

The African Commission on Human and Peoples' Rights and the exhaustion of local remedies under the African Charter

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SUMMARY

This article examines the question of the exhaustion of local (or domestic) remedies under article 56(5) of the African Charter on Human and Peoples' Rights. Analysing the jurisprudence of the African Commission on Human and Peoples' Rights, the contribution examines issues involving the availability and effectiveness of local remedies. Attention is given to issues such as exceptions to the requirement to use local recourse in the event of massive violations, the absence of local remedies and 'ouster clauses'.

1 Introduction

The African Charter on Human and Peoples' Rights (African Charter or Charter)¹ has over the past 20 years reflected efforts by a continent to grapple with concerns over human rights. The Charter, as is the case with international and other regional treaties, envisages scrutiny by treaty organs over state conduct that is in violation of human and peoples' rights. The primary organ for monitoring and protecting human (and peoples') rights under the Charter is the African Commission on Human and Peoples' Rights (African Commission or

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¹ African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/3, rev 5, 27 June 1981.

Commission).² Under the Charter, the Commission is expected to perform a multiplicity of functions, amongst which is a protectionist role in the form of receiving communications on allegations of violations of human and peoples' rights.³ Invariably, the performance of this function by the Commission entails scrutiny of incidents and situations obtaining within the domestic legal order of the states that are party to the Charter. Of significance is the fact that the principle that human rights are not the preserve of the 'domestic jurisdiction of states' has been readily admitted and affirmed by the Commission.⁴

However, a critical issue has been the rationale behind the need to allow the domestic legal order the first opportunity to address and remedy any alleged violations of human rights. This issue has been reflected in the criteria for the admissibility of communications and more specifically in the requirement that local remedies must be exhausted. This requirement, which must be met for a communication to be receivable by the Commission, is an explication of a general principle of international law⁵ that has since found its way into provisions of the various human rights treaties⁶ and ultimately in the jurisprudence of international and regional human rights organs.

Under the African Charter, the exhaustion of local remedies rule is applicable in respect of both communications by state parties and the so-called 'other communications' under articles 47 and 55 respectively. The latter has largely underpinned communications by entities such as individuals and non-governmental organisations (NGOs). With regard to communications by the state parties, article 50 of the Charter provides:

² On the establishment of the African Commission on Human and Peoples' Rights, see art 30 of the African Charter. The primacy and exclusivity of the Commission as the mechanism for protection and enforcement has since been supplemented by a proposed court: See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, adopted in 1998, not yet in force. As of 28 February 2003, six states — Burkina Faso, The Gambia, Mali, Senegal, South Africa and Uganda — had ratified the Protocol.

³ n 1 above, arts 47 & 55.

⁴ Communications 137/94, 139/94, 154/96 & 161/97, *International Pen and Others (on behalf of Saro-Wiwa Jr) v Nigeria (Ken Saro-Wiwa case)*, Twelfth Annual Activity Report, para 116. This contrasts with the European organs that were in the early years dogged by debate and controversy over the so-called 'reserved domain of domestic jurisdiction'. See eg *Belgian Linguistics case (Preliminary Objections)* (1967) EHRR Ser A 16–19.

⁵ The rule is and remains the basis of diplomatic protection in international law; eg *Case of Certain Norwegian Loans (France v Norway)* (1957) ICJ Rep 9; *Interhandel case (Switzerland v United States)* (1959) ICJ Rep 6. For a recent postulation of the rule: ILC Draft Articles on State Responsibility, art 44(b) (2001) ILC Rep, GAOR, 56th sess, supp 10, (A/56/10), chap IV.E.1.

⁶ On the regional human rights treaties: eg European Convention for the Protection of Human Rights and Fundamental Freedoms, art 35; American Convention on Human Rights, art 46(1)(a).

The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.

In respect of the 'other communications', article 56(5) of the Charter uses almost similar language — these are receivable to be considered by the Commission if they are, *inter alia*, 'sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'. This rule is further embodied in the Rules of Procedure of the African Commission in respect of communications under article 55 of the Charter.⁷ With only one communication having been brought by a state party to date,⁸ most of the communications have been those under article 55, and the jurisprudence of the Commission has in effect necessarily been in respect of article 56(5).

This article examines the manner in which the Commission has since construed this significant aspect of its mandate in respect of the protection of human and peoples' rights in Africa. The Commission's conceptualisation of the exhaustion of local remedies rule, as embodied in the Charter, is examined in comparison with the approaches by international and other regional human rights enforcement organs.

2 Primacy of the domestic legal order over allegations of violations of human rights

Article 56 of the African Charter — and the Commission in certain decisions — uses the phraseology 'received' and 'receivable' in respect of what is traditionally the criteria for the admissibility of claims in the international plane.⁹ Of these criteria, the most pivotal is that of the exhaustion of local remedies. The rationale for the local remedies rule has traditionally been to enable a state to deal with a claim brought against it using the judicial and administrative mechanisms within its domestic

⁷ Rules of Procedure of the African Commission on Human and Peoples' Rights, 1995, rule 104(1)(f).

⁸ Communication 227/99, *Democratic Republic of the Congo v Burundi, Rwanda and Uganda*. As of 28 February 2003, the communication had not been finalised.

⁹ However, the phraseology 'irreceivable' is best applicable to communications brought against states not party to the Charter, while 'inadmissible' to communications that do not satisfy the criteria under art 56. See F Viljoen 'Admissibility under the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986–2000* (2002) 61–63. For an overview of issues of admissibility under the Charter, see O Gye-Wado 'The rule of admissibility under the African Charter on Human and Peoples' Rights' (1991) 2 *African Journal of International and Comparative Law* 742; EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedures* (1996) 61.

legal order.¹⁰ In *World Organisation against Torture and Others v Zaire*, the Commission stated the *raison d'être* of the rule in the following terms:¹¹

The requirement of exhaustion of local remedies is founded on the principle that a government should have notice of human rights violation in order to have the opportunity to remedy such violations before being called before an international body.

In *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*, the Commission reiterated the import of the rule in similar terms:¹²

The rule requiring the exhaustion of local remedies as a condition of the presentation of an international claim is founded upon, amongst other principles, the contention that the respondent state must first have an opportunity to redress by its own means within the framework of its own domestic legal system, the wrong alleged to have been done to the individual.

In essence, the Commission has taken cognisance of the fact that the intention of the Charter is not to destroy the principle of the sovereignty of states. In light of this fact, the Commission has declared as inadmissible communications that have been filed before or without having exhausted the available local remedies. This has been the case where no 'sufficient information' has been given by a complainant in his or her communication, or in respect of subsequent requests by the Commission, as to the exhaustion of local remedies. In *Dumbaya v The Gambia*, the communication only mentioned the complainant's dismissal from government service and an attempt to seek an explanation from the Public Service Commission. After receiving no response, on two occasions, to requests for further information on the exhaustion of local remedies, the Commission pointedly stated that:¹³

The complainant has failed or neglected to respond to two requests by the Commission for information on whether all local remedies have been exhausted . . . In the circumstances the Commission . . . declare[s] the

¹⁰ See in this regard: *Ambatielos Arbitration (Greece/Great Britain)* (1956) 12 RIAA 83. This rationale has since been affirmed in decisions of the human rights organs, eg under the European system: *De Wilde, Ooms & Versyp v Belgium (No 1)* (1974) 56 ILR 336.

