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A Critical Analysis of Article 56 of the Banjul Charter

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Dissertation submitted in fulfilment of the requirements for the degree
Magister Legum in Public Law and Legal Philosophy at the North-West
University

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Graduation: July 2019

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DEDICATION

I dedicate this dissertation to my husband and my best friend Rufaro Garidzirai and our daughter Atarah Jacquinah Garidzirai. Without your love, prayers, support and encouragement, I would not amount to much.

I love you all.

ACKNOWLEDGEMENTS

I express my sincere gratitude to God the creator for making my dream of obtaining a Master of Laws degree come to fruition. I would also like to extend my gratitude to my supervisor Prof A Agbor for the motivation, guidance and mentorship he offered during the writing of this dissertation. I am grateful to my husband Rufaro Garidzirai for his unwavering support and contribution towards the commencement and completion of this dissertation. I extend my gratitude to him for igniting in me the enthusiasm to advance my academic qualifications through post-graduate studies. I also wish to thank my family, colleagues and friends for their prayers, support and motivation through this journey.

Thank you all.

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LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
AEC	African Economic Community Treaty
AHRLJ	African Human Rights Law Journal
AJICL	African Journal of International and Comparative Law
AU	African Union
CAT	Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment
CERD	Convention on the Elimination of Racial Discrimination
COMESA	Common Market for Eastern and Southern Africa
ECOSOC	The United Nations Economic and Social Council
ECOWAS	Economic Community of West African States
HRQ	Human Rights Quarterly
ICCPR	International Covenant on Civil and Political Rights
IHRDA	Institute of Human Rights and Development in Africa
NGO	Non-Governmental Organisation
OAU	Organisation of African Unity
PELJ	Potchefstroom Electronic Law Journal
UK	United Kingdom
UN	United Nations
UNITA	<i>Uniao Nacional para a Independencia Total de Angola</i> (National Union for the Total Independence of Angola)

ABSTRACT

Human rights have gradually gained widespread recognition and have attained a priority status at both universal and regional level. Thus, there exist certain regional institutional mechanisms that capture the procedures necessary for submitting communications. The African Commission on Human and Peoples' Rights is one such institutional mechanism established in terms of Article 30 of the Banjul Charter to decide on communications by individuals in terms of article 55 of the Banjul Charter. In this regard, legal scholars have long since raised the issue that, in comparison with other regional and also global human rights complaints mechanisms, the number of communications received and dealt with under the African human rights system is miniscule. A problem is that the procedures available remain unknown to many. Even many a lawyer or NGO, who might otherwise contemplate bringing a claim before the African Commission is unaware of the procedures. Knowledge of especially the individual communication procedure before the commission is therefore crucial.

Hence, there is a need for these criteria to be known, and for it to be understood so as to know how the Commission applies them. The way the Commission applies them should be predictable, meaningful and lenient, to make the communication procedure a successful tool in vindicating human rights in Africa. These communications must comply with certain admissibility requirements embodied in article 56 of the Banjul Charter. These requirements stipulate that a communication "must indicate the authors"; "must be compatible with the Charter of the OAU or with the Banjul Charter"; "must not be written in disparaging or insulting language"; must "not be based exclusively on news disseminated through the mass media"; must "be sent after exhausting local remedies"; "must be submitted within a reasonable period from the time local remedies were exhausted" and "must not deal with cases which have been settled by these States".

Though such requirements may appear direct and simple to understand, they contain a vast array of impediments to individuals seeking to submit such communications. In other words, these requirements contain some words and

phrases which are ambiguous and need clarity. For example, the "communication must not be written in disparaging or insulting language" the "communication must be sent after exhausting local remedies, if any, unless if they are unduly prolonged"; and the "communication must be submitted within a reasonable period from the time local remedies are exhausted". In this light, obvious questions such as the meaning of "disparaging or insulting language"; "exhausting local remedies"; "unduly prolonged"; and "reasonable period" as used in these sub-paragraphs require clarity. This in turn presents a problem in the interpretation of the Banjul Charter as several individuals have a narrow understanding of article 56 which could result in a communication that does not comply with the requirements.

Considering these ambiguities, this study interprets the requirements for the admissibility of a communication by making use of the jurisprudence of the European Court of Human Rights, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. It examines the African Commission's interpretation of article 56 in comparison with the equivalent criteria applicable under the European and American systems. The jurisprudence of the European Court, the Inter-American Commission and the Inter-American Court will be considered alongside that of the African Commission so as to see whether, and if so, there is any potential for improvement of the admissibility criteria under article 56 of the Banjul Charter. Upon such exposition, the study attempts to provide clarity to any misunderstanding that may exist concerning the requirements for admissibility encapsulated in article 56.

Key words: admissibility, disparaging or insulting language, incompatible, manifestly ill-founded, reasonable period, unduly prolonged

Chapter 1 Context and Outline of the Study

1.1 Background

It is important to note that due to the increase in human rights violations, various regions have deemed it necessary to establish mechanisms that promote the respect of human rights.¹ To this end, certain human rights instruments and institutions were established as forming part of such mechanisms. One such mechanism is the European Convention for the Protection of Human Rights and Fundamental Freedoms (herein the European Convention)² which is a Council of Europe instrument that established the European Court of Human Rights (herein the European Court).³ Similarly, the American Convention on Human Rights (herein the American Convention)⁴ which was adopted by the Organisation of American States is another such instrument. This Convention's rights are enforced through the Inter-American Commission on Human Rights (herein the Inter-American Commission)⁵ as well as the Inter-American Court on Human Rights (herein the Inter-American Court).⁶

The African continent is no exception to such developments. Worth noting and relevant to this study is the African Charter on Human and Peoples' Rights (herein the Banjul Charter). This is a human rights instrument adopted in 1981 by the then Organisation of African Unity (herein the AU).⁷ The Banjul Charter, in article 30, contemplated the establishment of a Commission with the mandate to 'promote human and peoples' rights and ensure their protection in Africa'. It thus gave birth to the Commission which became operational in 1987.⁸ The Commission is

¹ Viljoen "Admissibility under the African Charter" 61.

² European Convention for the Protection of Rights and Fundamental Freedoms (1950).

³ The European Court of Human Rights was established by Protocol No 11 to the European Convention on 1 November 1998.

⁴ American Convention on Human Rights (1969).

⁵ The American Commission on Human Rights is established under Article 34 and 36 of the American Convention

⁶ The American Court on Human Rights was established in 2001, and like the American Commission, it has jurisdiction with regards to matters of the fulfilment of the commitments made by State Parties to the American Convention.

⁷ The Organisation of African Unity was established in Addis Ababa on the 25th of May 1963. In 2002, the then chairperson, Thabo Mbeki, disbanded it, replacing it with the African Union.

⁸ Article 30 of the Banjul Charter.

complemented by the African Court on Human and Peoples' Rights (herein the African Court).⁹

Though the African Court further reinforces the Commission's functions, it will not be the subject matter of this discussion. This is because, even though a Court exists, the Commission is still relevant as it caters for individual communications, unlike the Court which restricts communications brought by individuals or NGO's.¹⁰ Thus, article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court restricts communications submitted to the Court to NGO's and individuals with observer status. This means that if a State has not made a special declaration accepting the competence of the court, an NGO or an individual cannot approach the court. Put differently, even if a State Party has ratified the Banjul Charter and the Protocol but has not made the article 34(6) special declaration her individuals and NGO's *locus standi* is detracted. Hence, unlike the individuals and NGO's of State Parties which have made a special declaration in terms of article 34(6), State Parties which have not yet made the declaration cannot be brought before the African Court to account for human rights violations. Consequently, the African Court does deny individuals direct access to it as opposed to the Commission.

On this note, in terms of the Banjul Charter, the Commission is the regional institutional mechanism mandated with the promotion and protection of human and peoples' rights in Africa as well as interpreting the provisions of the Banjul Charter.¹¹ The Banjul Charter in this regard is a human rights instrument that contains dedicated provisions for the respect, protection and promotion of peoples' rights. It has been ratified by all African States save for Morocco.¹² The Commission is the continent's human and peoples' rights watchdog – a task that is prescribed in the

⁹ The African Court was established by Article 1 of the Protocol to the Banjul Charter on Human and Peoples' Rights in June 1998.

¹⁰ Article 5(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998).

¹¹ Article 45 of the Banjul Charter.

¹² African Commission on Human and Peoples Rights 2018
<https://www.achpr.org/instruments/achpr>.

Banjul Charter.¹³ The Commission commits to the principles and values of the Banjul Charter in dealing with complaints on human rights violations.¹⁴ However, as noted above, all the requirements for the admissibility of an individual communication must be met before the Commission can adjudicate on the communication. The position is the same with the European Convention and the American Convention which both require that a communication comply with the requirements for admissibility of a communication before any determination on the merits can be made.¹⁵

As Amerasinghe notes, one of the rationales behind the need to comply with these admissibility requirements is to filter or screen the alleged human rights violations that may be brought to the Commission at that level.¹⁶ This in turn fosters the sovereignty of States and acts as a balance between state sovereignty and international supervision. In this light, it is important that incidents of human rights violations, committed by States, be resolved through judicial and non-judicial mechanisms at the national level in the first instance.¹⁷ In other words, the Commission does not play the role of a court of first instance. In addition, reasonable opportunity should be given to the perpetrator State to be informed of the violations as well as to redress them using its legal framework and institutional mechanisms in place.

Nonetheless, even though such requirements may seem simple, they have various technical meanings attached to them. Hence, there is a need to examine the jurisprudence of the Commission in interpreting the wording of article 56 which is ambiguous in many instances. To this end, clarity and precision are required in understanding the provisions of article 56 used therein. Therefore, this study will examine such technical interpretation of article 56 of the Banjul Charter in light of the jurisprudence of the European Court, the Inter-American Commission and the

¹³ Rudman 2016 *PELJ* 2.

¹⁴ The newsletter of the African Union 2016 https://au.int/sites/default/files/documents/31520-doc-the_african_commission_on_human_and_peoples'_rights_at_the_forefront_of_advancing_human_rights.

¹⁵ Article 35 of the European Convention; Article 46 and Article 47 of the American Convention.

¹⁶ Amerasinghe *Local remedies in international law* 43.

¹⁷ Viljoen "Admissibility under the African Charter" 62.

Inter-American Court so as to reveal if there is any room for improvement in the jurisprudence of the African Commission in this regard

1.2 Problem statement

Human rights have over the years gained extensive recognition and have attained a priority status at both universal and regional level.¹⁸ To this end, there exist certain regional institutional mechanisms that capture the necessary procedures to be followed when submitting communications. Notably, the Commission is one such institutional mechanism that has been established in terms of the Banjul Charter.¹⁹ Legal scholars have long since raised the issue that, in comparison with other regional and also global human rights complaints mechanisms, the number of communications received and dealt with under the African human rights system is miniscule. This low number of communications does not, of course, reflect the sad reality that in many African countries human rights violations are not isolated occurrences. A problem is that the procedures available remain unknown to many. Even many a lawyer or NGO, who might otherwise contemplate bringing a claim before the African Commission is unaware of the procedures. Knowledge of especially the individual communication procedure before the commission is therefore crucial.

This naturally also concerns knowledge of the admissibility criteria to be met for a communication to be entertained by the Commission. Hence, there is a need for these criteria to be known, and for it to be understood so as to know how the Commission applies them. The way the Commission applies them should be predictable, meaningful and lenient, to make the communication procedure a successful tool in vindicating human rights in Africa. Accordingly, there is a need to examine the existing criteria in this light and to scrutinise the way the Commission interprets them. Thus, under the African Human Rights system, two kinds of

¹⁸ The newsletter of the African Union 2016 https://au.int/sites/default/files/documents/31520-doc-the_african_commission_on_human_and_peoples_rights_at_the_forefront_of_advancing_human_rights.

¹⁹ Article 30 of the Banjul Charter.

communications can be sent to the Commission.

These can either be communications by States alleging that another State has violated the Banjul Charter in terms of article 47, or communications by individuals alleging that a State has violated the Banjul Charter in terms of article 55. This study limits itself, however, to communications submitted by individuals as per article 55. With regards to such communications, their admissibility is governed by the requirements stipulated in article 56 of the Banjul Charter. These requirements are as follows:

1. The communication must indicate their authors even if the latter request anonymity;²⁰
2. The communication must be compatible with the Charter of the OAU or with the Banjul Charter;²¹
3. The communication must not be written in disparaging or insulting language directed against the State concerned and its institutions or to the OAU;²²
4. The communication must not be based exclusively on news disseminated through the mass media;²³
5. The communication must be sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;²⁴
6. The communication must be submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter;²⁵ and
7. The communication must not deal with cases which have been settled by these States involved in accordance with the principle of the Charter of the United Nations, or the Charter of the OAU or the provision of the Banjul Charter.²⁶

These requirements are considered as salient to any determination on the admissibility of an individual communication by the Commission. The wording of article 56, as seen above, contains some words and phrases which are ambiguous and need clarity. For example, the 'communication must not be written in disparaging or insulting language directed against the State concerned' as stipulated

²⁰ Article 56(1) of the Banjul Charter.

²¹ Article 56(2) of the Banjul Charter.

²² Article 56(3) of the Banjul Charter.

²³ Article 56(4) of the Banjul Charter.

²⁴ Article 56(5) of the Banjul Charter.

²⁵ Article 56(6) of the Banjul Charter.

²⁶ Article 56(7) of the Banjul Charter.

in article 56(3); the 'communication must be sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged' as provided for in article 56(5); and the 'communication must be submitted within a reasonable period from the time local remedies are exhausted' as mentioned in article 56(6). Obvious questions such as the meaning of 'disparaging or insulting language'; 'exhausting local remedies'; 'unduly prolonged'; and 'reasonable period' as used in these sub-paragraphs need to be clarified. Nonetheless, it is pivotal to note that though such requirements may appear as direct and simple to understand, they are encumbered by a vast array of impediments to individuals seeking to submit such communications. This in turn presents a problem in the interpretation of the Banjul Charter as several individuals have a narrow understanding of article 56. These requirements determine whether an individual's communication stands or falls before the Commission.

This study will in light of these ambiguities, interpret the requirements for the admissibility of a communication by making use of the jurisprudence of the European Court,²⁷ the Inter-American Commission²⁸ and the Inter-American Court.²⁹ In other words, this study examines the Commission's interpretation of article 56 in comparison with the European and American systems. The jurisprudence of the European Court, the Inter-American Commission and the Inter-American is used so as to see whether, and if so, there exists any potential for improvement in the manner in which the admissibility criteria in article 56 is construed. Upon such exposition, the study attempts to provide clarity to any misunderstanding that may exist concerning the requirements for admissibility encapsulated in article 56.

1.3 Aims and objectives

The main aim of this research was to identify and interpret the specific requirements in article 56 of the Banjul Charter in order to clarify the misunderstanding usually

²⁷ The European Court of Human Rights was established by Protocol No 11 to the European Convention on 1 November 1998.

²⁸ The American Commission on Human Rights is established under Article 34 and 36 of the American Convention.

²⁹ The American Court on Human Rights was established in 1979, and like the American Commission, it has jurisdiction with regards to matters of the fulfilment of the commitments made by State Parties to the American Convention.

attached to them by complainants and respondents alike. To this end, the essence of this research was to interpret these requirements by making use of the jurisprudence of the Commission. To achieve the above aim, the following objectives were examined:

- To examine the manner in which the Commission has construed the requirements for the admissibility of a communication as adumbrated in article 56 of the Banjul Charter.
- To identify how the Commission has applied these requirements to rule on the admissibility of a communication in terms of the Banjul Charter.
- To identify and examine situations in which the Commission has waived or departed from these requirements.

To illustrate whether there is potential for improvement of the admissibility criteria for admissibility as explored by the African Commission as assessed with the American and European systems.

1.4 Research question

Whether the African Commission on Human and Peoples' Rights interpretation of the provisions of article 56 of the Banjul Charter requires any improvement considering other regional human rights systems?³⁰

1.5 Basic hypothesis

- The requirements for admissibility in article 56 are often misunderstood by complaints seeking to submit communications before the Commission.
- The requirements for admissibility should be interpreted on a case by case basis to cater for the different circumstances of a particular case.
- The African Commission is inconsistent in its application of article 56.
- The admissibility requirements in article 46 and 47 of the American Convention are clear and easy to comprehend as compared to some of the requirements for admissibility in article 56 of the Banjul Charter.

³⁰ The Commission was established by Article 30 of the Banjul Charter. It is a human rights body established to promote and protect human and peoples' rights in Africa.

- The American Convention is more relevant and similar to the Banjul Charter as compared to the European Convention.

1.6 Rationale and justification

A number of studies have been conducted on the admissibility of communications submitted in terms of the Banjul Charter.³¹ However, this study sought to highlight the meaning attached to each requirement for the admissibility of a communication submitted in terms of the Banjul Charter and whether there exists any potential for improvement of the interpretation of these admissibility criteria. In other words, the meaning given to these requirements by the Commission was explored in a bid to make these requirements understandable and comprehensive to anyone intending to submit a communication in terms of article 55 of the Banjul Charter. This study therefore sought to clear the doubts and ambiguity associated with the interpretation of the purpose and the requirements in article 56. Furthermore, the practical implication of this research was to reveal if there are any lessons to be drawn from a comparison of the admissibility criteria of the African, American and European systems. This study was also devoted to revealing the potential solutions, if any, that could make the Banjul Charter more relevant and comprehensive in these modern times.

1.7 Research method

This research employed a doctrinal research method or black letter law approach. It is salient to note that this is regarded as the most traditional legal research approach.³² Such method affords immediate practical answers to legal problems as the researcher will be constantly analysing and examining primary and secondary sources such as legislation, case law, journal articles, reports and textbooks so as to bring forth a coherent and practical body of doctrine. The researcher therefore used the black letter law approach by employing legal analysis and reasoning to evaluate the technical meaning of the legal rules and propositions in relation to the

³¹ Amerasinghe *Local remedies in international law* 43; Viljoen "Admissibility under the African Charter" 62; Onoria 2003 *AHRLJ* 2.

³² Twining and Miers *How to Do Things with Rules* 69.

manner in which the Commission has interpreted the requirements for the admissibility of a communication in terms of article 56 of the Banjul Charter.

1.8 Scope and Limitations

This study primarily focused on the admissibility of communications in terms of the Banjul Charter. It thus aimed at exploring the manner in which the Commission has interpreted the requirements for the admissibility of a communication as per article 56 of the Banjul Charter. Furthermore, the study only focused on communications brought by individuals other than State parties to the Banjul Charter. This is mainly because the rules of admissibility of a communication in terms of article 56 are only applicable to communications brought by individuals, and not those brought by a State. Upon such exposition, the researcher noted, as per the jurisprudence of the Commission, the meaning and interpretation of each requirement for the admissibility of a communication stipulated in article 56 and whether such interpretation requires any improvement or modification when assessed with that of the American and European systems. This was done by limiting such analysis to communications that have been brought before the Commission for determination. Thus, this study solely relied on the jurisprudence of the Commission as a regional instrument of Africa and accordingly did not examine the jurisprudence of the African Court. However, the proposed study was purely analytical in nature and thus employed the doctrinal research method which neither requires the collection of field data nor sampling.

1.9 Literature review

There exists a plethora of literature on article 56 of the Banjul Charter.³³ Most of which stems from the jurisprudence of the Commission. This commission has laid down guiding principles on how the conditions for admissibility in article 56 should be construed. Thus, for a communication to be admissible before the Commission, it must comply with all the conditions for admissibility in article 56. The European

³³ Amerasinghe *Local remedies in international law* 43; Viljoen "Admissibility under the African Charter" 62; Onoria 2003 *AHRLJ* 2.

Convention and the American Convention both have similar requirements in this regard in article 35 and article 46 respectively. These two instruments precede the Banjul Charter³⁴ and can therefore be used in comparison with the Banjul Charter so as to assess if there is a need for improvement with the African system. Such assessment will also provide clarity on some of the ambiguous provisions of article 56. The conditions for admissibility of communications in article 56 have been clarified above and shall be succinctly examined herein alongside the jurisprudence of the European and American systems so as promote better comprehension of these provisions by individuals seeking to bring a communication before the Commission.

It is noteworthy that it is required in article 56(1) for a communication to indicate the author even if the latter requests anonymity. The European Convention has a similar provision in article 35(2)(a) which states that the European Court will only consider a communication that is not submitted anonymously. In this regard, the communication must be in the name of an individual who claims to be the victim. The author should also allege to be a victim of a violation of one or more of the rights enlisted in the Banjul Charter.³⁵ The rationale behind such provisions is to arm the Commission with adequate information that, to a certain degree, specifies the victims.³⁶ However, since article 56(1) of the Banjul Charter merely states that a communication has to indicate its author, it has often been misunderstood to mean that an individual had to merely mention that he or she is a victim of an alleged violation of the Banjul Charter. On the other hand, article 46(1)(d) of the American Convention goes a step further in this regard by requiring that the communication indicate the name, profession, nationality, domicile and signature of the complainant or legal representative of the entity submitting the claim. The researcher thus submits that there are lessons to be learnt in this regard as the American Convention does not provide any room for ambiguities because complainants are fully aware of

³⁴ The European Convention was established in 1950 whereas the American Convention was established in 1967.

³⁵ Rule 114 s 3 of the Rules of procedure of the African Commission on Human and Peoples' Rights.

³⁶ *Centre for Independence of Judges and Lawyers v Algeria* (2000) AHRLR 15 (ACHPR 1994) para 5.

what is expected of them, unlike the position of the Banjul Charter.

The second requirement, embodied in article 56(2), is that a communication must be compatible with the Charter of the Organization of African Unity or with the Banjul Charter. This provision is similar to article 35(3)(a) which requires that a communication be compatible with the European Convention or the applicable Protocols and not manifestly ill-founded. However, the American Convention phrases this requirement in a different manner by requiring a communication to indicate the facts that establish a violation of rights in question so that it is not groundless.³⁷ The African Commission adopted the American Convention's approach in *Hadjali Mohamad v Algeria* where it interpreted this provision to mean that a communication should invoke the alleged violated provisions of the Banjul Charter.³⁸ Accordingly, it is worth mentioning that the African Commission's stance in this respect is similar to that of the American and European Conventions. This is highly welcome as it enables the African Commission to fully investigate any specific incident or require information on the alleged violation from any interested individual or from the State.³⁹

Furthermore, in terms of article 56(3) a communication must not be written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity. The American and European Conventions, however, do not have a specific provision that clearly alludes to this fact. Nonetheless, article 35(3)(a) of the European Convention and article 47(c) of the American Convention can be understood to require that a communication be couched in language that is not insulting or disparaging. On this note, the European Convention in article 35(3)(a) stipulates that a communication will not be heard if it constitutes an abuse of the application. Similarly, article 47(c) of the American Convention requires that a communication will be declared inadmissible if the statements contained in the communication are out of order. This also implies that

³⁷ Article 47 (b) (c) of the American Convention.

³⁸ *Hadjali Mohamad v Algeria* (2002) AHRLR 15 (ACHPR 1994) para 2.

³⁹ Viljoen "Admissibility under the African Charter" 70.

the Inter-American Commission will declare any communication drafted in unsuitable language inadmissible.

The fourth requirement, in article 56(4) states that a communication must not be based exclusively on news disseminated through the mass media. Interestingly, this requirement is typical only to the Banjul Charter as the American and European systems do not have this requirement. It is thus contended in this light that the African Commission should interpret this requirement sparingly and with caution as it might result in numerous communications being declared inadmissible especially since the media is an important source of information that people rely on. The Commission has provided guidance to complainants in this regard by noting that article 56(4) permits the reliance on correct media reports because the media remains the most important source of information.⁴⁰ The African Commission does not therefore forbid reliance on correct media reports. In this regard it is submitted that this stance is commendable as it allows the African Commission to focus on the reliability of the information rather than the source thereof.

In addition to the above requirement is the condition in article 56(5) that a communication must be sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged. This condition has been the most controversial as a number of communications have been held to be inadmissible after failing to comply with this requirement. The rationale behind the requirement for such strict adherence is to permit the domestic legal order of a State the chance to address and remedy the alleged human rights violations through its local system.⁴¹ Notable is that this principle has also found its way into various human rights instruments and ultimately into the jurisprudence of regional and international human rights organs.⁴² This has also been deemed to be an explication of the general principle of international law necessary for diplomatic protection.⁴³ The

⁴⁰ *Jawara v The Gambia* 2000 (AHLR) 107 (ACHPR 2000) para 25.

⁴¹ Onoria 2003 *AHRLJ* 2

⁴² Regional treaties such as Article 35 of the European Convention; Article 46(1) (a) of the American Convention.

⁴³ Article 44(b) of the International Law Commission Draft Articles on State Responsibility.

American and European Convention also have provisions in this regard.⁴⁴ However, such condition can be excepted provided such remedies are not available, or will not give the complainant redress, or do not inspire any prospect for success, or are ultimately unduly prolonged by numerous and unnecessary adjournments.⁴⁵ In such an instance the complaint can then be submitted to the Commission.

The Commission has also held that the principle of constructive exhaustion of remedies may be invoked in cases where the complainant could not exhaust all local remedies due to the complainant's absence from the country due to fear for his or her life.⁴⁶ In addition, it is important to note that a local remedy should be of a judicial nature which includes appeals or reviews.⁴⁷ It is thus insufficient for one to allege that the complaint has been brought before a quasi-judicial institution at a local level. In *Alfred B. Cudjoe v Ghana* the complainant declared that he had exhausted all local remedies by submitting a complaint to the Commission on Human Rights and Administrative Justice and the Ghanaian national human rights institution.⁴⁸ The complainant thereafter submitted the same matter as a communication to the African Commission which declared the communication inadmissible due to the fact that the complainant had not exhausted local remedies of a judicial nature.⁴⁹ However, if a complaint is pending before a domestic court, local remedies are regarded as not having been exhausted. The complaint therefore bears the onus of laying a foundation that local remedies have been exhausted.⁵⁰ In this regard if a complainant does not lay a foundation that local remedies have been exhausted, the communication will be declared inadmissible.

On a similar note, article 35 (1) of the European Convention requires that all local remedies be exhausted in accordance with the recognised principles of international law. Although the European Convention does not go further to list the exemptions

⁴⁴ Article 35 (1) of the European Convention, Article 46 (1) (a) (2) of the American Convention.

⁴⁵ *Gabriel Shumba v Zimbabwe* 2017 (AHRLR) 142 (ACHPR 2017) para 73.

⁴⁶ *Jawara v The Gambia* 2000 (AHRLR) 107 (ACHPR 2000) para 35.

⁴⁷ *Jawara v The Gambia* 2000 (AHRLR) 107 (ACHPR 2000) para 35.

⁴⁸ *Alfred B. Cudjoe v Ghana* (2000) AHRLR 127 (ACHPR 1999) para 22.

⁴⁹ *Alfred B. Cudjoe v Ghana* (2000) AHRLR 127 (ACHPR 1999) para 22.

⁵⁰ *Diawara v Benin* (2000) AHRLR 22 (ACHPR 1994) para 6.

to this rule, the European Court has held that, by requiring that local remedies be exhausted in accordance with the generally recognised principles of international law, the European Convention ultimately recognises that there might exist special situations that exonerate the complainant from the obligation to exhaust all local remedies.⁵¹ On the other hand, the American Convention is clear on this as it requires the exhaustion of local remedies except in cases where the domestic legislation does not provide due process of the law and protection of the rights allegedly violated; where the complainant is prevented or denied access to the local remedies and where there is unwarranted delay in rendering judgment under the local remedies in question.⁵² The same can be said for the Banjul Charter as it also provides the aforementioned exceptions to the exhaustion of local remedies rule. From the above, one therefore gathers that all three regional instruments have more or less the same view point when it comes to the exhaustion of local remedies.

