AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: EK Murimi 'The exhaustion of local remedies rule before the African Court: Recalibrating the evidentiary approach in cases against military regimes' (2026) 26 *African Human Rights Law Journal* 311-337
http://dx.doi.org/10.29053/1996-2096/2026/v26n1a12

The exhaustion of local remedies rule before the African Court: Recalibrating the evidentiary approach in cases against military regimes

*Edward Kahuthia Murimi**
Postdoctoral researcher, Amsterdam Centre for International Law, University of Amsterdam, The Netherlands
https://orcid.org/0000-0003-1758-6629

Summary: *This article examines the application of the local remedies rule by the African Court on Human and Peoples' Rights in cases against military states. International human rights adjudication is premised on the understanding that international courts and tribunals serve as mechanisms of last resort, as the primary responsibility for the protection of human rights rests with national judicial authorities. Accordingly, the African Court requires applicants to exhaust local remedies, subject to exemptions where such remedies are unavailable, ineffective or insufficient. The article argues that the Court's current approach and evidentiary standards for determining claims of ineffectiveness are unsuitable in cases against military states. In particular, the presumption that formally available judicial remedies are effective and that national*

* LLB (Nairobi) LLM (Pretoria) PhD (Ghent); kahuthia.edward@gmail.com. The author is grateful to Dr Dilek Kurban, Iurie Patricheev and Prof Frans Viljoen for their insightful comments on earlier drafts, as well as to the two anonymous reviewers for their constructive and valuable comments, and to participants at the ICON-S 2026 Conference for their valuable feedback. This article was written as part of the 'Beyond Compliance' research project, which has received funding from the European Union (European Research Council, Beyond Compliance, 101166174). The views expressed and any errors are mine, and do not reflect the position of the EU or the ERC.

courts and judges are independent and impartial is inappropriate in such contexts. Drawing on a synthesis of case law, interviews with judges and legal officers at the African Court and civil society representatives, the article examines the contexts of Burkina Faso, Niger and Mali, three states under military rule. These contexts demonstrate the inappropriateness of a very high standard of proof applied by the Court in assessing claims of lack of judicial independence and requiring applicants to establish how generalised fear, repression or persecution specifically targeted them. The article makes a case for a context-sensitive evidentiary approach. It proposes a rebuttable presumption of ineffectiveness of local remedies in military states or the lowering of the standard of proof to the prima facie standard when determining claims that national courts lack independence. The article concludes that while increased judicial scrutiny of military regimes in admissibility decisions risks straining relations with such states, the proposed evidentiary approach offers the Court adjudicatory tools to navigate this tension in a manner that is fair to the states involved while safeguarding human rights protection.

Key words: *admissibility; African Court; evidence; local remedies; military states*

1 Introduction

A foundational element of international human rights adjudication is the understanding that international courts and tribunals are mechanisms of last resort, as the primary responsibility for the protection of human rights rests with national judicial authorities.[1] In every case submitted to it, the African Court on Human and Peoples' Rights (African Court) examines whether there is compliance with the requirement to exhaust local remedies and the justifications for exemption from the application of this rule, if any, when remedies are unavailable, ineffective or insufficient.[2] The rationale for the exhaustion rule is two-pronged: first, as a matter of principle, to avoid domestic courts being superseded by the international organ; and, second, for practical reasons, to avoid flooding the international organ with irrelevant complaints.[3] The exhaustion rule and other admissibility conditions, therefore, collectively act as a filter between national and

1 A notable exception in this regard is the ECOWAS Community Court of Justice where exhaustion of local remedies is not an admissibility requirement.
2 See art 56(5) of the African Charter on Human and Peoples' Rights as read with art 6 of the Protocol establishing the African Court.
3 AAC Trindade *The application of the rule of exhaustion of local remedies in international law: Its rationale in the international protection of individual rights* (1983) 3.

international courts, in the absence of which the latter would be overwhelmed by cases.[4] The rule reinforces the subsidiary nature of international human rights adjudicating bodies, limiting their task to intervening 'when domestic authorities are either unwilling or unable to provide remedies to human rights violations'.[5] The establishment and general acceptance of the logic in the local remedies rule notwithstanding, many aspects of its practical application have been said to 'remain doubtful, contested and unclear'.[6] The interpretation and application of the local remedies rule by the African Court as well as the African Commission on Human and Peoples' Rights (African Commission) is a relatively well-studied subject.[7] How the Court deals with evidentiary issues in determining compliance with and exceptions to the rule, especially in cases against military states, remains understudied and is the focus of this article.

The article argues that the approach and evidentiary standard that the Court currently applies to determine the validity of claims of ineffectiveness of local remedies by applicants is not suitable in cases against military states. The presumption that the formally available judicial remedies are effective and that national courts and judges are independent and impartial, which is the African Court's default starting point in assessing compliance with the exhaustion rule, is impractical in cases against military regimes. The contexts in Burkina Faso, Niger and Mali, three states currently under military rule, clearly demonstrate this impracticality. In Burkina Faso, for example, there has been forced military conscription and disappearance of journalists and judicial officers. The military leadership in Mali has banned all political parties, suspended elections, and a constitutional amendment now grants the President sole control over appoint of

4 F Viljoen 'Admissibility under the African Charter' in MD Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 61, 62.

5 J Contesse 'Resisting the Inter-American human rights system' (2019) 44 *Yale Journal of International Law* 179, 225; see Viljoen (n 4), where the author notes that the rule underscores the principle that international law is subsidiary to national law and the former does not replace the latter 'but rather supplements national institutions'.

6 S d'Ascoli & KM Scherr 'Rule of prior exhaustion of local remedies in the context of human rights protection' (2006) 16 *Italian Yearbook of International Law* 117, 118; also see CF Amerasinghe *Local remedies in international law* (2004) 4, where the author notes that many aspects and applications of the rule 'need to be clarified'.

7 See, eg, L Chenwi 'Exhaustion of local remedies rule in the jurisprudence of the African Court on Human and Peoples' Rights' (2019) 41 *Human Rights Quarterly* 374; MJ Nkhata 'A bundle of mystery? Unpacking the application of the "bundle of rights and guarantees" in the admissibility of applications before the African Court on Human and Peoples' Rights' (2020) 4 *African Human Rights Yearbook* 192; Viljoen (n 4) 61; R Murray *The African Charter on Human and Peoples' Rights: A commentary* (2019) 713; CM Roberts 'Previous exhaustion of local remedies: Human rights bodies' in H Ruiz Fabri (ed) *Max Planck encyclopedia of international procedural law* (2023) 1-20.

supreme court judges. Niger has witnessed arbitrary arrests and detention of government critics and the abolition of the Court of Appeal and State Council. Based on a synthesis of case law, interviews with judges and legal officers at the African Court and civil society representatives,[8] the article contends that such authoritarian practices demand a distinct and context-sensitive evidentiary approach to application of the local remedies rule.

Although a variety of definitions and measures exists as to what authoritarianism is or how authoritarian practices manifest, the article considers the three military states discussed to satisfy any criteria for what amounts to an autocratic or authoritarian state. The underlying assumption in the article that military states are synonymous with authoritarianism is supported by the leading democracy-measuring indexes. For example, the Democracy Report 2026 by V-Dem Institute categorises Niger, Burkina Faso and Mali as *closed autocracies*, while the Freedom in the World 2026 report by Freedom House classified the three as *not free*.[9] Distinctions have been made in the literature between hard and soft repression, where the former mobilises force or violence to control or crush oppositional action, while the latter takes non-violent forms such as surveillance, employment and benefits withdrawals, stigma, marginalisation of oppositional ideas and silencing activists.[10] The article proceeds on the understanding that the military regimes in Niger, Burkina Faso and Mali fall squarely in the hard repression category, which warrants a distinct and interventionist evidentiary approach to applying the local remedies rule in admissibility decisions in cases against such states.