¹¹ Communications 25/89, 47/90, 56/91 & 100/93, *World Organisation against Torture and Others v Zaire (Zaire mass violations case)*, Ninth Annual Activity Report, para 36.

¹² Communication 71/92, *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia (Zambian expulsion case)*, Tenth Annual Activity Report, para 11.

¹³ Communication 127/94, *Dumbaya v The Gambia (Dumbaya case)*, Eighth Annual Activity Report, paras 2 & 3. See also Communication 8/88; *Buyingo v Uganda*, Eighth Annual Activity Report, paras 3 & 4; Communication 43/90, *Union des Scolaires Nigeriens and Another v Niger*, Seventh Annual Activity Report, para 8; Communication 53/91, *Capitao v Tanzania (Capitao case)*, Eighth Annual Activity Report, para 3; Communication 138/94, *International Pen (on behalf of Senn and Another) v Côte d'Ivoire*, Eighth Annual Activity Report, para 3; Communication 201/97, *Egyptian Organisation for Human Rights v Egypt*, Thirteenth Annual Activity Report, para 15; Communication 209/97, *Africa Legal Aid v The Gambia*, Thirteenth Annual Activity Report, para 15; Communication 230/99, *Sakwe v Cameroon*, Fourteenth Annual Activity Report, para 19.

communication inadmissible on account of lack of exhaustion of local remedies.

On the other hand, where there are cases pending before the domestic courts, such communications have been treated as inadmissible. The Commission has in most of such instances been availed information of the pending cases, although at times with no further information as to their status before the domestic courts. It is to be noted that in respect of such communications, the Commission has nonetheless advised that they could be re-submitted after the claims before the domestic courts had taken their course without any satisfactory remedy.¹⁴ More crucially, the Commission has had to reflect upon the wording 'if any' in article 56(5) of the Charter, whose import is that the remedies must be in *existence* or *available* within the domestic legal order. Furthermore, it is necessary that the remedies are not only available but also *effective*.

3 Availability and effectiveness of domestic remedies

The exhaustion of local remedies rule requires that the remedies within the national legal order of a state are available and effective. In the *Zambian expulsion* case, the Commission observed that the exhaustion of local remedies rule 'does not mean, however, that complainants are required to exhaust any local remedy which is found to be, as a practical matter, *unavailable* or *ineffective*'.¹⁵ The availability and effectiveness of local remedies has in fact been pronounced upon by the European Court of Human Rights in *De Jong, Baljet & van den Brink v The Netherlands*.¹⁶

The only remedies which . . . [are required] to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness.

In this regard, the African Commission has on several occasions declared domestic remedies unavailable or ineffective. This has particularly been the case where the remedy was in its view non-judicial or discretionary or its accessibility had been negated by ousting of the jurisdiction of the courts. In *Constitutional Rights Project v Nigeria*, the Robbery and Firearms (Special Provision) Decree of 1984 did not allow for judicial appeals against decisions of a special tribunal, but left the sentences of

¹⁴ *Capitao case* (n 13 above) para 3. See also Communication 198/97, *SOS-Eslaves v Mauritania*, Twelfth Annual Activity Report, para 18.

¹⁵ *Zambian expulsion case* (n 12 above) para 11 (my emphasis).

¹⁶ *De Jong, Baljet & van den Brink v The Netherlands* (1984) 8 EHRR 20, para 39. This pronouncement has since been adopted *verbatim* by the African Commission in one of its decisions, Communications 147/95 & 149/96 *Jawara v The Gambia* (*Gambian coup case*), Thirteenth Annual Activity Report, para 35.

the tribunal subject to confirmation or disallowance by the governor of a state. The Commission considered this remedy as discretionary and non-judicial and therefore not one of a nature that required exhaustion for its attendant lack of effectiveness:¹⁷

The Robbery and Firearms Act entitles the Governor of a state to confirm or disallow the conviction of the Special Tribunal . . . This power is to be described as a discretionary extraordinary remedy of a non judicial nature. The object of the remedy is to obtain a favour and not to vindicate a right. It would be improper to insist on the complainants seeking remedies from sources which do not operate impartially and have no obligation to decide according to legal principles. The remedy is neither adequate nor effective . . . Therefore, the Commission is of the opinion that the remedy available is not of a nature that requires exhaustion according to article 56, paragraph 5 of the African Charter.

In *Achuthan and Another (on behalf of Banda and Others) v Malawi*, the likely remedy was also regarded as largely discretionary where the complainant, Aleke Banda, was being held on executive orders of the head of state.¹⁸ In another case, that of *Courson v Equatorial Guinea*, although an appeal had been lodged, the fact that the victim had been granted amnesty led the Commission to conclude that 'it appears most unlikely for any domestic court to entertain this appeal as this would only be a purely theoretical exercise'.¹⁹ Further, in *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi*, in response to the argument by the state party that the complainant had not exhausted other remedies including the plea for pardon, the Commission remarked that a '[pardon] is not a judicial remedy'.²⁰ What is therefore apparent from the

¹⁷ Communication 60/91, *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria (Robbery and Firearms Decree case)*, Eighth Annual Activity Report, paras 9–11. The Commission took a similar view in the case of Communication 87/93, *Constitutional Rights Project (in respect of Lekwot & Others) v Nigeria*, Eighth Annual Activity Report, regarding the Civil Disturbances (Special Tribunal) Act of 1987 under which the Armed Forces Ruling Council was empowered to confirm or disallow penalties of a special tribunal; paras 6–9. See also Communication 151/96, *Civil Liberties Organisation v Nigeria*, Thirteenth Annual Activity Report, paras 11–16.

¹⁸ Communication 64/92, 68/92 & 78/92, *Achutan (on behalf of Banda) and Another (on behalf of Chirwa and Another) (Chirwa case)*, Eighth Annual Activity Report, para 1.

¹⁹ Communication 144/95, *Courson v Equatorial Guinea*, Eleventh Annual Activity Report, para 16. Notably, the Commission determined that no violation of the Charter had occurred as it had not been provided with 'sufficient enough information' to that effect. Whether the grant of amnesty itself foreclosed a claim for damages as an appropriate remedy to the victim has been questioned, see I Osterdahl *Implementing human rights in Africa: The African Commission on Human and Peoples' Rights and individual communications* (2002) 84. In a subsequent decision, the Commission considered an amnesty law adopted by the Mauritanian legislature as foreclosing 'suits or other actions seeking redress that may be filed by the victims or their beneficiaries': Communication 54/91, 61/91, 98/93, 164/97 & 210/98, *Malawi African Association and Others v Mauritania (Mauritanian widows case)*, Thirteenth Annual Activity Report, para 83 (my emphasis).

²⁰ Communication 231/99, *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi (Burundian fair trial case)*, Fourteenth Annual Activity Report, para 23.

jurisprudence of the Commission is that, for the domestic remedy to be effective, firstly, it must be of a 'judicial' nature and must be founded upon 'legal' principles. Secondly, it is evident that any influence or intervention on the part of the executive organ of the state party renders an otherwise available domestic remedy ineffective. These two aspects have since been clearly stated in *Amnesty International and Others v Sudan* where the Commission observed that:²¹

In a case of violations against identified victims, the Commission demands the exhaustion of all internal remedies, if any, if they are of a *judicial nature*, are effective and are not subordinated to the *discretionary power* of public authorities.

