communication No. 288/2004, para. 49; ACommHPR, *Sir Dawda K. Jawara v. Gambia*, para. 39.

³⁸ ACommHPR, *Working Group on Strategic Legal Cases v. Democratic Republic of Congo*, Communication No. 259/02, Merits Decision, 14th Extra Ordinary Session (2011), para. 46, available at <http://www.achpr.org/communications/decision/259.02/> (citing ACommHPR, *Civil Liberties Organisation v. Nigeria*, Communication No. 129/94, Merits Decision, 17th Ordinary Session (1995), para. 17); ACommHPR, *Anuak Justice Council v. Ethiopia*, Communication No. 299/05, Admissibility Decision, 39th Ordinary Session (2006), para. 52, available at <http://www.achpr.org/communications/decision/299.05/>.

³⁹ ACommHPR, *Working Group on Strategic Legal Cases v. Democratic Republic of Congo*, para. 43.

⁴⁰ See ACommHPR, *Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Center for the Protection of Human Rights) v. Kenya*, paras. 53–55; ACommHPR, *Alfred B. Cudjoe v. Ghana*, Communication No. 221/98, Admissibility Decision, 25th Ordinary Session (1999), paras. 12–14, available at <http://www.achpr.org/communications/decision/221.98/>.

Extraordinary remedies are those that are purely discretionary and not subject to judicial oversight.⁴¹ A common example of remedies that are purely discretionary and non-judicial is that of pardons which a public authority is responsible for and has sole discretion to administer.⁴²

The African Commission has emphasized that complainants will not be excused from exhausting domestic remedies merely because these seem inconvenient, unattractive, or would not produce a favorable result for the petitioner.⁴³ The Commission has held that merely arguing that local remedies are not likely to be successful is not enough to prove available remedies need not be exhausted.⁴⁴ Thus, a complainant must pursue all remedies that have the slightest likelihood of success. Importantly, if a complainant only exhausts non-judicial remedies, the African Commission will not find that this requirement is met. For example, in *Alfred B. Cudjoe*, the African Commission deemed the communication inadmissible given that the complainant had only submitted a claim before the Ghanaian Human Rights Commission, which is not considered a court of judicial nature.⁴⁵

2. Exceptions to Exhaustion of Domestic Remedies

2.1 Unduly Prolonged Remedies

Article 56(5) provides an exception to the exhaustion of domestic remedies requirement when the domestic procedures have been “unduly prolonged.”⁴⁶ The African Commission has not established standard criteria to determine if a process has been “unduly prolonged;” rather, it has individually analyzed each communication taking into account the political situation of the country,⁴⁷ the country’s judicial history, and the nature of the complaint.⁴⁸

However, in *Zimbabwe Lawyers for Human Rights v. Zimbabwe*, the Commission stated that the common law doctrine of a “reasonable man’s test” could be used to determine what is “unduly prolonged.”⁴⁹ The test asks whether, given the nature and circumstances of a particular case, a reasonable man would find that that delay was *excessive* and if it was, whether there is a *justifiable* reason for prolonging a case.⁵⁰ If there is a justifiable reason for prolonging a case, the Commission

⁴¹ ACommHPR, *Monim Elgak, Osman Hummeida and Amir Suliman v. Sudan*, para. 67.

⁴² ACommHPR, *Working Group on Strategic Legal Cases v. Democratic Republic of Congo*, para. 43.

⁴³ ACommHPR, *Michael Majuru v. Zimbabwe*, paras. 102–03; ACommHPR, *Anuak Justice Council v. Ethiopia*, para. 58.

⁴⁴ ACommHPR, *J.E. Zitha & P.J.L. Zitha v. Mozambique*, Communication No. 361/08, Admissibility Decision, 9th Extraordinary Session (2011), paras. 106–08; ACommHPR, *Anuak Justice Council v. Ethiopia*, paras. 53–55; ACommHPR, *Socio Economic Rights and Accountability Project v. Nigeria*, Communication No. 300/2005, Merits Decision, 5th Extraordinary Session (2008), para. 52, available at <http://www.achpr.org/communications/decision/300.05/>.