In examining the contexts in the three states, the article's central argument is that the current approach to assessing proof when

8 The author conducted fieldwork in Arusha, the seat of the African Court on Human and Peoples' Rights, from 1 March to 15 April 2026. He interviewed six judges, five members of the registry, and three representatives of civil society organisations engaged with the Court. Approval to undertake the fieldwork interviews, conducted as part of the Beyond Compliance research project at the University of Amsterdam, was granted by the Ethics Committee of the Faculty of Law of the University of Amsterdam on 23 September 2025. The interviews were semi-structured and guided by a questionnaire. The interview transcripts and recordings are stored in the Beyond Compliance project's research drive, a secure research data storage service provided through the University of Amsterdam, with access restricted to the research team.

9 M Nord and others 'Democracy report 2026: Unraveling the democratic era?' 2026, V-Dem Institute, https://www.v-dem.net/documents/75/V-Dem_Institute_Democracy_Report_2026_lowres.pdf (accessed 9 July 2026); Freedom House 'Freedom in the World 2026 Report' 25, https://freedomhouse.org/sites/default/files/2026-03/FIW2026_final_digital%20%281%29.pdf (accessed 9 July 2026).

10 E Hanelt & A Vincze 'Managing courts in competitive authoritarian regimes: Co-optation, repression and resistance in Hungary' (2024) 18 *Zeitschrift für Vergleichende Politikwissenschaft* 381, 384; J Jämte & R Ellefsen 'The consequences of soft repression' *Mobilization: An International Journal* 383, 385.

applicants claim inability to exhaust local remedies in cases against military states hinders access to the African Court and is in need of reform. Given that the suggested change of approach is founded on the Court taking a position on the nature of governance in the respondent state, the article's main argument is limited to cases against military states.[11] The justification for this delineation is the fact that, while there may be debate about the criteria for determining which state is autocratic or authoritarian for purposes of the arguments advanced in the article, there arguably is no doubt that military states in Africa (and elsewhere) are authoritarian. Importantly, the African Union (AU) has a well-established normative framework outlawing replacement of democratically elected governments with military rule through *coups*, by mercenaries and armed dissidents.[12] This arguably justifies a distinct approach by the Court that would treat military respondent states as litigants appearing before the Court without clean hands, given their defiance of the AU's continental norms on democracy and governance. Although the empirical cases discussed in the article are military regimes, the analysis and conclusion are in principle also applicable to electoral and civilian authoritarian regimes.

Relying on *XYZ v Benin* (*XYZ*) as a case study, this article problematises the evidentiary approach that the African Court has cemented in the case. It interrogates the appropriateness of requiring proof of how a general climate of fear and persecution individually affected an applicant and their ability to exhaust local remedies. It also questions the high standard of proof applied by the Court in assessing claims of judicial bias and lack of judicial independence as justification for non-exhaustion of local remedies. The analysis lays the basis for the subsequent claim that the Court's approach and evidentiary standards applied in *XYZ* are not well suited to cases against military states and, therefore, the need for a differentiated evidentiary approach.

2 Dissecting the evidentiary approach in *XYZ v Benin*

As one of its most recent decisions, the African Court's June 2025 admissibility ruling in *XYZ* reflects its current evidentiary approach to assessing compliance with the exhaustion rule and addressing

11 Even though the arguments advanced arguably hold true for other forms of governance such as electoral autocracies.

12 See art 4 of the Constitutive Act of the African Union as read with art 23 of the African Charter on Democracy, Elections and Governance on the prohibited forms of unconstitutional changes of governance.

grounds for exceptions to the rule advanced by the applicants.[13] The applicant in the case sought anonymity for reasons of personal safety and, as the case name reflects, his request was granted. He was challenging a ministerial order that prohibited issuance of official documents to persons wanted by the courts of Benin. He alleged several violations, including the right to non-discrimination; the right to presumption of innocence; the right to freedom of movement; and the obligation to ensure independence of courts and separation of powers.[14] The state objected to the admissibility of the application on the ground of non-exhaustion of local remedies. It argued that the applicant's failure to challenge the contested ministerial order before the Constitutional Court meant that he did not comply with article 56(5) of the African Charter on Human and Peoples' Rights (African Charter). The applicant argued that 'the prevailing environment of persecution and the Constitutional Court's lack of independence and impartiality makes recourse to it impossible *de facto*'.[15] This argument is representative of the difficulties most complainants originating from military rule contexts would face, and which invites a differentiated evidentiary approach to assessing compliance with the exhaustion rule in such cases.

In determining admissibility in *XYZ*, the African Court repeated its earlier conclusions that Benin's Constitutional Court 'is an available, effective and satisfactory remedy'.[16] With regard to the applicant's claim that there exists 'an environment of persecution' that hindered pursuit of local remedies, the Court, in dismissing the claim, held that the applicant did 'not adduce any evidence of persecution *specifically targeted at him* that would have prevented him from exhausting local remedies'.[17] This finding consolidates the Court's recent position on the issue as it has arrived at a similar conclusion in a 2023 ruling.[18] This approach to assessing the impact of a climate of fear on the ability to exhaust local remedies by the African Court overlooks how authoritarian regimes function. In most cases, an environment of fear discourages litigation without any direct threat to a particular

13 *XYZ v Benin* Application 58/2019, Ruling of 26 June 2025 (*XYZ*).
14 *XYZ* (n 13); see the list of all violations at para 5 of the Ruling.
15 *XYZ* (n 13) para 26.
16 *XYZ* (n 13) para 33; the Court has taken a similar position in other cases against Benin. See, eg, *Laurent Mètognon & Others v Benin* Application 31/2018, Judgment (24 March 2022) para 63; *Conaîde Akouedjenoudje v Bénin* Application 24/2020, Judgment (13 June 2023) para 39.
17 *XYZ* (n 13) para 35 (my emphasis).
18 *Mama Seidou Samiratou v Benin* Application 54/2019, Ruling (5 September 2023) paras 46-47. Even more recent is a 2026 decision where the Court dismissed applicants' claims of a 'climate of fear' that prevented exhaustion for lack of 'substantiation' – see *Ado Shaibu & Others v Tanzania* Application 46/2020, Judgment (6 March 2026) paras 58 & 66.

person.[19] The Court's current position in the recent case against Benin also contradicts its earlier position in *Sébastien Germain Marie Aïkoue Ajavon v Benin*, where it had found that the interpretation of the exhaustion rule requires a *realistic* consideration of three factors: (i) the legal context; (ii) the *political* context; and (iii) the applicant's personal circumstances.[20] Consideration of the political context in determining whether an applicant can be excused from exhausting local remedies necessarily implies that broader political developments not directly linked to the applicant are relevant considerations. Indeed, in considering a different admissibility condition (reasonableness of time taken to file the application) in the *APDF & IHRDA v Mali* case, the Court took note of 'the climate of fear, intimidation and threats' in Mali following the adoption of a contentious law.[21] It then found that it was 'reasonable to expect the applicants to have been affected by that situation as well' and dismissed the State's objection to admissibility based on the four-and-a-half-year period taken to submit the case.[22] The Court did not require evidence of how the climate of fear and intimidation directly affected timely filing of the case. The Court did not follow this sound and practical approach in the *XYZ v Benin* decision. This inconsistency is possibly explained by the political nature of the subject matter in *XYZ* (challenging a ministerial order that allegedly targeted politicians) in contrast with the social nature of the subject matter in *APDF & IHRDA* (consistency of a family law with international human rights instruments).