Thirdly, it is evident that the Commission adopts an objective test in determining whether domestic remedies exist and are effective, rather than a subjective test based on the perception of the complainant as to the existence or effectiveness of those remedies — thus its reluctance to pronounce on the non-effectiveness of the local remedies in the *Kenya Human Rights Commission v Kenya*.²²

The inaccessibility of domestic remedies as a result of the ouster of the jurisdiction of the courts was considered in the 1991 case of *Civil Liberties Organisation v Nigeria*,²³ where the State Security and Detention of Persons Decree granted immunity from legal proceedings before the courts for human rights violations arising from anything done in pursuance of the decree. The local remedies rule invariably applies to remedies that are available and effective but further, in terms of article 56(5) of the Charter, whose procedure is not unduly prolonged. This is a facet of the rule requiring an individual to utilise the procedures that exist for the obtaining of a remedy unless it is evidently *futile* or *prolonged* to do so. The Commission has, in certain cases, considered the ouster clauses in domestic legislation as rendering local remedies not only likely to be *ineffective* but also *unduly prolonged*. In a subsequent 1994 case of *Civil Liberties Organisation v Nigeria*, the Commission took this view on the ousting of the jurisdiction of courts by the Political Parties (Dissolution) Decree of 1993:²⁴

The communication meets all the specifications for admissibility set out in Article 56 of the Charter. With specific reference to Article 56(5), the

²¹ Communication 48/90, 50/91, 52/91 & 89/93, *Amnesty International and Others v Sudan* (*Sudan detention without trial case*), Thirteenth Annual Activity Report, para 31 (my emphasis).

²² Communication 135/94 (*Kenya Human Rights Commission case*), Ninth Annual Activity Report, para 16. On the objective test applied by the African Commission and other human rights bodies in determining the existence and effectiveness of local remedies, see Viljoen (n 9 above) 85–86.

²³ Communication 67/91, *Civil Liberties Organisation v Nigeria*, Seventh Annual Activity Report.

²⁴ Communication 129/94, *Civil Liberties Organisation v Nigeria* (*Nigerian legality of decrees case*), Ninth Annual Activity Report, para 9.

Commission accepted the complainant's argument that since the decrees complained of ousted the jurisdiction of the courts to adjudicate their validity, 'it is reasonable to presume that domestic remedies will not only be prolonged but are certain to yield no results'.

Noticeably, most of the cases involving ouster of the jurisdiction of the courts have been those brought against Nigeria. These cases demonstrate the tendency among African governments, especially military regimes, to trample upon the rights of citizens, particularly the freedoms of expression, assembly and association and the right to a fair trial, through legislative deprivation of any remedial recourse to the courts.²⁵ In the subsequent cases brought against Nigeria, the Commission has observed that ouster clauses rendered domestic remedies 'non-existent, ineffective or illegal or illusory', and did 'create a legal situation in which the judiciary can provide no check on the executive branch of government'.²⁶ In the *Nigerian media* case, the Commission took cognisance of the fact that the Newspaper Decree of 1993 had been declared null and void by the Lagos state courts, which decisions were not respected by the Nigerian government.²⁷ The Commission observed:²⁸ '[t]his is a dramatic illustration of the futility of seeking a remedy from the Nigerian courts'. The ouster clauses have had the effect of removing the power of the courts to review the decrees of the military regime in Nigeria or, more specifically, the power of the courts to grant judicial remedies. In another case against Nigeria, the Commission observed that the effect of the State Security (Detention of Persons) Amended Decree of 1994 was to prohibit courts in Nigeria from issuing a writ of *habeas corpus* — the Commission thus concluded that 'even the remedy of *habeas corpus* does not exist'.²⁹ In more recent decisions, the Commission took

²⁵ Account of Internal Legislation of Nigeria and the Dispositions of the African Charter on Human and Peoples' Rights, second extraordinary session, Kampala, 18–19 December 1995, Doc II/ES/ACHPR/4.

²⁶ *Ken Saro-Wiwa* case (n 4 above) para 76. See also Communications 105/93, 128/94, 130/94 & 152/96, *Media Rights Agenda and Others v Nigeria* (*Nigerian media* case), Twelfth Annual Activity Report, para 50; Communication 102/93, *Constitutional Rights Project and Another v Nigeria*, Twelfth Annual Activity Report, para 41; Communications 140/94, 141/94 & 145/95, *Constitutional Rights Project and Others v Nigeria*, Thirteenth Annual Activity Report, paras 29, 31; Communications 143/95 & 150/96, *Constitutional Rights Project and Another v Nigeria* (*Nigerian habeas corpus case*), Thirteenth Annual Activity Report, para 18; Communication 151/96, *Civil Liberties Organisation v Nigeria*, Thirteenth Annual Activity Report, para 14.

²⁷ n 26 above, paras 50–51.

²⁸ As above, para 51. For an exposition of the futility of orders of the courts in Nigeria, see M Ongungbe 'Ouster clauses and disobedience of court orders in Nigeria: A judicial impediment' (1999) 5(2) *East African Journal of Peace and Human Rights* 196.

²⁹ Communication 153/96, *Constitutional Rights Project v Nigeria* (*Nigerian detention without trial* case), Thirteenth Annual Activity Report, paras 9–10. In Communication 148/96, *Constitutional Rights Project v Nigeria*, Thirteenth Annual Activity Report, it was noted by the Commission that 'no matter how meritorious the victims' case for freedom may be the courts cannot entertain it [as their jurisdiction was ousted]': para 11.

constructive notice of the prevailing situation under the military regime in Nigeria, which had occasioned 'lack of *available* and *effective* domestic remedies for human rights violations in Nigeria',³⁰ and to that end, it has deemed it not 'proper to insist on the fulfilment of this requirement [on the exhaustion of local remedies]'.³¹

In spite of the subsequent transition to democratic governance in Nigeria, the nemesis of ouster clauses remained resilient, with the phenomenon since being manifested in the constitutional legal framework. The new federal Constitution of 1999 provides that no legal action can be brought to challenge 'any existing law made on or after 15 January 1966 for determining any issue or question as to the competence of any authority or person to make any such law'.³² In response to this new manifestation of the ouster clause within the constitutional legal framework itself, the Commission has remarked: '[t]his means that there is no recourse within the Nigerian legal system for challenging the legality of any unjust laws', and in that regard, concluded that 'there were no avenues for exhausting local remedies'.³³ The major significance though is the fact that these cases reflect a deliberate and flagrant adoption of legislative measures by a state party to negate, rather than give effect, to the substantive rights enshrined in the African Charter.³⁴ It may be pointed out that in all these cases, after a determination on the inapplicability of the exhaustion of local remedies rule, the Commission went on to find the state party, Nigeria, to be in violation of the substantive rights and freedoms under the Charter.³⁵

Overall, the ouster clauses have had the effect of denying or preventing access by the individual to the remedies under domestic law

³⁰ Communication 215/98, *Rights International v Nigeria (Nigerian torture case)*, Thirteenth Annual Activity Report, para 23 (my emphasis).

³¹ Communication 205/97, *Aminu v Nigeria (Aminu case)*, Thirteenth Annual Activity Report, para 13; Communication 155/96, *The Social and Economic Rights Action Center and Another v Nigeria*, Fifteenth Annual Activity Report, para 41. These cases were decided after the *Nigerian torture case* (n 30 above).