Another condition of admissibility contained in article 56(6) is that a communication must be submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter. This has been held to mean that the communication must be submitted as early as possible.⁵³ Though the Commission has not stated what a reasonable time would be, it is inclined to be flexible on this condition by determining a reasonable time on a case by case basis.⁵⁴ This is contrary to the European and American systems, which demand the submission of a complaint within six months after the final decision was reached or after the complainant has been notified of the decision.⁵⁵ Viljoen states that the African Commission's stance on this requirement is highly welcome given the lesser accessibility and visibility of the Banjul Charter and African Commission.⁵⁶ It is also submitted that the latitude given to the African Commission is praiseworthy as it allows every case to be determined according to its own facts.

⁵¹ *Sejdovic v Italy* 1 March 2006 GC 46.

⁵² Article 46 (2) (c) of the American Convention.

⁵³ *Gabriel Shumba v Zimbabwe* 2017 (AHRLR) 142 (ACHPR 2017) para 44.

⁵⁴ *Gabriel Shumba v Zimbabwe* 2017 (AHRLR) 142 (ACHPR 2017) para 44.

⁵⁵ Article 35 of the European Convention; Article 46 (1) (b) of the American Commission.

⁵⁶ Viljoen "Admissibility under the African Charter" 92.

The last of the seven conditions enlisted in article 56(7) is that a communication must not deal with cases which have been settled by the States involved in accordance with the principle of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provision of the Banjul Charter. Similarly, the European Convention in article 35(2) (b) has the same provision as does article 46(1) (c) and article 47(d) of the American Convention. The rationale behind such provisions is to prevent usurpation of the jurisdiction of the bodies which are likely to provide relevant information or solutions.⁵⁷ This requirement reinforces the *ne bis in idem* rule.⁵⁸ This is undoubtedly sound because a case which has been finalised on the merits should not be reopened and a State should not be found guilty of a violation twice for one violating act or conduct.⁵⁹

Notable is that the Banjul Charter permits the simultaneous submission of communications to both a United Nations treaty body such as the United Nations Human Rights Committee and the African Commission. However, in this instance the complainant will accordingly be bound by the first decision whether it be favourable or not. This eliminates forum shopping and the unsettling likelihood of conflicting conclusions to the matter before different organisations.⁶⁰ In *Bob Ngozi Njoku v Egypt* the complainant had submitted the matter to the United Nations Sub-Commission on Human Rights before submitting it to the African Commission.⁶¹ The former had decided not to make a ruling on the matter which led to the African Commission ruling that this did not amount to a decision on the merits or that the matter had been settled.⁶² The communication was therefore declared admissible.

The present researcher therefore recognises the importance of complying with the conditions in article 56 on the admissibility of a communication. In this light, the study examined the interpretation of such provisions by the Commission in light of the jurisprudence of the American and European systems so as to attempt to

⁵⁷ African Commission, Fact Sheet 3, Communication Procedure; *Mpaka-Nsusu Andre Alphonse v DRC* (2001) AHRLR 17 (HRC 1986) para 3.

⁵⁸ This is to the effect that no legal action can be instituted twice for the same cause of action.

⁵⁹ Viljoen "Admissibility under the African Charter" 92.

⁶⁰ Viljoen "Admissibility under the African Charter" 93.

⁶¹ *Bob Ngozi Njoku v Egypt* (2000) AHRLR 83 (ACHPR 1997) par 12.

⁶² *Bob Ngozi Njoku v Egypt* (2000) AHRLR 83 (ACHPR 1997) par 12-13.

remedy the problem of communications being declared inadmissible by the Commission. This was done in a bid to foster better comprehension of these provisions.

1.10 Ethical consideration

This study made use of the doctrinal method which requires neither questionnaires nor interviews. To this end, ethical clearance is not required. Whilst making use of primary and secondary sources of data, quality, reliability and integrity was duly observed. All relevant sources of data were exhausted to enable a clear interpretation of the conclusions and recommendations presented. The study advanced all arguments clearly to enable readers to disagree or agree with the analysis propounded and consequently enabling the reader to make his/her own conclusions. Copyright laws applicable in SA were complied with as well as North West University research guidelines, including the elimination of all forms of academic dishonesty and plagiarism.

1.11 Chapter overview

The study is structured in five chapters.

1.1.1 Chapter 1: Context and outline of the study

This chapter contextualises and outlines the study. It consists of the research question, problem statement, assumptions and hypothesis, research methodology, scope and limitation of the study, rationale and justification of the study as well as its relevance to the research unit.

1.1.2 Chapter 2: Assessing the interpretation of articles 56(1) (2) and (3) of the Banjul Charter

This chapter examines articles 56(1)-(3) which deal with the issue of the content of the communications: disclosure of the authors, compatibility with the Banjul Charter and the appropriate language in detailing the communication. The chapter examines these requirements in light of similar requirements for admissibility encapsulated in the article 35 of the European Convention and article 46 and 47 of the American

Convention. It also provides the background of the Banjul Charter, the Commission and the Procedure for determination of communications before the Commission.

1.1.3 Chapter 3: A scrutiny into article 56(4) and article 56(5) of the Banjul Charter

This chapter assesses article 56(4) which requires that the allegations in the communication be factual and not based on news disseminated through mass media. This chapter further explored article 56(5) which deals with the procedural question of whether local remedies have been exhausted or are unduly prolonged. These provisions on the requirements for the admissibility of communications were explored in light of similar requirements for admissibility encapsulated in the article 35 of the European Convention and article 46 and 47 of the American Convention.

1.1.4 Chapter 4: An analysis of article 56(6) and article 56(7) of the Banjul Charter

This chapter ultimately discusses article 56(6) which demands that a communication be submitted to the Commission within a reasonable period of time. The chapter further examines article 56(7) which precludes the Commission from hearing communications involving cases settled by States involved in terms of the principles of the Banjul Charter, the Charter of the United Nations and the Charter of the Organisation of Africa Unity. Put differently, this chapter addressed the danger of double jeopardy. In addition, this chapter highlights the additional admissibility requirement typical to the European Convention alone which requires a complainant to have suffered a significant disadvantage before approaching the European Court. Thus, the chapter examines article 56(6) and article 56(7) in light of any similar requirements for admissibility encapsulated in the article 35 of the European Convention and article 46 and 47 of the American Convention.

1.1.5 Chapter 5: Conclusion and Recommendations

This chapter in essence addresses the general conclusion and makes legal and policy recommendations to the Commission, if any, to help make article 56 of the Banjul Charter more comprehensive and understandable.

Chapter 2 Assessing the Interpretation of Article 56(1)-(3) of the Banjul Charter

2.1 Introduction

Having listed the available requirements for the admissibility of a communication before the Commission and how such requirements are ambiguous, it is only prudent that these ambiguous words and phrases be clarified. This chapter therefore seeks to examine the equivocal wording of article 56(1) of the Banjul Charter which requires a "communication to indicate the author"; article 56(2) which requires a communication to "be compatible with the Charter of the OAU or with the Banjul Charter" and article 56(3) which requires that a "communication must not be written in disparaging or insulting language directed against the State concerned". Some of the wording of the above requirements is vague as obvious questions such as the meaning of 'indicate their authors'; 'compatible with the Charter of the OAU or with the Banjul Charter' and 'disparaging or insulting language' as used in these sub-paragraphs need to be clarified. In clarifying and interpreting these words and phrases, the American Convention and the European Convention will be consulted. The chapter starts by discussing the chronicles of the Banjul Charter and the Commission and proceeds to clarify the ambiguous phrases of article 56(1), article 56(2) and article 56(3).

2.2 The AU and international human rights law

The Organisation of African Unity (now the African Union) is the organisation responsible for the drafting of the Banjul Charter. It was conceived during the liberation struggle and the Cold War.¹ Its principal objective was to maintain the territorial integrity and sovereignty of its Member States.² This principle came as a result of the need to guard the freedom and independence of African countries from having their internal affairs interfered with.³ Certainly, the non-interference with the

¹ Amate *Inside the OAU* 60-61.

² Article 3(2) of the AU Charter.

³ Article 2 and Article 3 of the AU Charter.

internal affairs of a State is one of the basic principles of the AU.⁴ However, since international law and human rights have developed, the scope of the sovereignty of a State principle has been adequately restricted.⁵ It has therefore been recognised that human rights take priority over the national sovereignty of a State.⁶ This means that African States are compelled to accept having their human rights mechanisms scrutinised internationally.⁷ The AU has in this light taken concrete steps in the AU Constitutive Act to develop the protection of human rights.⁸ This it has also done through the adoption of several treaties which have contributed distinctively to international human rights law. One such treaty is the Banjul Charter which is discussed below.

2.3 The Banjul Charter

It should be noted that international human rights law came into existence as a result of the aftermath of the Second World War.⁹ Thus, the atrocities committed by the defeated powers during the Second World War gave rise to the need to have international human rights law.¹⁰ This law is in the form of international treaties. In 1976 two international covenants gave legal force to the Universal Declaration of Human Rights, a historic international document that gives every human being basic rights and fundamental freedoms.¹¹ Similarly, at the regional level various mechanisms were being adopted to address the issue of basic human rights and fundamental freedoms. Noteworthy is the adoption of the European Convention 1950¹² as well as the American Convention in 1967¹³ which was established under the auspices of the Organisation of American States.

⁴ Article 3(2) of the AU Charter.

⁵ Shaw *International Law* 24.

⁶ Article I paras 1, 4 and 5 of the Vienna Declaration and Programme of Action (1993).

⁷ Clapham *Africa and the International System: The Politics of State Survival* 190-191.

⁸ AU Constitutive Act 2000.

⁹ Murray *The African Commission on Human and Peoples' Rights and International Law* 9.

¹⁰ Murray *The African Commission on Human and Peoples' Rights and International Law* 9.

¹¹ International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966).

¹² European Convention on Human Rights (1950).

¹³ American Convention on Human Rights (1969).

On this note, the European Convention was established by the Council of Europe¹⁴ which is said to have the most advanced protection system for human rights at a regional level.¹⁵ It is regarded as the first comprehensive international instrument for the protection of human rights post the Second World War law-making process.¹⁶ As a result, it is the most important human rights instrument within Europe.¹⁷ Furthermore, like the Banjul Charter, it embodies civil and political rights that gave detail to many rights contained in the Universal Declaration of Human Rights.¹⁸ On the same note, the Organisation of American States established the American Convention. This was after the realisation that the recognition of human rights had proliferated both in Europe and the United Nations.¹⁹ The American Convention therefore embodies and recognises a wide range of political, civil, economic and social rights.²⁰ Of importance is that the aforementioned international mechanisms both provide for a Commission and a Court to see to the enforcement of the protection and promotion of human rights.²¹ However, as from 1998, the European Court on Human Rights became operational without the option of a Commission.²²

The African system is no exception though it is the most recent regional mechanisms in this regard. Notable is that over the years the OAU²³ has shifted its attention to the promotion of human rights.²⁴ This, alongside the recognition by some African leaders of the indispensable nature of human rights as well as the encouragement by the UN²⁵ to establish regional human rights mechanisms, fuelled the adoption of the Banjul Charter. Thus, the coming into force of the Banjul Charter in 1986

¹⁴ Council of Europe (1949).

¹⁵ Smith *Textbook on International Law* 96.

¹⁶ Smith *Textbook on International Law* 98.

¹⁷ Schabas *The European Convention on Human and Peoples' Rights* 1.

¹⁸ Schabas *The European Convention on Human and Peoples' Rights* 3.

¹⁹ Smith *Textbook on International Law* 121-122.

²⁰ Chapter II and Chapter III of the American Convention.

²¹ Article 19 of the European Convention; Article 33 of the American Convention.

²² The European Court of Human Rights was established in 1998 through the adoption of Protocol No 11 to the European Convention on Human Rights on 1 November 1998.

²³ OAU Charter (1964). It was disbanded in 2002 and replaced by the African Union (AU) by Thabo Mbeki, its last chairperson.

²⁴ Viljoen and Odinkalu *The Prohibition of Torture and ill-treatment in the African Human Rights System* 22.

²⁵ For example, Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa, Cairo (1969).

heralded the official recognition of human rights by the OAU. It most notably represents the African concept of basic human rights and fundamental freedoms.²⁶ On this note, the Banjul Charter is regarded as the principal instrument in Africa tasked with the mandate to protect human rights and fundamental freedoms.²⁷ The Banjul Charter's uniqueness is proven by its protection of a wide range of human and peoples' rights.²⁸ These include civil and political rights, economic, social and cultural rights, and rights of people.²⁹ To this end, the Banjul Charter in article 30 established an eleven-member Commission based in Banjul, Gambia, to see to the implementation of the above rights.

Nonetheless this recognition of human rights by the AU has been said to be a false dawn in the protection of human rights.³⁰ In other words, there is a divided opinion on the effectiveness of the Banjul Charter in implementing its purpose. This has sparked a debate among researchers. Gittleman propounds, for example, that the substantive provisions of the Banjul Charter are phrased in an equivocal manner which hinders it from being understood by everyone.³¹ However, Odinkalu expresses optimism in the effectiveness of the Banjul Charter by stating how the African Commission has sought to remedy this concern through its jurisprudence and procedures.³² In addition, Naldi opines that the Banjul Charter is marred with various clawback clauses that seem to make the enforcement of a right dependant on the discretion of national authorities or municipal law.³³ One such example can be drawn from article 10(1) which states that 'every individual shall have the right to free association provided that he abides by the law'. This clause undermines the enforcement of this right as it is subject to the dictates of municipal law.

However, it is not all gloom as the Banjul Charter also has positive attributes such

²⁶ Gye-Wado 1990 *AJICL* 191; Welch 1992 *HRQ* 45.

²⁷ Naldi 2002 *AHRLJ* 1.

²⁸ Scoble *Human Rights Non-Governmental Organisations in Black Africa* 197.

²⁹ Chapter 1 of the Banjul Charter; Benedek *Peoples' Rights and Individuals' Duties as Special Features of the African Charter on Human and Peoples' Rights* 62.

³⁰ Naldi *Future Trends in Human Rights in Africa: The increased Role of the OAU* 5.

³¹ Gittleman *Virginia Journal of International Law* 685.

³² Odinkalu *Transnational Law and Contemporary Problems* 398.

³³ Naldi *Future Trends in Human Rights in Africa: The increased Role of the OAU* 6.

as the listed legally enforceable third generation rights.³⁴ To add to the above, the Banjul Charter's broad *locus standi* requirements before the Commission should be acclaimed. These requirements permit organisations (such as NGOs) and individuals other than the victim to submit communications before the Commission.³⁵ These broad *locus standi* requirements pave the way for anyone who has an interest in an alleged human rights violation to submit a communication before the Commission. The purpose and role of the Commission is therefore succinctly discussed below.

2.4 The Commission

As noted above, the Banjul Charter has established a Commission responsible for the protection and promotion of human and peoples' rights.³⁶ This Commission consists of eleven independent experts tasked with the mandate of promoting, protecting and interpreting the rights in the Banjul Charter.³⁷ In 1987 the Commission was inaugurated and commissioners elected by the OAU.³⁸ These commissioners are required to be impartial as well as to act independently in their personal capacity.³⁹ The placement of the Commission headquarters away from that of the OAU and the privileges and immunities granted to commissioners supports this fact.⁴⁰ The Commission holds sessions twice yearly for 15 days.⁴¹ These were originally held in Banjul, The Gambia, where the Secretariat is situated, but after The Gambia *coup d'état* in 1994, sessions have been held in different African countries.⁴² It is worth noting that the function of the Commission is reflected in article 45 of the Banjul Charter. Thus the Commission is required to: protect, promote and interpret the rights in the Banjul Charter "as well as to carry out any

³⁴ Naldi *The Organisation of African Unity* 127-138; Umozurike *The African Charter on Human and Peoples' Rights* 45-49 and 51-61.

³⁵ Naldi *Documents of the Organisation of African Unity* 151.

³⁶ Article 30 of the Banjul Charter.

³⁷ Article 45 of the Banjul Charter.

³⁸ Article 33-38 of the Banjul Charter.

³⁹ Article 31 of the Banjul Charter; Bello *The African Charter on Human and Peoples' Rights* 42.

⁴⁰ Balanda *The African Charter on Human and Peoples' Rights* 142.

⁴¹ Eighth Annual Activity Report of the African Charter on Human and Peoples' Rights, 1994-5, ACHPR/RPT/8TH PARA 30. Rule 1 of the Rules of Procedure states that the number of sessions should enable the Commission to carry out its functions. Rule 2 states that this will 'normally be about 2' per year 'for about 2 weeks'. This has been reduced to 10 days given the lack of funding from the AU.

⁴² Murray *The African Commission on Human and Peoples' Rights and International Law* 14.

other tasks assigned to the Commission by the OAU".⁴³

In a bid to give effect to the Commission's purpose is the requirement that State parties to the Banjul Charter send reports to the Commission after every two years.⁴⁴ These reports are on the legislative and other measures taken by State parties in the implementation of the Charter.⁴⁵ All in all, this procedure is the backbone of the purpose of the Commission.⁴⁶

As a way of fulfilling its purpose, the Commission adjudicates on communications that allege a violation of a right that is protected by the Banjul Charter. In this regard, such communications can either be an inter-state communication procedure⁴⁷ or the entities other than States procedure.⁴⁸ Relevant to this study are communications submitted by entities other than State parties. Since its third sessions, the Commission has in this light developed a practice establishing the procedure to be followed in dealing with individual communications.⁴⁹ This has yielded commendable results as the Commission has adjudicated over 200 communications and the merits thereof.⁵⁰ However, before the Commission can adjudicate on the merits of a communication, such communication must pass the admissibility test. In other words, the Commission considers the issue of admissibility first in light of the received information.⁵¹ These admissibility requirements as set out in article 56 of the Banjul Charter are as follows:

1. The communication must indicate their authors even if the latter request anonymity;⁵²
2. The communication must be compatible with the Charter of the OAU or with the Banjul Charter;⁵³

⁴³ Article 45 of the Banjul Charter.

⁴⁴ Article 62 of the Banjul Charter.

⁴⁵ Murray *The African Commission on Human and Peoples' Rights and International Law* 16.

⁴⁶ El-Sheikh 1989 *NQHR* 281.

⁴⁷ Article 47 of the Banjul Charter.

⁴⁸ Article 55 of the Banjul Charter.

⁴⁹ First Annual Activity Report of the African Commission, 1987–8, ACHPR/RPT/1st, para 26.

⁵⁰ These are published in the Annual Activity Reports, from the seventh onwards.

⁵¹ Murray *The African Commission on Human and Peoples' Rights and International Law* 19.

⁵² Article 56(1) of the Banjul Charter.

⁵³ Article 56(2) of the Banjul Charter.

3. The communication must not be written in disparaging or insulting language directed against the State concerned and its institutions or to the OAU;⁵⁴
4. The communication must not be based exclusively on news disseminated through the mass media;⁵⁵
5. The communication must be sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;⁵⁶
6. The communication must be submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter;⁵⁷ and
7. The communication must not deal with cases which have been settled by these States involved in accordance with the principle of the Charter of the United Nations, or the Charter of the OAU or the provision of the Banjul Charter.⁵⁸

These requirements are salient to the admissibility of a communication as they must all be met before a communication can be adjudicated on the merits by the Commission. Interestingly on this note is that both the European and American Conventions encapsulate similar requirements for the admissibility of communications before their respective regional enforcement organs.⁵⁹ Worth mentioning however is that, though the European Convention embodies related requirements to the Banjul Charter, it nonetheless goes a step further in article 35(3) (b) by requiring that a significant disadvantage be suffered by the complaint before he or she can approach the Court. Furthermore, both the European and American Conventions do not have the requirement stipulated in article 56(4) of the Banjul Charter that forbids a communication to be based exclusively on news disseminated through the mass media. However, even with this requirement that is typical to the Banjul Charter, the Commission is not rigid in its consideration of these requirements as some of them can be waived if *prima facie* evidence of a series of serious and massive violations exists in relation to article 58 of the Banjul Charter.⁶⁰ This exception is usually pleaded in justifying the admissibility of a communication

⁵⁴ Article 56(3) of the Banjul Charter.

⁵⁵ Article 56(4) of the Banjul Charter.

⁵⁶ Article 56(5) of the Banjul Charter.

⁵⁷ Article 56(6) of the Banjul Charter.

⁵⁸ Article 56(7) of the Banjul Charter.

⁵⁹ Article 35 of the European Convention; Article 46 and Article 47 of the American Convention.

⁶⁰ Murray 1999 NQHR 112.

that has been sent without exhausting all local remedies⁶¹ as will be discussed in the subsequent chapters of the study.

It should be noted however that, though the Commission seeks to promote and protect the rights embodied in the Banjul Charter, its decisions on a communication are just recommendations and are not binding on a State party.⁶² This is a major shortcoming of the Banjul Charter as States are not compelled to abide by the Commission's decisions. To remedy such a defect, a court was deemed to be the best solution to this.

On this note, the notable non-existence of a Court at the commencement of the African regional system triggered considerable comment. Some authors like M'Baye argued that it was not only understandable but natural for the African regional system to lack a Court.⁶³ This was because having a Commission alone revealed African traditions of conciliation as opposed to confrontation.⁶⁴ However, the progression of drafting the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights⁶⁵ was in itself an acknowledgment that the African regional system was incomplete and a work in progress.⁶⁶ On this note it is salient to note that the African Court was created specifically to reinforce the role of the Commission.⁶⁷ That is to say, the African Court complements the protective mandate of the Commission.⁶⁸ Furthermore, the judgements of the African Court are binding on State parties to the Protocol.⁶⁹ This can be said to enhance the successful protection and promotion of human rights in Africa. The

⁶¹ *Lawyers Committee for Human Rights v Zaire* (2000) AHRLR 71 (ACHPR 1994) para 6.

⁶² Article 53 and A 58 of the Banjul Charter. The decisions of the Commission are recommendations which are non-binding judgments.

⁶³ M'Baye *Introduction to the African Charter on Human and People's Rights* 27.

⁶⁴ M'Baye *Introduction to the African Charter on Human and People's Rights* 27.

⁶⁵ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998).

⁶⁶ Harrington *The African Court on Human and Peoples' Rights* 306.

⁶⁷ Article 2 of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (1998).

⁶⁸ Article 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998).

⁶⁹ Article 30 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998).

African Court is however not the only judicial organ tasked with the mandate of protecting human rights in Africa. Thus, there will also exist in the future the Court of Justice which is set up by the AU's Treaty Establishing the African Economic Community (herein the AEC Treaty)⁷⁰ and a Court of Justice established under the Revised Treaty of the Economic Community of West African States (herein the ECOWAS).⁷¹ A further Court of Justice of Southern Africa was established by the AU through the Common Market for Eastern and Southern Africa Treaty (herein COMESA).⁷²

Although these courts pronounce on economic matters, it will not be long before they pronounce on issues of human rights as has been done by the ECOWAS and the European Union.⁷³ Despite all these judicial organs, this study focuses only on the Commission as established in terms of the Banjul Charter. Nonetheless, even though a Court exists, the Commission is still relevant as it caters for individual communications, unlike the Court which restricts communications brought by individuals or NGO's.⁷⁴ Thus, article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court restricts communications submitted to the Court to NGO's and individuals with observer status. This means that if a State has not made a special declaration accepting the competence of the court, an NGO or an individual cannot approach the court. Put differently, even if a State Party has ratified the Banjul Charter and the Protocol but has not made the article 34(6) special declaration her individuals and NGO's *locus standi* is detracted. Hence, unlike the individuals and NGO's of State Parties which have made a special declaration in terms of article 34(6), State Parties which have not yet made the declaration cannot be brought before the African Court to account

⁷⁰ Under Article 3(g) of the AEC Treaty, one of the principles of the AEC is the 'recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the Banjul Charter'. The Court of Justice has jurisdiction to adjudicate upon this provision under Article 18 of the AEC Treaty; Naldi *Documents of the Organization of African Unity* 20.

⁷¹ Article 4(g) of the Revised ECOWAS Treaty.

⁷² Article 6(e) of the COMESA Treaty.

⁷³ *Internationale Handelsgesellschaft v Einfuhr und Vorratstelle fur Getreide und Futtermittel* (1970) ECR 1125.

⁷⁴ Article 5(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998).

for human rights violations. Consequently, the African Court does deny individuals direct access to it as opposed to the Commission. Individuals can thus submit communications to the Commission and such an individual has therefore no legal standing to submit the communication to the Court once the Commission passes its judgment.⁷⁵ Thus, it is only the Commission that can forward the matter to the Court.⁷⁶ Although State parties are permitted to submit cases to the Court, they are likely to refrain from submitting so as to avoid negative legally binding judgments or negative publicity.⁷⁷ Interestingly enough, the same admissibility requirements for a communication before the Commission are the same admissibility requirements that have to be met before the Court.⁷⁸ However, for the purpose of this study, these admissibility requirements will be examined in the light of the Commission and not the Court.

2.5 The Procedure for the consideration of a communication before the Commission

It should be noted that, following the end of the Second World War various international treaties have been put in place to protect human rights both at a global and regional level.⁷⁹ Some of these instruments make it possible for individuals to submit complaints against their respective governments. For instance, the UN has at a global level adopted optional mechanisms in the First Optional Protocol to the International Covenant on Civil and Political Rights (hereinafter the ICCPR),⁸⁰ the Convention on the Elimination of Racial Discrimination (hereinafter the CERD),⁸¹ the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (hereinafter the CAT)⁸² and more recently the Convention on the

⁷⁵ Viljoen and Odinkalu *The Prohibition of Torture and ill-treatment in the African Human Rights System* 80.

⁷⁶ Rule 118(1) of African Commission Rules of Procedure (2010).

⁷⁷ Viljoen and Odinkalu *The Prohibition of Torture and ill-treatment in the African Human Rights System* 80.

⁷⁸ Article 6 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998).

⁷⁹ Viljoen "Admissibility under the African Charter" 61.

⁸⁰ First Optional Protocol to the International Covenant on Civil and Political Rights (1966).

⁸¹ Article 14 of the Convention on the Elimination of Racial Discrimination (1969).

⁸² Article 22 of the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (1987).

Elimination of All Forms of Discrimination Against Women (CEDAW).⁸³ On the other hand, individual complaints can be submitted at a regional level through the European Convention,⁸⁴ the American Convention⁸⁵ and the Banjul Charter.⁸⁶

As a means of dealing with the aforementioned complaints, certain monitoring bodies were established to adjudicate on these complaints which these treaties usually call communications.⁸⁷ The said monitoring bodies which range from quasi-judicial to judicial bodies also have to make a determination on the admissibility of communications. The European Commission and Court of Human Rights were the primary human rights institutions to tackle issues pertaining to the admissibility of communications.⁸⁸ Thereafter, the Human Rights Committee under the ICCPR,⁸⁹ the CERD Committee, the CAT Committee, the Inter-American Commission and Court on Human Rights⁹⁰ and the African Commission⁹¹ all followed to a certain extent or deviated from the precedence laid by the European Commission and Court.⁹² In tackling issues of admissibility, these bodies consider where the communication meets the requirements for admissibility as stipulated in their respective regional mechanisms.

Thus, the principle that communications submitted to these bodies have to observe certain admissibility requirements before they may be considered for adjudication serves as a mechanism for filtering and screening cases that can be brought before national and international institutions.⁹³ Such filter prevents these international institutions from being overburdened with cases. In addition, the importance of the

⁸³ The Convention on the Elimination of All Forms of Discrimination against Women (1979).

⁸⁴ Article 34 of the European Convention.

⁸⁵ Article 44 of the American Convention.

⁸⁶ Article 55 of the Banjul Charter provides for compulsory acceptance of communications other than those of States Parties.