Regarding the applicant's claim of lack of judicial independence and impartiality at the Constitutional Court of Benin as justification for not pursuing local remedies, the African Court held that

> independence and impartiality of judges is *presumed*, such that any party alleging a violation thereof *must prove the same beyond any shadow of doubt*. The Court observes that the Applicant does not prove his allegations and confines himself to *mere assertions*. The Court, therefore, dismisses this contention.[23]

This position is consistent with the Court's previous decisions on the issue. It held in *Landry Angelo Adelakoun & Others v Benin* that 'the impartiality of a judge is presumed, and *undisputable* evidence

19 LJ Chua 'Legal mobilization and authoritarianism' 2019 (15) *Annual Review of Law and Social Science* 355, 362; JW Penney 'Understanding chilling effects' 2022 (106) *Minnesota Law Review* 1451, 1454-1455.
20 *Sébastien Germain Marie Aïkoue Ajavon v Benin* Application 62/2019, Judgment (4 December 2020) para 100.
21 *APDF & IHRDA v Mali* Application 46/2016, Judgment (11 May 2018) para 54.
22 As above.
23 *XYZ* (n 13) para 36 (my emphasis).

is required to refute this presumption'.[24] Still on the presumed impartiality of national courts and judges, it has ruled in *Issiaka Keïta & Others v Mali* that '*incontrovertible* evidence is required to rebut this presumption'.[25] In *Ajavon*, the Court stated that 'the impartiality of a judge is presumed and … *compelling* evidence is needed to rebut this presumption'.[26] Similarly, in *Fidele Mulindahabi v Rwanda*, the applicant had claimed that two judges of Rwanda's Supreme Court were not impartial, and the Court took the view that such a claim 'must be *irrefutably proven* by the party alleging it'.[27] As argued elsewhere, the use of phrases such as 'undisputable evidence', 'compelling evidence', 'irrefutable proof' and 'incontrovertible evidence' points to the Court's application of a standard of proof proximate to the criminal law standard of beyond reasonable doubt.[28] This perhaps explains why no applicant has yet succeeded in a claim of bias or impartiality by a national court judge, suggesting that such a high threshold of proof is not ideal in human rights adjudication.[29]

An additional layer of complexity has been added in *Komi Koutche v Benin*, where the Court faulted the applicant for challenging the efficiency of Benin's judicial system 'without providing sufficient information to prove it'.[30] The applicant had provided information related to the procedure for appointing judges and the lack of impartiality by some judges. The submitted evidence notwithstanding, the Court took the view that this '[did] not prevent him from exhausting all available remedies in the internal judicial system to test its efficiency'.[31] If this position by the Court means that, regardless of the evidence of lack of judicial independence, there is a requirement to 'test' national judicial remedies, it risks an unqualified dismissal of all general claims related to judicial independence that may be valid in states under military rule. The impracticality of the Court's evidentiary approach in *XYZ* in such contexts is demonstrated next.

24 *Landry Angelo Adelakoun & Others v Benin* Application 12/2021, Judgment (4 December 2023) para 40.
25 *Issiaka Keïta & Others v Mali*, Application 5/2019, Judgment (5 September 2023) para 83.
26 *Sébastien Germain Marie Aïkoue Ajavon v Benin* (n 20) para 293 (my emphasis).
27 *Fidele Mulindahabi v Rwanda* Application 4/2017, Judgment (26 June 2020) para 70 (my emphasis).
28 EK Murimi 'Evidence at the African Court on Human and Peoples' Rights: The case for an equitable applicant-centred approach as a pathway to substantively fairer decisions' PhD thesis, Ghent University, 2025 137.
29 As above.
30 *Komi Koutche v Benin* Application 20/2019, Ruling (25 June 2021) para 93.
31 As above.

3 Why the current evidentiary approach is problematic in the context of military regimes

A series of *coups* between 2020 and 2023 have brought the three Sahelian states of Niger, Burkina Faso and Mali under military rule. Faced with international condemnation and sanctions from the AU and the Economic Community of West African States (ECOWAS) for the overthrow of democratically elected leaders, the military juntas in the three states have forged a closer partnership. They have, for example, established a mutual defence pact referred to as the Alliance of Sahel States (AES).[32] The three states have also left ECOWAS as a response to suspension and sanctions from the West African regional bloc.[33] Further to this, these states have withdrawn from the International Criminal Court (ICC), a move that was termed as limiting 'access to justice for victims of atrocity crimes'.[34] Given this background, and the recent withdrawals of the declaration allowing direct access to the Court for individuals and non-governmental organisations (NGOs) by five other African states, it is interesting that the three states have not withdrawn the declaration allowing direct access to the African Court.[35] Although these states are currently suspended from the AU, according to a member of the Court's registry, 'the Court is the only AU institution that is engaging with them', a fact that gives them 'some kind of legitimacy'.[36] Interview data suggests that the three military regimes have retained the declaration because so far there has been no adverse decision against any of them:[37]

> Mali and Niger continue to file submissions, even Burkina Faso, continue to file pleadings in cases involving them. They will still file comprehensive proceedings denying things. But I will say to you, the real test would be if the Court gave a seriously adverse decision against one of those countries.

32 S Vo 'Junta rule in the Sahel: Decolonization and Destabilization' (2025) *Harvard International Review* (online).

33 C Ewokor 'Three military-run states leave West African bloc – What will change?' *BBC News* 29 January 2025, https://www.bbc.com/news/articles/c5yvd91j72eo (accessed 18 June 2026).

34 News Release 'Sahel countries: ICC withdrawal endangers civilians' *Human Rights Watch* 24 September 2025, https://www.hrw.org/news/2025/09/24/sahel-countries-icc-withdrawal-endangers-civilians (accessed 18 June 2026); the ICC has formally confirmed the withdrawal steps taken by the three states. See ICC 'Statement by the Presidency of the Assembly of States Parties on the withdrawals from the Rome Statute by Burkina Faso, Mali, and Niger' Press Release 1 July 2026, https://www.icc-cpi.int/news/statement-presidency-assembly-states-parties-withdrawals-rome-statute-burkina-faso-mali-and (accessed 11 August 2026).

35 The five states that have withdrawn the Declaration under art 34(6) of the African Court Protocol are Rwanda, Tanzania, Benin, Côte d'Ivoire and Tunisia.

36 Interview with registry member 2 at the African Court, Arusha, Tanzania, 2 April 2026.

37 Interview with registry member 1 at the African Court, Arusha, Tanzania, 27 March 2026.

As of August 2026, there were four cases against Niger and six against Burkina Faso pending determination at the Court.[38] Although some were filed after the military *coups*, all these cases raise claims of violations occurring before the military takeovers and do not claim violations under the current leadership. This article's analyses of application of the local remedies rule in the contexts prevailing in the two countries, therefore, speak more to future applications against these states. Mali, however, presents a different scenario. Out of the 11 cases against Mali pending determination by the Court as of August 2026, two of the pending cases specifically concern claims of human rights violations by the military government.[39] As alluded to in the above-mentioned interview, the real test of the military states' cooperation with the Court is when their actions are challenged in cases before the Court. True to this, Mali did not file a response in one of the two pending cases, *Cheick Mohamed Chérif Kone & Dramane Diarra v Mali*, where the applicant sought orders for interim measures.[40] Whether these developments are a sign of things to come in the Court's relationship with Mali now that the actions of the military junta have been challenged remains to be seen. Regarding Mali, therefore, this article speaks to issues that are live and has the possibility to inform current practices. Overall, in both pending and future applications, the suggested change of approach can reduce the dismissal of what are valid applications before the Court. The downside to a formalistic interpretation of the local remedies rule without regard to the actual rule of law situation in a country, as Kurban suggests, is 'routine inadmissibility decisions in favour of authoritarian regimes without an assessment of the effectiveness of their legal systems'.[41]

3.1 Repression under military rule in Niger

Niger has been under military rule since the July 2023 *coup*. Its leadership established a National Council for the Safeguard of the Homeland (CNSP) as the state's main decision-making body.[42] There have been credible reports about the military junta's crackdown on the opposition, the media, civil society and trade unions through