³² Constitution of the Federal Republic of Nigeria, 1999, art 6(6)(d).

³³ Communication 218/98, *Civil Liberties Organisation and Others v Nigeria*, Fourteenth Annual Activity Report, para 23; Communication 224/98, *Nigeria Rights Agenda v Nigeria (Editor of 'The Diet' case)*; Communication 225/98, *Huri-Laws v Nigeria (Civil Liberties Organisation case)*, Fourteenth Annual Activity Report, paras 38–39.

³⁴ This would in itself be in contravention of the spirit of art 1 of the Charter.

³⁵ See eg *Robbery and Firearms Decree case* (n 17 above), the Commission considered the ouster of jurisdiction of the courts as a violation of the 'right to appeal to a competent court' guaranteed under art 7(1) as well as leaving un-redressed the rights to life and liberty under arts 4 and 6 due to the non-access to the courts (n 17 above paras 13 & 14). In the *Legality of Decrees case*, the ouster was similarly held to violate art 7(1) (paras 16–20). In the *Nigerian media case* the Commission found a violation of art 7(1) as well as art 9 (para 82). In Communication 206/97, *Centre for Free Speech v Nigeria* (case, a violation of arts 6 and 7 was found by the Commission (paras 11–16).

by making them unavailable and non-existent.³⁶ The Commission has since defined the criteria for the application of the local remedies rule as entailing the remedy being 'available, effective and sufficient'.³⁷ Of these criteria, the Commission has explained that:³⁸

[a] remedy is considered *available* if the petitioner can pursue it without impediment, it is deemed *effective* if it offers a prospect of success, and it is found *sufficient* if it is capable of redressing the complaint.

In light of these criteria, the Commission considers the ouster clauses as negating the availability and effectiveness of local remedies:³⁹

[A] remedy is considered *available* only if the applicant can make use of it in the circumstance of his case . . . [R]emedies, the *availability* of which is not evident, cannot be invoked by the State to the detriment of the complainant. Therefore, in a situation where the jurisdiction of the courts have been ousted by decrees whose validity cannot be challenged or questioned, as is the position with the case under consideration, local remedies are deemed not only to be *unavailable* but also *non-existent*.

It can be said that the inaccessibility of remedies in the national legal orders as a result of ouster clauses and the creation of special tribunals has coincided with the Commission's finding of violations of the right to a fair trial guaranteed under article 7 of the Charter and, in a number of communications, a failure to secure independent and competent national organs as required under article 26 of the Charter. With regard to article 26 of the Charter, the Commission has regarded ouster clauses in domestic laws to constitute a failure to afford protection [to] the courts as *institutions* which give meaning and content to the *right to access national remedies* and which 'have traditionally been the bastion of protection of individual's rights against abuses of state power'.⁴⁰

On the other hand, the Commission has been confronted with instances where a complainant has been *prevented* from utilising local remedies owing to non-legal factors such as flight from the territory of a state party, which renders it physically dangerous for the complainant to return and bring an action before the courts of the country of flight. In such instances, the Commission has declared remedies to be unavailable and the local remedies rule to be inapplicable. In *Abubakar v Ghana*, the complainant, a Ghanaian citizen resident in Côte d'Ivoire claimed

³⁶ In effect, the Commission's jurisprudence seems to have come close to an exception specifically stipulated under art 46(2) of the American Convention which provides that the local remedies rule would not be applicable where '... (b) the party alleging violation of his rights has been *denied* access to the remedies under domestic law or has been *prevented* from exhausting them' (my emphasis).

³⁷ *Gambian coup* case (n 16 above) para 31.

³⁸ As above, para 32 (original italics). See also the *Sudan detention without trial* case (n 21 above) para 37.

³⁹ As above, paras 33–4, 38 (my emphasis).

⁴⁰ *Nigerian legality of decrees* case (n 24 above) para 15 (my emphasis). See also *Civil Liberties Organisation* case (n 33 above) paras 45–46.

inability to return to Ghana for fear of persecution. The Commission treated his situation as one in which the complainant was prevented from utilising local remedies:⁴¹

In this case, the complainant is residing outside the State against which the communication is addressed and thus where the remedies would be available. He escaped to Côte d'Ivoire from prison in Ghana and has not returned there. Considering the nature of the complaint, it would not be logical to ask the complainant to go back to Ghana in order to seek a remedy from national legal authorities. Accordingly, the Commission does not consider that local remedies are available for the complainant.

In the *Gambian coup* case, the complainant, a former head of state, could not return in the wake of his overthrow and trial *in absentia* and a general situation of terror and intimidation obtaining in The Gambia. In light of these facts, the Commission remarked that:⁴²

[I]f the applicant can not turn to the judiciary of his country because of generalised fear for his life (or even those of his relatives), local remedies would be considered to be unavailable to him . . . The complainant in this case had been overthrown by the military, he was tried *in absentia*, former Ministers and Members of Parliament of his government have been detained and there was terror and fear for lives in the country. It would be an affront to common sense and logic to require the complainant to return to his country to exhaust local remedies . . . There is no doubt that there was a generalised fear perpetrated by the regime as alleged by the complainant. This created an atmosphere not only in the mind of the author but also in the minds of right thinking people that returning to his country at that material moment, for whatever reason, would be risky to his life. Under such circumstances, domestic remedies cannot be said to have been available to the complainant.

In situations where there is no adequate or effective remedy available to a complainant, the Commission has since considered there to have been a *constructive* exhaustion of domestic remedies. In the *Nigerian torture* case, the Commission found Mr Wiwa's inability to pursue any local remedies following his flight for fear of his life to Benin and subsequent grant of refugee status to him by the United States to satisfy the standard for constructive exhaustion of domestic remedies.⁴³ The Commission took a similar stance in *Ouko v Kenya* where the complainant's flight followed persecution for his political views and student activities at University of Nairobi, and for which he ended up being granted refugee status in the Democratic Republic of Congo. Regarding the exhaustion of local remedies, the Commission stated:⁴⁴

[T]he complainant is unable to pursue any domestic remedy following his flight to the Democratic Republic of Congo for fear of his life, and his subsequent recognition as a refugee by the Office of the United Nations High Commissioner for Refugees. The Commission therefore declare[s] the

⁴¹ Communication 103/93, *Abubakar v Ghana*, Tenth Annual Activity Report, para 6.

⁴² n 16 above, paras 35–7.

⁴³ *Nigerian torture* case (n 30 above) para 24. See also *Aminu* case (n 31 above) para 13.

⁴⁴ Communication 232/99, *Ouko v Kenya*, Fourteenth Annual Activity Report, para 19.

communication admissible based on the principle of constructive exhaustion of local remedies.