⁸⁷ European Commission and Court; the American Commission; the American Court; the African Commission; Human Rights Committee under the ICCPR; the CERD Committee and the CAT Committee.

⁸⁸ Zwart *The Admissibility of Human Rights Petitions* 19.

⁸⁹ McGoldrick *The Human Rights Committee. Its Role in the Development of the International Covenant on Civil and Political Rights* 160.

⁹⁰ Davidson *The Inter-American Court of Human Rights* 61-79.

⁹¹ Ankumah *The African Commission on Human and Peoples' Rights* 61-70.

⁹² Zwart *The Admissibility of Human Rights Petitions* 19.

⁹³ Viljoen "Admissibility under the African Charter" 62.

sovereignty of a State is reflected in all UN treaties complaints mechanism because they are all optional. Furthermore, the admissibility requirements place an additional boundary between international supervision and the sovereignty of States.⁹⁴ This is due to the fact that individuals and their States should firstly resolve disputes through judicial and non-judicial mechanisms at the national level.⁹⁵

Hence, a complaint needs to be of a specific degree for it to qualify to be adjudicated at an international level. Issues of admissibility are separately determined before a substantive consideration of a communication can be done.⁹⁶ The admissibility of communications is determined by the Commission, or a working group of its members.⁹⁷ Before 1999, issues on admissibility were only determined by the Commission because the initial number of communications was low.⁹⁸ Thus, a working group was established to handle the preparation of communications between the Commission's 27th and 28th Sessions.⁹⁹ In practice, a commissioner who assumes the role of a rapporteur is assigned a particular communication.¹⁰⁰

When a communication is submitted to the Commission, it is received by the Secretary who then compiles a list of all communications and a brief summary of each communication's contents.¹⁰¹ The Rules of Procedure of the African Commission provide that the "Commission, through the Secretary, may request the author of a communication to furnish clarifications" of his or her communication.¹⁰² This means that the Secretary has to confirm that all the information relating to admissibility has been collected before submitting the communication to the Commission.¹⁰³ The Commission also has to make a decision on the admissibility of communications "as early as possible".¹⁰⁴ It is however unfortunate that decisions

⁹⁴ Viljoen "Admissibility under the African Charter" 62.

⁹⁵ Viljoen "Admissibility under the African Charter" 62.

⁹⁶ *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) para 28-32.

⁹⁷ Rule 23 of the African Commission's Rules of Procedure (2010).

⁹⁸ Viljoen "Admissibility under the African Charter" 62.

⁹⁹ Rule 23 and 97 of the African Commission's Rules of Procedure (2010).

¹⁰⁰ Rule 23 and 97 of the African Commission's Rules of Procedure (2010).

¹⁰¹ Rule 93 of the African Commission's Rules of Procedure (2010).

¹⁰² Rule 104 of the African Commission's Rules of Procedure (2010).

¹⁰³ Rule 93 of the African Commission's Rules of Procedure (2010).

¹⁰⁴ Rule 113 of the African Commission's Rules of Procedure (2010)

on the admissibility of communications have been characterised by delay rather than promptness. This is due to the fact that the process of obtaining the relevant information from the author is often characterised by either the Commission's or Secretariat's delay.¹⁰⁵

For instance, in *Peoples' Democratic Organisation for Independence and Socialism v The Gambia* where the communication was submitted to the Commission in 1990 and the decision on admissibility was only reached in 1995.¹⁰⁶ From the year 1990 to 1995, the Commission had been verifying whether the complainant had exhausted all available local remedies. Such a delay is unacceptable considering the existence of human rights violations that the complainant will be seeking redress for. However, some communications have been dealt with timeously as in *Amnesty International v Zambia* where the communication was found to be admissible only after a month of its submission to the Commission.¹⁰⁷ The attachment of the Commissioners' names who serve as rapporteurs in respect of a specific communication as forming part of the Commission's decision could be a factor that enhances greater commitment in having a communication speedily dealt with.¹⁰⁸ The Commission may request clarification from the author of a communication or that he or she provides any missing information on an incomplete or defective communication.¹⁰⁹ Upon making such a request, the Commission is required to prescribe a suitable time limit to have the information gathered for adjudication.¹¹⁰ Before reaching a decision on admissibility, the Commission has to also request supplementary information from the State complained against.¹¹¹ This request must also be accompanied by a suitable time limit so as to prevent the matter "from dragging on too long".¹¹² If the State complained against does not offer a response

¹⁰⁵ *Peoples' Democratic Organisation for Independence and Socialism v The Gambia* (2000) AHRLR 104 (ACHPR 1996) para 10.

¹⁰⁶ *Peoples' Democratic Organisation for Independence and Socialism v The Gambia* (2000) AHRLR 104 (ACHPR 1996) para 10.

¹⁰⁷ *Amnesty International v Zambia*, (2000) AHRLR 325 (ACHPR 1999) para 28-32.

¹⁰⁸ Viljoen "Admissibility under the African Charter" 63.

¹⁰⁹ Rule 104(2) of the African Commission's Rules of Procedure (2010).

¹¹⁰ Rule 104(2) of the African Commission's Rules of Procedure (2010).

¹¹¹ Rule 93-97 of the African Commission's Rules of Procedure (2010).

¹¹² Rule 117(1) of the African Commission's Rules of Procedure (2010).

within "three months from the date of notification of the communication", the Commission will be obliged to decide on the admissibility of the communication.¹¹³

A case in point is that of *Union Interafricaine des Droits de l'Homme v Angola* where the Commission declared the communication admissible in April 1997.¹¹⁴ The Commission relied mostly on information provided by the complainant and criticised "the fact that the Respondent State did not respond to the notification sent to it in December 1996".¹¹⁵ Hence, in order to prevent the delayed processing of communications, a number of issues have to be borne in mind. That is to say, a communication has to be as detailed as possible from the beginning of the submission.¹¹⁶ Furthermore, a communication also has to be drafted in one of the working languages of the OAU which is English, French or Arabic.¹¹⁷ However, because only a few commissioners' and secretarial staff speak Arabic, it would be practical and prudent to submit Arabic communications with an accompanying French or English translation of the communication.¹¹⁸ It should also be noted that the Commission may reconsider its decision on admissibility at a later date if requested to.¹¹⁹ The Commission may at times however invite the author of the communication to request the Commission to reconsider its decision on admissibility.¹²⁰ This was done in *Alberto T. Capita v Tanzania* where the Commission made an observation that the communication could be resubmitted after the local remedies had been exhausted or once the complainant proves that local remedies are ineffective, unavailable or unreasonably prolonged.¹²¹

After such request the Commission has to make its decision on admissibility known to both the Respondent State and the author of the communication "as soon as possible". The following is therefore a discussion of the first requirement for

¹¹³ Rule 117(4) of the African Commission's Rules of Procedure (2010).

¹¹⁴ *Union Interafricaine des Droits de l'Homme v Angola* (2000) AHRLR 18 (ACHPR 1997) para 6.

¹¹⁵ *Union Interafricaine des Droits de l'Homme v Angola* (2000) AHRLR 18 (ACHPR 1997) para 6.

¹¹⁶ *Union Interafricaine des Droits de l'Homme v Angola* (2000) AHRLR 18 (ACHPR 1997) para 6.

¹¹⁷ Rule 36 of the African Commission's Rules of Procedure (2010).

¹¹⁸ Rule 36 of the African Commission's Rules of Procedure (2010).

¹¹⁹ Rule 118(2) of the African Commission's Rules of Procedure (2010).

¹²⁰ *Alberto T. Capita v Tanzania* (2000) AHRLR 313 (ACHPR 1994) para 3.

¹²¹ *Alberto T. Capita v Tanzania* (2000) AHRLR 313 (ACHPR 1994) para 3.

admissibility encapsulated in article 56(1) of the Banjul Charter.

2.6 Article 56(1)

As noted earlier, article 56 of the Banjul Charter sets out the admissibility requirements for individual communications. These requirements are also supplemented by the African Commission's Rules of Procedure as well as its jurisprudence.¹²² The failure to comply with any one of the listed requirements may result in a communication being held inadmissible. The first of these requirements is enumerated in article 56(1) which provides as follows:

Communications relating to human and peoples' rights referred to in Article 55 received by the Commission shall be considered if they indicate their authors even if the latter request anonymity.¹²³

It should be noted that the 'indicate their authors' phrase should be construed broadly so as to arm the Commission with all the details necessary for the adjudication of a communication. The Banjul Charter does not elaborate on the full meaning of this phrase.¹²⁴ On the other hand, the American Convention is more specific on this note. Thus, article 46(1) (d) of the American Convention states that a communication shall be admissible if it contains the name, profession, nationality, signature of the person or of the legal representative and domicile of the complainant.¹²⁵

This provision, unlike article 56(1), is more detailed on what is required of the author of a communication. On a different note altogether, the European Convention does not say much about this requirement except for the statement that a communication does not have to be anonymous.¹²⁶ This has been construed to mean that the complainant must be duly identified in the communication.¹²⁷ Nonetheless, with all

¹²² Viljoen and Odinkalu *The Prohibition of Torture and ill-treatment in the African Human Rights System* 80.

¹²³ Article 1 of the Banjul Charter.

¹²⁴ Article 56(1) only mentions that the communication must indicate the author thereof. Much is left to be desired from such equivocal wording.

¹²⁵ Article 46(1) (d) of the American Convention.

¹²⁶ Article 35(2) (a) of the European Convention.

¹²⁷ Rule 47(1) (a) of the Rules of the European Court of Human and Peoples' Rights.

this being said, the first question that has to be dealt with is who qualifies to be the author or complainant of a communication? This brings one to the consideration of *locus standi*. Thus, before delving into the other admissibility requirements, the Commission must examine whether or not the complainant has legal standing to be a complainant or author of the communication.¹²⁸ Although the Banjul Charter has not explicitly addressed the issue of legal standing, the Commission has adopted a broad approach by extending access to both Non-Governmental Organizations (herein NGOs) and victims.¹²⁹ Thus, the African system like the European Convention in article 34 and the American Convention in article 44 allows any individual to lodge a communication with the Commission.¹³⁰ In addressing the issue of *locus standi*, the Commission has laid down jurisprudence to the effect that an author need not be a victim, a family member or a person authorised to act for a victim.¹³¹ The Commission in *Baes v Zaire* developed this principle by ruling the communication admissible where a Danish national had submitted a communication on behalf of her illegally detained colleague at the University of Kinshasa where she was employed at the time.¹³²

In addition to the above, the author of a communication need not be a citizen or a resident of a State party to the Banjul Charter or any AU member State.¹³³ *Haregewoin Gebre-Sellasse & IHRDA v Ethiopia* is a classic case in this regard.¹³⁴ In this case, the Commission rejected the respondent State's argument that the Institute for Human Rights and Development in Africa (IHRDA) had no legal standing as the author of the communication. The respondent State argued that the IHRDA had no legal standing because it was not registered in Ethiopia. In holding

¹²⁸ Viljoen and Odinkalu *The Prohibition of Torture and Ill-treatment in the African Human Rights System* 79.

¹²⁹ *Maria Baes v Democratic Republic of the Congo (former Zaire)* (2000) AHRLR 72 (ACHPR 1995); *Haregewoin Gebre-Sellasse & IHRDA v Ethiopia* 2018 (AHRLR) 118 (ACHPR 2017) para 64.

¹³⁰ Article 55 of the Banjul Charter.

¹³¹ *Organisation Mondiale contre la Torture (OMCT) v Zaire* (1996) AHRLR 6 (ACHPR 1996) para 92.

¹³² *Maria Baes v Democratic Republic of the Congo (former Zaire)* (2000) AHRLR 72 (ACHPR 1995) para 5.

¹³³ *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v Botswana* (2018) AHRLR 5 (ACHPR 2018) para 24.

¹³⁴ *Haregewoin Gebre-Sellasse & IHRDA v Ethiopia* (2018) AHRLR 118 (ACHPR 2017) para 64.

the communication admissible, the Commission reaffirmed the principle that a complainant need not be a citizen of the State party involved or of a State party to the Banjul Charter.¹³⁵ Thus, any person, individual or corporation, can bring a communication before the Commission even if they do not enjoy observer status with the Commission.¹³⁶ The position is different, however, with the Court as NGOs need to enjoy observer status with the Commission before they can bring a communication before the Court.¹³⁷

The above serves to show how the phrase 'indicate their author' in article 56(1) is often misunderstood to imply that only victims of an alleged violation may seize the Commission. This was the case in *Bakweri v Cameroon*, where the respondent State argued that the complainants had no legal standing because they were not the victims of the alleged violations.¹³⁸ In rejecting the respondent State's contention, the Commission held that the complainants who were all Bakweri including counsel and the Bakweri Land Claims Committee had legal standing because they were accredited representatives of the Bakweri with authority to speak on their behalf.¹³⁹

The Commission thus noted that one need not have a restrictive interpretation of the *locus standi* requirement by implying that only victims could approach the Commission. All article 56(1) requires is that one discloses the identity of the author of the communication even if he or she is not the victim of the alleged violation.¹⁴⁰ Hence, this requirement is broad enough to cater for submissions from organisations and individuals other than the victim of the human rights violation.¹⁴¹ Put clearly, there need not be a direct interest (such as being the victim) for one to be able to bring a communication before the Commission.¹⁴² The rationale behind such broad interpretation is that in Africa most victims face difficulties that impair them from

¹³⁵ *Haregewoin Gebre-Sellassie & IHRDA v Ethiopia* (2018) AHRLR 118 (ACHPR 2017) para 64.

¹³⁶ *Haregewoin Gebre-Sellassie & IHRDA v Ethiopia* (2018) AHRLR 118 (ACHPR 2017) para 64.

¹³⁷ Article 5(3) and Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998).

¹³⁸ Kofele-Kale 2007 *Annual Survey of International and Comparative Law* 131.

¹³⁹ *Bakweri Land Claims Committee v Cameroon* (2004) AHRLR 60 (ACHPR 2004) para 46.

¹⁴⁰ *Bakweri Land Claims Committee v Cameroon* (2004) AHRLR 60 (ACHPR 2004) para 46.

¹⁴¹ *Bakweri Land Claims Committee v Cameroon* (2004) AHRLR 60 (ACHPR 2004) para 46.

¹⁴² *Bakweri Land Claims Committee v Cameroon* (2004) AHRLR 60 (ACHPR 2004) para 46.

successfully approaching the Commission without help.¹⁴³

The same goes for the European Court which also permits communications from direct victims and from people who are not directly affected by the violation.¹⁴⁴ However, the European Court limits the scope of who it considers to be a direct victim to persons directly affected by an infringement of the protected rights.¹⁴⁵ For instance, if the organiser of a demonstration is forced not to demonstrate, he or she can claim as a direct victim that his right to freedom of assembly has been denied.¹⁴⁶ On the other hand, an ordinary person who would have attended such demonstration cannot claim to be a direct victim of a violation of the right to freedom of assembly.¹⁴⁷ However, the European Court is cautious not to stretch the concept of a direct victim too far. For instance, in cases that would permit an indeterminate number of people to lodge a complaint.¹⁴⁸ It is thus submitted that the African Commission should be circumspect in determining direct access so as to prevent an indeterminate number of persons from lodging a complaint.

The European Court also permits persons indirectly affected to submit communications. For instance, the European Court has heard a communication submitted by the nephew of a person who had died suspiciously¹⁴⁹ and a communication submitted by a husband of a woman who had been compelled to submit to a gynaecological test.¹⁵⁰ The position of the European Court to adjudicate on communications even from people not directly affected is commendable. It is also the same as that of the Inter-American Commission. Therefore, it is submitted that the drafters' intent behind article 56(1) was that the author discloses his identity regardless of his or her status as a direct or indirect victim. This brings one to the second question that has to be dealt with when tackling the conundrum of who the

¹⁴³ *Bakweri Land Claims Committee v Cameroon* (2004) AHRLR 60 (ACHPR 2004) para 46.

¹⁴⁴ *Vatan v Russia* (2004) 47978/99 ECHR para 48.

¹⁴⁵ *Norris v Ireland* (1988) 142 ECHR para 31; *Open Door and Dublin Well Woman v Ireland* (1992) 246 ECHR para 43.

¹⁴⁶ *Patyi and Others v Hungary* (2008) 5529/05 ECHR para 25–28.

¹⁴⁷ *Hyde Park v Moldova* 14 September (2010) 6991/08 ECHR para 32.

¹⁴⁸ *Hyde Park v Moldova* (2010) 6991/08 ECHR para 32.

¹⁴⁹ *Yaşa v Turkey* (1998) 28 ECHR 408 para 14–20.

¹⁵⁰ *Fidan v Turkey* (2000) 24209/94 ECHR para 7.

author of a communication is.

Worth noting is that the 'indicate their author' phrase is to be broadly construed to mean a disclosure of the full particulars of the authors and/or victims.¹⁵¹ This enables the Secretary of the Commission to contact the author if any information is required as well as to keep the author abreast with the status of the communication.¹⁵² Thus, a certain degree of specificity of the victims is required. The Commission has also taken pains to stress that the 'indicate their author' requirement in article 56(1) goes beyond a mere mention of full names.¹⁵³ Instead, it extends to indicating an address where the author can be reached or contacted should any questions arise.¹⁵⁴ An address can therefore be a postal address, street address, telephone number, email address and fax number if available.¹⁵⁵ From this it can be gathered that the African Commission has adopted the same criteria required when assessing the requirement to 'indicate the author of a communication' from the American Convention which requires that the communication state the name, nationality, profession and address of the complainant.¹⁵⁶

In *Tanko Bariga v Nigeria*, the Commission stressed the importance of an address by finding the communication inadmissible because it did not indicate the address.¹⁵⁷ The failure to include an address presents numerous difficulties for the Commission as illustrated in *Monja Joan v Madagascar*.¹⁵⁸ In this case, the Commission was unsuccessful in trying to contact the complainant even through other individuals because of a lack of address.¹⁵⁹ It later came to the attention of the Commission that the complainant had died and the Commission could still not contact the

¹⁵¹ Viljoen "Admissibility under the African Charter" 67.

¹⁵² *Ibrahim Dioumessi, Sekou Kande, Ousmane Kaba v Guinea* (2000) AHRLR 129 (ACHPR 1994) para 5.

¹⁵³ *Tanko Bariga v Nigeria* (2000) AHRLR 178 (ACHPR 1994) para 7-10.

¹⁵⁴ *Tanko Bariga v Nigeria* (2000) AHRLR 178 (ACHPR 1994) para 7-10.

¹⁵⁵ Article 46(1) (d) of the American Convention.

¹⁵⁶ Article 46(1) (d) of the American Convention.

¹⁵⁷ *Tanko Bariga v Nigeria* (2000) AHRLR 178 (ACHPR 1994) para 7-10.

¹⁵⁸ *Monja Joana v Madagascar* (2000) AHRLR 141 (ACHPR 1996) para 7.

¹⁵⁹ *Monja Joana v Madagascar* (2000) AHRLR 141 (ACHPR 1996) para 17

complainant's legal successor because of the lack of an address.¹⁶⁰

In addition to the above, the requirement to 'indicate their author' means that no communication is to be submitted anonymously.¹⁶¹ Viljoen thus opines that even if the author requests anonymity, he or she would likely still have to state his or her names and other details in the communication.¹⁶² Therefore, even if the author requests anonymity, it will most likely prove to be difficult to maintain such as the Respondent State needs to be informed of the specific circumstances that gave rise to the communication against it.¹⁶³ To date, the Commission has not received any communication requesting the anonymity of the complainant, mainly because organisations such as NGOs stipulate on whose behalf the communication is authored.¹⁶⁴ However, where the NGO does not stipulate on whose behalf it is acting, it is likely because the communication alleges massive or widespread violations of human rights.¹⁶⁵ In this instance, the Commission will accept a communication without express details of the victims.¹⁶⁶

The European Convention also prohibits the submission of anonymous complaints.¹⁶⁷ The European Court in this regard has held that it requires elements in a communication that enable the court to clearly identify the complainant.¹⁶⁸ Put differently, the complainant must be duly identified. In some cases, however, the Court has the discretion to withhold the identity of the complainant to the public. This means that he or she will be identified by his or her initials or a letter.¹⁶⁹ The same goes for the American Convention even though it does not specifically provide that a communication should not be anonymous. That is to say, the fact that the

¹⁶⁰ *Monja Joana v Madagascar* (2000) AHRLR 141 (ACHPR 1996) para 17.

¹⁶¹ There exists similar requirements for communications under A 3 of the Optional Protocol to the ICCPR and A 22(2) of the CAT.

¹⁶² Viljoen "Admissibility under the African Charter" 67.

¹⁶³ Viljoen "Admissibility under the African Charter" 67.

¹⁶⁴ Viljoen "Admissibility under the African Charter" 67.

¹⁶⁵ *Constitutional Rights Project v Nigeria* (2000) AHRLR 180 (ACHPR 1995) para 23.

¹⁶⁶ *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) para 8.

¹⁶⁷ Article 35(2) (a) of the European Convention.

¹⁶⁸ Rule 47(1) (a) of the Rules of Procedure of the European Court on Human Rights; *Blondje v the Netherlands* (2009) 7245/09 ECHR.

¹⁶⁹ Rule 47(1) (4) of the Rules of Procedure of the European Court on Human Rights.

American Convention clearly mentions the elements it expects in a communication does not leave any room for an anonymous communication. It would therefore be prudent for the African Commission to follow the jurisprudence of the European Court in not disclosing the identity of a complainant who would prefer to remain anonymous in that a disclosure of the identity could at times be prejudicial and unsafe for the complainant.

Therefore, upon coming to a finding that there was an indication of the author, the Commission proceeds to make a determination on the second admissibility requirement as stipulated in article 56(2). Article 56(2) is discussed below.

2.7 Article 56(2)

It is worth noting that, upon making a finding of whether the communication indicates its author, the Commission proceeds to examine if the communication is in compliance with article 56(2). Article 56(2) is the second admissibility requirement in terms of the Banjul Charter. It states that communications will be received by the Commission if they are compatible with the Charter of the OAU or with the Banjul Charter.¹⁷⁰

Similarly, article 35(3) (a) of the European Convention stipulates that a communication will be held inadmissible if:

The application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application.¹⁷¹

The European Convention's use of the term 'manifestly ill-founded' has been held to mean that unsubstantiated, confused and far-fetched complaints that do not reveal a clear violation of the European Convention will be declared inadmissible.¹⁷² In addition, the American Convention provides that a communication will be held inadmissible if:

¹⁷⁰ Article 56(2) of the Banjul Charter.

¹⁷¹ Article 35(3) (a) of the European Convention.

¹⁷² *Trofimchuk v Ukraine* (2005) 4241/03 (ECHR 2005) para 4.

b. the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention; c. the statements of the petitioner or of the state indicate that the petition or communication is manifestly groundless or obviously out of order.¹⁷³

The aforementioned provisions of the European and American Conventions are therefore quite similar to article 56(2) of the Banjul Charter. From the above provision, it would appear that it is required that a communication be compatible with the Banjul Charter or the OAU Charter, and not compatible with both.¹⁷⁴ However, it makes little sense to require an allegation of a violation of the Banjul Charter to be compatible with the OAU Charter and not with the Banjul Charter,¹⁷⁵ especially as the OAU Charter is regarded as the document founding the OAU as well as the functions and mandate of the OAU institutions.¹⁷⁶ It is to be noted, however that the OAU Charter has some provisions that are in conflict with the ethos of the Banjul Charter. These provisions include the OAU Charter advocates for State sovereignty as well as non-interference with the domestic affairs of a member State.¹⁷⁷ To this end, the OAU Charter mentions only the issues of human rights in its purpose, which is to:

Promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.¹⁷⁸

Quite distinctive from the OAU Charter, the Banjul Charter encapsulates the rights of individuals and peoples in State Parties.¹⁷⁹ It also places the onus on State Parties to fully recognise and give effect to these rights.¹⁸⁰ It is therefore submitted that one should read the word 'or' in article 56(2) conjunctively so as to combine the two instruments and thereby make it a requirement that all communications be compatible with the Banjul Charter and the OAU Charter.

¹⁷³ Article 47(b) (c) of the American Convention (1967).

¹⁷⁴ Article 56(2) reads as follows: 'are compatible with the Charter of the OAU or with the present Charter.'

¹⁷⁵ Viljoen "Admissibility under the African Charter" 68.

¹⁷⁶ Organisation of African Unity Charter (1963).

¹⁷⁷ Article 2 and Article 3 of the AU Charter.

¹⁷⁸ Article 2 of the AU Charter.

¹⁷⁹ Chapter 1 of the Banjul Charter.

¹⁸⁰ Chapter 2 of the Banjul Charter.

The Commission in *Katangese Peoples' Congress v Zaire* had to consider the communication's compatibility with the OAU Charter.¹⁸¹ Though the Commission did not expressly refer to the OAU Charter, it nevertheless considered the sovereignty and territorial integrity of Zaire whilst also considering the compatibility of the communication with the Banjul Charter.¹⁸² This lends support to the contention that all communications have to be compatible with both the Banjul Charter and the OAU Charter. Thus, the essence of article 56 as a whole is that the Commission adjudicates only on communications that are compatible with the Banjul Charter.

This ushers in the four main aspects of compatibility with the Banjul Charter as stipulated in article 56(2). Significantly, the Commission has to firstly allege that a right stipulated in the Banjul Charter has been violated.¹⁸³ This is the substantive requirement (*ratione materiae*).¹⁸⁴ The second aspect is that the communication must be directed at a State Party to the Banjul Charter and must also be submitted by a competent person.¹⁸⁵ This is the personal requirement (*ratione personae*).¹⁸⁶ Thirdly, the communication must be "based on events that occurred within the period of the Charter's application".¹⁸⁷ This is the temporal requirement (*ratione temporis*).¹⁸⁸ The last aspect is that the communication must be based on events that have taken place within the territorial sphere of the Banjul Charter except if it is proven that there is a continuing violation.¹⁸⁹ This is known as the territorial requirement (*ratione*

¹⁸¹ *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995) para 22.

¹⁸² *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995) para 22.

¹⁸³ Viljoen and Odinkalu *The Prohibition of Torture and ill-treatment in the African Human Rights System* 85.

¹⁸⁴ *Dabolorivhuwa Patriotic Front v the Republic of South Africa* (2000) AHRLR 115 (ACHPR 2013) para 72.

¹⁸⁵ Viljoen "Admissibility under the African Charter" 69.

¹⁸⁶ *Dabolorivhuwa Patriotic Front v the Republic of South Africa* (2000) AHRLR 115 (ACHPR 2013) para 72.

¹⁸⁷ Viljoen and Odinkalu *The Prohibition of Torture and ill-treatment in the African Human Rights System* 85.

¹⁸⁸ *Dabolorivhuwa Patriotic Front v the Republic of South Africa* (2000) AHRLR 115 (ACHPR 2013) para 72.

¹⁸⁹ Annette Pagnouille (on behalf of Mazou) v Cameroon (2000) AHRLR 55 (ACHPR 2000) para 17; Viljoen "Admissibility under the African Charter" 69.

loc).¹⁹⁰ The aforementioned aspects also apply in the American and European systems. In making a decision on the admissibility of a communication, the African Commission always considers whether the four aspects of compatibility have been met. The same goes for the European Court. It is therefore evident that all three regional organs are in sync on this matter. These aspects will be examined in turn.