38 See these statistics from use of relevant filters in the Court's database, https://www.african-court.org/ajudata/ (accessed 13 August 2026).
39 *Cheick Mohamed Chérif Kone & Dramane Diarra v Mali* Application 4/2024, Ruling (Provisional Measures) (20 November 2024); *Idrissa Minta v Mali* Application 2/2024.
40 *Cheick Mohamed Chérif Kone* (n 39) para 16.
41 D Kurban 'Authoritarian resistance and judicial complicity: Turkey and the European Court of Human Rights' (2024) 35 *European Journal of International Law* 355, 366.
42 Freedom House 'Freedom in the World 2025 Report', https://freedomhouse.org/country/niger/freedom-world/2025 (accessed 9 June 2025).

decrees.[43] Freedom House has categorised Niger as 'not free', the justification being that 'the junta restricted media freedom, weakened due process, and dissolved local councils, which had been among the country's few remaining elected institutions'.[44] In October 2024, the junta's leader, General Abdourahamane Tiani, signed a decree stripping Nigerien nationality from nine associates of former President Mohamed Bazoum. The decree accused the nine of, among other things, 'conducting activities likely to disturb public peace and security'.[45] Several officials of the deposed government have been arbitrarily arrested and detained. A journalist, who is a critic of the military regime, has been arrested on accusations of 'treason and plotting against the state security', for posts on social media and republishing an article by an international media.[46] Civilian political actors have also been tried in military courts,[47] in violation of continental standards on the right to a fair trial which limit the purpose of military courts to determining offences of a purely military nature committed by military personnel.[48] An extract from Amnesty International's reporting on Niger sums up the political environment in the country since the *coup*:[49]

> In this repressive climate, self-censorship has become the norm among journalists and human rights defenders, for fear of reprisals. 'If you criticise the government, be sure that you risk being arrested', a civil society member told Amnesty International.

Given this context, it becomes clear why there have been very few cases filed against Niger at the African Court. The country made the declaration permitting the Court to receive applications from individuals and NGOs in April 2022. At the time of writing, four years later, only two applications by individuals have been submitted against Niger as a single respondent state, and only one of these

43 I Allegrozzi 'Niger's new emergency law threatens right' *Human Rights Watch* 9 January 2026, https://www.hrw.org/news/2026/01/09/nigers-new-emergency-law-threatens-rights (accessed 5 June 2026); AT Domena 'What has changed in Niger two years after the coup?' *DW* 26 July 2025, https://www.dw.com/en/what-has-changed-in-niger-two-years-after-the-coup/a-73415504 (accessed 9 June 2026).

44 See 'Freedom in the World report' (n 42).

45 I Allegrozzi 'Niger counterterrorism decree targets political opponents' *Human Rights Watch* 15 October 2024, https://www.hrw.org/news/2024/10/15/niger-counterterrorism-decree-targets-political-opponents (accessed 5 June 2026).

46 Amnesty International 'Niger: "Threatened and brought to heel" – Human rights and civic space under pressure since the 26 July coup' 2025 9, https://www.amnesty.org/en/documents/afr43/8865/2025/en/ (accessed 5 June 2026).

47 Amnesty International (n 46) 32, 37, 39 & 51.

48 African Commission on Human and Peoples' Rights Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003 para L.

49 Amnesty International 'Niger: Authorities failing to uphold their commitment to respect human rights since military coup' 18 March 2025, https://www.amnesty.org/en/latest/news/2025/03/niger-human-rights-military-coup/ (accessed 5 June 2026).

applications was filed after the military *coup*.[50] The fact that only one case has been brought before the African Court since the start of the military rule three years ago arguably is explained in part or wholly by a repressive domestic context where critics of the regime face reprisals. Applying the African Court's evidentiary standard in *XYZ* to the context in Niger would require evidence of persecution *specifically targeted* at an applicant. Yet, applicants need not risk arbitrary arrest, detention and other forms of persecution in challenging military regimes in domestic courts in order to meet an admissibility criterion for accessing a regional human rights mechanism.

Regarding judicial independence, a Freedom House report notes that through a decree by the CNSP, 'the Court of Cassation and Council of State were abolished and replaced by the State Court, whose function and membership are determined by presidential decree'.[51] Further, the military leadership has, through decrees, dissolved four justice sector unions without giving reasons for the dissolution.[52] Two leading magistrates were also dismissed from the Autonomous Union of Magistrates according to the African Commission's Special Rapporteur on Human Rights Defenders, who called on Nigerien authorities to fully respect the independence of the judiciary.[53] According to the Bertelsmann Transformation Index (BTI):[54]

> Until the July 2023 coup, the judiciary included the Constitutional Court, the Court of Appeal (Cour de cassation), the State Council (Conseil d'état), the Court of Auditors (Cour des comptes) and the ordinary courts. The Court of Appeal and the State Council have now been replaced with courts whose members are appointed by Gen Tiani, so they cannot be considered independent. After the coup, the junta formally named Tiani, in his role as the CNSP's president, as head of the judicial system.

Applying the standard established in *XYZ* to this context demonstrates the inadequacy of an acontextual evidentiary approach to assessing

50 The two applications are *Mohamed Al Bousifi v Niger* Application 3/2022, filed in June 2022 involving a land dispute; and *Maazou Moussa Madougou v Niger* Application 15/2024, on a property dispute. Two other applications where Niger is a respondent state were filed against several states and by non-Nigerians.

51 'Freedom in the World report' (n 42).

52 Human Rights Watch 'Niger: Events of 2025', https://www.hrw.org/world-report/2026/country-chapters/niger (accessed 9 June 2026).

53 African Commission commissioner and Special Rapporteur on Human Rights Defenders, Focal Point on Reprisals in Africa and the Focal Point on Judicial Independence in Africa 'Intersession Report' submitted at the 85th ordinary session of the African Commission on Human and Peoples' Rights, 2025 https://achpr.au.int/en/intersession-activity-reports/special-rapporteur-human-rights-defenders-83os (accessed 6 July 2026).

54 Bertelsmann Stiftung's Transformation Index (BTI) 'BTI 2026 Country Report: Niger' (2026) 13, https://bti-project.org/en/reports/country-report/NER (accessed 13 July 2026).

compliance with the exhaustion rule. The default starting point for the Court, according to its well-established jurisprudence, is that judicial independence is presumed. Hypothetically, an applicant from Niger claiming bias by judicial officers or lack of judicial independence would be required to adduce 'incontrovertible', 'compelling', 'irrefutable' or 'undisputable' evidence of such claims. This imposes an unduly onerous evidentiary burden on applicants, effectively requiring them to establish allegations of bias and lack of judicial independence with absolute certainty.

3.2 Crackdown on rights in Burkina Faso

In January 2022, following a series of anti-government protests, members of the Burkina Faso armed forces ousted the country's democratically elected President, and established military rule under the leadership of Lieutenant Colonel Paul-Henri Sandaogo Damiba.[55] Eight months later, Damiba was ousted in a second *coup* led by Captain Ibrahim Traoré. The CIVICUS Monitor[56] has since 2024 categorised the country as '*repressed'* and flagged troubling erosion of civic freedoms.[57] Under Traoré's leadership, there has been a crackdown on civil society activists through abductions, arbitrary and incommunicado detention.[58] Media freedom is also restricted, with arrests and forced military conscription of journalists, the dissolution of the Journalists' Association and the suspension of media outlets for reporting on human rights and security situations.[59]

The targeting of judicial officers has made oversight of the military government's actions difficult. Seven judges and prosecutors who had opened legal proceedings against supporters of the military regime were notified that they would be conscripted, and six of the seven who reported to a military base have been disappeared.[60] The democratic space has further shrunk with the disbandment of Burkina

55 M Ofori-Mensah & H Gavin 'Lest we forget: Burkina Faso at a crossroads against human suffering and instability' *Transparency International* 11 October 2024, https://ti-defence.org/burkina-faso-coup-military-defence-security-corruption-integrity/ (accessed 11 June 2026).