Furthermore, the Commission has taken a similar stance in situations involving deportation of complainants from the territory of a state party. This was a view it took regarding the exhaustion of local remedies in *Amnesty International v Zambia*, where Chinula, at the time deported to Malawi, was prevented from returning to Zambia by threats of imprisonment, and was in effect outside the territory of the state party.⁴⁵ The Commission observed that Chinula's arbitrary deportation by Zambia 'prevented him from exercising this right' of exhausting domestic remedies.⁴⁶ Similarly, in *Modise v Botswana*, the Commission considered the legal process (for exhaustion of local remedies) wilfully obstructed by the government's repeated deportation of the complainant.⁴⁷

However, in its subsequent decisions, the Commission seems to draw a distinction between the situations of *flight on account of persecution* and *deportation* of complainants. In the former, it seems the Commission is willing to admit a danger in seeking to exhaust local remedies, while in the latter, it considers that exhaustion can be sought through counsel even though the complainant is outside the territory of a state party. Thus, in *Legal Defence Centre v The Gambia*, in which the victim, a Nigerian, had been deported from The Gambia to Nigeria for allegedly writing newspaper articles critical of Nigeria, the Commission was reluctant to consider the local remedies inaccessible or unavailable, arguing that 'the victim need not be physically in a country to avail himself of the available domestic remedies, such could be done through his counsel'.⁴⁸ For it seems that a situation where a complainant is outside the territory of a state party will have the exhaustion of local remedies appreciated in light of the facts of a particular case.

Although somewhat in a related context, the Commission has nonetheless been hesitant to accept the exhaustion of local remedies rule on account of indigence of a complainant. In its view, the Commission considers that making such an exception would open floodgates of claims being taken direct to the Commission on the

⁴⁵ Communication 212/98, *Amnesty International v Zambia* (*Zambian deportation case*), Twelfth Annual Activity Report, para 7.

⁴⁶ As above, para 29 (my emphasis).

⁴⁷ Communication 97/93, *Modise v Botswana* (2), Tenth Annual Activity Report, para 20 (decision of the Commission at first determination of communication in April 1997). The *inaccessibility* of local remedies on account of detentions and subsequent expulsions of complainants from the territory of a state party has been upheld in other decisions: *Zambian mass expulsion case* (n 12 above) See also Communication 159/96, *Union Inter Africaine des Droits de l'Homme and Others v Angola*, Eleventh Annual Activity Report, para 12.

⁴⁸ Communication 219/98, *Legal Defence Centre v The Gambia*, Thirteenth Annual Activity Report, para 17.

grounds that the complainants are indigent. This is notwithstanding that, in Africa, the financial aspects of litigation remains a major constraint as regards the commencement of legal proceedings before domestic courts for the majority of litigants. This is more so in the face of weak or non-existent legal aid schemes in most African states.⁴⁹ Thus, in *Africa Legal Aid v The Gambia*, the Commission refused to accept the argument that the victim's lack of financial means should be a basis for exempting the requirement to exhaust local remedies.⁵⁰ Given that the majority of the cases that have come before the Commission have been initiated by NGOs, the reasoning of the Commission seems to suggest that in respect of such communications, the question of indigence of the complainant should not arise, and presupposes that the NGOs are financially secure.⁵¹ However, it does not dispose off the question of whether a communication personally brought by an individual who is indigent is to be exempted from the requirement to exhaust local remedies.⁵²

4 Demonstration of efforts to exhaust domestic remedies alleged to be ineffective

Although the exhaustion of local remedies rule requires that the remedies be available and effective, it is not entirely sufficient for a claimant to merely allege that the available remedies are futile or ineffective without having made an attempt to exhaust them. In this regard, in its interpretation of the rule in article 56(5) of the African Charter, the Commission has required that a complainant demonstrate

⁴⁹ On the problem of legal aid, see AS Butler 'Legal aid before human rights treaty monitoring bodies' (2000) 49 *International and Comparative Law Quarterly* 360. It is to be noted that in the *Zambian expulsion* case, the Commission rejected Zambia's claim that the victims were at fault not to take advantage of the legal aid system, noting that since it was alleged that they were illegal persons, 'they would not be eligible for legal aid' (n 12 above) para 16.

⁵⁰ See Communication 207/97, *Africa Legal Aid v The Gambia*, Fourteenth Annual Activity Report, para 33.

⁵¹ Interestingly, in the *Civil Liberties Organisation* case (n 33 above), the NGO which presented the communication was unable to attend the session of the Commission when the communication was being considered due to lack of funds; Osterdahl (n 19 above) 72.

⁵² Notably, in the Inter-American context, indigence has been taken to exempt the requirement to exhaust local remedies: Exceptions to the Exhaustion of Domestic Remedies (Arts 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Inter-American Court of Human Rights, Advisory Opinion OC-11/90, Ser A No 11, 10 August 1990. Similarly, in the European context, the high costs of legal procedures and poor financial position of a complainant has been a ground for exempting application of the local remedies rule: *X v Federal Republic of Germany* (1955-7) EHRyBk 139.

serious efforts to exhaust the local remedies. Thus, in *Manjang v The Gambia*,⁵³ the complainant, who alleged that he had been wrongfully detained at an airport, merely stated in his communication that the possibilities of remedies were 'very little and improbable'. The Commission regarded the lack of efforts towards exhaustion of local remedies as inexcusable, thus rendering the communication inadmissible.⁵⁴

In *Ceesay v The Gambia*, there was no effort made by the complainant to pursue domestic remedies after he was charged with mutiny and subsequently dismissed from the Gambian national army. He contended that a rectification of the violations was not possible under the domestic courts as no action could be brought against the President of The Gambia. This was in fact a veiled attempt at arguing that any local remedies would be 'ineffective'. The Commission declared the communication inadmissible for failure to exhaust local remedies.⁵⁵

In specific instances, the Commission has noted the remarkable efforts put in by a complainant to exhaust domestic remedies. Thus, in *Pagnouille (on behalf of Mazou) v Cameroon*, it observed that submissions and petitions had been made to the Ministry of Justice and the Supreme Court for settlement and reinstatement to employment of the complainant — although such actions failed to yield any results, the Commission held that 'local remedies had been duly exhausted'.⁵⁶ This has similarly been the case in *Peoples' Democratic Organisation for Independence and Socialism v The Gambia*;⁵⁷ *Legal Resources*

⁵³ Communication 131/94, *Manjang v The Gambia*, para 1 (version of communication on file with author, information not contained in the Seventh Annual Activity Report).

⁵⁴ Similarly, the failure to demonstrate any 'attempt to have recourse to national procedures' by an NGO on behalf of an individual was considered in Communication 92/93, *International Pen v Sudan*, Eighth Annual Activity Report, where the communication only referred to the fact that Sudan had denied the existence of incommunicado detentions — the Commission observed that this 'does not amount to saying that the case has been tried in Sudanese courts' (para 3). See also Communication 73/92, *Diakit  v Gabon*, Thirteenth Annual Activity Report, where the complainant, a national of Mali, never contested before the national courts the order of expulsion that had previously been issued against him since his return to Gabon (para 17).

⁵⁵ Communication 86/93, *Ceesay v The Gambia (Ceesay case)*, para 4 (version of communication on file with author, information not contained in the Eighth Annual Activity Report).

⁵⁶ Communication 39/90, *Pagnouille (on behalf of Mazou) v Cameroon (Mazou case)*, Tenth Annual Activity Report, para 13.

⁵⁷ Communication 44/90, *Peoples' Democratic Organisation for Independence and Socialism v The Gambia (Gambia voters registration case)*, Thirteenth Annual Activity Report, paras 18–20. In this case, several letters and a notice of objection were addressed to, and filed before, the Supervisor of Elections (and a Revising Court) — it was deemed that the local remedies had been exhausted.