1.1.6 A communication must allege a violation of the Banjul Charter

The first aspect on compatibility with the Banjul Charter as set out in article 56(2) is that a communication must allege a violation of one or more of the provisions of the Banjul Charter.¹⁹¹ This is not exclusive to the Banjul Charter as all international human rights systems require the same.¹⁹² In other words, this means that allegations in the communication should provide *prima facie* proof that indeed a provision of the Banjul Charter has been violated.¹⁹³ The facts alleged should reveal a violation of any one or more of the substantive rights protected by the Banjul Charter.¹⁹⁴ Thus, if a communication does not contain such violations of the Banjul Charter, the communication will be found to be incompatible with it.¹⁹⁵ *Frederick Korvah v Liberia* lends support to this contention.¹⁹⁶ In this case, the author alleged that the Liberian Security Police lacked discipline, were corrupt and that the Liberian people in general were immoral.¹⁹⁷ The author also alleged that a national security risk was being caused by American financial experts and that other countries were

¹⁹⁰ *Dabakorivhuwa Patriotic Front v the Republic of South Africa* (2000) AHRLR 115 (ACHPR 2013) para 72.

¹⁹¹ Viljoen and Odinkalu *The Prohibition of Torture and ill-treatment in the African Human Rights System* 85.

¹⁹² Article 1 of the Optional Protocol to the ICCPR where the Human Rights Committee can entertain communications alleging violations of 'any of the rights set forth in the Covenant'; Article 47(b) of the American Convention where a petition which does not state 'facts that tend to establish a violation of the rights guaranteed' by the Convention are inadmissible.

¹⁹³ Viljoen "Admissibility under the African Charter" 69.

¹⁹⁴ *Mouvement des R'éfugiés Mauritaniens au S'en'egal v Senegal*, (2000) AHRLR 287 (ACHPR 1997) para 28.

¹⁹⁵ *Mouvement des R'éfugiés Mauritaniens au S'en'egal v Senegal* (2000) AHRLR 287 (ACHPR 1997) para 28.

¹⁹⁶ *Frederick Korvah v Liberia* (2000) AHRLR 140 (ACHPR 1988) para 21-28.

¹⁹⁷ *Frederick Korvah v Liberia* (2000) AHRLR 140 (ACHPR 1988) para 21-28.

supporting South Africa and her apartheid regime.¹⁹⁸ In finding the communication inadmissible, the Commission held that the allegations did not amount to violations of human rights under the Banjul Charter.¹⁹⁹

Similarly, the European Court declared a communication inadmissible because it concerned the right to be issued a driving licence which was not a right protected by the European Convention.²⁰⁰ It is also important to note that, even though a complainant is not obliged to specify the alleged violated provisions of the Banjul Charter, he or she should nevertheless indicate the factual basis on which the violation is based.²⁰¹ The Inter-American Commission has noted that such indication enables the Commission to know the specific incident to investigate, or to require information from the States.²⁰² The Inter-American Commission has also stated that in indicating the factual basis upon which the communication is based it must conduct a *prima facie* evaluation in order to determine whether the communication establishes a possible or potential human rights violation of a right protected by the American Convention.²⁰³ This determination is a primary analysis which is not a prejudgment on the merits of the case.²⁰⁴ Furthermore, such indication need not specify the alleged violated rights as this is a task incumbent on the Inter-American Commission to determine which rights had been violated after consulting the jurisprudence of the system.²⁰⁵

In addition to the above, the Commission in *Katangese Peoples' Congress v Zaire* declared the communication inadmissible for failing to *prima facie* prove that the claim constituted a violation of article 20(1) of the Banjul Charter.²⁰⁶ In this case, the complainant, the Katangese Peoples' Congress, submitted a communication

¹⁹⁸ *Frederick Korvah v Liberia* (2000) AHRLR 140 (ACHPR 1988) para 21-28.

¹⁹⁹ *Frederick Korvah v Liberia* (2000) AHRLR 140 (ACHPR 1988) para 21-28.

²⁰⁰ *Rinck v France* (2010) 18774/09 ECHR para 43.

²⁰¹ *Mouvement des Réfugiés Mauritiens au S'en'egal v Senegal* (2000) AHRLR 287 (ACHPR 1997) para 28.

²⁰² *Juan Jose Resendiz Chavez v Mexico* (2017) 127 IACHR para 17.

²⁰³ *Jose Gregorio Mota v Venezuela* (2012) 1336-07 (ACHR 2012) para 6-7.

²⁰⁴ *Jose Gregorio Mota v Venezuela* (2012) 1336-07 (ACHR 2012) para 6-7.

²⁰⁵ *Jose Gregorio Mota v Venezuela* (2012) 1336-07 (ACHR 2012) para 6-7.

²⁰⁶ *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995) para 22.

under article 20(1) of the Banjul Charter requesting the Commission to recognise that the Katangese region was entitled to independence from the then Zaire. The Commission upheld the sovereignty and territorial integrity of the State as provided for by the OAU Charter²⁰⁷ and accordingly held that the right to self-determination had not been violated. This was because the right to self-determination could supersede a State's sovereignty only if evidence could be presented of concrete human rights violations that question the territorial integrity of the State or if a complainant is being denied the right to participate in government.²⁰⁸ In this case, none of the above had been proved and therefore the complainant had failed to prove a *prima facie* violation of article 20(1).

This case shows that the Banjul Charter takes a different path from the European Court, in that it recognises the right to self-determination unlike its counterpart. On this note, the European Court has on one occasion declared a communication inadmissible that was based on the right to self-determination because the right was not protected by the European Convention.²⁰⁹ This ultimately meant that the communication was not compatible with the material aspect of the European Convention. Hence, although the Banjul Charter and the European Convention differ in the rights they protect, it is submitted that the African Commission and the European Court do at least share the same stance on the issue of compatibility of communications with the respective regional institutions.

Furthermore, the fact that an allegation must reveal a *prima facie* violation of the Banjul Charter implies that a Respondent State may not argue that the alleged violation is permitted because the right contains a clawback clause.²¹⁰ For instance, article 10(1) of the Banjul Charter affords one the right to free association within the confines of the law. The Commission's stance on this issue is that it regards 'law' as international standards according to articles 60 and 61 of the Banjul Charter.²¹¹

²⁰⁷ Article 2 and Article 3 of the AU Charter.

²⁰⁸ *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995) para 23.

²⁰⁹ *X v the Netherlands* (1976) 7230/75 (ECtHR 1976) para 3.

²¹⁰ Such as the terms 'laid down by law' in Article 6; 'subject to law and order' in Article 8; and 'provided he abides by the law' in Article 12(1).

²¹¹ *Amnesty International v Zambia*, (2000) AHRLR 325 (ACHPR 1999) para 28-32.

Therefore, a clawback clause should not be used as a tool for denying the Commission jurisdiction in a matter and should not be interpreted against the values and principles of the Banjul Charter.²¹² Thus, this should not be used as a tool for giving credence to expressing violations of the Banjul Charter.

1.1.7 A communication must be directed at a State Party to the Banjul Charter

The second aspect to article 56(2) is that "a communication must be directed at a State that is a party to the Banjul Charter".²¹³ The Inter-American Commission and European Court also have virtually the same principles in this regard. On this issue, it should be noted that this aspect has often been misunderstood by many complainants and has therefore resulted in a number of communications being declared inadmissible. Thus, in the initial years of the Commission's existence twenty-three of the twenty-four cases found to be inadmissible by the Commission until May 1999 were found to be inadmissible because of failure to meet this requirement.²¹⁴ Instead of directing a communication towards a State Party to the Banjul Charter, most complainants misunderstood this requirement by directing the communication towards non-African states,²¹⁵ the OAU itself,²¹⁶ OAU Member States

²¹² *Amnesty International v Zambia*, (2000) AHRLR 325 (ACHPR 1999) para 28-32.

²¹³ Viljoen "Admissibility under the African Charter" 72.

²¹⁴ Viljoen "Admissibility under the African Charter" 72.

²¹⁵ Non-African States complained against are Bahrain (*Committee for the Defence of Political Prisoners v Bahrain* (1988) AHRLR 4 (ACHPR 1988); Indonesia (*Wesley Parish v Indonesia* (1990) AHRLR 8 (ACHPR 1990)); the USA (*Iheanyichukwu A. Ihebereme v USA* (1988) AHRLR 13 (ACHPR 1988); *Prince J. N. Makoge v USA* (1988) AHRLR 18 (ACHPR 1988); and Yugoslavia (*Centre for the Independence of Judges and Lawyers v Yugoslavia* (1988) AHRLR 17 (ACHPR 1988)). One communication was directed at two such States simultaneously, Haiti and the USA (*Georges Eugene v USA, Haiti* (1990) AHRLR 6 (ACHPR 1990)).

²¹⁶ A further communication was directed at the AU (*Mohamed El-Nekheily v OAU* (1988) AHRLR 10 (ACHPR 1988)).

that had not yet become State Parties to the Banjul Charter²¹⁷ and the only African non-OAU member, Morocco.²¹⁸ The Commission Rules of Procedure have addressed this issue by providing that a communication concerning a Respondent State which is not a party to the Banjul Charter will not be "received by the Commission or placed on a list under rule 103 of the present rules",²¹⁹

To add to this requirement, it should be noted that a communication cannot be directed against an individual.²²⁰ Thus, even though the Banjul Charter provides for rights and duties of individuals, such duties by individuals to other individuals should be interpreted as a guideline for States to fulfil their general obligation contained in article 1.²²¹ Hence, only States may be held in breach of the Banjul Charter and not individuals. The European Commission has also noted in *X v The United Kingdom* that a communication will be incompatible *ratione personae* with the European Convention if the communication is against an individual.²²² On the other hand, non-state actors such as multi-nationals, parastatals, or guerrilla groups may hold responsible a State for violating the Banjul Charter.²²³ In addition, a State may also be held in violation of the Banjul Charter if it is complicit in human rights violations with a non-state actor, provided it has substantial control over the actor or if it fails

²¹⁷ African States complained against before they had become party to the Charter are: Angola (*Union Nationale de Liberation de Cabinda v Angola* (1988) AHRLR 10 (ACHPR 1988)); Burundi (*Austrian Committee Against Torture v Burundi* (2018) AHRLR 14 (ACHPR 2018)); Ethiopia (*International Lawyers Committee for Family Reunification v Ethiopia* (1988) AHRLR 14 (ACHPR 1988)); *Getachew Abebe v Ethiopia* (1988) AHRLR 2 (ACHPR 1988)); *Dr Abd Eldayem AE Sanussi v Ethiopia* (1988) AHRLR 6 (ACHPR 1988)); *Centre Haitien des Libertés Publiques v Ethiopia* (1988) AHRLR 12 (ACHPR 1988)); *Association Internationales des Juristes Démocrates v Ethiopia* (1989) AHRLR 5 (ACHPR 1989)); *Commission Française Justice et Paix v Ethiopia*, (1989) AHRLR 6 (ACHPR 1989)); and Ghana (*Co-ordinating Secretary of the Free Citizens Convention v Ghana* (1988) AHRLR 9 (ACHPR 1988)); *Dr Kodji Kofi v Ghana* (1988) AHRLR 15 (ACHPR 1988)); Lesotho (*Simon B. Ntaka v Lesotho* (1988) AHRLR 18 (ACHPR 1988)). One communication was directed at simultaneously at four States, none of them a party to the Banjul Charter at the time (*International Pen v Cameroon, Ethiopia, Kenya, Malawi* (1989) AHRLR 8 (ACHPR 1988)).

²¹⁸ Two communications were directed at Morocco, who at that stage was not a member of the OAU (*Austrian Committee Against Torture v Morocco* (1989) AHRLR 4 (ACHPR 1989)); *Andre Houer v Morocco* (1990) AHRLR 5 (ACHPR 1990))

²¹⁹ Rule 102(2) of the Rules of the African Commission (2010).

²²⁰ *Mohammed El-Nekheily v OAU* (1988) AHRLR 10 (ACHPR 1988). The communication in this case was submitted against then Secretary-General of the AU, Idée Oumarou.

²²¹ Viljoen "Admissibility under the African Charter" 73.

²²² *X v The United Kingdom* (1976) 6956/76 ECHR (1976) para 10.

²²³ Viljoen "Admissibility under the African Charter" 73.

to make an investigation of human rights violations.²²⁴ In *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, the Commission held that the government of Chad had the responsibility to ensure that the rights and safety of its citizens were protected during the civil war.²²⁵ The Commission thus found Chad responsible for the alleged human rights violations.

1.1.8 A communication must be based on events that occurred within the period of the Banjul Charter's application

Regarding this requirement, it is common cause and a principle of international law that a treaty only binds a party in respect of an act or fact that took place after the date of entry into force of the treaty in question.²²⁶ There are, however, exceptions to this general rule, for instance, where the treaty itself expressly provides that it has a retroactive effect or where there are continuous violations.²²⁷ In this light, a continuous violation is an action that commenced before a treaty entered into force and its effects or the act itself continues to occur after the entry into force of the treaty.²²⁸ Though the Banjul Charter is silent on this aspect, the Commission has had to clarify the issue by applying the general principles of the Banjul Charter.

This means that the Commission is competent to consider violations that allegedly occurred from the date of entry into force of the Banjul Charter, or communications that originate after the date of entry into force for a particular State.²²⁹ The position is the same with the Inter-American Commission and European Court. The date of entry into force is a three months period after a state deposits its adherence to the instrument.²³⁰ The above principles were accepted in *Muthuthirin Ngoka v Kenya* where the Commission found the communication to be inadmissible in 1991 because

²²⁴ *Hertzberg v Finland* (1982) 1713 (UNHRC 1982) para 16, in which the Human Rights Committee pointed out that Finland was responsible for the actions of a broadcasting company in which it had a dominant stake (90 per cent) and which was placed under specific government control.

²²⁵ *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) para 31.

²²⁶ Article 28 of the Vienna Convention on the Law of Treaties (1969).

²²⁷ Article 28 of the Vienna Convention on the Law of Treaties (1969).

²²⁸ Viljoen "Admissibility under the African Charter" 77.

²²⁹ Viljoen "Admissibility under the African Charter" 77.

²³⁰ Article 65 of the Banjul Charter.

Kenya was not yet a State Party to the Banjul Charter.²³¹ The complainant resubmitted the communication to the Commission in 1992 when Kenya had acceded to the Banjul Charter.²³² The Commission upheld its decision by ruling the communication inadmissible. The reason this time was due to the fact that the cause of the complaint had arisen at a time when Kenya was not yet a party to the Banjul Charter.²³³ Further to that, the Commission noted that there was no continuous violation or effect on the complainant.

However, the Commission in *Dabolorivhuwa Patriotic Front v The Republic of South Africa* declared the communication admissible because, even though the alleged violation had taken place in 1994, before 1996, when South Africa became a party to the Banjul Charter, the effects of such violation still existed thereby making the violation a continuous action.²³⁴ Thus, because the complainants were still being paid less than they were entitled to from the prioritisation of the Venda Pension Fund, such an act constituted a continuous violation thereby resulting in the communication being declared admissible.²³⁵ The issue of a continuous violation was also considered in *Papamichalopoulos v Greece*, a European Court decision, where the *ratione temporis* aspect was met because there existed a continuing unlawful occupation without compensation of the complainants' land by the navy of land.²³⁶

1.1.9 A communication must be within the territorial sphere within which the Charter operates

This territorial requirement is to the effect that State Parties to the Banjul Charter are in principle only responsible for violations that occur within their territory.²³⁷ The European Commission has noted, however, that there are exceptions to this

²³¹ *Muthuthirin Njoka v Kenya* (2000) AHRLR 135 (ACHPR 2000) para 19.

²³² Kenya acceded to the Banjul Charter on 23 January 1992.

²³³ *Muthuthirin Njoka v Kenya* (2000) AHRLR 135 (ACHPR 2000) para 19.

²³⁴ *Dabolorivhuwa Patriotic Front v the Republic of South Africa* (2000) AHRLR 115 (ACHPR 2013) para 72.

²³⁵ *Dabolorivhuwa Patriotic Front v the Republic of South Africa* (2000) AHRLR 115 (ACHPR 2013) para 72.

²³⁶ *Papamichalopoulos v Greece* (1993) 14556/89 (ECHR 1993) para 45.

²³⁷ *Dabolorivhuwa Patriotic Front v the Republic of South Africa* (2000) AHRLR 115 (ACHPR 2013) para 75.

principle such as the refusal to grant a visa by a diplomatic post in a foreign state.²³⁸ Thus, though the refusal to grant the visa took place outside the State, the State was still responsible and was found in violation of its obligations. This means that a State may be held responsible for violations committed by its consular and diplomatic representatives abroad,²³⁹ or for violations of human rights carried out on board vessels and aircrafts registered in the Contracting State.²⁴⁰ This requirement gains its logic from the fact that a State is responsible only for events or actions under its control.²⁴¹ However, a State may be responsible for an extra territorial occurrence if such a State has *de facto* control over the incident. A government can therefore exercise control directly in another State through a subordinate local administration or through its armed forces.²⁴² With that said, it should be borne in mind that the European Court has held that a decision of lack of jurisdiction *ratione loci* will not withhold it from examining whether the communication comes under the jurisdiction of a Contracting State of the European Convention.²⁴³ It is therefore submitted that the African Commission should draw inspiration from the European Court on this matter by proceeding to examine which jurisdiction the communication falls under after finding the communication incompatible *ratione loci*.

2.8 Article 56(3)

The third requirement for admissibility of a communication before the Banjul Charter is that:

The communication must not be written in disparaging or insulting language directed against the State concerned and its institutions or to the OAU.²⁴⁴

This raises the question of what constitutes 'disparaging or insulting language'. This

²³⁸ *Amekane v UK* (1973) 356 (YB 1973) para 16.

²³⁹ *Bankovic v Belgium* (1999) 52207/99 (ECHR 1999) para 34.

²⁴⁰ *X v Germany* (1961) 984/61 (ECHR 1961) para 27.

²⁴¹ Viljoen "Admissibility under the African Charter" 78.

²⁴² *Loizidou (Preliminary Objections) v Turkey* (1995) 310 (EHRR 1995) at 513; Viljoen "Admissibility under the African Charter" 78.

²⁴³ *X v Germany* (1961) 984/61 (ECHR 1961) para 43.

²⁴⁴ Article 56(3) of the Banjul Charter.

requirement is exclusive to the Banjul Charter and is therefore not found in other international human rights instruments.²⁴⁵ However, both the European and American Conventions have slightly similar provisions which have more or less the same effect on communications as article 56(3). Thus, article 35(3) (a) of the European Convention provides that a communication will be declared inadmissible if it is an abuse of the right of individual application. Article 47(c) of the American Convention also provides that a communication will be declared inadmissible if it is obviously out of order. These provisions can be examined in the same manner as article 56(3) of the Banjul Charter. However, although the assumption that the “obviously out of order” phrase is close to disparaging and insulting may be far-fetched, it is submitted that a communication that is crafted in language that is inappropriate and insulting towards a Respondent State is likely to be declared inadmissible by the Inter-American Commission as being out of order. To date, the Inter-American Commission has not declared any communication inadmissible based on the ground that it was drafted in inappropriate language.

On the other hand, the “abuse of the right of application” phrase in article 35(3) (a) of the European Convention can be construed to mean that the complainant must not provide misleading information, mislead the court or use offensive language.²⁴⁶ Misleading the court would pertain to providing untrue facts with the intention of deceiving the Court or using vague and undefined terms with the intent of making the circumstances of the case similar to a case previously dealt with by the Court.²⁴⁷ In addition, offensive language is deemed an abuse of the right of application where the communication is drafted in vexatious, threatening, insulting or provocative language against the Respondent State, its authorities, or Agent, the Court itself, its registry, members, or judges thereof.²⁴⁸ The European Court requires, however, that the language should not only be mere sarcasm or insult but must exceed the

²⁴⁵ The closest similarity is the requirement that a complainant must not abuse the right to submit a communication, found in both Article 3 of the Optional Protocol to the ICCPR and Article 22(2) of the CAT.

²⁴⁶ *S.A.S v France* (2014) 43835/11 (ECHR 2014) para 11.

²⁴⁷ *Verbanov v Bulgaria* (2000) 31365/96 (ECHR 2000) para 32.

²⁴⁸ *Duringer & Others v France* (1999) 61164/00 (ECHR 1999) para 19.

bounds of civil, legitimate and normal criticism.²⁴⁹ A complainant can remedy an abusive communication by offering an apology or expressly withdrawing the offensive language. Upon such instance the Court will not reject the communication based on the abuse of application aspect.²⁵⁰

Referring back to the Banjul Charter, the Charter does not expressly define disparaging or insulting language, thereby exposing this provision to more than one interpretation. The Commission has previously declared a communication inadmissible because it was drafted in disparaging and insulting language towards a head of state. Thus in *Ligue Camerounaise des Droits de l'Homme v Cameroon*, the Commission dismissed the allegation that the Cameroon government was responsible for the commission of a series of serious and massive human rights violations.²⁵¹ The complainant also alleged that the government was responsible for ethnically motivated massacres and persecution of civilian population.²⁵² The Respondent State argued that the communication was inadmissible because it contained language that was insulting and abusive towards its president, Paul Biya. The Respondent State objected to language such as "Paul Biya must respond to crimes against humanity" and phrases such as "regime of torturers", "thirty years of the criminal neo-colonial regime incarnated by the duo Ahidjo/Biya" and "government barbarisms".²⁵³

The Commission declared the communication inadmissible thereby sustaining the Respondent State's objection, but this decision attracted criticism from a number of authors. Viljoen averred that the Commission's decision in this case was regrettable and unfortunate as the statements in the communication consist of a passionate plea to pay attention to the appalling human rights situation in Cameroon.²⁵⁴ The author further opined that the Commission should have struck out the offending

²⁴⁹ *Di Salvo v Italy* (2007) 16098/05 (ECHR 2007) para 24.

²⁵⁰ *Chernitsyn v Russia* (2006) 5694/02 (ECHR 2006) para 14.

²⁵¹ *Ligue Camerounaise des Droits de l'Homme v Cameroon* (2000) AHRLR 61 (ACHPR 1997) para 24.

²⁵² *Ligue Camerounaise des Droits de l'Homme v Cameroon* (2000) AHRLR 61 (ACHPR 1997) para 23.

²⁵³ *Ligue Camerounaise des Droits de l'Homme v Cameroon* (2000) AHRLR 61 (ACHPR 1997) para 21.

²⁵⁴ Viljoen "Admissibility under the African Charter" 79.

statements and/or referred the matter back to the author with a reference to article 56(3). In addition, the statements were against Paul Biya, the president of Cameroon, and not the State itself. Therefore, the need to distinguish between insulting language towards a State from that of a head of state arises.

In this light it is important to note that the Banjul Charter only proscribes insulting language towards a State and not toward a head of state. Odinkalu therefore vehemently criticises this decision and contends that, when interpreted in this light, article 56(3) becomes "an artifice for obfuscation, distraction and subterfuge".²⁵⁵ However, it appears that the Commission chose to follow the jurisprudence of the European Court which also prohibits the use of disparaging language not only towards the Respondent State but also towards any of its authorities or agents.²⁵⁶ It is therefore submitted that this requirement should be narrowly interpreted so as to prevent article 56(3) from being used by Respondent States as a device for evading liability resulting from a human rights violation. The Commission should emulate the European Court which allows a complainant to remedy the insulting language by offering an apology or expressly withdrawing the offending phrases.²⁵⁷ In other words, the Commission should not be quick to declare a communication that is drafted in offensive language as inadmissible without giving the complainant the chance to remedy the offensive phrases.

Furthermore, the Commission sought to clarify the meaning of 'disparaging or insulting language' in *Zimbabwe Council for Human Rights v Zimbabwe*.²⁵⁸ The complainant alleged that the Respondent State had violated articles 3, 7, 9, 14 and 15 of the Banjul Charter.²⁵⁹ The Respondent State therefore challenged the communication's admissibility on the grounds that the communication was drafted in language that was insulting to the judiciary. The complainant had published that:

²⁵⁵ Odinkalu *The Individual Complaints Procedure* 382.

²⁵⁶ *Di Salvo v Italy* (2007) 16098/05 (ECHR 2007) para 26.

²⁵⁷ *Di Salvo v Italy* (2007) 16098/05 (ECHR 2007) para 26.

²⁵⁸ *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (2009) AHRLR 97 (ACHPR 2009) para 96.

²⁵⁹ *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (2009) AHRLR 97 (ACHPR 2009) para 84.

The handing down of the judgment marked a sad day for Zimbabwe's constitutional history. I suppose we should be immensely thankful that we are not prisoners on death row because the practical effect of this judgment is that had we have been challenging the death penalty and not AIPPA, we would have had to hang first and challenge the penalty from hell.²⁶⁰

In providing clarity on the threshold for insulting language, the Commission held that:

In determining whether a certain remark is disparaging or insulting and whether it has dampened the integrity of the judiciary, the Commission has to satisfy itself whether the said remark or language is aimed at unlawfully and intentionally violating the dignity, reputation or integrity of a judicial officer or body and whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the administration of justice. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute. To this end, Article 56(3) must be interpreted bearing in mind Article 9(2) of the African Charter, which provides that "every individual shall have the right to express and disseminate his opinions within the law". A balance must be struck between the right to speak freely and the duty to protect state institutions to ensure that while discouraging abusive language, the African Commission is not at the same time violating or inhibiting the enjoyment of other rights guaranteed in the African Charter, such as in this case, the right to freedom of expression.²⁶¹

The Commission rejected the Respondent State's objection and declared the communication admissible because the language used therein did not undermine the status and integrity of the judiciary in Zimbabwe. The Commission held further that the complainant's remarks were a genuine criticism of the judiciary which did not amount to insulting language.²⁶² It is therefore submitted that complainants should describe the alleged acts that constitute human rights violations in less polarising language so as to allow the Commission to arrive at conclusions on the gravity of the alleged actions or the depravity of the implicated persons.

²⁶⁰ *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (2009) AHRLR 97 (ACHPR 2009) para 86.

²⁶¹ *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (2009) AHRLR 97 (ACHPR 2009) para 91.

²⁶² *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (2009) AHRLR 97 (ACHPR 2009) para 93.

2.9 Conclusion

In this regard, 'indicate their author' in article 56(1) means that the author must specify his name and full particulars even if he requests anonymity. It should be noted that the 'indicate their authors' phrase should be construed broadly so as to arm the Commission with all the details necessary for the adjudication of a communication. The Banjul Charter does not elaborate on the full meaning of this phrase.²⁶³ However, the American Convention is more specific on this note as it requires a communication to contain the name, profession, nationality, domicile, and signature of the person or of the legal representative of the complainant.²⁶⁴ This provision, unlike article 56(1), is more detailed on what is required of the author of a communication.

However, the European Convention does not say much about this requirement except for the statement that a communication did not have to be anonymous.²⁶⁵ This has been construed to mean that the complainant must be duly identified in the communication.²⁶⁶ This requirement also means that anyone has *locus standi* to be the author of a communication. The Commission has adopted a broad approach by extending access to both NGOs and victims.²⁶⁷ This includes NGOs and individuals other than the victim. Thus, the African system like the European Convention in article 34 and the American Convention in article 44 allows any individual to lodge a communication with the Commission.²⁶⁸ In addition to the above, the author of a communication need not be a citizen or a resident of a State party to the Banjul Charter or any AU member State.²⁶⁹

Furthermore, "compatible with the OAU Charter and the Banjul Charter" as the

²⁶³ Article 56(1) only mentions that the communication must indicate the author thereof. Much is left to be desired from such equivocal wording.

²⁶⁴ Article 46 (1) (d) of the American Convention.

²⁶⁵ Article 35 (2) (a) of the European Convention.

²⁶⁶ Rule 47(1) (a) of the Rules of the European Court of Human and Peoples' Rights.

²⁶⁷ *Maria Baes v Democratic Republic of the Congo (former Zaire)* (2000) AHRLR 72 (ACHPR 1995) para 32; *Haregewoin Gebre-Sellassie & IHRDA v Ethiopia* 2018 (AHRLR) 118 (ACHPR 2017) para 64.