⁴⁵ ACommHPR, *Alfred B. Cudjoe v. Ghana*, paras. 12–14.

⁴⁶ African Charter, art. 56(5); ACommHPR, *Zimbabwe Lawyers for Human Rights v. Zimbabwe*, Communication No. 293/2004, Merits Decision, 43rd Ordinary Session (2008), paras. 57–60, available at <http://www.achpr.org/communications/decision/293.04/>.

⁴⁷ See ACommHPR, *Zimbabwe Lawyers for Human Rights v. Zimbabwe*, para. 54.

⁴⁸ See ACommHPR, *Dr. Farouk Mohamed Ibrahim (represented by REDRESS) v. Sudan*, Communication 386/10, Admissibility Decision, 13th Extraordinary Session (2013), available at <http://www.achpr.org/communications/decision/386.10/>; ACommHPR, *Zimbabwe Lawyers for Human Rights v. Zimbabwe*, para. 58; para. 50; ACommHPR, *The Law Office of Ghazi Suleiman v. Sudan*, Communication No. 228/99, Merits Decision, 33rd Ordinary Session (2002), para. 36, available at <http://www.achpr.org/communications/decision/228.99/>.

⁴⁹ ACommHPR, *Zimbabwe Lawyers for Human Rights v. Zimbabwe*, para. 60.

⁵⁰ *Id.* at para. 60 (emphasis added).

stated that it cannot be termed “undue.”⁵¹ Examples of justifiable reasons include civil strife or war in a country, or when the victim, his family, or his representatives “partly caused” the delay.⁵²

The Commission will presume that remedies will be unreasonably prolonged or will not yield results when the State allegedly in violation of the African Charter has adopted ouster decrees suspending the constitution or limiting the national courts’ jurisdiction and nullifying the domestic effect of the African Charter.⁵³ Once a complainant realizes that remedies will be unduly prolonged, the complainant must submit the complaint “*immediately*.”⁵⁴

3. Additional Considerations

3.1 Time Frame for Submitting a Communication

Article 56(6) requires that communications be submitted within a reasonable period of time after local remedies have been exhausted; however the African Charter does not define the time frame that would be considered “reasonable.”⁵⁵ From its practice, the African Commission has been flexible in determining what constitutes a “reasonable period” and will make the determination on a case-by-case basis.⁵⁶ In making its determination, the African Commission has specified that it will focus on when domestic remedies were exhausted or when the complainant realized that domestic remedies were not available, sufficient, or effective—not on the period of time when the allegations were committed.⁵⁷ However, where there is a good and compelling reason for why a complainant did not submit a complaint for consideration within a reasonable amount of time, the African Commission has held that it may nevertheless examine the complaint to ensure fairness and justice.⁵⁸

The African Commission has not established a clear standard on the amount of time between exhaustion of domestic remedies and submission of a communication considered to be unduly prolonged. Taking into consideration “the challenges of the communications system in Africa” and of securing representation for international cases, the African Commission has admitted communications received 10 months after domestic remedies have been exhausted.⁵⁹ Under certain circumstances, it has also admitted communications submitted 16 months after the exhaustion of remedies.⁶⁰ However, the African Commission recently rejected a communication submitted 15 months after domestic remedies

⁵¹ ACommHPR, *Zimbabwe Lawyers for Human Rights v. Zimbabwe*, para. 60.

⁵² *Id.*

⁵³ ACommHPR, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, Communication Nos. 143/95-150/96, Merits Decision, 26th Ordinary Session (1999), paras. 16–18, available at <http://www.achpr.org/communications/decision/143.95-150.96/>; ACommHPR, *Civil Liberties Organisation v. Nigeria*, Communication No. 129/94, Merits Decision, 17th Ordinary Session (1995), paras. 1, 9, available at <http://www.achpr.org/communications/decision/129.94/>.

⁵⁴ ACommHPR, *Nixon Nyikadzino (represented by Zimbabwe Human Rights NGO Forum) v. Zimbabwe*, para. 61 (emphasis in original).