56 A collaborative research initiative that tracks the state of civic freedoms in countries around the world.

57 CIVICUS Lens 'Burkina Faso: Three years of broken promises military junta tightens repression and indefinitely postpones return to civilian rule' 25 November 2025, https://lens.civicus.org/burkina-faso-three-years-of-broken-promises/ (accessed 11 June 2026).

58 As above.

59 As above.

60 'Burkina Faso conscripts magistrates for acting against junta, unions say' *Reuters* 16 August 2024, https://www.reuters.com/world/africa/burkina-faso-conscripts-magistrates-acting-against-junta-unions-say-2024-08-16/ (accessed 12 June 2026); CIVICUS (n 57).

Faso's electoral commission which the military leadership named 'a waste of money'.[61] In January 2026, the military government banned all political parties and seized their assets through a decree that scrapped all laws establishing and regulating political parties.[62] The Interior Minister justified this ban on the ground that the country's multiparty system was 'promoting division among citizens and weakening the social fabric'.[63]

Again, this calls into question the African Court's approach to the exhaustion of local remedies rule in *XYZ*. To date, 13 cases have been filed against Burkina Faso, five of which were brought against Burkina Faso and other African states as co-respondents, filed by non-Burkinabe individuals and NGOs. Of the eight cases brought by individuals from Burkina Faso, only one case was submitted after the military *coups* in 2022, where the applicant claimed violations related to an employment dispute predating the *coups*.[64] Evidently, to challenge the government in national courts is not only difficult but dangerous. Yet, to access the African Court, applicants from Burkina Faso need to prove how a repressive environment specifically affected their ability to exhaust local remedies, and show 'beyond any shadow of doubt' that national judges are biased or national courts lack independence. Such an extremely high evidentiary standard fortifies impunity, hinders justice and denies voice to a constituency that desperately needs it at the regional level given the impossibility of the same domestically.

3.3 Excesses of the military rule in Mali

In August 2020, following mass protests over corruption and insecurity, General Assimi Goïta led a *coup* in Mali, deposing President Ibrahim Boubacar Keïta.[65] Although he had promised a quick return to civilian rule, Goïta staged a second *coup* a year later, side-lined

61 C Ewokor & D Zane 'Burkina Faso military rulers scrap electoral commission, taking control of future polls' *BBC News* 17 July 2025, https://www.bbc.com/news/articles/clyzj2k2pmvo (accessed 11 June 2026).

62 S Lawal 'Why has Burkina Faso banned political parties, and what's next?' *Aljazeera* 30 January 2026, https://www.aljazeera.com/news/2026/1/30/why-has-burkina-faso-banned-political-parties-and-whats (accessed 11 June 2026).

63 W Chibelushi & N Négoce 'Burkina Faso junta announces ban on all political parties' *BBC Africa* 30 January 2026, https://www.bbc.com/news/articles/cevnlv9my1no (accessed 11 June 2026).

64 *Traoré Frederick v Burkina Faso* Application 5/2025, registered on 8 October 2025. See case statistics, https://www.african-court.org/ajudata/ (accessed 11 June 2026).

65 CIVICUS Lens 'Mali's blocked transition: Five years of broken promises and escalating repression under military rule' (2 October 2025), https://lens.civicus.org/malis-blocked-transition/ (accessed 16 June 2026).

transitional civilian leaders and became the new President.[66] Credible reports have documented the deteriorating human rights situation in Mali. Human Rights Watch has reported that under Goïta's leadership, there has been a 'crack down on peaceful dissent, political opposition, civil society, and the media, shrinking the country's civic and political space'.[67] Amnesty International has found the military junta's dissolution of all political parties to illustrate 'the alarming and continuing crackdown on the rights to freedom of expression, peaceful assembly and association'.[68] The United Nations (UN) High Commissioner for Human Rights has described the decree banning all political parties in Mali as 'draconian' and urged its reversal.[69] The African Commission's Special Rapporteur on Human Rights Defenders described this ban as well as the directive to all media houses in Mali to stop covering the activities of political parties and associations as 'likely to restrict the rights to freedom of expression, access to information, association and assembly and participation in public affairs guaranteed by the African Charter'.[70] In April 2025, UN experts condemned the summary execution and enforced disappearances by Malian armed forces.[71] These reports depict an environment that would make it difficult for civil society organisations and individuals to organise or challenge the excesses of Mali's military leadership through domestic litigation.

These challenges are compounded by the shrinking political space in Mali. In a 2023 referendum, 97 per cent of the voters approved constitutional amendments that have consolidated power in the interim President, and the military leadership has unilaterally postponed elections several times.[72] More recently, Goïta was

66 As above.
67 Human Rights Watch 'Mali: Events of 2024', https://www.hrw.org/world-report/2025/country-chapters/mali (accessed 16 June 2026).
68 Amnesty International 'Mali 2025' report, https://www.amnesty.org/en/location/africa/west-and-central-africa/mali/report-mali/ (accessed 16 June 2026).
69 OHCHR 'Mali: Curbs to political rights risk further deepening human rights concerns' Press release, 16 May 2025, https://www.ohchr.org/en/press-releases/2025/05/mali-curbs-political-rights-risk-further-deepening-human-rights-concerns (accessed 16 June 2026).
70 African Commission commissioner and Special Rapporteur on Human Rights Defenders, Focal Point on Reprisals in Africa and Focal Point on Judicial Independence 'Intersession Report' submitted at the 79th ordinary session of the African Commission on Human and Peoples' Rights (2024) paras 15-16, https://achpr.au.int/en/intersession-activity-reports/special-rapporteur-human-rights-defenders-focal-point-reprisals (accessed 6 July 2026).
71 OHCHR 'Mali: UN experts outraged by reports of summary executions and enforced disappearances' Press release 30 April 2025, https://www.ohchr.org/en/press-releases/2025/04/mali-un-experts-outraged-reports-summary-executions-and-enforced (accessed 16 June 2026).
72 CIVICUS 'Mali heads in the wrong direction: Military junta ramps up repression instead of calling elections' 13 May 2024, https://lens.civicus.org/mali-heads-in-the-wrong-direction/ (accessed 16 June 2025).

granted a five-year presidential term through a law passed by the transitional Parliament, a move that keeps him in power until 2030. Even more problematic, the presidential term will be renewable 'as many times as necessary' until the country was 'pacified'.[73] The junta has also attacked and captured the judiciary. According to Freedom House, Mali's judiciary 'is beholden to the executive, despite constitutional guarantees of judicial independence'.[74] The President has sole authority to appoint Supreme Court judges, and attacks against judicial officers have resulted in some judges vacating their positions.[75]

In *Sébastien Ajavon v Benin,* the African Court took the view that judicial independence implies 'the ability of courts to discharge their functions free from external interference and without depending on any other authority'.[76] The Court clarified that the concept has two limbs, namely, institutional and individual independence. Institutional independence connotes the 'status and relationship' of the judiciary with the executive and legislature, while individual independence pertains to 'the personal independence of judges and their ability to perform their functions without fear of reprisal'.[77] Additionally, individual judicial independence is reflected in the following: (i) the manner of appointing judges; (ii) security of tenure for judges;[78] and (iii) ensuring that judges are not transferred or dismissed from their jobs at the whim or discretion of the executive or any other government authority or private institutions. Applying these criteria to the situation in Mali, where Supreme Court judges are appointed by the interim President, clearly demonstrates a lack of judicial independence.