²⁶⁸ Article 55 of the Banjul Charter.

²⁶⁹ *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v Botswana* (2018) AHRLR 5 (ACHPR 2018) para 24.

second requirement for admissibility means that the communication must allege a *prima facie* violation of the Banjul Charter.²⁷⁰ The American and European Conventions also have the same requirement²⁷¹ which implies that the communication must be directed at a State Party to the Banjul Charter, and that the communication must be based on acts which occurred within the period of the Charter's application to the State concerned.²⁷² The European Convention uses the term 'manifestly ill-founded' and this has been held to mean that unsubstantiated, confused and far-fetched complaints that do not reveal a clear violation of the European Convention will be declared inadmissible.²⁷³

Compatibility with the Banjul Charter also extends to the four main aspects of compatibility with the Banjul Charter as stipulated in article 56(2). Significantly, the Commission has to firstly allege that a right stipulated in the Banjul Charter has been violated.²⁷⁴ This is the substantive requirement (*ratione materiae*).²⁷⁵ The second aspect is that the communication must be directed at a State Party to the Banjul Charter and must also be submitted by a competent person.²⁷⁶ This is the personal requirement (*ratione personae*).²⁷⁷ Thirdly, the communication must be "based on events that occurred within the period of the Charter's application".²⁷⁸ This is the temporal requirement (*ratione temporis*).²⁷⁹ The last aspect is that the communication must be based on events that have taken place within the territorial sphere of the Banjul Charter except if it is proven that there is a continuing

²⁷⁰ *Maria Baes v Democratic Republic of the Congo (former Zaire)* (2000) AHRLR 72 (ACHPR 1995) para 32; *Haregewoin Gebre-Sellassie & IHRDA v Ethiopia* 2018 (AHRLR) 118 (ACHPR 2017) para 64.

²⁷¹ Article 35(3)(a) of the European Convention; Article 47(b)(c) of the American Convention.

²⁷² Viljoen and Odinkalu *The Prohibition of Torture and ill-treatment in the African Human Rights System* 85.

²⁷³ *Trofimchuk v Ukraine* (2005) 4241/03 (ECHR 2005) para 43.

²⁷⁴ Viljoen and Odinkalu *The Prohibition of Torture and ill-treatment in the African Human Rights System* 85.

²⁷⁵ *Dabakorivhuwa Patriotic Front v the Republic of South Africa* (2000) AHRLR 115 (ACHPR 2013) para 72.

²⁷⁶ Viljoen "Admissibility under the African Charter" 69.

²⁷⁷ *Dabakorivhuwa Patriotic Front v the Republic of South Africa* (2000) AHRLR 115 (ACHPR 2013) para 72.

²⁷⁸ Viljoen and Odinkalu *The Prohibition of Torture and ill-treatment in the African Human Rights System* 85.

²⁷⁹ *Dabakorivhuwa Patriotic Front v the Republic of South Africa* (2000) AHRLR 115 (ACHPR 2013) para 72.

violation.²⁸⁰ This is known as the territorial requirement (*ratione loci*).²⁸¹ The aforementioned aspects also apply in the American and European systems. In making a decision on the admissibility of a communication, the Commission always considers whether the four aspects of compatibility have been met. The same goes for the European Court. It is therefore evident that all three regional organs are in sync on this matter.

The third admissibility requirement in article 56(3) raises the question of what disparaging or insulting language entails. This has been held to mean language that undermines the integrity and status of a State. It also entails remarks meant to unlawfully and intentionally violate the dignity and reputation of the State concerned.²⁸² The American Convention has a provision that requires that a communication must not be out of order.²⁸³ This provision can be said to imply that offensive language is not allowed in the drafting of a communication to be submitted before the American Commission. Similarly, the European Convention has a provision that requires a communication not to constitute an abuse of the right of application.²⁸⁴ This has been held to mean that the communication must not be drafted in offensive language or in untrue statements that mislead the court.²⁸⁵

The European Court is, however, more advanced than the African Commission in this regard as it allows complainants to remedy the offensive language so as to enable the communication to pass the admissibility test. The African Commission will therefore have to match up to this standard so that this requirement cannot be used by Respondent States who want to easily escape responsibility for human rights violations. In sum, it should be noted that these requirements are all salient to the admissibility of a communication. The failure to meet any of the above requirements could result in the communication being declared inadmissible.

²⁸⁰ *Annette Pagnoulle (on behalf of Abdoulaye Mazou) v Cameroon* (2000) AHRLR 55 (ACHPR 1995) para 16-18; Viljoen "Admissibility under the African Charter" 69.

²⁸¹ *Dabolorivhuwa Patriotic Front v the Republic of South Africa* (2000) AHRLR 115 (ACHPR 2013) para 72.

²⁸² Kofele-Kale 2007 *Annual Survey of International and Comparative Law* 131.

²⁸³ Article 47 (c) of the American Convention.

²⁸⁴ Article 35 (3) (a) of the European Convention.

²⁸⁵ *Verbanov v Bulgaria* (2000) 31365/96 (ECHR 2000).

However, the literature above only examines the first three admissibility requirements. The other four requirements enumerated in articles 56(4), 56(5), 56(6) and 56(7) will be examined in the subsequent chapters.

Chapter 3 A Scrutiny into Article 56(4) and Article 56(5) of the Banjul Charter

3.1 Introduction

Having examined the first three requirements for admissibility, this chapter will examine the fourth and fifth requirements for the admissibility of a communication. These will be assessed against similar requirements of the European and American Conventions. Thus, for a communication to be admissible before the Commission, it must not be exclusively based on news disseminated through the mass media¹ and it must be submitted to the Commission after the exhaustion of all local remedies, save for when such a procedure is unduly prolonged.² Therefore, this chapter will examine the meaning of phrases such as 'based exclusively on news disseminated through the mass media', 'exhaustion of all local remedies' and 'unduly prolonged'. These requirements will be discussed seriatim.

3.2 Article 56(4)

Another requirement for the admissibility of communications before the Commission is stipulated in article 56(4) of the Banjul Charter. Thus, article 56(4) requires that a communication "must not be based exclusively on news disseminated through mass media". It is worth noting that other UN treaties and other regional human rights systems have no similar requirement. Therefore, this requirement is typical only of the Banjul Charter. Thus, the provision that specifically provides for the submission of a communication alleging a series of massive and serious violations³ as well as the fact that one can submit a communication even if one is not the victim implies that a communication can be based on mass media reports.

These media reports may at times misrepresent information or provide biased reports. Furthermore, the increase in electronic awareness and the increase of global awareness of human rights violations means that the submission of

¹ Article 56(4) of the Banjul Charter.

² Article 56(5) of the Banjul Charter.

³ Article 58 of the Banjul Charter.

communications as a result of media-based outrages will be proliferated.⁴ On this note, though the Banjul Charter was not necessarily drafted with this in mind, it nevertheless sufficiently deals with the growing demands of global communication.⁵ Thus, the Banjul Charter does not completely prohibit a complainant's reliance on media reports. In fact, it only bars reliance on media reports as the only basis for the alleged violations.⁶ Put differently, a complainant may not rely exclusively on media reports. However, this raises the question of what the boundaries of 'exclusive reliance on media reports' entail. For the first time, the Commission sought to consider the import of this admissibility requirement in *Sir dawda K. Jawara v The Gambia*.⁷

In this case, a deposed and exiled former President was tried and convicted in his absence by his usurpers. Among other violations, the complainant alleged a violation of the right to respect to one's life (article 4), dignity (article 5), liberty and security of person (article 6), self-determination (article 20), and the right to be heard by an independent court (article 26). The Respondent State among other objections objected to the communication on the grounds that the communication was based on information from the news media.⁸ In clarifying the import of the word 'exclusively', the Commission held that it would be precarious if the Commission rejects a communication on the grounds that it has some aspects that rely on "news disseminated through the mass media".⁹ The Commission further stated that the test for exclusive reliance should not be whether the information was acquired through the media, but whether the information is truthful.¹⁰ Furthermore, the Commission held that a complainant must have at least tried to verify the truthfulness of these allegations. In holding the communication admissible, the Commission held that:

While it would be dangerous to rely exclusively on news disseminated from the mass media, it would be equally damaging if the Commission were to reject a

⁴ Viljoen "Admissibility under the African Charter" 110.

⁵ Viljoen "Admissibility under the African Charter" 110.

⁶ Odinkalu 2001 *AHRLJ* 237-238.

⁷ *Jawara v The Gambia* 2000 AHRLR 107 (ACHPR 2000) para 23-27.

⁸ *Jawara v The Gambia* 2000 AHRLR 107 (ACHPR 2000) para 11-16.

⁹ *Jawara v The Gambia* 2000 AHRLR 107 (ACHPR 2000) para 24.

¹⁰ *Jawara v The Gambia* 2000 AHRLR 107 (ACHPR 2000) para 26.

communication because some aspects of it are based on news disseminated through the mass media. This is borne out of the fact that the Charter makes use of the word "exclusively". There is no doubt that the media remains the most important, if not the only source of information. It is common knowledge that information on human rights violations is always gotten from the media. The genocide in Rwanda, the human rights abuses in Burundi, Zaire, Congo, to name but a few, were revealed by the media. The issue therefore should not be whether the information was gotten from the media, but whether the information is correct. Did the Complainant try to verify the truth about these allegations? Did he have the means or was it possible for him to do so, given the circumstances of his case?¹¹

Therefore, from the above it is noteworthy that a complainant can rely only on news disseminated through mass media in part and not exclusively. The Commission applied the same principle in other subsequent communications.¹² For instance, the Commission in *Zimbabwe Human Rights NGO Forum v Zimbabwe* accepted the complainant's partial reliance on news disseminated through the mass media by reiterating that the operative term that had to determine the admissibility of a communication on this ground was 'exclusively'.¹³ In this light, the Commission recognises the rationale of article 56(4) but also proceeds to circumscribe its effect, particularly in torture cases. This is particularly because torture by its nature is very difficult to prove and would often entail media reports.¹⁴ Furthermore, the physical injuries are in most cases not visible, and, if visible, these injuries may be explained in one way or the other. Media reports therefore become instrumental in the corroboration of the widespread use of torture.¹⁵ This explains why the American and European systems do not have this requirement as media reports are very essential in corroborating some crimes such as torture.

It is nearly impossible to rule out the importance and influence of the media in this day and age. Information is disseminated and acquired through the media. On this note, though the European Convention does not expressly provide for a limit on the reliance on media, it is nonetheless submitted that the European Court may rule out

¹¹ *Jawara v The Gambia* 2000 AHRLR 107 (ACHPR 2000) para 23-26.

¹² *Dr. Farouk Mohamed Ibrahim (represented by REDRESS) v Sudan* (2018) AHRLR 10 (ACHPR 2018) para 10.

¹³ *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 76 (ACHPR 2006) para 43.

¹⁴ *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 76 (ACHPR 2006) para 43.

¹⁵ Viljoen and Odinkalu *The Prohibition of Torture and Ill-Treatment in the African Human Rights System* 87.

a communication that relies on false media reports. Such reliance will constitute a ploy to mislead the court and consequently constitute an abuse of the right of application as stipulated in article 35(3) (a). The Commission's decision to accept the reliance on truthful media reports is therefore acceptable since the media is an important tool in acquiring and sharing information.

3.3 Article 56(5)

As noted before, one of the functions of the Commission is to assume a protectionist role in the form of adjudicating communications on allegations of human rights violations.¹⁶ The fulfilment of this function encompasses the scrutiny of allegations within the domestic legal order of State parties to the Banjul Charter.¹⁷ This also entails a critical issue of allowing the domestic legal order of the state to remedy the alleged human rights violations.¹⁸ This issue is reflected in the criteria for the admissibility of communications and more importantly in the requirement for the exhaustion of local remedies.¹⁹ This requirement in article 56(5) is an explication of an international law general principle that has found its application in the jurisprudence of international regional human rights bodies as well as in the provisions of numerous human rights treaties.²⁰

Article 56(5) requires that a communication should be submitted to the Commission after exhausting all local remedies, "if any, unless it is obvious that this procedure is unduly prolonged".²¹ The rationale of this rule derives logic from the principle that a State must be given the full opportunity to effectively enforce its consented to international law obligations.²² Under the Banjul Charter the exhaustion of the local remedies requirement is applicable to both communications by State parties and communications by individuals and NGOs.²³ In respect of communications by State

¹⁶ Article 47 and Article 55 of the Banjul Charter.

¹⁷ Onoria H 2003 *AHRLJ* 2.

¹⁸ Amerasinghe *Local Remedies in International Law* 49.

¹⁹ Article 56(5) of the Banjul Charter.

²⁰ Article 35 of the European Convention; A 46(1) (a) of the American Convention.

²¹ Article 56(5) of the Banjul Charter.

²² Amerasinghe *Local Remedies in International Law* 9-25.

²³ Article 47 and 55 of the Banjul Charter.

parties article 50 of the Banjul Charter stipulates that the Commission can only receive a matter submitted to it after ascertaining that all local remedies were exhausted. This can only be excepted where it is obvious that the procedure of exhausting "local remedies would be unduly prolonged".²⁴

On the other hand, in respect of communications by individuals, article 56(5) makes use of similar language; that is to say, communications are receivable if they are, *inter alia*, submitted after the exhaustion of local remedies. The rules of procedure of the African Commission further embody this requirement in Rule 104(1)(f). In the same light, the European Convention embodies the same requirement in article 35(1). The same goes for the American Convention which also requires the exhaustion of local remedies in article 46(1)(a)(2). Furthermore, all three regional organs, the African Commission, the European Court and the Inter-American Commission have applied this principle in a similar manner. This requirement therefore raises a number of important questions such as when is a complainant said to have exhausted a local remedy? What entails a local remedy? What is the meaning of 'unduly prolonged' and the exemptions to this rule? The above key questions will be examined in series.

1.1.10 The primacy of the domestic legal order of a state over allegations of human rights

Of importance is that the Commission uses the phraseology received and receivable regarding the traditional criteria for admissibility of communications.²⁵ Of these traditional criteria, the most pivotal is that of exhausting local remedies.²⁶ The rationale of this rule is traditionally to enable a State to handle a human rights claim against it using the administrative and judicial mechanisms within its domestic legal order.²⁷ The Commission stated the rationale of the rule in *World Organisation against Torture v Zaire* as founded on the principle that a government has to take

²⁴ Article 50 of the Banjul Charter.

²⁵ Gye Wado O 1993 *African Journal of International and Comparative Law* 742.

²⁶ Onoria H 2003 *AHRLJ* 3.

²⁷ *Ambatielos Arbitration v Greece/ Great Britain* (1956) 12 (RIAA 1956) para 83; *De Wilde, Ooms & Versyp v Belgium* (1974) 56 (ILR 1974) para 336.

notice of human rights violations so as to remedy such violations before being summoned before an international body.²⁸

The import of this rule was reiterated in *Rencontre Africaine pour la Defense des Drats de l'Homme v Zambia* as requiring that the Respondent State first have an opportunity to redress the alleged wrong committed to an individual by its own means "within the framework of its own domestic legal system".²⁹ The Commission further articulated three pragmatic reasons for the necessity of exhausting local remedies as a first step before international procedures are engaged.³⁰ The first of the three is the need to afford domestic courts the opportunity to make a decision on "cases before they are brought to an international forum" so as to avoid contradicting "judgments of law at the national and international level".³¹

Secondly, that a State Party against whom a complaint has been submitted should be given notice of a human rights violation so as to have an opportunity to redress such human rights violation before summoned to account to an international tribunal. Thus, the requirement to exhaust domestic remedies should be understood as guaranteeing that the State concerned has a sufficient opportunity to redress the situation.³² Finally, this requirement is intended to strictly ensure that the Commission does not turn out to be a "tribunal of first instance for cases which an effective domestic remedy exists".³³ This means, in other words, that the Commission acknowledges the sovereignty of States as protected by the Banjul Charter and the OAU Charter.

In this light, the Commission has previously declared inadmissible a communication

²⁸ *World Organisation against Torture v Zaire* (1996) AHRLR 1 (ACHPR 1996) para 36.

²⁹ *Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996) para 11.

³⁰ *The Social & Economic Rights Action Centre for Economic & Social Rights v Nigeria Africa* (2001) AHRLR 34 (ACHPR 2001) para 37-39.

³¹ *The Social & Economic Rights Action Centre for Economic & Social Rights v Nigeria Africa* (2001) AHRLR 34 (ACHPR 2001) para 37-39.

³² *The Social & Economic Rights Action Centre for Economic & Social Rights v Nigeria Africa* (2001) AHRLR 34 (ACHPR 2001) para 37-39.

³³ *The Social & Economic Rights Action Centre for Economic & Social Rights v Nigeria Africa* (2001) AHRLR 34 (ACHPR 2001) para 37-39.

filed without or before exhausting the available local remedies.³⁴ The Commission has also declared a communication as inadmissible for failing to provide information on the exhaustion of local remedies after subsequent requests by the Commission.³⁵ The European Court has also reiterated the aforementioned principles in *Eberhard & M v Slovenia* by stating that the exhaustion of local remedies rule was put in place to allow the domestic legal order of a State to provide a remedy that is effective in relation to the human rights violations.³⁶ The court further stated that the rule applies irrespective of the fact that the provisions of the European Convention have not yet been incorporated into national law.³⁷ The Inter-American Commission has in this regard also held that the purpose of this requirement for admissibility is to give the national authorities of a State the power to adjudicate on the alleged violations and, if appropriate, to also attempt to resolve the matter before it is taken to an international body for adjudication.³⁸

Furthermore, a communication will be treated as inadmissible if it is based on a case that is pending before the domestic courts of a state.³⁹ Further to this, upon discovering that the case is still pending before a domestic court, the Commission may still advise a complainant to resubmit the communication once the domestic courts have taken their course and yielded no satisfactory relief.⁴⁰ In taking note of a State's sovereignty in dealing with its domestic affairs, the Commission considers whether the local remedies are available and effective. If they fall short of being available and effective the Commission may declare such communications admissible even without meeting the exhaustion of local remedies requirement as will be discussed below.

1.1.11 The meaning of the wording 'exhaustion of local remedy' in

³⁴ *Sakwe v Cameroon* (2000) AHRLR 26 (ACHPR 2000) para 19.

³⁵ *Dumbaya v the Gambia* (1994) AHRLR 11 (ACHPR 1994) para 2 - 3.

³⁶ *Eberhard & M v Slovenia* (2009) 8673/05 and 9733/05 (ECHR 2009) para 53.

³⁷ *Eberhard & M v Slovenia* (2009) 8673/05 and 9733/05 (ECHR 2009) para 23.

³⁸ *Jose Gregorio Mota v Venezuela* (2012) 1336-07 (ACHR 2012) para 7.

³⁹ *SOS-Esclaves v Mauritania* (1997) AHRLR 35 (ACHPR 1997) para 18.

⁴⁰ *SOS-Esclaves v Mauritania* (1997) AHRLR 35 (ACHPR 1997) para 18.

article 56(5)

Article 56(5) provides that a communication can be submitted after exhausting local remedies. The phrase 'after exhausting' means that if a matter is still pending before a domestic court, local remedies have not yet been exhausted.⁴¹ The question of whether local remedies have been in fact exhausted is a factual question to which the Commission in some circumstances requests further information.⁴² This raises the conundrum of who has the duty to exhaust local remedies and who bears the onus to prove this before the Commission. The Banjul Charter in this respect uses a passive voice and is therefore not clear as to whether the local remedies must be exhausted by the victim or the complainant.⁴³ Communications may be sent by victims or by complainants who are not victims to the alleged violations.⁴⁴ The same applies to the American and European Conventions.⁴⁵ The position as to who bears the onus is clear when the victim is also the complainant. However, confusion may ensue if the communication is submitted by a complainant who is not the victim.

Viljoen asserts that it seems logical that the burden to exhaust local remedies be placed on the person bringing the claim, especially taking into account the fact that a complainant need not have authorisation from the victim.⁴⁶ However, the narrow legal standing in most domestic systems in contrast to the broad legal standing before the Commission has the effect of hindering most non-victim complainants from possibly exhausting local remedies.⁴⁷ It therefore seems more logical to require the victims to exhaust the local remedies as opposed to complainants who are not the victims as they might not have the legal standing to bring the claim in a domestic court. In light of this, the Commission in *Purohit and Another v The Gambia* exempted the complainant from the requirement of exhausting local remedies

⁴¹ *Anuak Justice Council v Ethiopia* AHRLR 97 (ACHPR 1996) para 27.

⁴² Viljoen "Admissibility under the African Charter" 112.

⁴³ Article 56(5) of the Banjul Charter.

⁴⁴ Article 56(1) of the Banjul Charter.

⁴⁵ Article 34 of the European Convention; Article 44 of the American Convention.

⁴⁶ Viljoen "Admissibility under the African Charter" 112.

⁴⁷ *Locus standi* is limited in the domestic law of States to only those parties with an interest in the matter.

because of the indigent nature of the victims.⁴⁸ Therefore, in answering the question of who has the obligation to exhaust local remedies, it is evident that the victim has the duty to exhaust local remedies.

Regarding the question of onus, the Commission at least requires the complainant to set a foundation that local remedies have been exhausted.⁴⁹ In *SOS-Esclaves v Mauritania*, the Commission declared a communication as inadmissible because the complainant had failed to respond as to whether local remedies had been duly exhausted.⁵⁰ Furthermore, when tackling the issues of onus, a three phased process is adopted.⁵¹ Initially the onus, although not a heavy one, lies with the complainant.⁵² A complainant is required to set out a foundation for a potential finding of admissibility which is to aver that he or she has exhausted or attempted to exhaust all local remedies.⁵³ A complainant may also allege that a particular remedy is ineffective, unavailable or insufficient.⁵⁴ The second step in the process is that the Respondent State may deny the allegations that local remedies have been exhausted.⁵⁵ Upon such denial the Respondent State bears the onus to prove that there is a further available, effective and sufficient remedy.⁵⁶ The final step in the process is that, after the Respondent State meets its onus, the complainant has the obligation to prove that the remedy is not available, or, if it is available, why in this particular case it is insufficient and ineffective.⁵⁷

⁴⁸ *Purohit and Moore v The Gambia* (2003) AHRLR 49 (ACHPR 2003) para 26-27.

⁴⁹ *SOS-Esclaves v Mauritania* (1997) AHRLR 35 (ACHPR 1997) para 18-19.

⁵⁰ *SOS-Esclaves v Mauritania* (1997) AHRLR 35 (ACHPR 1997) para 18-19.

⁵¹ *Ilesanmi v Nigeria* (2003) AHRLR 49 (ACHPR 2003) para 46.

⁵² *Rencontre Africaine pour la Defense de Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996) para 12.

⁵³ *Anuak Justice Council v Ethiopia* AHRLR 97 (ACHPR 1996) para 57-58.

⁵⁴ McGoldrick D *The Human Rights Committee. Its Role in the Development of the International Covenant on Civil and Political Rights* 145-150.

⁵⁵ *Alberto T. Capita v Tanzania* (2017) AHRLR 1 (ACHPR 2017) para 78.

⁵⁶ *Rencontre Africaine pour la Defense de Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996) para 12-14.

⁵⁷ *Rencontre Africaine pour la Defense de Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996) para 12-14.

The Commission is mostly inclined to follow this approach as shown in *Rencontre Africaine pour la Defense des Drats de l'Homme v Zambia*.⁵⁸ In this case the complainant who had initially met the burden of proof successfully met the third burden after the Respondent had successfully met its onus by indicating that the Immigration and Deportations Act (legislation) provided for appeals and reviews against expulsion orders.⁵⁹ Thus, the complainant successfully met its onus (which had shifted back on to the complainant) by proving that the remedy of an appeal alleged by the Respondent State was not practical or readily available in the circumstances.⁶⁰ The same principle was reiterated by the European Court in *Dalia v France* where the court held that, after the Respondent State has discharged its burden, the complainant had to prove that he or she had made use of the remedy, or provide evidence to show that the remedy is ineffective and inadequate given the particular circumstances of the case or that special circumstances that absolve the complainant from the requirement existed.⁶¹ In addition, the Inter-American Commission in *Gerardo Paez Garcia v Venezuela* confirmed the aforesaid principle by echoing that a Respondent State that argues that domestic remedies have not yet been exhausted must show which domestic remedies the complainant had to exhaust and also provide evidence of the availability of such.⁶² All three regional organs therefore have the same principles on this matter as shown above.

Furthermore, the Commission has also deemed a communication inadmissible because the complainant had failed to prove the ineffectiveness of domestic remedies after the Respondent State had proven there were effective and available local remedies that the complainant had not exhausted.⁶³ The complainant had therefore failed to discharge the onus of casting doubt on the availability and

⁵⁸ *Rencontre Africaine pour la Defense de Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996) para 12-14.

⁵⁹ *Rencontre Africaine pour la Defense de Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996) para 12-14.

⁶⁰ *Rencontre Africaine pour la Defense de Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996) para 12-14.

⁶¹ *Dalia v France* (1998) 38 (ECHR 1998) para 5.

⁶² *Gerardo Paez Garcia v Venezuela* (2013) 13113 (ACHR 2013) para 6-7.

⁶³ *Anuak Justice Council v Ethiopia* AHRLR 97 (ACHPR 1996) para 57-58.

effectiveness of local remedies.⁶⁴ Communications are therefore usually dismissed because the complainant would have failed to indicate a factual basis for establishing that local remedies have been exhausted.⁶⁵ As noted in *Sana Dumbaya v The Gambia*, the Commission is inclined to declare a communication inadmissible if the complainant fails to respond to the Commission's request for clarity on the exhaustion of local remedies.⁶⁶ The Commission therefore assumes that, had all local remedies been exhausted, the complainant would have brought it to the attention of the Commission.⁶⁷ It is therefore advisable that complainants attach copies of the relevant national judgements so as to adequately discharge the onus that local remedies have indeed been exhausted.⁶⁸

1.1.12 The meaning of 'local remedies' in article 56(5)

For the purposes of article 56(5), a local remedy has been noted to be a common law remedy that exists in local jurisdictions and therefore accessible to people seeking for justice.⁶⁹ This local remedy must be an action before the courts of law⁷⁰ (of a judicial nature) and must include remedies in common law such as administrative law action on the abuse of authority and tort actions.⁷¹ The remedy goes further to include appeals or reviews.⁷² Further to the above, this local remedy does not extend to extraordinary remedies such as instituting private prosecutions,⁷³ requesting a review of a final judicial order⁷⁴ or challenging the constitutional legality of an executive order.⁷⁵ The European Court confirmed this principle in *Cinar v Turkey* and held that a complainant need not exhaust extraordinary or discretionary remedies, such as requesting a review of a court's decision save for exceptional

⁶⁴ *Anuak Justice Council v Ethiopia* AHRLR 97 (ACHPR 1996) para 57-58.

⁶⁵ *Dumbaya v the Gambia* (1994) AHRLR 11 (ACHPR 1994) para 2 -5.

⁶⁶ *Dumbaya v the Gambia* (1994) AHRLR 11 (ACHPR 1994) para 2- 5.

⁶⁷ *Dumbaya v the Gambia* (1994) AHRLR 11 (ACHPR 1994) para 2- 5.

⁶⁸ *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) para 32.

⁶⁹ *Interights v Mauritania* (2010) AHRLR 105 (ACHPR 2010) para 27.

⁷⁰ *Alfred B. Cudjoe v Ghana* (1999) AHRLR 2 (ACHPR 1999) para 14.

⁷¹ *Mouvement des Réfugiés Mauritaniens au S'en'egal v Senegal* (2000) AHRLR 287 (ACHPR 1997) para 19.

⁷² *Bob Ngozi Njoku v Egypt* (2000) AHRLR 83 (ACHPR 1997) para 57.