⁵⁵ African Charter, art. 56(6); ACommHPR, *Gabriel Shumba v. Zimbabwe*, para. 44.

⁵⁶ ACommHPR, *Gabriel Shumba v. Zimbabwe*, para. 44.

⁵⁷ ACommHPR, *Dr. Farouk Mohamed Ibrahim (represented by REDRESS) v. Sudan*, para. 71.

⁵⁸ ACommHPR, *Dr. Farouk Mohamed Ibrahim (represented by REDRESS) v. Sudan*, para. 75; ACommHPR, *Michael Majuru v. Zimbabwe*, para. 109.

⁵⁹ ACommHPR, *Egyptian Initiative for Personal Rights and Interights v. Egypt*, Communication No. 334/06, Merits Decision, 9th Extraordinary Session (2011), para. 99, available at <http://www.achpr.org/communications/decision/334.06/>.

⁶⁰ ACommHPR, *Gabriel Shumba v. Zimbabwe*, para. 44.

were exhausted stating that the reasons provided were not sufficiently compelling⁶¹ and has specifically noted that “twenty two (22) months after fleeing the country is clearly beyond a reasonable man’s understanding of a reasonable period of time.”⁶²

Given the uncertainty regarding what constitutes a “reasonable period” and the African Commission’s references to the requirements of the European and Inter-American systems,⁶³ both of which prescribe a six-month limit for a communication to be filed following the exhaustion of domestic remedies, complainants should file a communication as close to the six-month time limit as possible.

3.2 Duplication of Proceedings

The African Charter reflects the principle or prohibition of double jeopardy to ensure that a Member State is not held at fault twice for the same alleged violations of human rights.⁶⁴ Article 56(7) specifically states that the Commission may not consider cases that have been decided by another international, judicial mechanism similar to the Commission, with the ability to grant declaratory or compensatory relief.⁶⁵ Therefore, if a final settlement has been reached on a matter by another international human rights body, the communication will not be admitted.⁶⁶ However, if a matter has only been discussed by a non-judicial international body, the communication may be admissible.⁶⁷

3.3 Burden of Proof

Complainants have the initial responsibility, in their complaints, for describing the steps taken to seek redress at the national level for the alleged violation, or for indicating why domestic remedies were not exhausted, including if they were unduly prolonged. If a State objects to the admissibility of a communication on the grounds that domestic remedies were not exhausted, then the burden shifts to the State to show that local remedies are available, effective, and sufficient and that these have not been exhausted.⁶⁸

II. African Court on Human and Peoples’ Rights

Before submitting an application to the African Court on Human and Peoples’ Rights, complainants⁶⁹ must comply with Article 6(2) of the [Protocol to the African Charter on Human and Peoples’ Rights on](#)

⁶¹ ACommHPR, *Dr. Farouk Mohamed Ibrahim (represented by REDRESS) v. Sudan*, para. 77.

⁶² ACommHPR, *Michael Majuru v. Zimbabwe*, para. 110.

⁶³ See e.g., ACommHPR, *Lawyers for Human Rights (Swaziland) v. The Kingdom of Swaziland*, Communication No. 414/12, Admissibility Decision, 14th Extra Ordinary Session (2013), paras. 43–44, available at <http://www.achpr.org/communications/decision/414.12/>; ACommHPR, *Darfur Relief and Documentation Centre v. Sudan*, Communication No. 310/05, Admissibility Decision, 46th Ordinary Session (2009), paras. 76–78, available at <http://www.achpr.org/communications/decision/310.05/>; ACommHPR, *Michael Majuru v. Zimbabwe*, para. 108.

⁶⁴ ACommHPR, *Bakweri Land Claims Committee v. Cameroon*, Communication No. 260/02, Admissibility Decision, 36th Ordinary Session (2004), para. 52, available at <http://www.achpr.org/communications/decision/260.02/>.

⁶⁵ African Charter, art. 56(7); ACommHPR, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v. Sudan*, para. 105.