*Foundation v Zambia*⁵⁸ and in the *Burundian fair trial case*.⁵⁹ Notably, it has been argued that in such situations, it may be useful as a practical matter to have copies of the relevant national decisions attached to communications.⁶⁰

There is a specific concern raised by the Commission's decision in the *Ceesay* case above regarding the burden of proof (and upon whom it falls) as to the effectiveness or otherwise of the domestic remedies alleged to exist.⁶¹ The general position in international law is to place the burden on whoever alleges a fact — thus a state pointing to some form of redress, which it claims should have been pursued, has to establish or prove that the remedy is in fact *effective* in the particular case. In respect of human rights, the onus is placed upon the state party to prove that the local remedies it alleges to exist within its domestic legal order are effective.⁶² In the *Zambian expulsion case*, the Commission observed in respect of Zambia's contention that there were in fact remedies that had not been exhausted:⁶³

When the Zambian government argues that the communication must be declared inadmissible because the local remedies have not been exhausted, the government then has the *burden of demonstrating* the existence of such remedies. The government of Zambia attempts to do so by referring to the Immigration and Deportation Act which provides for expulsion orders . . . The question is therefore whether, in the circumstances alleged, the Immigration and Deportation Act constitutes an *effective* and *adequate* remedy in respect to the complaints.

In light of the 'circumstances' of the mass and speedy character of the arrest and expulsion of the victims, which in fact deprived them of an opportunity to challenge the arrests and expulsions under the Immigration and Deportation Act, the Commission concluded:⁶⁴

For complainants to contact their families, much less attorneys, was not possible. Thus the recourse referred to by the government under the Immigration and Deportation Act was as a practical matter not *available* to the complainants.

⁵⁸ Communication 211/98, *Legal Resources Foundation v Zambia*, Fourteenth Annual Activity Report, para 9 — the matter had been taken as far as the Supreme Court of Zambia.

⁵⁹ n 20 above, para 21 — the victim, who was sentenced to death, had appealed to the Ngozi Court of Appeal and the Burundi Supreme Court. The Commission noted that 'the domestic remedies have been duly exhausted'.

⁶⁰ Viljoen (n 9 above) 83. In the *Zambian deportation case* (n 45 above), decisions on suits and applications filed by Banda before courts in Malawi and Zambia from 1991–1995 were made available to the Commission, para 29.

⁶¹ n 55 above (version of communication on file with author, information not contained in the Eighth Annual Activity Report).

⁶² This position is evident in the decision of the European Court of Human Rights in the *De Jong, Baljet & van den Brink case* (n 16 above) para 39.

⁶³ *Zambian expulsion case* (n 12 above) paras 12–13 (my emphasis).

⁶⁴ As above, para 14 (my emphasis).

Thus, if it was indeed the fact, as alleged in the *Ceesay* case that the remedy in the circumstances could only be sought against the President, and that no such action could prevail under the national constitution, then any alleged local remedies should have been considered as 'ineffective'. The burden should then have been placed upon the state party, The Gambia, to prove that there are actually remedies in *existence* and that they are *effective*. In Africa, where there is a tendency to shelter acts of the government and its officials behind all manner of legal and political immunities, it may be imperative to place a stricter burden upon the state party to prove not only the existence of local remedies but also of their accessibility and effectiveness. The Commission has therefore in this case and others not addressed in a very satisfactory manner the element of the burden of proof.

5 Serious or massive violations of human rights as an exception to local remedies rule

The general exception to the exhaustion of local remedies rule in human rights treaties is the unavailability and ineffectiveness of remedies or that their procedures are likely to be unduly prolonged. Nonetheless, the notion of 'serious' or 'massive' violations as an exception to the applicability of the rule has since evolved in the jurisprudence of human rights organs. This is notwithstanding that it is not expressly spelt out in the provisions of the various human rights instruments as an exception to the rule. While the African Charter and its organ, the Commission, employ the phraseology 'serious' or 'massive' violations, the European system defers to the concept of 'a practice'. The rationale of the exception is premised upon the fact that the human rights organs are called upon to determine the general compatibility of the acts or conduct of the state party with its international obligations and to ensure cessation and non-recurrence of violations.⁶⁵ In this regard, the European Court of Human Rights observed in *Ireland v United Kingdom*:⁶⁶

The concept of practice is of particular importance for the operation of the rule of exhaustion of domestic remedies. This rule, as embodied in article 26 of the Convention, applies to state applications, in the same way as it does to 'individual' applications, when the applicant state does no more than denounce a violation or violations allegedly suffered by 'individuals' whose place, as it were, is taken by the state. On the other hand and in principle, the rule does not apply where the applicant state complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Commission or the Court to give a decision on each of the cases put forward as proof or illustrations of that practice.

⁶⁵ *Ireland v United Kingdom* [1978] 2 EHRR 25, para 159.

⁶⁶ As above.

Notably, the European Court observed that '[i]t is inconceivable that the higher authorities of a state should be, or at least should be entitled to be, unaware of the existence of such a practice'.⁶⁷ In the same vein, in a number of cases, the African Commission has declared the admissibility requirements under the African Charter met, including the exhaustion of local remedies, where *serious* or *massive* violations have occurred. The Commission has premised its decision upon the fact that, in view of the import of the local remedies rule being *notice* to the government of a state party, in such situations of *serious* or *massive* violations, the state has had *ample notice* of such violations.⁶⁸ The premise for the presumption of *ample notice* of the violations of the part of the state party arises from the fact that such situations involve numerous victims and violation of several rights. Further, the *ample notice* of human rights violations may arise from the international and national attention given to the situation in the territory of a state party. Thus, in the *Sudan detention without trial case*, the Commission observed that:⁶⁹

In the cases under consideration, the government of Sudan has not been unaware of the serious human rights situation existing in that country. For nearly a decade the domestic situation has focused national and international attention on Sudan. Many of the alleged violations are directly connected to the new national laws in force in the country in the period covered by these communications. Even where no domestic legal action has been brought by the alleged victims, the government has been sufficiently aware to the extent that it can be presumed to know the situation prevailing within its own territory as well as the content of its international obligations.

Additionally, the Commission has observed that in such situations, it would be very impractical for each victim of the violations to present a claim before the domestic courts.

It can thus be said that the Commission has given new dimensions to the rationale of the 'practice' or 'serious violations' exception to the exhaustion of local remedies rule. Noticeably, the African Charter requires that where there is evidence of serious violations, the Commission should bring such a situation to the attention of the Assembly of Heads of State and Government.⁷⁰ This was the decision that the Commission took in *Lawyers Committee for Human Rights v Zaire*.⁷¹

⁶⁷ As above.

⁶⁸ *Zaire mass violations case* (n 11 above). The Commission made this observation on the basis that additionally, in respect of certain of the several communications, victims had protested to the government of Zaire or had approached national courts without result: para 55.

⁶⁹ n 21 above, para 33. See also the *Mauritian widows case* (n 19 above) para 81.

⁷⁰ Art 58 African Charter.

⁷¹ Communication 47/90, *Lawyers Committee for Human Rights v Zaire*, Seventh Annual Activity Report, para 1. See also the *Zaire mass violations case* (n 11 above) para 15.