⁷³ *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 76 (ACHPR 2006) para 67.

⁷⁴ *Interights v Mauritania* (2010) AHRLR 105 (ACHPR 2010) para 25-28.

⁷⁵ *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 76 (ACHPR 2006) para. 67

circumstances, for instance, a situation where the domestic law of a State recognises a review as constituting an effective remedy.⁷⁶

The Commission in *Interights (on behalf of Sikunda) v Namibia* has held that proceedings that contest the wilful disregard of an order of a court forms part of a local remedy.⁷⁷ However, this places a heavy burden on a complainant since he or she will have to prove that the said proceedings were conducted and finalised. This is illustrated in the facts of this case where Sikunda, the victim, who had been arrested and detained by the Namibian government on the suspicion of being a UNITA member, failed to prove that proceedings to enforce a court order on his release had been concluded. The court kept on postponing the hearing of his application on holding the Minister of Home Affairs in contempt of a court order that ordered his release.⁷⁸ In declaring the communication inadmissible on the grounds of failure to comply with article 56(5), the Commission held that, because the hearing on contempt was still pending, local remedies have not been exhausted.⁷⁹

Furthermore, it should be noted that a quasi-judicial institution at a domestic level does not amount to a local remedy.⁸⁰ For instance, alleging that the National Human Rights Institution has attempted to investigate the violation does not fulfil the local remedies requirement.⁸¹ This was the case in *Alfred B. Cudjoe v Ghana* where the complainant approached the Commission on Human Rights and Administrative Justice, a Ghanaian national human rights institution, which found that the dismissal of the complainant without benefits was unlawful and the complainant was therefore entitled to compensation.⁸² The same matter was then submitted to the Commission as a communication. The Commission declared the complainant's communication as inadmissible because he had not pursued remedies of a judicial nature.⁸³ The Inter-

⁷⁶ *Cinar v Turkey* (2006) 28602/95 (ECHR 2006) para 21.

⁷⁷ *Interights (on behalf of Sikunda) v Namibia* (2002) AHRLR 21 (ACHPR 2002) para 7.

⁷⁸ *Sikunda v Government of Namibia* (1) 2001 NR 67 (HC).

⁷⁹ *Sikunda v Government of Namibia* (3) 2001 NR 481 (SC); *Government of Namibia v Sikunda* 2002 NR 203 (SC).

⁸⁰ *Ilesanmi v Nigeria* (2003) AHRLR 49 (ACHPR 2003) para 56.

⁸¹ *Ilesanmi v Nigeria* (2003) AHRLR 49 (ACHPR 2003) para 56.

⁸² *Ilesanmi v Nigeria* (2003) AHRLR 49 (ACHPR 2003) para 56.

⁸³ *Ilesanmi v Nigeria* (2003) AHRLR 49 (ACHPR 2003) para 56.

American Commission has also previously declared a communication inadmissible because the complainant had failed to file a motion for a judicial remedy in the local courts to enforce payment of illegally withheld money.⁸⁴

It should be noted further that the Commission will not declare a communication as inadmissible if the available local remedy is of a non-judicial nature. Thus, the Commission has declared a communication as admissible even if the alleged claim (a request by a military governor to nullify a death sentence order against him) could still be pursued within the domestic system through non-judicial remedies.⁸⁵ The Commission held that such a claim was a discretionary extraordinary remedy of a non-judicial nature which could not be imposed on the complainant because it constituted obtaining a favour and not vindicating a right.⁸⁶ Hence, requesting the complainant to pursue such a remedy would be tantamount to requesting a complainant to seek redress from impartial sources with no obligation to pass legally binding principles.⁸⁷

In addition to the above, the question of whether a colonial judicial remnant forms part of a local remedy may also arise. The case of *Peoples' Democratic Organisation for Independence & Socialism v The Gambia* instructs us in this regard.⁸⁸ In this case, the Commission dismissed the Respondent State's claim that local remedies had not been exhausted because the complainant had not yet taken his complaint to the UK Privy Council, a colonial judicial remnant of The Gambia.⁸⁹ Sadly, though, the Commission has not provided a clear-cut decision on whether such colonial judicial remnants form part of local remedies. This is because the commission has previously declared such communications against Gambia as inadmissible for failure to exhaust local remedies of approaching the UK Privy Council.⁹⁰ Ankumah rightly

⁸⁴ *Gerardo Faez v Venezuela* (2013) 13113 (ACHR 2013) para 43.

⁸⁵ *Constitutional Rights Project v Nigeria* (2000) AHRLR 180 (ACHPR 1995) para 24.

⁸⁶ *Constitutional Rights Project v Nigeria* (2000) AHRLR 180 (ACHPR 1995) para 24.

⁸⁷ *Constitutional Rights Project v Nigeria* (2000) AHRLR 180 (ACHPR 1995) para 24.

⁸⁸ *Peoples' Democratic Organisation for Independence and Socialism v The Gambia* (2000) AHRLR 104 (ACHPR 1996) para 81, 91.

⁸⁹ *Peoples' Democratic Organisation for Independence and Socialism v The Gambia* (2000) AHRLR 104 (ACHPR 1996) para 81, 91.

⁹⁰ *M. S. Ceasay v The Gambia* (1995) 13 AHRLR (ACHPR 1995) para 24.

asserts that an appeal to the Privy Council should not be deemed a local remedy, as making use of it would cause unnecessary hardships of travelling to England.⁹¹ Furthermore, a consideration of the Privy Council as a local remedy would be inconsistent with the notion that the Banjul Charter represents a forum meant to cater for the special needs of people from Africa.⁹² Nonetheless, the Gambian government has restructured its judiciary to have its Supreme Court as the highest court of the land.⁹³ However, some African States such as Mauritius have retained the Privy Council.

1.1.13 *The meaning of the wording 'if any' in article 56(5)*

The wording 'if any' in article 56(5) would appear to mean that remedies that are available, sufficient and adequate need to be exhausted.⁹⁴ The Commission treats these elements as separate even though they go hand in glove and are entangled. Thus, the Commission has held that a domestic remedy is regarded as available if it is as a matter of practical reality readily accessible.⁹⁵ On the other hand, a remedy is regarded as adequate or effective if it offers a likelihood of success.⁹⁶ A remedy is also sufficient if it is possibly capable of providing redress for the complainant.⁹⁷ Worthy of note is the question, whether the subjective belief (perception) of the complainant is adequate to comply with this requirement or whether an objective standard has to be applied?⁹⁸

In *SHB v Canada* the complainant argued before the UN Human Rights Committee that the available remedy which was a further appeal to the domestic court was ineffective and exhaustion would therefore be futile.⁹⁹ The UN Human Rights Committee held that the complainant's insecurities about the effectiveness of the

⁹¹ Ankumah *The African Commission on Human and Peoples' Rights* 69.

⁹² Ankumah *The African Commission on Human and Peoples' Rights* 69.

⁹³ Yahya Jammeh restructured the judiciary and made the Supreme Court the highest court of the land through the 1997 Constitution of Gambia.

⁹⁴ *Jawara v The Gambia* 2000 AHRLR 107 (ACHPR 2000) para 28-35.

⁹⁵ *Jawara v The Gambia* 2000 AHRLR 107 (ACHPR 2000) para 32-35.

⁹⁶ *Jawara v The Gambia* 2000 AHRLR 107 (ACHPR 2000) para 28-35.

⁹⁷ *Jawara v The Gambia* 2000 AHRLR 107 (ACHPR 2000) para 28-35.

⁹⁸ Viljoen "Admissibility under the African Charter" 118.

⁹⁹ *SHB V Canada* (1985) A/42/40 (ACHR 1985) para 4.

remedy was unwarranted and therefore did not absolve him from the duty to exhaust the local remedy. This decision seemingly supports the objective standards in determining the existence of a local remedy. The commission has adopted a similar stance on this issue.¹⁰⁰

Of importance is that in *Kenya Human Rights Commission v Kenya* the complainant was challenging the Registrar of Trade Unions' refusal to have the University's Academic Staff Union (UASU) registered as a trade union.¹⁰¹ Although court proceedings to challenge this refusal were still pending, the Commission had to determine whether the Kenyan President's public utterances that the government will never register the UASU warranted the complainant's claim of an insufficient remedy.¹⁰² The Commission held that the communication was inadmissible because the Respondent's public utterances did not amount to a sufficient claim that the remedy was unavailable and therefore not sufficient.¹⁰³ Although the Commission does not explicitly state that it adopted the objective standard, it can be inferred from its finding that the complainant's perception of an insufficient remedy was not watertight so as to exempt the complainant from exhausting all available local remedies.

The European Court also adopts the same principle on this issue. Of importance is that in *Milošević v the Netherlands* the European Court held that mere doubt and fear on the part of the complainant that the judicial system will not act impartially does not absolve the complainant of the duty to exhaust local remedies.¹⁰⁴

1.1.14 The exemptions to the exhaustion of local remedies rule in article 56(5)

It is noteworthy that under the American Convention the exhaustion of local remedies requirement is not applicable in some situations, namely when:

¹⁰⁰ *Kenya Human Rights Organisation v Kenya* (1996) AHRLR 9 (ACHPR 1996) para 47.

¹⁰¹ *Kenya Human Rights Organisation v Kenya* (1996) AHRLR 9 (ACHPR 1996) para 47.

¹⁰² *Kenya Human Rights Organisation v Kenya* (1996) AHRLR 9 (ACHPR 1996) para 47.

¹⁰³ *Kenya Human Rights Organisation v Kenya* (1996) AHRLR 9 (ACHPR 1996) para 47.

¹⁰⁴ *Milošević v the Netherlands* (2002) 631/01 (ECHR 2002) para 25.

the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or there has been unwarranted delay in rendering a final judgment.¹⁰⁵

On a similar note, under the Banjul Charter, a number of grounds for exemption from fulfilling the exhaustion of local remedies rule can be identified.¹⁰⁶ These exemptions include "cases of massive or serious violations"; "where clauses oust the jurisdiction of national courts"; "when it is illogical to require exhaustion of local remedies"; and "when a complainant is indigent".¹⁰⁷ These exemptions will be addressed seriatim.

1.1.14.1 Serious or massive violations

Local remedies are for all practical purposes regarded as unavailable if there exists serious and massive violations.¹⁰⁸ This principle, though not expressly stated in the Banjul Charter, has been adopted in the jurisprudence of the Commission. In *Free Legal Assistance Group & Others v Zaire*, the complainants alleged detention, widespread arrests, torture, extra judicial executions, denial of access to education, unfair trials, deprivation of property and restriction of press freedom.¹⁰⁹ As a result, the Commission brought the situation to the attention of the OAU Assembly as per article 58 of the Banjul Charter. In finding the communication admissible, the Commission remarked that the local remedies requirement was never intended to apply in impractical cases where it would be undesirable for the complainant to approach the domestic courts considering the extent and severity of the alleged violations.¹¹⁰

It therefore appears that there is no need for a complainant to exhaust domestic remedies if there exist violations which fall within the context of serious or massive

¹⁰⁵ Article 46(2) of the American Convention.

¹⁰⁶ *Law Offices of Ghazi Suleiman v Sudan* (2003) AHRLR 47 (ACHPR 2003) para 36

¹⁰⁷ Viljoen "Admissibility under the African Charter" 119.

¹⁰⁸ Viljoen "Admissibility under the African Charter" 119.

¹⁰⁹ *Free Legal Assistance Group Lawyers' Committee for Human Rights Union Interafricaine des Droits de l'Homme Les T'emoins de Jehovah v Zaire* (1996) AHRLR 9 (ACHPR 1996) para 11.

¹¹⁰ *Free Legal Assistance Group Lawyers' Committee for Human Rights Union Interafricaine des Droits de l'Homme Les T'emoins de Jehovah v Zaire* (1996) AHRLR 9 (ACHPR 1996) para 11.

violations of human rights.¹¹¹ In such circumstances, domestic remedies are regarded as ineffective because more than one right has been violated simultaneously and such circumstances include various victims.¹¹² In such cases the Commission concludes that it is not necessary to exhaust local remedies because they are clearly insufficient as the respondent states that they would have been aware of the violations and resorted to not addressing them. The Inter-American Commission and the European Court however do not provide for a similar exception to the exhaustion of local remedies rule. This means that the Commission, unlike its counterparts, has gone a step further in couching exceptions that can be relied upon by victims. This is commendable and relevant to Africa as a lot of serious and massive violations of human rights are in perpetual occurrence. Hence, an occurrence of serious human rights violations may at times result in the impossibility of exhausting local remedies on the part of the complainant.

1.1.14.2 An attempt to oust the jurisdiction of the courts

The second exemption would be where there has been an attempt to oust the jurisdiction of the courts.¹¹³ Like the "serious or massive violations of human rights" exception, this exception is the brain child of the Commission's jurisprudence. The Commission in *Constitutional Rights Project (in respect of Zamani & Six Others) v Nigeria* declared the communication admissible because of the ouster clauses which applied therein.¹¹⁴ In this case, the Nigerian Military Government had adopted numerous ouster clauses in decrees that put a blanket exclusion on judicially reviewing certain judgements of special military tribunals. In other words, the ouster clauses insulated the decrees from a judicial review,¹¹⁵ for instance, the Constitutional decree 107 of November 1993 which was to the effect that: "no question as to the validity of this decree... shall be entertained by a court of law in

¹¹¹ *Union Interafricaine des Droits de l'Homme v Angola* (2000) AHRLR 18 para 15.

¹¹² *Union Interafricaine des Droits de l'Homme v Angola* (2000) AHRLR 18 para 15.

¹¹³ Viljoen F and Odinkalu C *The Prohibition of Torture and Ill-treatment in the African Human Rights System* 93.

¹¹⁴ *Media Rights Agenda, Constitutional Rights Project, Media Rights Project and Constitutional Rights Project v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 34.

¹¹⁵ *Media Rights Agenda, Constitutional Rights Project, Media Rights Project and Constitutional Rights Project v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 34.

Nigeria".¹¹⁶ The Commission in this case and other subsequent ones held that ouster clauses such as these rendered local remedies ineffective, non-existent, illusory or illegal.¹¹⁷ This is because the illegality of these clauses create a legal situation where the judiciary cannot prove any check on the government's executive arm.¹¹⁸ This exception is not unique to the Commission because the American Convention has a similar provision in article 46(2) (a) which states that the requirements for admissibility will not be applicable where the domestic legislation of the Respondent State fails to provide due process of law for the protection of the allegedly violated right or rights.¹¹⁹

It is submitted that such a provision may find applicability where the domestic law of a State contains ouster clauses that in turn prevent a victim from approaching the domestic courts because the ouster clauses would have ousted the jurisdiction of the courts. This exception has, however, not been applied by the European Court but has been applied by the Commission in a number of communications. This is largely due to the fact that a number of African States such as Nigeria and Sudan may have ouster clauses in their domestic law that possibly oust the jurisdiction of the courts, thereby prejudicing the rights of that State's citizens.¹²⁰

1.1.14.3 If exhaustion of a local remedy would be illogical

A further ground that exempts complainants from fully exhausting available local remedies is when such exhaustion would be illogical,¹²¹ for instance, where the

¹¹⁶ *Media Rights Agenda, Constitutional Rights Project, Media Rights Project and Constitutional Rights Project v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 34.

¹¹⁷ *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* (2011) AHRLR 85 (ACHPR 2011) para 96; *Purohit and Moore v The Gambia* (2003) AHRLR 49 (ACHPR 2003); *Zegveld and Ephrem v Eritrea* (2003) AHRLR 52 (ACHPR 2003); *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) para 31; *Amnesty International v Sudan* (2018) AHRLR 11 (ACHPR 2018); *Malawi Africa Association v Mauritania* (2018) AHRLR 136 (ACHPR 2018).

¹¹⁸ *International Pen Constitutional Rights Project Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v Nigeria* (1998) AHRLR 1 (ACHPR 1998) para 76-78.

¹¹⁹ Article 46(2) (a) of the American Convention.

¹²⁰ *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* (2011) AHRLR 85 (ACHPR 2011) para 96; *Purohit and Moore v The Gambia* (2003) AHRLR 49 (ACHPR 2003); *Zegveld and Ephrem v Eritrea* (2003) AHRLR 52 (ACHPR 2003).

¹²¹ Viljoen "Admissibility under the African Charter" 121.

victim is deceased.¹²² The Commission in the communication relating to the treatment and execution of Ken Saro-Wiwa ruled the communication admissible because the victims were all deceased and therefore no local remedy could give the complainants the legal redress they sought.¹²³ It is unfortunate, however, that this logic or reasonableness approach has resulted in inconsistencies regarding the issue of whether a victim who fled a Respondent State is exempted from the requirement to exhaust local remedies in that State.

The Commission, in the first of these decisions, held that a complainant victim who had fled to another country and escaped imprisonment as a political detainee need not be bound to the requirement of exhausting local remedies in the country from which he fled.¹²⁴ In a subsequent communication, the Commission held that the victim who had fled from Nigeria after he had been tortured in a Nigerian military institution was exempt from the article 56(5) rule because he was unable to successfully pursue any local remedy as a result of his flight for fear of his life.¹²⁵ One can relate this exemption to the exemption encapsulated in article 46(2) (b) of the American Convention which exempts a complainant from exhausting local remedies if the complainant has been denied access to the available remedies under the domestic law of the Respondent State "or has been prevented from exhausting them".¹²⁶

Thus, a complainant would be denied access or prevented from exhausting local remedies if, for instance, he is forced to flee the Respondent State in fear of his life. Such an approach means that the American Convention also recognises that the Inter-American Commission need not require the exhaustion of local remedies if it would be illogical to do so considering the factors in article 46(2) (b).

In addition, the Commission has in this light passed three relevant judgements at

¹²² *International Pen Constitutional Rights Project Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v Nigeria* (1998) AHRLR 1 (ACHPR 1998) para 76-78.

¹²³ *International Pen Constitutional Rights Project Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v Nigeria* (1998) AHRLR 1 (ACHPR 1998) para 76-78.

¹²⁴ *Alhassan Abubakar v Ghana* (1996) AHRLR 3 (ACHPR 1996) para 20-30.

¹²⁵ *Rights International v Nigeria* (2000) AHRLR 132 (ACHPR 2000) para 24.

¹²⁶ Article 46(2)(b) of the American Convention.

its 27th session.¹²⁷ The Commission in two of these communications followed its prior decisions on the matter. Thus, in *Jawara v The Gambia* the Commission held that the exiled President's generalised fear for his life and that of his relatives exculpated him from returning to The Gambia to exhaust domestic remedies.¹²⁸ It was held further that requiring a person who flees a country for fear of his life to exhaust local remedies would be contrary to common sense and logic. The ultimate test is that the fear of a risk to one's life should exist not only in the victim's mind but in the minds of right-thinking people as well.¹²⁹

The Commission reached a similar decision in *Amim v Nigeria* where a lawyer submitted a communication on behalf of a victim who had fled Nigeria following his torture by Nigerian security officials.¹³⁰ The Commission held that the victim was exempted from exhausting local remedies as it would be illogical considering the concern he had for his safety. The Commission also deemed it unreasonable to require the complainant, the lawyer, to play the role of exhausting the local remedies on behalf of the victim.¹³¹ The Commission however adopted a different approach all together in *Legal Defence Centre v The Gambia*.¹³² In this case, the complainant, a Nigerian based NGO and the victim, a Nigerian deported journalist, claimed that his right to freedom among other rights had been violated by the Nigerian government who alleged that the victim was engaging in critical journalism.¹³³

The Commission held that, even though the victim's deportation order from The Gambia to Nigeria was still subsisting, the victim did not have to be physically present in Nigeria to avail himself of local remedies since such could be exhausted through his legal counsel.¹³⁴ The same principles were applied in *Demopoulos v Turkey* where the European Court held that factual or legal borders were not an in

¹²⁷ *Jawara v The Gambia* 2000 AHRLR 107 (ACHPR 2000) para 35.

¹²⁸ *Jawara v The Gambia* 2000 AHRLR 107 (ACHPR 2000) para 35.

¹²⁹ *Jawara v The Gambia* 2000 AHRLR 107 (ACHPR 2000) para 35.

¹³⁰ *Kazeem Aminu v Nigeria* (2000) AHRLR 15 (ACHPR 2000) para 20-28.

¹³¹ *Kazeem Aminu v Nigeria* (2000) AHRLR 15 (ACHPR 2000) para 20-28.

¹³² *Legal Defence Centre v The Gambia* (2000) AHRLR 18 (ACHPR 2000) para 17.

¹³³ *Legal Defence Centre v The Gambia* (2000) AHRLR 18 (ACHPR 2000) para 17.

¹³⁴ *Legal Defence Centre v The Gambia* (2000) AHRLR 18 (ACHPR 2000) para 17.

any way an obstacle *per se* to exhaust local remedies.¹³⁵ This was because complainants residing outside the jurisdiction of a Respondent State were not exempted from exhausting local remedies within that State, understandable personal reluctance or other practical inconveniences notwithstanding.¹³⁶ The European Court concedes, however, that where the victim has done all that he or she could reasonably do to exhaust local remedies, the particular circumstances of the case, such as the political and legal situation, will then influence the court's decision in declaring the communication admissible or not.¹³⁷

However, the above contradiction by the Commission has not been resolved in other subsequent decisions. The Commission in *Ouko v Kenya*, for example, held that the victim, a student leader who had been unlawfully detained for his political opinion for a 10 months period and had fled Kenya for fear of his life, was not required to exhaust the local remedies.¹³⁸ However, the Commission reached a different conclusion again in *Institute for Human Rights and Development in Africa v Democratic Republic of Congo*.¹³⁹ In this case a Burundi national who had been working in the DRC fled to Togo and was not granted the exemption of not exhausting the local remedies because the Commission did not see the existence of any moral or material constraints that prevented the complainant from exhausting local remedies.¹⁴⁰

It therefore appears that the Commission's inconsistency in applying this principle is accorded to the fact that it considers the circumstances of the case in making a finding on whether the exemption applies or not. In other words, the Commission like the European Court examines the circumstances of the case in deciding whether the complainant is exempted from exhausting local remedies in this regard.

¹³⁵ *Demopoulos v Turkey* (2010) 46113/99 (ECHR 2010) para 98-101.

¹³⁶ *Demopoulos v Turkey* (2010) 46113/99 (ECHR 2010) para 98-101.

¹³⁷ *Akdivar v Turkey* (1996) 4 (ECHR 1996) para 68-75.

¹³⁸ *John D Ouko v Kenya* (2000) AHRLR 27 (ACHPR 2000) para 19.

¹³⁹ *Institute for Human Rights and Development in Africa (on behalf of Jean Simbarakiye) v Democratic Republic of Congo* (2003) AHRLJ 43 (ACHPR 2003) para 31-32.

¹⁴⁰ *Institute for Human Rights and Development in Africa (on behalf of Jean Simbarakiye) v Democratic Republic of Congo* (2003) AHRLJ 43 (ACHPR 2003) para 31-32.

1.1.14.4 The lack of financial means to exhaust local remedies

It is debatable whether a domestic remedy is available to a victim or complainant who lacks the financial means to pursue it.¹⁴¹ Thus, the question of whether indigence absolves a complainant from the requirement in article 56(5) arises. It is a sad reality that many African countries lack free legal aid.¹⁴² The Banjul Charter provides that every person is entitled to enjoy the rights and freedoms that are guaranteed and recognised in it without any kind of distinction such as fortune, social origin or other status.¹⁴³

In *Purohit & Moore v The Gambia*, the Commission accepted that local remedies in the form of common law actions or constitutional challenges were available but could not be logically instituted by the particular victims who were two mental health institution patients.¹⁴⁴ Thus, it was not realistic to demand the exhaustion of local remedies from the victims because they were indigent and from a poor background.¹⁴⁵ This factor also raises the question of whether an incompetent legal representative provided by the State exempts the complainant from exhausting all local remedies.¹⁴⁶ In this regard, it should be noted that these exemptions do not apply where the complainant negligently failed to exhaust local remedies.¹⁴⁷ This exemption is also related to the exemption in article 46(2) (b) of the American Convention which absolves a complainant of the obligation to exhaust local remedies if he or she is prevented from doing so. Thus, the indigent nature of a victim may be regarded as a factor that prevents a complainant from acquiring the best legal representatives. This is especially so in a case where the complainant does not have the financial means to get legal representation to help him exhaust local remedies

¹⁴¹ Exceptions to the Exhaustion of Local Remedies, Inter-American Court, Advisory Opinion OC-11/90, 10 August 1990, reprinted in Human Rights Law Journal 1:2 (1991) 20.

¹⁴² Butler A S *International and Comparative Law Quarterly* 375.

¹⁴³ Article 2 of the Banjul Charter.

¹⁴⁴ *Purohit and Moore v The Gambia* (2003) AHRLR 49 (ACHPR 2003) para 36-37.

¹⁴⁵ *Purohit and Moore v The Gambia* (2003) AHRLR 49 (ACHPR 2003) para 36-37.

¹⁴⁶ Though not decided on, this ground was invoked in *Roberto Moreno Ramos v United States* (2003) 4446/02 (ACHR 2003).

¹⁴⁷ *Paul S. Hays v The Gambia* (1994) AHRLR 12 (ACHPR 1994) para 30.

in his or her country of origin whilst he or she has fled to a foreign State as a result of fear for her life.

1.1.14.5 The length of the procedure

The wording in article 56(5) of the Banjul Charter, "unless it is obvious that this procedure is unduly prolonged" draws one to conclude that a complainant is not required to exhaust any domestic remedies if the procedure to do so is being unduly prolonged. In *Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso*, the Commission declared the communication admissible because local remedies had been unduly prolonged.¹⁴⁸ In this case some of the victims had unsuccessfully spent fifteen years attempting to obtain redress from the courts for violations arising from assassinations and disappearances.¹⁴⁹

On the other hand, in *Kenya Human Rights v Kenya*, the complainant had instituted local court proceedings in December 1993.¹⁵⁰ The communication was submitted in March 1994 and was declared inadmissible in October 1995 by the Commission on the ground that local remedies had not been unduly prolonged. This poses the question of how the concept of 'undue delay' is to be determined in a matter. Two possibilities arise in this regard. Firstly, one may deem such a period to be the period between the initiation of local proceedings and the submission of the communication.¹⁵¹ Secondly, one may deem such a period to be the period between the commencement of local proceedings and the period of the judgement of the Commission.¹⁵²

Viljoen propounds that the Banjul Charter seems to require a strict interpretation of article 56(5) and thereby requiring the first method of calculation.¹⁵³ This is because

¹⁴⁸ *Mouvement Burkinabe des droits de l'Homme et des Peuples v Burkina Faso* (2001) AHRLR 32 (AHCPR 2001) para 4, 14 & 36.

¹⁴⁹ *Mouvement Burkinabe des droits de l'Homme et des Peuples v Burkina Faso* (2001) AHRLR 32 (AHCPR 2001) para 4, 14 & 36.

¹⁵⁰ *Kenya Human Rights Organisation v Kenya* (1996) AHRLR 9 (ACHPR 1996) para 20-30.

¹⁵¹ *Kenya Human Rights Organisation v Kenya* (1996) AHRLR 9 (ACHPR 1996) para 20-30.

¹⁵² *Kenya Human Rights Organisation v Kenya* (1996) AHRLR 9 (ACHPR 1996) para 20-30; Viljoen "Admissibility under the African Charter" 124.