⁶⁶ ACommHPR, *Bakweri Land Claims Committee v. Cameroon*, paras. 52–53.

⁶⁷ See ACommHPR, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v. Sudan*, paras. 104–05.

⁶⁸ ACommHPR, *Rencontre Africaine pour la Defense des Droits de l’Homme (RADDHO) v. Zambia*, para. 12.

⁶⁹ In the African System, “complainants” tend to be referred to as “applicants.” However, for consistency purposes, this guide uses the term “complainant” to refer to the alleged victim(s) or their representatives. See *f.n.* 3.

[the Establishment of an African Court on Human and Peoples' Rights](#), which requires the Court to “rule on the admissibility of cases taking into account the provisions of article 56 of the Charter.”⁷⁰ As mentioned above, Article 56(5) requires that complainants exhaust all domestic remedies unless it is obvious that the procedure would be “unduly prolonged.”⁷¹ To meet this requirement, complainants must state that all domestic remedies have been exhausted or explain clearly why the process has been unduly prolonged.⁷²

1. Exhaustion of Domestic Remedies

1.1 Available, Effective, and Sufficient Remedies

The African Court has ruled that complainants are only required to exhaust judicial remedies that meet the availability, effectiveness, and sufficiency criteria.⁷³ Remedies, such as political processes that are not accessible to individuals, discretionary remedies that may be abandoned at any time, or remedies whose outcome depends on the will of the majority, will not be considered available, effective, nor sufficient.⁷⁴

With regard to the availability of a remedy, the African Court also follows the Commission's definition, which requires a remedy to be accessible to the complainant “without any impediment” in order for it to be considered available.⁷⁵ Further, the African Court has held that complainants are required to exhaust remedies so long as such remedies “exist” for the particular complainant. For example, where a complainant would not have legal standing to pursue an action pursuant to the national legislation, the African Court will not require the complainant to exhaust domestic remedies given that remedies do not “exist” for the complainant.⁷⁶

The African Court has analyzed the **availability** of remedies in the context of a State's time limit for submitting an appeal. In *Lohe Issa Konate v. Burkina Faso*, the African Court established that a time limit to appeal of five days, though short, is not an obstacle that causes an impediment for the complainant. See AfCHPR, *Lohe Issa Konate v. Burkina Faso*, App. No. 004/2013, Judgment of 5 December 2014, paras. 96-107.

⁷⁰ Protocol Establishing the African Court, art. 6(2); AfCHPR, *Tanganyika Law Society, Legal and Human Rights Centre v. Tanzania*, App. Nos. 009/2011 & 011/2011 (joined), Judgment of 14 June 2013, para. 80.1, available at <http://www.african-court.org/en/index.php/55-finalised-cases-details/844-app-nos-009-011-2011-tanganyika-law-society-and-legal-and-human-rights-centre-and-reverend-christopher-r-mtikila-v-united-republic-of-tanzania-details>; AfCHPR, *Frank David Omary and Others v. Tanzania*, App. No. 001/2012, Judgment of 28 March 2014, para. 85, available at <http://en.african-court.org/index.php/49-41st-ordinary-session/770-appl-no-001-2012-frank-david-omary-and-others-v-the-republic-of-tanzania-2>; AfCHPR, *Peter Joseph Chacha v. Tanzania*, App. No. 003/2012, Judgment of 28 March 2014, para. 142, available at <http://www.african-court.org/en/index.php/55-finalised-cases-details/850-app-no-003-2012-peter-joseph-chacha-v-united-republic-of-tanzania-details>.

⁷¹African Charter, art. 56(5); AfCHPR, *Frank David Omary and Others v. Tanzania*, para. 98.

⁷² African Charter, art. 56(5); AfCHPR, *Frank David Omary and Others v. Tanzania*, paras. 137–38.

⁷³ See AfCHPR, *Frank David Omary and Others v. Tanzania*, para. 99; AfCHPR, *Tanganyika Law Society, Human Rights Centre & Rev. Christopher Mtikila v. Tanzania*, para. 82(1-3).