A total of 11 cases have been submitted against Mali since the August 2020 *coup* and are pending determination as of August 2026.[79] Importantly, the human rights violations in Mali are reflected in two of these cases. In *Idrissa Minta v Mali*, the applicant contends that the two *coups* in 2020 and 2021, the decrees establishing the military leadership and delays in returning to civilian rule have

73 C Ewokor 'Mali coup leader granted five-year term in power' *BBC News* 4 July 2025, https://www.bbc.com/news/articles/c9qxnxxzde8o (accessed 16 June 2026).
74 Freedom House *Freedom in the World 2025* report, https://freedomhouse.org/country/mali/freedom-world/2025 (accessed 16 June 2026).
75 As above.
76 *Sébastien Germain Marie Aïkoué Ajavon v Benin* (n 27) para 277.
77 *Sébastien Germain Marie Aïkoué Ajavon v Benin* (n 27) para 278.
78 The Court pointed out that this specifically means the existence of clear criteria of selection, appointment, duration of term of office, and the availability of adequate safeguards against external pressure.
79 AJUDATA African Court jurisprudence database, https://www.african-court.org/ajudata/ (accessed 11 August 2026).

violated various provisions of the African Charter, the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Democracy, Elections and Governance (African Democracy Charter) and the ECOWAS Protocol on Democracy.[80] In *Cheick Mohamed Chérif Kone & Dramane Diarra v Mali*, the applicants alleged that governance in Mali (after the 2020 *coup*) 'is characterised by violation of the fundamental rights of citizens, in particular arbitrary arrests, abductions and kidnappings of political figures'.[81] They also take issue with the military junta's disregard for the commitment it has made to limit the military transition to 18 months, and further claim that the country's new Constitution 'reverses democratic gains and republican values, while undermining the impartiality and independence of the judiciary by radically changing the composition of the High Judicial Council'.[82] Although it remains unclear what kind of arguments on admissibility the applicants will advance as the case is yet to be determined, questions regarding exhaustion of local remedies and claims of lack of judicial independence can be anticipated because an appeal was pending at Mali's Supreme Court when the application was submitted. Should such claims arise, the Court ought to depart from its approach to examining the exhaustion rule applied in *XYZ* in view of Mali's domestic context.

This article suggests that the Court could draw inspiration from the jurisprudence of the African Commission, particularly in cases against states under military rule and where claims of mass violations of human rights are made. In *Constitutional Rights Project & Others v Nigeria* the complainants were challenging decrees by the military government in Nigeria that proscribed three newspapers from publishing and circulating in the country. Other complaints in the case included the arrest and detention of six pro-democracy activists detained without charges. The decrees in question also contained clauses that ousted the jurisdiction of ordinary courts. The Commission found that the implication of the ouster clauses is that there was no legal basis to challenge government actions taken pursuant to the decrees.[83] It was therefore 'reasonable to presume that domestic remedies will not only be prolonged but are certain to yield no results'.[84] The Commission declared the case admissible, and it has taken this position in other cases involving Nigeria while under

80 *Idrissa Minta* (n 39) Case Summary; the applicant claims violations of 'the right to participate freely in public affairs', 'the right to have democratic institutions and leaders' and 'the right to have an electoral cycle that complies with the constitution and laws of the country'.
81 *Cheick Mohamed Chérif Kone* (n 39) para 3.
82 *Cheick Mohamed Chérif Kone* (n 39) paras 7 & 8.
83 *Constitutional Rights Project & Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 31.
84 As above.

military rule.[85] Some occurrences in military regimes amount to the implicit ousting of the jurisdiction of ordinary courts of law. Even without the issuance of a decree formally ousting courts' jurisdiction in Burkina Faso, the arrest, conscription and enforced disappearance of judicial officers effectively preclude challenges to government action before the courts, as such brazen attacks have an intimidating effect on both human rights defenders and the judiciary.

In cases of serious and mass violations of human rights, the African Commission has also heard complainants who did not exhaust local remedies. In *Jawara v The Gambia*, the complainant, a former head of state, alleged that the military junta that deposed his government had 'initiated a reign of terror' marked by the banning of political parties, arbitrary arrests and detention, kidnappings and torture, and restrictions on freedom of expression. The Commission acknowledged that 'there [was] no doubt that there was a generalised fear perpetrated by the regime as alleged by the complainant'.[86] It observed that the military regime 'controlled all the arms of government and had little regard for the judiciary', concluding that in the circumstances, 'it would be reversing the clock of justice to request the complainant to attempt local remedies'.[87] Other decisions by the African Commission point to the established position that the exhaustion of local remedies rule is not to be applied 'literally' in instances 'where it is impractical or undesirable' for the complainant to pursue domestic courts.[88] It should be noted, however, that the cases identified from the Commission, which fall outside the scope of this article, do not demonstrate a consistent approach in its jurisprudence on this issue.[89]

85 *Civil Liberties Organisation v Nigeria* (2000) AHRLR 188 (ACHPR 1995).
86 *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 37.
87 *Jawara v The Gambia* (n 86) para 40.
88 Communication 25/89, 47/90, 56/91, 100/93 (Joined), *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) para 37; the European Court of Human Rights took a similar position in *Case of Akdivar & Others v Turkey* Application 21893/93, Judgment (16 September 1996) para 67. The Court held that the exhaustion rule 'is also inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective'.
89 See, eg, Communication 340/07 *Nixon Nyikadzino (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe* where the Commission rejected arguments by the applicant that were centred on the general human rights situation in Zimbabwe as justification for failing to exhaust local remedies.

4 An alternative: A context-sensitive evidentiary approach

In his examination of the European Court of Human Rights' application of the local remedies rule in cases against '*de facto* illiberal democracies', Madsen faults the Court for 'proceduralisation' and strict formalism that is not ideal in cases against 'democratically decaying' states such as Hungary and Turkey.[90] He points out that in some cases against Hungary, the European Court 'is focused on the mere existence of a potential remedy', namely, the Hungarian Constitutional Court. What he finds problematic with this, and which is relevant to this article, is that it is done without questioning 'the actual independence of the Hungarian justice system'.[91] Madsen takes issue with the European Court's assumption that the remedy is formally effective as it does in cases against Hungary for wrongly insisting on procedural and formal subsidiarity relative to local remedies 'even in cases where it is well-known that democracy and the rule of law is decaying'.[92] In the African context, given the prevailing state of governance in military regimes, the African Court's positions, for example, that the Supreme Court and the Court of Cassation in Mali are effective remedies and cannot be 'prejudged' without exercising or testing them, now requires qualification.[93] To require applicants who raise claims of general persecution and widespread violations in military regimes to prove how these facts specifically impacted their ability to exhaust local remedies would be a 'non-contextual understanding' of the local remedies rule, which the Court should abandon.[94]

A similar argument can be made about the Court's apparent requirement that such applicants should adduce evidence of attempting to exercise or test the local remedies for a claim of ineffectiveness of local remedies to succeed. In the context of military regimes, the current standard of proof in considering claims of lack of judicial independence and judicial bias is impossible to meet or prohibitively difficult. Even in democratic states, it is acknowledged that judges occupy an insecure position within the political system and remain aware of personal and political implications of making

90 MR Madsen 'The narrowing of the European Court of Human Rights? Legal diplomacy, situational self-restraint, and the new vision for the Court' (2021) 2 *European Convention on Human Rights Law Review* 180, 201.
91 As above.
92 As above.
93 See, eg, *Ibrahima Podiogou & Others v Mali* Application 4/2019, Ruling (22 September 2022) paras 35-36. Although the Court makes this finding during the pendency of the *coup* in Mali and in a case regarding an employment dispute, it no longer holds for politically sensitive cases as the article argues.
94 Madsen (n 90) 202.

decisions that go against the core interests of the governance settings in which they operate.[95] This insecurity is more pronounced and exacerbated in authoritarian states, such as the military regimes, where the necessity of a different evidentiary approach is all the more evident. For clarity, this article does not suggest abolishing the application of the local remedies rule when considering cases against military regimes. Rather, it advocates a context-sensitive application of the rule. From an evidence standpoint, such context sensitivity could take two main forms, namely, the use of a rebuttable presumption of ineffectiveness or applying the *prima facie* standard of proof.