¹⁵³ Viljoen "Admissibility under the African Charter" 124.

the Banjul Charter in article 56(5) refers to communications being submitted only after exhausting local remedies. However, the author further contends that it is quite relevant for the Commission to firstly consider whether local remedies have not been exhausted as yet at the time of the Commission's judgement especially if it is discovered that the complainant kept on trying to exhaust domestic remedies after the submission of the communication.¹⁵⁴ This also applies where the Commission took an inordinate long time to render its decision on the admissibility of the communication regarding exhaustion of local remedies.¹⁵⁵

Interestingly, the Inter-American Commission also deems 'undue delay' as an exception to the exhaustion of the local remedies rule.¹⁵⁶ Thus, article 46(2) (c) of the American Convention states that the exhaustion of local remedies requirement to exhaust local remedies will not be considered where the local courts unduly delay in presenting a final judgement of the matter under consideration. In this regard the Inter-American Commission in *Jose Gregorio Mota v Venezuela* applied the article 46(2) (c) exception and declared the communication admissible even though local remedies had not been exhausted.¹⁵⁷ The Inter-American Commission's reasoning was that there was undue delay because even after seven and a half years of the occurrence of the alleged violation the domestic trial court of Venezuela had still not conducted a trial.¹⁵⁸ The same principles were reiterated in *Jimmy Rafael & Raman Antonio & Family v Venezuela* where the Inter-American Commission held that the complainants' were exonerated from fulfilling the exhaustion of the local remedies requirement because there was an unwarranted delay of seven years in conducting a trial to enforce the alleged violated rights.¹⁵⁹

Furthermore, the European Court has also adopted the same principle in its jurisprudence; for example, in *Scordino v Italy* where the European Court stated

¹⁵⁴ Onoria H 2003 *AHRLJ* 18.

¹⁵⁵ *Mouvement Burkinabe des droits de l'Homme et des Peuples v Burkina Faso* ((2001) *AHRLR* 32 (AHCPR 2001) para 4, 14 & 36.

¹⁵⁶ *Jose Gregorio Mota v Venezuela* (2012) 1336-07 (ACHR 2012) para 8.

¹⁵⁷ *Jose Gregorio Mota v Venezuela* (2012) 1336-07 (ACHR 2012) para 8.

¹⁵⁸ *Jose Gregorio Mota v Venezuela* (2012) 1336-07 (ACHR 2012) para 8.

¹⁵⁹ *Jimmy Rafael & Raman Antonio & Family v Venezuela* (2011) 4/11 (ACHR 2011) para 6.

that there was no need for a complainant to fulfil the exhaustion of local remedies requirement if there was an unnecessary and excessive delay in obtaining redress from the local courts.¹⁶⁰ Moreover, in *Williams v the United Kingdom* the European Court held that, if a domestic remedy is not dependent on any time limit, it creates uncertainty and therefore cannot be regarded as an effective remedy.¹⁶¹ Therefore, all three regional organs require that the local courts deal with violations of human rights in an expeditious manner so as to remedy and prevent the proliferation of any disadvantage suffered by a victim.

3.4 Conclusion

The Banjul Charter provides for seven requirements for the admissibility of a communication. The fourth of these requirements is to the effect that a communication must not be based on news disseminated through the mass media. This requirement deals with the increasing demands of global communication and technology awareness.¹⁶² Other United Nations treaties and other regional human rights systems have no similar requirement. Therefore, this requirement is only typical to the Banjul Charter. The Commission in providing clarity on this has held that article 56(4) does not prohibit reliance on media reports in part; in fact, it bars only the complete reliance on media reports as the only basis for the communication.¹⁶³ This raises the question of the limitations that can or should be attached to exclusive reliance as provided in article 56(4).

The Commission provides clarity in this regard by requiring the information from the media to be correct and truthful.¹⁶⁴ Furthermore, in clarifying the import of the word 'exclusively', the Commission held that it would be precarious if the Commission rejects a communication on the grounds that it has some aspects that rely on "news disseminated through the mass media".¹⁶⁵ The Commission further stated that the

¹⁶⁰ *Scordino v Italy* (2003) 4 (ECHR 2003) para 136-148.

¹⁶¹ *Williams v the United Kingdom* (2009) 32567/06 (ECHR 2009).

¹⁶² Viljoen "Admissibility under the African Charter" 110.

¹⁶³ Odiinkalu 2001 *AHRLJ* 237-238.

¹⁶⁴ *Jawara v The Gambia* 2000 AHRLR 107 (ACHPR 2000) para 26.

¹⁶⁵ *Jawara v The Gambia* 2000 AHRLR 107 (ACHPR 2000) PARA 24.

test for exclusive reliance should not be whether the information was acquired through the media, but whether the information is truthful.¹⁶⁶ Furthermore, the Commission held that a complainant must have at least tried to verify the truthfulness of these allegations. The Commission also accepts the reliance on media reports in part, especially in torture cases where media reports are instrumental in the corroboration of the widespread use of torture.¹⁶⁷

In addition, the fifth requirement for admissibility is that the complainant must exhaust all local remedies before submitting a communication to the Commission. The American and European Convention also have a similar requirement.¹⁶⁸ This requirement reflects the sovereignty of a State Party in dealing with its domestic affairs.¹⁶⁹ This requirement is therefore an explication of international law's general principle of the sovereignty of a State.¹⁷⁰ The rationale of this rule derives logic from the principle that a State must be given the full opportunity to effectively enforce its consented to international law obligations.¹⁷¹ Under the Banjul Charter the exhaustion of the local remedies requirement is applicable to both communications by State parties and communications by individuals and NGOs.¹⁷²

The rules of procedure of the African Commission also embody this requirement in Rule 104(1)(f). In the same light, the European Convention embodies the same requirement in article 35(1). The same goes for the American Convention which also requires the exhaustion of local remedies in article 46(1)(a)(2). Furthermore, all three regional organs, the African Commission, the European Court and the Inter-American Commission have applied this principle in a similar manner. This requirement, however, raises numerous conundrums that have to be understood before a complainant lodges a communication with the Commission. Thus important

¹⁶⁶ *Jawara v The Gambia* 2000 AHRLR 107 (ACHPR 2000) PARA 26.

¹⁶⁷ Viljoen and Odinkalu *The Prohibition of Torture and Ill-Treatment in the African Human Rights System* 87.

¹⁶⁸ Article 35 of the European Convention; Article 46(1)(a) of the American Convention on Human and Peoples' Rights.

¹⁶⁹ Amerasinghe *Local remedies in International Law* 49.

¹⁷⁰ Amerasinghe *Local remedies in International Law* 49.

¹⁷¹ Amerasinghe *Local Remedies in International Law* 9-25.

¹⁷² Article 47 and Article 55 of the Banjul Charter.

questions arise such as: When is a complainant said to have exhausted a local remedy? What entails a local remedy? What is the meaning of 'unduly prolonged' as well as the exemptions to this rule?

Worth mentioning is that exhausting a local remedy places the onus to exhaust the local remedy on the victim as it would be illogical to require a complainant who is not the victim to exhaust local remedies.¹⁷³ This is especially so considering the fact that such a complaint may not have the legal standing to exhaust the local remedies. The Commission in *Purohit and Another v The Gambia* exempted the complainant from the requirement of exhausting local remedies because of the indigent nature of the victims.¹⁷⁴ Therefore, in answering the question of who has the obligation to exhaust local remedies, it is evident that the victim has the duty to exhaust local remedies.

It therefore stands that the complainant has the duty to cast doubt on the effectiveness of a local remedy if such remedies have not been exhausted.¹⁷⁵ Furthermore, such local remedies can be common law remedies that exist in legal jurisdictions and are accessible to those seeking justice.¹⁷⁶ To add on to the above, these local remedies can only be of a judicial nature to the exclusion of quasi-judicial remedies.¹⁷⁷ They do not extend to extraordinary remedies such as instituting private prosecutions, requesting a review of a final judicial order or challenging the constitutional legality of an executive order.¹⁷⁸ In addition, the wording 'if any' in article 56(5) has been noted to mean that remedies should be available, sufficient and adequate.¹⁷⁹

The complainant will therefore have to prove that he or she failed to exhaust all local remedies because they were not available or were either insufficient or

¹⁷³ Viljoen "Admissibility under the African Charter" 112.

¹⁷⁴ *Purohit and Moore v The Gambia* (2003) AHRLR 49 (ACHPR 2003) para 26-27.

¹⁷⁵ *Anuak Justice Council v Ethiopia* AHRLR 97 (ACHPR 1996) para 58.

¹⁷⁶ *Interights v Mauritania* (2010) AHRLR 105 (ACHPR 2010) para 27.

¹⁷⁷ *Mouvement des R'efugi'es Mauritaniens au S'en'egal v Senegal* (2000) AHRLR 287 (ACHPR 1997) para 19.

¹⁷⁸ *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 76 (ACHPR 2006) para 67.

¹⁷⁹ *Jawara v The Gambia*.2000 AHRLR 107 (ACHPR 2000) para 28-35.

inadequate.¹⁸⁰ The Commission treats these elements as separate even though they go hand in glove and are entangled. Thus, the Commission has held that a domestic remedy is regarded as available if it is as a matter of practical reality readily accessible.¹⁸¹ On the other hand, a remedy is regarded as adequate or effective if it offers a likelihood of success.¹⁸² A remedy is also sufficient if it is possibly capable of providing redress for the complainant.¹⁸³

However, it should be borne in mind that to every general rule there is an exception. Thus, there are exceptions to the application of article 56(5). The American Convention has also stated three exceptions to this rule in article 46(2). These include situations where the domestic legislation of the State concerned does not afford due process of law for the protection of the violated right; the complainant has been prevented or denied access to the domestic remedies; "or there has been unwarranted delay in rendering a final judgment".¹⁸⁴

On a similar note, under the Banjul Charter, a number of grounds for exemption from fulfilling the exhaustion of local remedies rule can be identified.¹⁸⁵ These exemptions include "cases where there is evidence of massive or serious violations"; "where clauses attempt to oust the jurisdiction of national courts by way of ouster clauses"; "when it is illogical to require the exhaustion of local remedies"; and "when a complainant is indigent and cannot financially afford legal assistance".¹⁸⁶ In sum, it should be noted that each requirement for admissibility in article 56 is indispensable. However, the exhaustion of the local remedies requirement has been the most controversial as a number of communications have been declared inadmissible as a result of a failure to comply with article 56(5).

¹⁸⁰ *Kenya Human Rights Organisation v Kenya* (1996) AHRLR 9 (ACHPR 1996) para 47.

¹⁸¹ *Jawara v The Gambia* 2000 AHRLR 107 (ACHPR 2000) para 32-35.

¹⁸² *Jawara v The Gambia* 2000 AHRLR 107 (ACHPR 2000) para 28-35.

¹⁸³ *Jawara v The Gambia* 2000 AHRLR 107 (ACHPR 2000) para 28-35.

¹⁸⁴ Article 46(2) of the American Convention.

¹⁸⁵ *Law Offices of Ghazi Suleiman v Sudan* (2003) AHRLR 47 (ACHPR 2003) para 36

¹⁸⁶ Viljoen "Admissibility under the African Charter" 119.

Chapter 4 An Analysis of Article 56(6)-(7) of the Banjul Charter

4.1 Introduction

Having discussed in the proceeding chapter the requirement that a communication need not be exclusively based on news disseminated through the mass media and that such communication should be submitted only after exhausting the available local remedies, it is only prudent that a complete examination of the rest of the seven admissibility requirements be conducted. Thus, after considering whether the communication meets the fourth and fifth requirements stated above, the Commission proceeds to determine whether such communication also complies with the sixth and seventh requirements for the admissibility of a communication. That is to say, the Commission must complete its findings on the admissibility of a communication by examining whether the communication was submitted within a reasonable time from the period local remedies were exhausted¹ and whether the communication deals with matters that have been settled already by the Respondents' State.² The Banjul Charter is however not clear on what such requirements fully demand from a complainant. For instance, article 56(6) does not specify what a reasonable time entails which raises the question of what the Commission considers to be a reasonable time. Furthermore, regarding article 56(7) the Banjul Charter is silent on whether the settled cases by the international bodies should have been settled by judicial bodies or quasi-judicial bodies. The above requirements will therefore be assessed against similar requirements for admissibility contained in article 35(1) and 35(2) (b) of the European Convention and article 46(1) (b), 46(1) (c) and 47(d) of the American Convention.

4.2 Article 56(6)

Article 56(6) of the Banjul Charter requires that a communication will be admissible before the Commission if it is submitted within a reasonable time from the period

¹ Article 56(6) of the Banjul Charter.

² Article 56(7) of the Banjul Charter.

local remedies were exhausted or from the time the Commission was seized of the case.³

This provision does not go further to recommend what a reasonable period entails. Hence, the question of what a `reasonable period` entails arises in this regard. The Commission has not specified what this is and resorts to treating every matter on a case by case basis.⁴ However, the Information Sheet No. 3 which was prepared by the Secretariat of the African Commission on Communication Procedures propounds that a communication should be submitted as early as possible.⁵ This raises more questions than answers as such a response begs the question of `what is as early as possible`? On this note, it is proposed that the Commission draws inspiration and guidance from the jurisprudence of the European and American Systems which both require a communication to be submitted within six months of the final decision of a local court or after the complainant has been notified of the final decision of the local court.⁶ This is provided for in article 35(1) of the European Convention and article 46(1) (b) of the American Convention.

However, the Inter-American Commission does at times deviate from the usual six months period required to submit a communication. Such exception can only be applied where the exhaustion of local remedies was unduly delayed by the local courts of the Respondent State. The case of *Jose Gregorio Mota v Venezuela* instructs us in this regard.⁷ In this case, the Inter-American Commission held that where it is established that an exception to the exhaustion of local remedies rule exists, the communication had to be submitted within a reasonable time.⁸ This called for a consideration of the circumstances of the case and the date the alleged violations took place. The Inter-American Commission thus stated that the normal six months period required in terms of article 46(1)(b) of the American Convention

³ Article 56(6) of the Banjul Charter.

⁴ Viljoen F Communications under the African Charter: Procedure and Admissibility 125.

⁵ African Commission on Human and Peoples' Rights Information Sheet No.3 http://www.achpr.org/files/pages/communications/procedure/achpr_communication_procedure_eng.pdf.

⁶ Article 35(1) of the European Convention; Article 46(1) (b) of the American Convention.

⁷ *Jose Gregorio Mota v Venezuela* (2012) 1336-07 (ACHR 2012) para 7.

⁸ *Jose Gregorio Mota v Venezuela* (2012) 1336-07 (ACHR 2012) para 7.

and article 32 of the Inter-American Commission's Rules of Procedure were not applicable if the exhaustion of local remedies was unduly delayed and therefore impossible. The researcher submits that the reason for such an exception to the six months rule is to give the complainant an opportunity to have his or her case heard for the purpose of justice and fairness.

However, the Commission adopts a different approach altogether. Put clearly, the Commission is flexible and determines a reasonable time on a case by case basis.⁹ Viljoen contends that this is attributed to the less visibility and accessibility to the Commission.¹⁰ Therefore, adopting a rigid six months rule would not be realistic in Africa. Furthermore, it is important to bear in mind that a reasonable time is measured from the time the communication is submitted to the Commission after exhausting local remedies, or from the time the complainant instantly realizes that local remedies are unavailable, insufficient or ineffective. Thus, reasonable time is not measured from the time when the alleged violations were committed.¹¹

Thus, it is not measured from the period the alleged violations were submitted by the complainant to the local courts.¹² The European Court has also adopted the principle that the six months period commences on the day following the date the final decision was publicly pronounced or on the day the complainant and/or his or her legal representative was informed of the final decision.¹³ The period expires after six months regardless of the duration of the six months. The European Court, however, uses its own time calculations and not that of each domestic legislation when calculating the six months period.¹⁴ This is done to ensure the proper administration of justice and legal certainty. In other words, the European Court will not extend the six months' time limit even if the final date for the six months falls on an official holiday, a Saturday or a Sunday.¹⁵

⁹ Viljoen F *Communications under the African Charter: Procedure and Admissibility* 125.

¹⁰ Viljoen F *Communications under the African Charter: Procedure and Admissibility* 125.

¹¹ *REDRESS v Sudan* (2018) AHRLR 10 (ACHPR 2018) para 71.

¹² *REDRESS v Sudan* (2018) AHRLR 10 (ACHPR 2018) para 71.

¹³ *Ataykaya v Turkey* (2014) 50275/08 (ECHR 2014) para 40.

¹⁴ *Sabri Güneş v Turkey* (2012) 27396/06 (ECHR 2012) para 43, 56, 61.

¹⁵ *Sabri Güneş v Turkey* (2012) 27396/06, (ECHR 2012) para 43, 56, 61.

Nevertheless, it should be noted that the Commission's flexible approach on this requirement has yielded some inconsistency in its application of article 56(6). For instance, the Commission referred to the six months usual period from the exhaustion of local remedies given by the Inter-American Commission on Human Rights (herein the Inter-American Commission) and the European Court on Human Rights (herein the European Court) regarding the submission of complaints.¹⁶ On the other hand, the Commission has declared admissible communications submitted after six months from the time local remedies had been exhausted.¹⁷ Noteworthy in this regard is that the Commission applies the 'good and compelling reasons' principle in determining how long a reasonable time should be. The Commission has provided clarity on this issue by stating that:

Where there is a good and compelling reason why a Complainant does not submit his complaint to the Commission for consideration, the Commission has a responsibility, for the sake of fairness and justice, to give such a Complainant an opportunity to be heard.¹⁸

This means that the Commission will likely declare a communication admissible even if it was submitted after six months provided that the complainant propounds a good and compelling reason that for the sake of justice and fairness warrants an opportunity for the complainant to be heard.¹⁹

In *Darfur Relief and Documentation Centre v Sudan*, the communication was sent after twenty-nine months of the exhaustion of local remedies.²⁰ The complainant did not provide a reason for the 29 months delay, which promoted the Commission to declare the communication inadmissible for failing to comply with article 56(6).²¹ On a similar note, in *Article 19 and Others v Zimbabwe*, the complainants' submitted a communication challenging the legislative restrictions on the media which allegedly were an infringement on their freedom of expression.²² The communication was

¹⁶ *Darfur Relief and Documentation Centre v Sudan* (2009) AHRLR 104 (ACHPR 2009) para 75-78; *Obert Chingamo v Zimbabwe* (2007) AHRLR 80 (ACHPR 2007) para 89.

¹⁷ *Gabriel Shumba v Zimbabwe* 2017 (AHRLR) 142 (ACHPR 2017) para 44.

¹⁸ *Darfur Relief and Documentation Centre v Sudan* (2009) AHRLR 104 (ACHPR 2009) para 77.

¹⁹ *Darfur Relief and Documentation Centre v Sudan* (2009) AHRLR 104 (ACHPR 2009) para 77.

²⁰ *Darfur Relief and Documentation Centre v Sudan* (2009) AHRLR 104 (ACHPR 2009) para 75-78; *Obert Chingamo v Zimbabwe* (2007) AHRLR 80 (ACHPR 2007) para 89.

²¹ *Darfur Relief and Documentation Centre v Sudan* (2009) AHRLR 104 (ACHPR 2009) para 78-79.

²² *Article 19 v Zimbabwe* (2010) AHRLR 108 (ACHPR 2010) para 23-32.

sent two years after the Supreme Court's decision. The complainants' reason for delay was that they were waiting to see if the decision of the Supreme Court would be implemented. The Commission however did not find this to be a compelling or good reason because the decision of the Supreme Court held only four of the 17 challenged legislative provisions unconstitutional. Hence, the Commission declared the communication inadmissible because it lacked any compelling and good reasons for the two year delay between the exhaustion of local remedies and submission of the communication to the Commission.²³

Nonetheless, there appears to be inconsistencies in the findings of the Commission on what is considered to be compelling and good reasons for delaying more than six months after exhausting local remedies. In *Gabriel Shumba v Zimbabwe*, the communication was submitted sixteen months after the complainant was forced to flee Zimbabwe for fear of his safety and life.²⁴ In its findings on article 56(6), the Commission stated that:

Indeed, as the Respondent State has noted, the African Commission has not specified what a reasonable period is but it is apparent from its practice that it has tended to be flexible and as such, determines this question on a case-by-case basis. For instance, in several communications, the African Commission has admitted communications that have been brought before the African Commission more than 16 months after the violation is reported to have taken place or domestic remedies were exhausted. Consequently, the African Commission believes that the Complainant in the present communication having filed the communication 16 months after the violation took place, met the conditions laid down in Article 56(6) of the African Charter.²⁵

Though the Commission declared this particular communication admissible, it did not extrapolate on how the sixteen months delay met the good and compelling reason justification as per article 56(6), but the Commission ruled differently in a similar case. Thus, in *Michael Majuru v Zimbabwe* the Commission declared a communication inadmissible which had been filed twenty-two months after the complainant had fled his country for fear of his life and safety.²⁶ As a good and

²³ *Article 19 v Zimbabwe* (2010) AHRLR 108 (ACHPR 2010) para 23-32.

²⁴ *Gabriel Shumba v Zimbabwe* 2017 (AHRLR) 142 (ACHPR 2017) para 44.

²⁵ *Gabriel Shumba v Zimbabwe* 2017 (AHRLR) 142 (ACHPR 2017) para 44.

²⁶ *Michael Majuru v Zimbabwe* (2008) AHRLR 95(ACHPR 2008) para 109.

compelling reason for the twenty-two months delay, the complainant submitted that after fleeing Zimbabwe he needed ample time to settle and undergo psychotherapy in South Africa as a result of his harassment and threats experience on his life.²⁷

He further explained how concerned he was for his family's life and safety. In declaring the communication inadmissible, the Commission held that the complainant's reason for his late submission did not meet the good and compelling reason test and therefore did not give the Commission any grounds to examine the communication based on fairness and justice.²⁸ Similarly, in *REDRESS v Sudan*, the Commission held that there were no good and compelling reasons that justified the complainants' fifteen months delay in submitting the communication.²⁹ It is evident then that the good and compelling reasons test used as a measure of reasonable time under article 56(6) is a mechanism employed by the Commission to restrict the application of article 56(6).

It is submitted, however, that the flexible approach of the Commission in determining a reasonable time is commendable. This is due to the fact that some complainants may genuinely be unable to submit their communications within six months from the time of the local court's final decision, for instance, in cases where the complainant exceeds the normal six months' time period because he was forced to flee the Respondent State due to fear for his life and safety. Therefore, the fact that the Commission considers the circumstances of the case in this regard means that it expects the complainant to timeously submit a communication in cases of continued serious or massive human rights violations such as arbitrary detentions.

It is contended that the Inter-American Commission's approach is also praiseworthy. That is to say, even though the Inter-American Commission requires the communication to be submitted within six months, it nonetheless is flexible enough to allow for an exception in cases where the complainants' claim before the local courts was excessively delayed. It therefore shows that the Inter-American

²⁷ *Michael Majuru v Zimbabwe* (2008) AHRLR 95(ACHPR 2008) para 109.

²⁸ *Michael Majuru v Zimbabwe* (2008) AHRLR 95(ACHPR 2008) para 109.

²⁹ *REDRESS v Sudan* (2018) AHRLR 10 (ACHPR 2018) para 78.

Commission would allow a complainant to submit a communication even after the lapse of the required six months if faced with other compelling circumstances that in the interests of fairness and justice warrant a deviation from the six months' time period.

4.3 Article 56(7)

Article 56(7) is the last of the seven requirements for admissibility encapsulated in article 56 of the Banjul Charter. Article 56(7) stipulates that communications before the Commission are admissible if they haven't been settled already by the Respondent State in accordance with the principle of the Banjul Charter, the Charter of the UN, or the Charter of the OAU.³⁰ This requirement enforces the *ne bis in idem* rule.³¹ This is a sound principle a State is not to be found "in violation twice for one violating action or conduct" and a matter "that has been finalised on the merits should not be reopened".³²

This principle is the rationale behind the requirement in article 56(7). Furthermore, this principle corresponds with the *autrefois acquit* and *autrefois convict* principles. These principles imply that an accused in a criminal trial may not stand trial more than once for a similar offence to the one for which he or she has already been acquitted or convicted.³³ On this note, a question arises of whether different matters submitted at an international level are substantially similar? This is because International Human Rights bodies that function internationally also operate either at a global³⁴ or a regional level.³⁵ This raises a problem on the concurrent jurisdiction of these international bodies, especially regarding allegations of human rights violations that are protected by both a regional and international instrument.

It therefore becomes necessary for the interrelationships of such institutions to be

³⁰ Article 56(7) of the Banjul Charter.

³¹ This Latin rule translates to "not twice in the same issue". Thus, no legal action can be lawfully instituted twice for the same matter or cause of action.

³² Viljoen F *Communications under the African Charter: Procedure and Admissibility* 126.

³³ Korang D 2015 *Journal of law and Policy and Globalisation* 96-104.

³⁴ For instance, the United Nations Human Rights Committee which is responsible for monitoring international global treaties such the International Covenant on Civil and Political Rights.

³⁵ For instance, the European Convention; the American Convention and the Banjul Charter.

defined clearly so as to foster a clear understanding of what article 56(7) requires. It should be noted further that even though the Banjul Charter provides for the submission of communications simultaneously to a United Nations treaty body such as the United Nations Human Rights Committee and the Commission, a complainant is still obliged to abide by the first finding or decision.³⁶ This approach is commendable as it eliminates the possibility of diverging conclusions in the same settled particular case before different bodies.³⁷ Thus, the Commission requires that the matter brought before it must not have been settled by an international body as required by article 56(7).

For instance, in *Bob Ngozi Nyoku v Egypt* the complainant had submitted the same matter before the United Nations Sub-Commission on Human Rights before submitting it to the Commission.³⁸ The former took a decision not to hear the matter nor to make a pronouncement on it. The Commission held that the United Nations Sub-Commission's inaction did not boil down to a finding on the merits of the matter and therefore was not in any way an indication of a settled matter as required by article 56(7).³⁹ The Commission therefore declared the communication admissible. Furthermore, the position is the same with other international instruments such as the European and American Conventions.

The American Convention provides that a communication will be considered if the subject of the communication is "not pending in another international proceeding for settlement"; and if the communication is not "substantially the same as one previously studied by the Commission or by another international organization".⁴⁰

The American Convention has thus held to this effect that if a case is pending before any other international proceedings or if the communication is a reproduction of previously examined complaints by the Inter-American Commission itself or any other international body, the requirement in article 46(1) (c) and 47(d) would not

³⁶ Rule 93(2) of the African Commission's Rules of Procedure.

³⁷ Viljoen F Communications under the African Charter: Procedure and Admissibility 126.

³⁸ *Bob Ngozi Njoku v Egypt* (2000) AHRLR 83 (ACHPR 1997) para 25-30.

³⁹ *Bob Ngozi Njoku v Egypt* (2000) AHRLR 83 (ACHPR 1997) para 25-30.

⁴⁰ Article 46(1) (c) and 47(2) (d) of the American Convention.

have been met.⁴¹ The above was reiterated in *Jimmy Rafael & Rama Antonio & Family v Venezuela* where the Inter-American Commission held that a communication would be declared inadmissible if it was a reproduction of a communication previously dealt with by the Inter-American Commission or other international body.⁴²

In addition, the European Convention provides that the European Court will not deal with a communication that is substantially similar with a case already examined by the Court or sent for another international settlement or investigation "and contains no relevant new information".⁴³

The first limb of the above provision is meant to ensure that the decision of the European Court is final, thereby preventing the appeal of the court's previous decisions.⁴⁴ Further to that, the purpose of the second limb to the provision in article 35(2) (b) is to avoid an incident where various international bodies simultaneously deal with complaints which are substantially similar.⁴⁵ The European Court therefore considers whether the communication is substantially similar as a matter already submitted to a parallel set of international proceedings.⁴⁶ If answered in the affirmative, the court proceeds to consider whether the simultaneous proceedings constitute "another procedure of international investigation or settlement" as per article 35(2) (b). Moreover, the concept of another international body settling the matter is dependent on whether the procedure and effect of its decision excludes the jurisdiction of the European Court.⁴⁷ In determining the above, the European Court considers whether the communication pertains to the same complainants, same persons, same relief sought, same legal arguments and the same facts.⁴⁸ The complainant is therefore required to submit new information which has not been

⁴¹ *Jose Gregorio Mota v Venezuela* (2012) 1336-07 (ACHR 2012) para 7.