6 Length of time taken by complainant's claim before the domestic courts

It is noticeable that the Commission has regarded ouster clauses in domestic legislation and situations of serious or massive violations as likely to result in domestic remedies being *unduly prolonged*. However, it has also considered the question of the unavailability of local remedies where the procedure is unduly prolonged owing to the length of time taken before the domestic courts. In *Mouvement Burkinabé des droits de l'Homme et des Peuples v Burkina Faso*, where some of the victims had spent as long as 15 years trying to obtain redress for violations arising from disappearances and assassinations before the national courts without any success, the Commission implicitly admitted that the domestic remedies were unduly prolonged.⁷² Interestingly, the Commission's views in the *Modise* case were a little baffling in some respects. The facts show that the complainant had sought recognition of his status as a Botswana citizen by birth before the national courts for over 16 years prior to filing a communication with the Commission.⁷³ Although in the end the Commission concerned itself with the fact of wilful obstruction of national legal procedures by Botswana through repeated deportations of the complainant,⁷⁴ the pronouncement that 'if issues related to the acquisition of full citizenship are not resolved by *competent domestic judicial authorities* Mr Modise can resort once more to the Commission'⁷⁵ is baffling. After battling for 16 years before domestic courts to establish his claim to citizenship by birth without success, what good would be achieved by referring the complainant to the same institutions?⁷⁶

The Commission seems to take the view that the 'unduly prolonged' nature of local remedies is to be determined from the moment of initiation of local proceedings before national courts and submission of a communication to the Commission. However, it has been argued that it may be 'relevant to consider whether local remedies have not yet been exhausted at the time the Commission considers the communication (especially if the complainant has kept on trying to exhaust local remedies, after submission of the communication)'.⁷⁷ This is especially

⁷² Communication 204/97, *Mouvement Burkinabé des droits de l'Homme et des Peuples v Burkina Faso*, Fourteenth Annual Activity Report, paras 4, 14 & 36.

⁷³ *Modise* case (n 47 above) para 20.

⁷⁴ As above.

⁷⁵ As above, para 40 (my emphasis).

⁷⁶ In the end, this resulted in the re-opening of the case that was first determined in April 1997 for further determination in October–November 2000. See Fourteenth Annual Activity Report.

⁷⁷ Viljoen (n 9 above) 91.

so where, as in the early communications, the Commission took inordinately long periods before rendering decisions on admissibility with regard to the exhaustion of local remedies.⁷⁸

7 Nature and scope of domestic remedies to be exhausted

Traditionally, under international law, it has been the requirement that a claimant must exhaust all the judicial and administrative remedies that are available within the domestic legal order before engaging international tribunals.⁷⁹ The remedies must be judicial in character and capable of being premised upon or determined along legal principles. Therefore local remedies that are essentially *non-judicial* or *discretionary* are not the kind envisaged by the rule.⁸⁰ More significant is whether a quasi-judicial remedy is to be regarded a remedy for the purposes of the rule. In interpreting the rule under article 56(5) of the Charter, the Commission has pointed out that a complainant must make use of the available remedies of a 'judicial nature', and that recourse to certain quasi-judicial procedures without any effort to seize traditional courts left local remedies un-exhausted. In *Cudjoe v Ghana*, the complainant approached only the Ghana Commission on Human Rights and Administrative Justice, which upheld his claim. However, the

⁷⁸ See eg the *Modise* case (n 47 above) where the Commission rendered its decision on the exhaustion of local remedies five years after the filing of the communication in 1992. In any event the Commission found the repeated deportations of the complainant an obstruction to the exhaustion of local remedies (rather than the 16 years that his claim had been before the courts). In the *Diakité* case (n 62 above), where the communication was filed in 1992, the Commission rendered its decision on exhaustion of local remedies eight years later in May 2000. In the end, the complainant was found not to have at any time contested the order of expulsion issued against him before the national courts in Gabon. In the *Sudan detention without trial* case (n 21 above), the communication was filed in 1990 and a determination on admissibility was only made in 2000. Eventually, local remedies were deemed foreclosed and unavailable. Notably, in the *Kenya Human Rights Commission* case (n 22 above), the Commission not only regarded the passage of two months not to constitute 'undue delay' but found, as a fact, that the cases before the High Court of Kenya were 'still pending', while in Communication 220/98, *Law Offices of Ghazi Suleiman v Sudan*, Fifteenth Annual Activity Report, the Commission found no indication of proceedings having being instituted before the domestic courts.

⁷⁹ See Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, 1961, art 19 (claimant to employ all *administrative, arbitral and judicial remedies*); *Salem* case (Egypt/United States) (1932) 2 RIAA 1161 (claimant to have brought suit to the highest instance of *national judiciary*).

⁸⁰ In the *Salem* case, the arbitral tribunal regarded the 'recours en requête civile' not to be a regular legal remedy. On the other hand, the European organs considered the Danish Special Court of Revision, although an extraordinary remedy, as one that had to be exhausted: *Nielsen* case (1958-9) 2 YBECHR 413 436.

government refused to comply with the decision that was handed down. The Commission noted that there had been a failure to exhaust domestic remedies:⁸¹

For, it should be clearly stated, the internal remedy to which article 56.5 refers entails remedy sought from courts of a judicial nature, which the Ghanaian Human Rights Commission is clearly not. From the African Commission's point of view, seizing the said Commission can be taken as preliminary amicable settlement and should, in principle, considering the employer's failure to react, be followed by an action before the law courts.

Although the Commission may have been correct in its decision, it remains to be seen what it would say in respect of parallel human rights commissions in other state parties on the continent that are vested with judicial powers comparable with those of traditional courts.⁸² Perhaps the major concern then is whether the individual will have exhausted the spectrum of local remedies. In this regard, it has been the position that the individual must utilise the processes of appeal or review as are available. In *Njoku v Egypt*, the Commission noted that 'all local remedies provided by Egyptian law, including the possibility of having the case reviewed' had been exhausted by the complainant.⁸³

The processes of appeal or review must invariably be accessible, effective and not unduly prolonged. Thus, in the *Sudan detention without trial* case, the Commission noted that the appeal process did not exist as to the regular courts, and where it did, this was only in respect of a 'death penalty or prison terms over 30 years', and therefore did not fulfil the criteria of effectiveness.⁸⁴ The Commission made the following observation:⁸⁵

[T]he right to appeal, being a general and non-derogable principle of international law must, where it exists, satisfy the conditions of effectiveness. An effective appeal is one that, subsequent to the hearing by the competent tribunal of first instance, may reasonably lead to a reconsideration of the case by a superior jurisdiction.

On the other hand, the further question is posed as to the breadth of the appeal or review and, for that matter, the institutions to be seized. This is of major concern given the differing systems of courts in the domestic legal orders of state parties to the Charter that have their origins or foundations in either anglophone or francophone traditions.⁸⁶ In the

⁸¹ Communication 221/98, *Cudjoe v Ghana*, Twelfth Annual Activity Report, para 14.

⁸² As of 2001, there are established Human Rights Commissions in 21 states in Africa: Human Rights Watch 'Protectors or pretenders? Government Human Rights Commissions in Africa', *World Report 2001*.

⁸³ Communication 40/90, *Njoku v Egypt*, para 57.

⁸⁴ n 21 above, para 36.

⁸⁵ As above, para 37.

⁸⁶ On these concerns, see eg C Anyangwe 'Administrative litigation in francophone Africa: The rule of prior exhaustion of internal remedies' (1996) 8 *African Journal of International and Comparative Law* 808; AA An-Na'im *Universal rights, local remedies: Implementing human rights in the legal systems of Africa* (1999).