⁷⁴ AfCHPR, *Tanganyika Law Society, Human Rights Centre & Rev. Christopher Mtikila v. Tanzania*, para. 82(3).

⁷⁵ AfCHPR, *Lohe Issa Konate v. Burkina Faso*, App. No. 004/2013, Judgment of 5 December 2014, para. 96, available at <http://en.african-court.org/index.php/55-finalised-cases-details/857-app-no-004-2013-lohe-issa-konate-v-burkina-faso-details>.

⁷⁶ AfCHPR, *Norbert Zongo v. Burkina Faso*, App. No. 013/11, Judgment of 21 June 2013, paras. 107–12, available at <http://en.african-court.org/images/Cases/Judgment/Nobert%20Zongo%20Judgment-%20English.pdf>; see also

Similar to the African Commission’s definition, the African Court has held that an effective remedy is one that “produces the expected result . . . measured in terms of its ability to solve the problem raised by the complainant.”⁷⁷ This requirement excludes extraordinary remedies; thus, only judicial remedies that constitute an effective means of redressing human rights violations have to be exhausted.⁷⁸ In *Alex Thomas v. Tanzania*, the African Court further clarified that when an “application for review is an extraordinary remedy because the granting of leave by the Court of Appeal to file an application for review of its decision is based on specific grounds and . . . is granted at the discretion of the Court” the complainant does not have to exhaust that remedy.⁷⁹

The Court has only issued a limited number of decisions regarding the exhaustion of domestic remedies requirement; however, it often relies on the African Commission’s jurisprudence regarding the availability, effectiveness, and sufficiency of a local remedy.⁸⁰ Complainants should refer to the Commission’s criteria described above for further guidance.

2. Exceptions to Exhaustion of Domestic Remedies

2.1 Unduly Prolonged Remedies

If the procedure of a remedy is “unduly prolonged,” the African Court will excuse the complainant from having to exhaust domestic remedies. To determine whether a procedure has been “unduly prolonged,” the African Court will focus on the time frame from when the local remedy procedure is deemed to have started, which begins on the date when the State’s judicial system begins dealing with the issue.⁸¹ Although there is no set time limit for establishing that a procedure falls within the “unduly prolonged” exception, the African Court will follow the African Commission’s “reasonable man’s test” when making its assessment.⁸²

In some cases, the African Court will monitor the progress of various applications through a State’s national courts to assess whether a particular application has been unduly prolonged in comparison to other applications.⁸³ For example, in *Peter Joseph Chacha*, the African Court reviewed several applications before Tanzania’s High Court between a two-year time period to gauge the average duration of each application before the court.⁸⁴ After reviewing these applications, the African Court concluded that a process that lasts more than two years is not “unduly prolonged.”⁸⁵

ACommHPR, *Media Rights Agenda v. Nigeria*, App. No. 224/98, Judgment of 6 November 2000, paras. 36–39, available at <http://www.achpr.org/communications/decision/224.98/>.

⁷⁷ AfCHPR, *Onyango Nganyi & 9 Others v. Tanzania*, App. No. 006/2013, Judgment of 18 March 2016, para. 89, available at <http://www.african-court.org/en/index.php/library/53-40th-ordinary-session/824-app-no-006-2013-wilfred-onyango-nganyi-9-others-v-united-republic-of-tanzania> (citing AfCHPR, *Norbert Zongo v. Burkina Faso*, App. No. 013/11, Judgment of 28 March 2014, para. 68).

⁷⁸ See AfCHPR, *Tanganyika Law Society, Human Rights Centre & Rev. Christopher Mtikila v. Tanzania*, para. 82(3); AfCHPR, *Urban Mkandawire v. Malawi*, App. No. 003/2011, Judgment of 21 June 2013, para. 38.1, available at <http://en.african-court.org/index.php/55-finalised-cases-details/835-app-no-003-2011-urban-mkandawire-v-republic-of-malawi-details>.