4.1 Presumptions

The Court's Practice Directions make it clear that in appropriate circumstances it 'may make use of presumptions and inferences'.[96] Presumptions have been described as 'conclusions drawn from known facts about unknown facts'[97] requiring that 'a finding of a basic fact give rise to the existence of a presumed fact'.[98] In international litigation, what is customary, normal or more probable is presumed.[99] As discussed earlier, one of the well-established presumptions on which the African Court has consistently relied concerns the impartiality of a judge in domestic proceedings, requiring applicants to submit cogent evidence for rebuttal.[100] In the context of autocratic governance, such as is the case in the military regimes discussed, this presumption is unsustainable. Fombad has defined an independent judiciary as one that is 'free to render justice on all issues of substantial legal and constitutional importance, fairly, impartially, in accordance with the law, without threat, fear of reprisal, intimidation or any other undue influence or consideration'.[101]

One may argue that what is more probable in military regimes is lack of judicial independence given the climate of fear and actual reprisals

95 T Ginsburg & T Moustafa 'Introduction: The functions of courts in authoritarian politics' in T Ginsburg & T Moustafa (eds) *Rule by law: The politics of courts in authoritarian regimes* (2008) 14.

96 African Court on Human and Peoples' Rights Practice Directions adopted 5 March 2024, Annexure on Evidentiary Matters para 8.

97 M Kazazi *Burden of proof and related issues – A study on evidence before international tribunals* (1996) 269.

98 CF Amerasinghe 'Presumptions and inferences in evidence in international litigation' (2004) 3 *Law and Practice of International Courts and Tribunals* 395.

99 Amerasinghe (n 98) 398.

100 *Landry Angelo Adelakoun & Others v Benin* Application 12/2021, Judgment (4 December 2023) para 40; *Issiaka Keïta & Others v Mali* Application 5/2019, Judgment (5 September 2023) para 83.

101 CM Fombad 'Some perspectives on the prospects for judicial independence in post-1990 African constitutions' (2001) 16 *Denning Law Journal* 17, 19-20.

against judicial officers. Going by Fombad's definition, the actions of military juntas with regard to the judiciary in these countries are the textbook definition of *lack* of judicial independence. A member of a transnational human rights NGO that regularly litigates at the African Commission and the African Court made an observation that supports this proposition: 'There is no military regime anywhere in the world, if anyone can name one, that is fair minded, just [and] was not high handed. [It] doesn't happen.'[102]

A reasonable approach for the Court would be to adopt in its practices a rebuttable presumption of ineffectiveness of local remedies in such non-democratic contexts. In a case against a state under military rule, for example, the state would have the initial onus or burden to rebut the presumption of ineffective local remedies by proving the contrary. This reversal of the burden of proof would have the added benefit of ensuring that in every case, a military regime is placed under the judicial spotlight to clarify the existence and effectiveness of local remedies as well as independence of the judiciary if its objections to admissibility based on the exhaustion rule are to succeed.[103] Under the current approach by the Court, this does not or may not always happen. Claims of ineffectiveness of local remedies by applicants have the possibility to fail even without a response from the state. The suggested approach would also be consistent with well-established AU norms and practices that reject military *coups* as an illegitimate means of attaining political power and military rule and its attendant excesses as an unacceptable form of governance on the continent.

In an interview with a current judge of the African Court, I asked about the feasibility of this approach, where the Court would take into consideration the regime type in the respondent state, in this case military rule, in applying the exhaustion rule. The judge observed as follows:[104]

> Personally, I don't think the Court has to go into political affairs. We cannot think about this State is not democratic, we cannot speak about that. Because we will mix two things that cannot go together … we are not to give our opinions about what is happening in some countries … We don't say that this government is not democratic, no. We say because of the position of this applicant … we put the link between the situation and the person. But we don't criticise [the state], that is going too far.

102 Interview with civil society member 2 in Arusha, Tanzania, 3 March 2026.
103 See a similar take in C Roberts 'Reversing the burden of proof before human rights bodies' (2021) 25 *The International Journal of Human Rights* 13.
104 Interview with Judge 3 in Arusha, Tanzania, 26 March 2026.

This take on the Court's approach reveals reluctance to scrutinise the actual rule of law situations and their impact on the efficacy of local remedies, precisely what would be required in applications against military states if just admissibility decisions are to be arrived at. Contrary to the Court's position in *Ajavon*, that it will consider the applicant's personal circumstances, legal and political contexts in considering the exhaustion rule and its exceptions, being blind to 'political affairs' would overlook the political context limb of the criteria set in *Ajavon*.[105] The reluctance to take into consideration the nature of governance in respondent states closely resembles the counter-argument that the application of a rebuttable presumption of ineffectiveness of local remedies in military states would 'stigmatise' such states.[106] This raises the question of whether the current approach represents the African Court's deliberate avoidance of the political question in respondent states in view of the backlash against the Court in the form of withdrawals of article 34(6) declarations by five states. A legal officer in the Court's registry pointed to this likelihood. In response to the question of whether the Court's decision making has been impacted by these withdrawals, the officer observed as follows:[107]

> I don't think they [the Court] have been the same [after the withdrawals]. I sense that in dealing with states, especially states that have withdrawn but still have pending cases, I take the view that they are a bit more circumspect. Especially when dealing with cases that are raising new issues, not repetitive ones.

When I pushed for a concrete example of how the Court has changed its approach, particularly in admissibility decisions, the legal officer noted that 'at the time Tanzania was withdrawing or a year after Tanzania had withdrawn, if you did a proper count of decisions against Tanzania you would have noted that the Court increasingly was dismissing most of the claims'.[108]

In view of the above, given the current relationship between the African Court and states, one can expect the Court to prefer a formalistic approach that prioritises the individual circumstances of the applicant within a repressive domestic context and how that inhibits exhaustion of the formally available but practically ineffective local remedies. What arguably is an attempt at self-preservation by

105 *Sébastien Germain Marie Aïkoue Ajavon v Benin* (n 20) para 100.
106 This was feedback I received when I presented a draft of this article at the ICON 2026 Conference, held 29 June-1 July 2026 in Dublin. It was suggested that this 'stigma' could possibly engender more resistance against the African Court by states.
107 Interview with registry member 1 at the African Court, Arusha, Tanzania, 27 March 2026.
108 As above.

the Court comes at the expense of a genuine scrutiny of the efficacy of judicial remedies under autocratic governance. As a result, and in an effort to avoid 'stigmatising' the relevant autocratic state, an opportunity would be lost to rightly stigmatise authoritarianism in the African continent.

4.2 Lowered standard of proof

It would be prudent for the African Court to consistently bear in mind that the difficult conditions faced under military regimes are not theoretical but real. In the African context, it is common knowledge that the repression that characterises states under military and other forms of autocratic rule is often defined by fear of litigating against the state. The member of a transnational human rights NGO cited above described the realities faced by human rights defenders in military states as follows:[109]

> I think the Court ought to be acutely aware of the consequences of these kinds of military regimes. The fact that there is limited judicial oversight, oftentimes accountability is very limited, if at all. And therefore people are genuinely generally scared. And they cannot oftentimes publicly utilise the internal processes to resolve their disputes, because they are scared of what may happen if they are seen to be embarrassing the regime or trying to be troublemakers in whatever way. They may be charged with treason. You see examples literally everywhere. So the Court ought to be acutely aware of what the implications of these kinds of undemocratic regimes can have on populations. And to take judicial notice that these are things that have an impact on a person's ability to exhaust domestic remedies.