Gambian voters registration case, the controversy over the local remedies concerned the extent of the appeal process, whether it extended to the Supreme Court of The Gambia or to the Privy Council. The state party, The Gambia, had initially argued on inadmissibility as appeals could be taken to the 'level of the (British) Privy Council'. In response, the complainants pointed out that the domestic legislation on elections stipulated that the judgment of the Supreme Court of The Gambia would be final, and therefore an appeal to the Privy Council was not necessary.⁸⁷ In the end, this issue was not addressed or dealt with by the Commission. Nor has it been canvassed in any of the other communications brought against The Gambia.

8 Absence of any remedies in the domestic legal order

In a number of instances, the Commission has had to reflect on the total absence or futility of any remedy in the domestic legal order of a state party in the particular circumstances. Where there is no remedy whatsoever, the Commission has considered the local remedies rule to be inapplicable. Such has been the case where there is no remedy in the domestic legal order as regards the particular right being claimed in the communication. This is apparently the view expressed by the Commission in *Katangese Peoples' Congress v Zaire* that there were 'no remedies available at national level to express the independence of the one area from the state'.⁸⁸ In a different context, the Commission has stated that there is no remedy to give a complainant the satisfaction sought where the victim had died at the hands of the government of a state party. Thus, in the *Ken Saro-Wiwa* case, the Commission noted that '[i]n light of the fact that the subjects of the communications are now deceased, it is evident that no domestic remedy can now give the complainants the satisfaction they seek'.⁸⁹ The Commission affirmed

⁸⁷ *Gambia voters registration* case (n 57 above), paras 34–35. It has been contended that the appeal to the Privy Council should not be construed as a local remedy in The Gambia owing to the fact that an individual would have to travel abroad to the United Kingdom; Ankumah (n 9 above) 69.

⁸⁸ Communication 75/92, *Congrès du Peuple Katangais v Zaire*, para 22. The complainant was seeking the independence of Katanga from Zaire in furtherance of the right to self-determination under art 20 of the Charter. In the end, the claim was dismissed by the Commission during hearing of the merits. In reflecting upon the manner of exercise of the right of self-determination under the Charter, the Commission remarked of its obligation to 'uphold the sovereignty and territorial integrity of Zaire, a member of the OAU and a party to the African Charter on Human and Peoples' Rights' para 27 (version of communication on file with author, not corresponding with Eighth Annual Activity Report).

⁸⁹ n 4 above, para 77.

this view of the total inapplicability of the local remedies rule in *Forum of Conscience v Sierra Leone*. In that case, 24 soldiers had been executed, following trial and death sentence by a court martial, for alleged involvement in a coup that overthrew an elected government of President Tijan Kabah. In light of the absence of a right of appeal against the decision and sentence of the court martial under the domestic military law, the Commission remarked:⁹⁰

[T]he complaint was filed on behalf of people who were already executed. In this regard, . . . there were no local remedies for the complainant[s] to exhaust. Further, . . . even if such possibility had existed, the execution of the victims had completely foreclosed such a remedy.

The reasoning of the Commission in both cases is perhaps a little ambiguous, for it places emphasis on the execution of the victims as foreclosing local remedies. The crucial concern should have been whether there were any available local remedies to allow for the challenge of the validity of the executions (by relatives or otherwise). In the *Ken Saro-Wiwa* case, any such remedial recourse to the national courts was foreclosed by the *ouster clauses* in the domestic laws. On the other hand, in the *Sierra Leone death penalty* case, the unavailability of local remedies was occasioned by the absence of the *right of appeal* against the sentences of death under the domestic military law.⁹¹ In the circumstances, it is the foreclosure of the domestic legal procedures rather than the executions that accounted for the unavailability of local remedies.

⁹⁰ Communication 223/98, *Forum of Conscience v Sierra Leone* (*Sierra Leone death penalty* case), Fourteenth Annual Activity Report, para 15.

⁹¹ *Sierra Leone death penalty* case (n 90 above), Fourteenth Annual Activity Report, para 5. In the end, the Commission did in fact determine that the execution of the soldiers without a right of appeal was a violation of art 7(1)(a) of the Charter: para 17. Attention may be drawn to the fact that an incident that involved military execution of two soldiers in Uganda on 25 March 2002 mirrors the situation in the *Sierra Leone death penalty* case. The Uganda military law does not provide for an appeal from decisions of a Field Court Martial (the two soldiers were tried before this kind of military court). Nonetheless, two petitions have since been filed before the Constitutional Court of Uganda to challenge the provisions of the military law (including the non-existence of the right of appeal) as well as the executions: *Uganda Law Society v Attorney-General*, Constitutional Petition No 2 of 2002; *Karugaba v Attorney-General*, Constitutional Petition No 6 of 2002. The petitions raise issues of fair trial standards under domestic law, especially under the provisions of the national Constitution promulgated in 1995. By the end of 2002, the two petitions were yet to be heard by the Constitutional Court.

9 Conclusion

It is apparent from the decisions of the African Commission since 1988 that a fledgling yet impressive jurisprudence on the local remedies rule has emerged that compares favourably with that of its more illustrious European and Inter-American predecessors. The rationale of the rule itself in allowing a state party an opportunity to correct the prejudice to human rights has invariably come under a severe test. With the Commission making a determination on actual and due exhaustion of local remedies in only a very limited number of cases, reality dawns as to the apparent lack of effective and competent judicial organs in most of the state parties to the Charter. The phenomenon of *ouster clauses* in domestic law had on its own, in a decade of military regimes in Nigeria alone, underscored a situation in which there seemed in fact *no justice to exhaust*. This practice in Nigeria (and in other state parties such as The Gambia, Sudan and Mauritania) coupled with the attendant situations of *serious violations* in several of the state parties — Benin, Chad, Malawi, Togo, Zaire — in fact shows that the inapplicability of the local remedies rule in the claims brought against these states coincides with gross violations of substantive rights under the Charter.

There is therefore clearly a relationship between the findings on exhaustion of local remedies and the functional state of national judicial and legal procedures of the state parties to the Charter. This arises from either a deliberate deprivation of the *right of access to domestic ordinary courts* or placing *judicial power in the hands of special tribunals* that tend to be political and incompetent or a situation of *malfunctioning national judicial systems*. Firstly, the use of *ouster clauses* in foreclosing suits or appeals or remedies deprives access to the domestic judicial organs for vindication of claims involving violations of human rights. Secondly, deferring judicial power to special tribunals relegates the exercise of such power to vindicate human rights claims to largely incompetent bodies. And thirdly, the situations of serious violations of rights and the lengthy periods taken by claims before national courts epitomise the absence of effective judicial procedures or the existence of such procedures that nonetheless do not function satisfactorily. In the end, this has resulted in the Commission somehow becoming the court of first instance in many of the claims that have come before it, thus negating the whole essence of the local remedies rule.

More significant, though, is the fact that the Commission has been able, only at the stage of admissibility, to expose realities of the human rights situations in what have hitherto been Africa's foremost dictatorial regimes. It is also apparent that in a continent where states are not yet adept towards the protection of human rights within their domestic legal orders, the Commission (and, in the not so distant future, the Court) will remain fundamental in the scrutiny of state conduct that is in

violation of human and peoples' rights. As of the present, the plaudits must go to the Commission for its rejection of the contention put forward by the then Abacha regime in Nigeria that '[i]t is the nature of military regimes to provide ouster clauses'.⁹²

⁹² *Nigerian media case* (n 26 above) paras 14 & 82.