⁷⁹ AfCHPR, *Alex Thomas v. Tanzania*, App. No. 005/2013, Judgment of 20 November 2015, para. 63, available at <http://en.african-court.org/index.php/55-finalised-cases-details/858-app-no-005-2013-alex-thomas-v-united-republic-of-tanzania-details>.

⁸⁰ See e.g., *Peter Joseph Chacha v. Tanzania*, paras. 144–45.

⁸¹ AfCHPR, *Norbert Zongo v. Burkina Faso*, para. 104.

⁸² AfCHPR, *Onyango Nganyi & 9 Others v. Tanzania*, para. 92.

⁸³ AfCHPR, *Peter Joseph Chacha v. Tanzania*, para. 147.

⁸⁴ *Id.* at paras. 147–48.

There are limited examples addressing the number of years that would constitute an “unduly prolonged” determination; however, the African Court has concluded that a period of over seven years is unduly prolonged and did not require complainants to exhaust the domestic remedies that were still available.⁸⁶ Similarly, in *Onyango Nganyi & 9 Others*, the African Court held that the continuation of domestic proceedings 10 years after they started constituted undue delay.⁸⁷

3. Additional Considerations

3.1 Time Frame for Submitting an Application

Article 56(6) of the African Charter does not specify a timeline for submitting a case to the Court. However, Rule 40(6) of the [Rules of Court](#) refers to a “reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized of the matter.”⁸⁸ In analyzing what constitutes a reasonable time within the meaning of Article 56(6) of the Charter, the African Court has stated that the “reasonableness of the timeline for referrals to it depends on the circumstances of each case and must be assessed on a case-by-case basis.”⁸⁹

In *Tanganyika Law Society, Human Rights Centre & Rev. Christopher Mtikila v. Tanzania*, the African Court held that applications filed about one year from the date of the judgment of an appellate domestic court is not “unreasonably long.”

In particular, the Court has allowed for complaints submitted to it three years after the alleged violation to be admitted when the complainant is imprisoned and indigent. In *Mohamed Abubakari v. Tanzania*, the African Court held that an application received three years after the alleged violation was “reasonable within the meaning of Article 56(6) of the Charter.”⁹⁰ In that case, the Court considered the fact that the complainant was in prison,

illiterate, unaware of the existence of the Court given its recent establishment, and the fact that he was indigent and could not pay for a lawyer nor had access to free legal assistance.⁹¹ Similarly, in *Alex Thomas v. Tanzania*, the African Court concluded that three years and five months was a reasonable time for submitting an application considering that the complainant in that case was an indigent, incarcerated person, who had attempted to use extraordinary measures.⁹²

⁸⁵ *Id.* at para. 148.

⁸⁶ AfCHPR, *Norbert Zongo v. Burkina Faso*, paras. 105–06.

⁸⁷ AfCHPR, *Onyango Nganyi & 9 Others v. Tanzania*, para. 94.

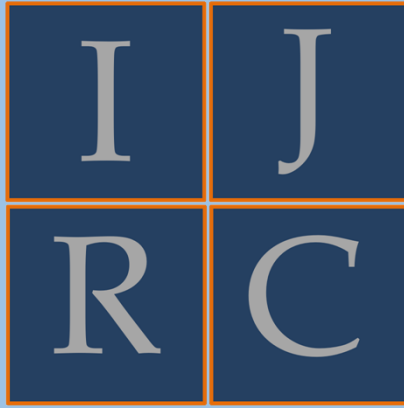
⁸⁸ AfCHPR, Rules of Court, rule 40(6).

⁸⁹ AfCHPR, *Mohamed Abubakari v. Tanzania*, App. No. 007/2013, Judgment of 3 June 2016, para. 91, available at <http://en.african-court.org/index.php/55-finalised-cases-details/860-app-no-007-2013-mohamed-abubakari-v-united-republic-of-tanzania-details>.

⁹⁰ AfCHPR *Mohamed Abubakari v. Tanzania*, paras. 90–94.

⁹¹ *Id.* at para. 92.

⁹² AfCHPR, *Alex Thomas v. Tanzania*, para. 74.



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