This view underscores the significance of the chilling effect of the states' repression of human rights defenders, journalists and civil society organisations, which results in under-reporting of violations and avoiding litigation in national courts. Some studies have shown that state-led repression has the twin effect of either deterring or promoting litigation in international human rights tribunals.[110] Given the fact that very few cases have been submitted at the African Court to directly and specifically challenge the excesses of the military regimes that have now lasted years, a plausible deduction is that the

109 Interview with civil society member 2 in Arusha, Tanzania, 3 March 2026.

110 See, eg, N de Silva & M Plagis 'NGOs, international courts, and state backlash against human rights accountability: Evidence from NGO mobilization against Tanzania at the African Court on Human and Peoples' Rights' (2023) 57 *Law & Society Review* 36, 40-42; also see F van der Vet '"When they come for you": Legal mobilization in new authoritarian Russia' (2018) 52 *Law & Society Review* 301, 330-331, where the author concludes that in the context of Russian authoritarianism, repression has motivated lawyers to reinvent their everyday practices to cope with state coercion and strategically determine when (not) to litigate in national courts and before the European Court of Human Rights.

generalised fear in these states has deterred litigation at the African Court.

Although the question of proving a generalised state of fear in the population from state (in)action first arose while the African Court was considering the merits of the *Norbert Zongo* case, the Court's position and the separate opinion in the matter are relevant to this article's main argument in relation to admissibility decisions. In that case, the applicants had argued that Burkina Faso's failure to expeditiously identify, apprehend and prosecute those who assassinated an investigative journalist was a violation of the freedom of expression of journalists in general, who now risked 'working under fear, apprehension and intimidation'.[111] The Court found that although the state's failure 'could potentially cause fear and anxiety in media circles', the applicants had nonetheless 'not shown proof that the Burkinabe media had not been able to exercise freedom of expression'.[112] The state, therefore, was not in violation of the freedom of expression. In a separate opinion, four judges acknowledged that the state's failure to try the assassins may have 'generated a certain degree of fear and anxiety'.[113] In this regard, they took the position that

> when it comes to facts of a 'psychological' nature, which are generally difficult to prove, the Court did not have to insist on getting convincing evidence. We are in favour, especially in the area of the protection of human rights, of an adjustment of the standard of proof relating to the establishment of the violation of certain rights guaranteed under the Charter or any other applicable legal instruments, and in particular, regarding evidence of the possible 'intimidating effect' of a behaviour by a Respondent State which would be contrary to the international obligation.[114]

Although all four judges concurred with the majority's conclusion, namely, that the applicants had not submitted evidence of the climate of fear, they had a more nuanced take. They faulted the applicants for not providing 'the slightest evidence' to convince the Court of the existence of an 'intimidating effect'. Instead, according to them, they had made a 'general allegation without substantiating it with precise facts which could concretely reflect this fear and anxiety and thus establish *prima facie,* the merits of the said allegation'.[115] The

111 *Beneficiaries of the Late Norbert Zongo & Others v Burkina Faso* Application 13/2011, Judgment (28 March 2014) para 184.
112 *Beneficiaries of the Late Norbert Zongo* (n 111) para 186.
113 Separate opinion/joint declaration: Gérard Niyungeko, Fatsah Ouguergouz, El Hadji Guisse and Kimelabalou Aba JJ in *Beneficiaries of the Late Norbert Zongo* (n 111) para 3.
114 Separate opinion/joint declaration (n 113) para 4.
115 Separate opinion/joint declaration (n 113) para 6.

central point emerging from this separate opinion is that there was preference for a lower threshold or standard of proof, namely, *prima facie*, as the requirement that an applicant alleging a general state of fear or persecution must meet. Importantly, the judges acknowledged that 'when *circumstances which are not attributable to a party* are such that evidence required from it is difficult or impossible to obtain, the judge may be inclined to be *convinced more easily than in normal circumstances*'.[116] In other words, the judges reasonably advocated a lowered standard of proof in such circumstances. Applying the same logic to this article's main argument, applicants from military regimes are bound to make generalised claims of lack of judicial independence as justification for not approaching national courts before submitting cases at the African Court. Importantly, as the views in the separate opinion demonstrate, a case for the existence of generalised fear that inhibits exhaustion of local remedies can still be made without evidence of how such an environment individually affects an applicant's ability to exhaust the remedies.

Building on this logic, I suggest that the Court should accept claims of generalised fear, persecution and lack of judicial independence even when applicants do not directly link such political and legal environments to how these specifically hindered the applicants from exhausting local remedies. This is in view of the unduly heavy evidentiary burden of trying to do so, as affirmed by the separate opinion in *Zongo* and the dangers of attempting to litigate domestically in autocratic contexts to satisfy this admissibility condition. In this regard, and from an evidentiary perspective, the second main proposition (as an alternative to use of rebuttable presumptions) is that the African Court ought to adopt the *prima facie* standard of proof to determine arguments for exemption from the exhaustion rule in applications against military regimes.[117] Green defines this standard as one requiring that the 'evidence produced is indicative of the proposition claimed'.[118] In relation to this, indicative and circumstantial evidence of repression and serious human rights violations in military states, such as the three discussed here, should suffice. Evidence of governance conditions that make local remedies ineffective in reports from credible sources, such as the African Commission's special mechanisms, Amnesty International and Human Rights Watch, arguably is sufficient to shift the burden of

116 Separate opinion/joint declaration (n 113) para 5 (my emphasis).
117 For more on the various standards of proof applied at the Court, see EK Murimi 'Fluctuating standards of proof at the African Court: A case for principled flexibility' (2023) 7 *African Human Rights Yearbook* 158-182.
118 JA Green 'Fluctuating evidentiary standards for self-defence in the International Court of Justice' (2009) 58 *The International & Comparative Law Quarterly* 163, 166.

proof to the state to prove the contrary if objections to admissibility are to stand.

Regarding claims of lack of judicial independence particularly, the current evidentiary standard, as seen earlier, requires applicants to establish such claims almost with certainty, an approach that does not work in all domestic contexts. Similar to the claims related to the general human rights situation in autocratic contexts, the application of the *prima facie* standard of proof to determine whether allegations of lack of judicial independence have been established should be sufficient. Requiring 'undisputable' or 'irrefutable' proof that there is judicial bias or lack of judicial independence in a military state amounts to upholding an evidentiary standard that would favour autocratic governance in view of the high failure rate in establishing such claims under the current evidentiary approach.

5 Conclusion

The African Court's starting point for its local remedies rule has so far been the now well-established presumption that domestic judges and courts are independent. The Court applies a very high standard of proof that resembles the beyond reasonable doubt standard for claims of lack of judicial independence in national courts at both the admissibility and merits stage. The Court's approach, as applied in *XYZ*, also requires applicants who claim ineffectiveness of local remedies because of repressive domestic climates to go further and establish how they themselves have been targeted by the generalised fear or persecution. The realities in three military states on the continent demonstrate the inappropriateness of the Court's evidentiary standards in such contexts. The Court should instead make use of a rebuttable presumption of ineffectiveness of local remedies in military states or lower the standard of proof to the *prima facie* standard in determining claims that national courts lack independence and proving generalised fear. Such an approach could be extended to other forms of autocratic rule where governments are elected to power.

In the face of a backlash from five states, which manifested through the withdrawal of the declaration allowing direct access to the Court for individuals and NGOs, and as some insiders at the Court confirmed in interviews, the Court is likely to proceed with caution in determining compliance with the exhaustion rule in cases against the military states that still allow direct access. It is hopefully clear from the discussion that, on the one hand, retaining the current approach in pending and future cases against military states

will make the African Court less accessible with more inadmissibility decisions. This would be a major setback in the quest to push back against serious rule of law and human rights violations for Africans in desperate need of the Court's intervention. On the other hand, an interventionist role for the Court will likely result in more cases being determined on their merits and greater judicial scrutiny for the activities of the military respondent states. The potential risk to this is a collapse of the relationship between these states and the Court, denying their citizens and NGOs direct access to the Court. The suggested evidentiary approach offers the African Court two adjudicatory tools that could help it navigate this dilemma in a manner that is fair to the states involved and yet not deleterious to human rights protection.