⁴² *Jimmy Rafael & Raman Antonio & Family v Venezuela* (2011) 4/11 (ACHR 2011) para 6.

⁴³ Article 35(2) (b) of the European Convention.

⁴⁴ *Kafkaris v Cyprus* (2011) 9644/09 (ECHR 2011) para 67.

⁴⁵ *OAO Neftyanaya Kompaniya Yukos v Russia* (2011) 14902/04 (ECHR 2011) para 52.

⁴⁶ *Gürdeniz v Turkey* (2014) 59715/10 (ECHR 2014) para 39-40.

⁴⁷ *Greek Federation of Bank Employee Unions v Greece* (2011) 72808/10 (ECHR 2011) para 33-38.

⁴⁸ *Amarandei v Romania* (2016) 1443/10 (ECHR 2016) para 106-111.

considered by the court before. This however does not apply where the communication has never been part of the subject matter of a formal decision.

The original Rules of Procedure deviated from the above position.⁴⁹ Thus, instead of requiring that a communication be admissible unless it has already been settled by the OAU Charter or the Banjul Charter, the Rules of Procedure require that:

The Commission must ensure that the same issue is not already being considered by another international investigating or settlement body.⁵⁰

This rule was expressed in *Amnesty International v Tunisia* where the Commission noted that the purpose of the rule in Rule 114(3) (f) was to effectively ensure that there is no 'usurpation of the jurisdiction of another body'.⁵¹ The Commission declared the communication inadmissible on the grounds that the communication had been examined already in accordance with the established procedure of the ECOSOC resolution 1503.⁵² On a similar note, the Commission has under the same Rules of Procedure declared the communication in *Mpaka-Nsusu Andre Alphonse v Zaire* inadmissible.⁵³ This was because the communication had already been referred to the Human Rights Committee for consideration.⁵⁴ Though the matter had not been settled by the Human Rights Commission, the Commission did not require that it be settled by the United Nations Human Rights Committee or the Human Rights Commission because Rule 114(3) (f) required that the matter be under consideration and not be settled.⁵⁵

On a different note, the Revised Rules of Procedure heralded the reflection of these rules with the Banjul Charter.⁵⁶ That is to say, Rule 116 specifies that article 56 of the Banjul Charter shall determine all aspects of the admissibility of communications before the Commission. This in all aspects means that the requirement of 'settlement' as contained in article 56(7) is applicable as compared to the 'being

⁴⁹ Rule 114(3)(f) of the African Commission's Rules of Procedure (1995).

⁵⁰ Rule 114(3)(f) of the African Commission's Rules of Procedure (1995).

⁵¹ *Amnesty International v Tunisia* Seventh Activity (1993) AHRLR 9 (ACHPR 1993) para 25-38.

⁵² *Amnesty International v Tunisia* Seventh Activity (1993) AHRLR 9 (ACHPR 1993) para 25-38.

⁵³ *Mpaka-Nsusu Andre Alphonse v Zaire* (1988) AHRLR 1 (ACHPR 1988) para 16.

⁵⁴ *Mpaka-Nsusu Andre Alphonse v Zaire* (1988) AHRLR 1 (ACHPR 1988) para 16.

⁵⁵ *Mpaka-Nsusu Andre Alphonse v Zaire* (1988) AHRLR 1 (ACHPR 1988) para 16.

⁵⁶ Rules of Procedure of the African Commission on Human and Peoples' Rights 2010.

settled requirement' in Rule 114(3) (f). However, regardless of this restatement of the position of the Banjul Charter, the Commission seemingly prefers the position under the Rule 114(3) (f) of the defunct Rules of Procedure. This position is elucidated in one of the Commission's confusing decisions.

Thus, in *Interights (on behalf of Pan-African Movement & Others) v Eritrea & Ethiopia*, the Commission declared the communication admissible at its 27th session but proceeded to suspend its finding on the merits of the case *sine die*.⁵⁷ The grounds for such suspension was that the matter had been submitted to the Ethiopian-Eritrean Claims Commission.⁵⁸ The Commission stated how such a Claims Commission is to be considered and treated as a body envisaged under article 56(7).⁵⁹ This led to the Commission's decision to suspend its decision on the merits pending the final judgment of the Claims Commission. This decision amounted to a finding that communications will be declared inadmissible if they were being considered by a body envisaged under article 56(7) of the Banjul Charter. It is submitted, however, that the Commission erred in its decision because it should have considered the communication since it had not yet been 'settled' by a body envisaged under article 56(7) of the Banjul Charter.

Furthermore, it is important to note that the envisaged bodies in article 56(7) must be of a judicial nature and should be obliged to make judgments according to legal principles.⁶⁰ The requirement of having a judicial body decide on the matter distinguishes the article 56(7) process from political mediation. Thus, bodies such as the Working Group on Arbitrary Detention and other similar non-judicial international bodies do not meet the criteria for the international bodies envisaged in article 56(7).⁶¹ Hence, cases which have been submitted to such bodies should

⁵⁷ *Interights (on behalf of Pan-African Movement and Citizens for Peace in Eritrea) v Ethiopia* (2003) AHRLR 45 (ACHPR 2003) para 56-57.

⁵⁸ *Interights (on behalf of Pan-African Movement and Citizens for Peace in Eritrea) v Ethiopia* (2003) AHRLR 45 (ACHPR 2003) para 57.

⁵⁹ *Interights (on behalf of Pan-African Movement and Citizens for Peace in Eritrea) v Ethiopia* (2003) AHRLR 45 (ACHPR 2003) para 56.

⁶⁰ *Interights (on behalf of Pan-African Movement and Citizens for Peace in Eritrea) v Ethiopia* (2003) AHRLR 45 (ACHPR 2003) para 56.

⁶¹ *Interights (on behalf of Pan-African Movement and Citizens for Peace in Eritrea) v Ethiopia* (2003) AHRLR 45 (ACHPR 2003) para 56.

not be found inadmissible by the Commission for failing to meet article 56(7).

4.4 Significant disadvantage as a requirement for admissibility

It is important to note that the European Convention, unlike the Banjul Charter and the American Convention, has a further unique requirement for admissibility in article 35(3) (b). This requirement stipulates that a communication will be declared inadmissible if:

The applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.⁶²

This admissibility criteria is new since it was only incorporated in the European Convention in 2010 through Protocol No. 14 on the 1st of June 2010 (hereafter the Protocol). Article 20 of the Protocol provided that the 'significant disadvantage' criteria would apply to all communications that were pending before the European Court, save for communications already declared admissible. The rationale for introducing this criteria was to lessen the case load before the European Court.⁶³

In other words, the *de minimis non curat praetor* principle necessitated the inclusion of this criterion into the already established admissibility requirements.⁶⁴ The European Court can thus consider this requirement of its own motion as an objection raised by the Respondent State or may even consider this requirement before considering all the other requirements for admissibility.⁶⁵ The main issue to be considered is whether the complainant has suffered any significant disadvantage.⁶⁶ The European Court has held that violations that are purely technical and therefore insignificant do not warrant European supervision.⁶⁷ Such assessment is dependent on the circumstances of the case.⁶⁸

⁶² Article 35(3) (b) of the European Convention.

⁶³ *Dudgeon v the United Kingdom* (1981) 45 (ECHR 1981) para 67.

⁶⁴ *O'Halloran and Francis v the United Kingdom* (2008) 46 (EHRR 2008) 21.

⁶⁵ *Shefer v Russia* (2012) 45175/04 (ECHR 2012).

⁶⁶ *Shefer v Russia* (2012) 45175/04 (ECHR 2012).

⁶⁷ *Y v Latvia* (2014) 61183/08 (ECHR 2014) 44.

⁶⁸ *Y v Latvia* (2014) 61183/08 (ECHR 2014) 44.

It is submitted that this additional criteria is commendable and could work for the good of complainants if applied correctly. However, it is contended that the Banjul Charter need not include such a provision in article 56. Thus, though the European Convention precedes the Banjul Charter there may be good reasons to depart from the European practices in the African setting. It should be noted that the European and American systems have dealt with thousands of communications as opposed to only over 200 communications dealt with by the African Commission. It is therefore wise for the European Court to limit the number of communications brought before it, the converse is true for Africa. Put differently, individuals should actually be encouraged to submit more communications before the African Commission.

4.5 Conclusion

Article 56(6) of the Banjul Charter which is the sixth requirement for admissibility of a communication before the Commission provides that a communication is admissible if it is lodged within a reasonable time from the period local remedies were exhausted "or from the date the Commission is seized of the matter".⁶⁹

This provision does not go further to recommend what a reasonable period entails. The Commission has not specified what this is and resorts to treating every matter on a case by case basis.⁷⁰ However, the Information Sheet No. 3 which was prepared by the Secretariat of the African Commission on Communication Procedures propounds that a communication should be submitted as early as possible.⁷¹ This raises more questions than answers as such a response begs the question of 'what is as early as possible'? On this note, it has been proposed that the Commission should draw inspiration and guidance from the jurisprudence of the European and American Systems which both require a communication to be submitted within six months of the final decision of a local court or after the complainant has been notified of the final decision of the local court.⁷² This is provided for in article 35(1)

⁶⁹ Article 56(6) of the Banjul Charter.

⁷⁰ Viljoen F *Communications under the African Charter: Procedure and Admissibility* 125.

⁷¹ African Commission on Human and Peoples' Rights Information Sheet No.3 http://www.achpr.org/files/pages/communications/procedure/achpr_communication_procedure_eng.pdf.

⁷² Article 35(1) of the European Convention; A 46(1) (b) of the American Convention.

of the European Convention and article 46(1)(b) of the American Convention.

Since the Banjul Charter does not prescribe a time limit on the submission of communications unlike its counterparts, it can only mean that the Commission is given the latitude to be flexible and make its own determination on what a reasonable time can entail. On this note, the Commission chooses to be flexible in determining the meaning of 'reasonable'.⁷³ This means that unlike the American and European Conventions that prescribe six months as a reasonable time, the Commission chooses to determine a reasonable time on a case by case basis.⁷⁴ This is mostly due to the fact that adopting a rigid six months rule would not be realistic in the African context considering the lesser visibility and accessibility of the Commission.⁷⁵

In addition, it should be noted that the last requirement for the admissibility of communications is embodied in article 56(7). Article 56(7) stipulates that communications before the Commission are admissible if they haven't been settled already by the Respondent State in accordance with the principle of the Banjul Charter, the Charter of the UN, or the Charter of the OAU.⁷⁶

This requirement enforces the *ne bis in idem* rule which is to the effect that a State is not to be found "in violation twice for one violating action or conduct" and a matter "that has been finalised on the merits should not be reopened".⁷⁷ This principle is the rationale behind article 56(7) of the Banjul Charter as well as article 35(2) (b) and articles 46(1) (c) and 47(d) of the European Convention and American Convention respectively. The principle further reinforces the *autrefois convict* and *autrefois acquit* principles.⁷⁸ It should be noted further that even though the Banjul Charter provides for the submission of communications simultaneously to a United

⁷³ Viljoen F *Communications under the African Charter: Procedure and Admissibility* 125.

⁷⁴ *Interights (on behalf of Pan-African Movement and Citizens for Peace in Eritrea) v Ethiopia* (2003) AHRLR 45 (ACHPR 2003) para 56; A 35(1) of the European Convention; Article 46(1) (b) of the American Convention.

⁷⁵ Viljoen F *Communications under the African Charter: Procedure and Admissibility* 125.

⁷⁶ Article 56(7) of the Banjul Charter.

⁷⁷ Viljoen F *Communications under the African Charter: Procedure and Admissibility* 126.

⁷⁸ Korang D 2015 *Journal of law and Policy and Globalisation* 96-104.

Nations treaty body such as the United Nations Human Rights Committee and the Commission, a complainant is still obliged to abide by the first finding or decision.⁷⁹ This approach is commendable as it eliminates the possibility of diverging conclusions in the same settled particular case before different bodies.⁸⁰

The original Rules of Procedure have deviated from the article 56(7) admissibility requirement in the Banjul Charter.⁸¹ Thus, instead of requiring that a communication is admissible unless it "has already been settled by the OAU Charter or the Banjul Charter", the Rules of Procedure require that the Commission ensure that a similar matter is not already being adjudicated by another international settlement or investigating body.⁸²

On a different note, the Revised Rules of Procedure heralded the reflection of these rules with the Banjul Charter. That is to say, Rule 116 specifies that article 56 of the Banjul Charter shall determine all aspects of the admissibility of communications before the Commission. This in all aspects means that the requirement of 'settlement' as contained in article 56(7) is applicable as compared to the 'being settled requirement' in Rule 114(3) (f). However, regardless of this restatement of the position of the Banjul Charter, the Commission seemingly prefers the position under the Rule 114(3) (f) of the defunct Rules of Procedure.⁸³

In sum, it is worthy of note that the European Convention, unlike the Banjul Charter and the American Convention, has a further unique requirement for the admissibility of communications in article 35(3) (b). This unique requirement is to the effect that a communication will be declared inadmissible if the complainant "has not suffered a significant disadvantage".⁸⁴ The rationale for introducing this criteria was to lessen the case load before the European Court since it will only consider a communication for admissibility if the complainant has suffered a significant disadvantage. Thus, it is contended that the Banjul Charter need not include such a provision in article 56.

⁷⁹ Rule 93(2) of the African Commission's Rules of Procedure.

⁸⁰ Viljoen F *Communications under the African Charter: Procedure and Admissibility* 126.

⁸¹ Rule 114(3)(f) of the African Commission's Rules of Procedure (1995).

⁸² Rule 114(3)(f) of the African Commission's Rules of Procedure (1995).

⁸³ *Mpaka-Nsusu Andre Alphonse v Zaire* (1988) AHRLR 1 (ACHPR 1988) para 16.

⁸⁴ Article 35(3) (b) of the European Convention.

Thus, though the European Convention precedes the Banjul Charter there may be good reasons to depart from the European practices in the African setting. It should be noted that the European and American systems have dealt with thousands of communications as opposed to only over 200 communications dealt with by the African Commission. It is therefore wise for the European Court to limit the number of communications brought before it, the converse is true for Africa. Put differently, individuals should actually be encouraged to submit more communications before the African Commission.

Chapter 5 Conclusion and Recommendations

5.1 Summary

The study has examined the manner in which the Commission interpreted the provisions of article 56 of the Banjul Charter. This was done in consideration of other regional human rights systems. The study has indicated that the AU is the organisation responsible for the drafting of the Banjul Charter. It was conceived during the liberation struggle and the Cold War.¹ Its principal objective is to maintain the territorial integrity and sovereignty of its Member States.² This principle came as a result of the need to guard the freedom and independence of African countries from having their internal affairs interfered with.³ However, since international law and human rights have developed, the scope of the sovereignty of a State principle has been adequately restricted.⁴ It has therefore been recognised that human rights take priority over the national sovereignty of a State.⁵

The Banjul Charter is one of the various regional level mechanisms which were adopted to address the issue of basic human rights and fundamental freedoms. Noteworthy is the adoption of the European Convention 1950⁶ as well as the American Convention in 1967⁷ which was established under the auspices of the Organisation of American States. The European Convention was established by the Council of Europe⁸ which is said to have the most advanced protection system for human rights at a regional level.⁹ It is regarded as the first comprehensive international instrument for the protection of human rights post the Second World War law-making process.¹⁰ As a result, it is the most important human rights

¹ Amate *Inside the OAU* 60-61.

² Article 3(2) of the Organisation of African Unity Charter (1963).

³ Article 2 and Article 3 of the Organisation of African Unity Charter (1963).

⁴ Shaw *International Law* 24.

⁵ Article I paras 1, 4 and 5 of the Vienna Declaration and Programme of Action (1993).

⁶ European Convention for the Protection of Rights and Fundamental Freedoms (1950).

⁷ American Convention on Human Rights (1969).

⁸ Council of Europe was established in 1949.

⁹ Smith *Textbook on International Law* 96.

¹⁰ Smith *Textbook on International Law* 98.

instrument within Europe.¹¹

The Banjul Charter is no exception and it was established under the auspices of the OAU Charter.¹² It is the regional instrument in Africa that is responsible for the protection and promotion of human and peoples' rights. It represents the basic human rights and fundamental freedoms of African people.¹³ In other words, it most notably represents the African concept of basic human rights and fundamental freedoms.¹⁴ On this note, the Banjul Charter is regarded as the principal instrument in Africa tasked with the mandate to protect human rights and fundamental freedoms.¹⁵ The Banjul Charter's uniqueness is proven by its protection of a wide range of human and peoples' rights.¹⁶ These include civil and political rights, economic, social and cultural rights, and rights of people.¹⁷ To see to the enforcement of these rights, the Banjul Charter established an eleven member Commission that is based in Banjul, Gambia. This Commission was inaugurated in 1987 and commissioners duly elected.¹⁸

In a bid to give effect to the Commission's purpose is the requirement that State parties to the Banjul Charter send reports to the Commission after every two years.¹⁹ In addition to the reports, the Commission fulfils its purpose by adjudicating on communications that allege a violation of any one or more of the rights articulated in the Banjul Charter. These communications can either be inter-state communications or communications submitted by individuals.²⁰ In order for such communications to be admissible before the Commission, they have to comply with the requirements for admissibility enumerated in article 56 of the Banjul Charter.

¹¹ Schabas *The European Convention on Human and Peoples' Rights* 1.

¹² Murray *The African Commission on Human and Peoples' Rights and International Law* 9.

¹³ Chapter 1 of the Banjul Charter.

¹⁴ Gye-Wado 1990 *AJICL* 191; Welch 1992 *HRQ* 45.

¹⁵ Naldi 2002 *AHRLJ* 1.

¹⁶ Scoble *Human Rights Non-Governmental Organisations in Black Africa* 197.

¹⁷ Chapter 1 of the Banjul Charter; Benedek *Peoples' Rights and Individuals' Duties as Special Features of the African Charter on Human and Peoples' Rights* 62.

¹⁸ Article 33-38 of the Banjul Charter; First Annual Activity Report of the African Commission on Human and Peoples' Rights, 1987-8, ACHPR/RPT/1st, para 4.

¹⁹ Article 62 of the Banjul Charter.

²⁰ Article 47 of the Banjul Charter; Article 55 of the Banjul Charter.

These requirements are that the communication "must indicate the authors";²¹ "must be compatible with the Charter of the OAU or with the Banjul Charter";²² "must not be written in disparaging or insulting language";²³ must "not be based exclusively on news disseminated through the mass media";²⁴ must "be sent after exhausting local remedies";²⁵ "must be submitted within a reasonable period from the time local remedies were exhausted"²⁶ and "must not deal with cases which have been settled by these States".²⁷

These requirements are also supplemented by the African Commission's Rules of Procedure as well as its jurisprudence.²⁸ The failure to comply with any one of the listed requirements may result in a communication being held inadmissible. The American and European Conventions also have similar requirements for the admissibility of a communication before their respective enforcement organs. Worth mentioning however is that, though the European Convention embodies related requirements to the Banjul Charter, it nonetheless goes a step further in article 35(3)(b) by requiring that a significant disadvantage be suffered by the complaint before he or she can approach the Court. Furthermore, both the European and American Conventions do not have the requirement stipulated in article 56(4) of the Banjul Charter that forbids a communication to be based exclusively on news disseminated through the mass media.

The wording of article 56, as seen above, contains some words and phrases which are ambiguous and need clarity. For example, the 'communication must not be written in disparaging or insulting language directed against the State concerned' as stipulated in article 56(3); the 'communication must be sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged' as provided for in article 56(5); and the 'communication must be submitted within

²¹ Article 56(1) of the Banjul Charter.

²² Article 56(2) of the Banjul Charter.

²³ Article 56(3) of the Banjul Charter.

²⁴ Article 56(4) of the Banjul Charter.

²⁵ Article 56(5) of the Banjul Charter.

²⁶ Article 56(6) of the Banjul Charter.

²⁷ Article 56(7) of the Banjul Charter.

²⁸ Viljoen and Odinkalu *The Prohibition of Torture and Ill-treatment in the African Human Rights System* 80.

a reasonable period from the time local remedies are exhausted' as mentioned in article 56(6). Obvious questions such as the meaning of 'disparaging or insulting language'; 'exhausting local remedies'; 'unduly prolonged'; and 'reasonable period' as used in these sub-paragraphs needed to be clarified. Thus, though such requirements may appear as direct and simple to understand, they are encumbered by a vast array of impediments to individuals seeking to submit such communications. This in turn presents a problem in the interpretation of the Banjul Charter as a number of individuals have a narrow understanding of article 56.

This study has in the light of these ambiguities sought to interpret the requirements for the admissibility of a communication by making use of the jurisprudence of the European Court, the Inter-American Commission and the Inter-American Court. In other words, this study examined whether the manner in which these requirements are interpreted can be improved if need be when

assessed together with the European and American systems. The jurisprudence of the European Court, the Inter-American Commission and the Inter-American Court was therefore used in this regard. Consequently, the study attempted to provide clarity as to any misunderstanding that may exist concerning the requirements for admissibility encapsulated in article 56.

5.2 Conclusion and Recommendations

It has been noted that due to the increase in human rights violations, various regions have deemed it necessary to establish mechanisms that promote the respect of human rights.²⁹ To this end, certain human rights instruments and institutions were established as forming part of such mechanisms. Some of such mechanisms include the European Convention and the American Convention. The African continent is no exception to such developments. Worth noting and relevant to this study is the Banjul Charter. The Banjul Charter, in article 30, contemplated the establishment of a Commission with the mandate to 'promote human and peoples' rights and ensure their protection in Africa'. The Commission is complemented by

²⁹ Viljoen "Admissibility under the African Charter" 61.

the African Court.³⁰

It has been noted further that though the African Court further reinforces the Commission's functions, it was not relevant to the subject matter of the discussion. This is because, even though a Court exists, the Commission is still relevant as it caters for individual communications, unlike the Court which restricts communications brought by individuals or NGO's.³¹ Thus, article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court restricts communications submitted to the Court to NGO's and individuals with observer status. This means that if a State has not made a special declaration accepting the competence of the court, an NGO or an individual cannot approach the court. Put differently, even if a State Party has ratified the Banjul Charter and the Protocol but has not made the article 34(6) special declaration her individuals and NGO's *locus standi* is detracted. Hence, unlike the individuals and NGO's of State Parties which have made a special declaration in terms of article 34(6), State Parties which have not yet made the declaration cannot be brought before the African Court to account for human rights violations. Consequently, the study noted that the African Court denies individuals direct access to it as opposed to the Commission.

Furthermore, with regards to the Commission, legal scholars have long since raised the issue that, in comparison with other regional and also global human rights complaints mechanisms, the number of communications received and dealt with by the Commission is miniscule. This is as a result of a problem that the procedures available remain unknown to many. Even many a lawyer or NGO, who might otherwise contemplate bringing a claim before the Commission is unaware of the procedures. Knowledge of especially the individual communication procedure before the commission is therefore crucial. Hence, there is a need for these criteria to be known, and for it to be understood so as to know how the Commission applies them. The way the Commission applies them should be predictable, meaningful and

³⁰ The African Court was established by Article 1 of the Protocol to the Banjul Charter on Human and Peoples' Rights in June 1998.

³¹ Article 5(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998).

lenient, to make the communication procedure a successful tool in vindicating human rights in Africa. Accordingly, the study noted that there is a need to examine the existing criteria in this light and to scrutinise the way the Commission interprets them.

The study has noted that the requirement for admissibility in article 56(1) that requires a communication to 'indicate their author' in article 56(1) means that the author must specify his name and full particulars even if he requests anonymity. The study further noted that the, 'indicate their authors,' phrase should be construed broadly so as to arm the Commission with all the details necessary for the adjudication of a communication. The study also revealed that the American Convention is more specific on this note as it requires a communication to contain the name, profession, nationality, domicile, and signature of the person or of the legal representative of the complainant.³² This is more specific unlike the European Convention which does not say much about this requirement except for the statement that a communication did not have to be anonymous.³³ This requirement also means that anyone has *locus standi* to be the author of a communication. This includes NGOs and individuals other than the victim. The study thus recommends that the Banjul Charter incorporate additional information required by the Commission for one to meet the requirement in article 56(1). In other words, the Banjul Charter, like the American Convention, should state that a communication must specify the name, profession, nationality, signature of the complainant or his or her legal representative and domicile. This will make article 56(1) more detailed as to what is required of the author of a communication and thereby remedying any misunderstanding that may arise in this regard. Additionally, fewer communications will be declared inadmissible for failing to comply with article 56(1).

Furthermore, the study concluded that "compatible with the OAU Charter and the Banjul Charter" which is the second requirement means that the communication

³² Article 46 (1) (d) of the American Convention.

³³ Article 35 (2) (a) of the European Convention.

must allege a *prima facie* violation of the Banjul Charter.³⁴ The American and European Conventions also have the same requirement³⁵ which implies that the communication must be directed at a State Party to the Banjul Charter, and that the communication must be based on acts which occurred within the period of the Charter's application to the State concerned.³⁶ The study also revealed that the European Convention uses the term 'manifestly ill-founded' and this has been held to mean that unsubstantiated, confused and far-fetched complaints that do not reveal a clear violation of the European Convention will be declared inadmissible.³⁷

In addition, the study noted that compatibility with the Banjul Charter also extends to the four main aspects of compatibility with the Banjul Charter as stipulated in article 56(2). Significantly, the Commission has to firstly allege that a right stipulated in the Banjul Charter has been violated.³⁸ This is the substantive requirement (*ratione materiae*).³⁹ The second aspect is that the communication must be directed at a State Party to the Banjul Charter and must also be submitted by a competent person.⁴⁰ This is the personal requirement (*ratione personae*).⁴¹ Thirdly, the communication must be "based on events that occurred within the period of the Charter's application".⁴² This is the temporal requirement (*ratione temporis*).⁴³ The last aspect is that the communication must be based on events that have taken place within the territorial sphere of the Banjul Charter except if it is proven that

³⁴ *Maria Baes v Democratic Republic of the Congo (former Zaire)* (2000) AHRLR 72 (ACHPR 1995) para 42; *Haregewoin Gebre-Sellassie & IHRDA v Ethiopia* 2018 (AHRLR) 118 (ACHPR 2017) para 64.

³⁵ Article 35 (3) (a) of the European Convention; Article 47 (b) (c) of the American Convention.

³⁶ Viljoen and Odinkalu *The Prohibition of Torture and ill-treatment in the African Human Rights System* 85.

³⁷ *Trofimchuk v Ukraine* (2005) 4241/03 (ECHR 2005) para 43.

³⁸ Viljoen and Odinkalu *The Prohibition of Torture and ill-treatment in the African Human Rights System* 85.

³⁹ *Dabolorivhuwa Patriotic Front v the Republic of South Africa* (2000) AHRLR 115 (ACHPR 2013) para 72.

⁴⁰ Viljoen "Admissibility under the African Charter" 69.

⁴¹ *Dabolorivhuwa Patriotic Front v the Republic of South Africa* (2000) AHRLR 115 (ACHPR 2013) para 72.

⁴² Viljoen and Odinkalu *The Prohibition of Torture and ill-treatment in the African Human Rights System* 85.

⁴³ *Dabolorivhuwa Patriotic Front v the Republic of South Africa* (2000) AHRLR 115 (ACHPR 2013) para 72.

there is a continuing violation.⁴⁴ This is known as the territorial requirement (*ratione loci*).⁴⁵ The aforementioned aspects also apply in the American and European systems. In making a decision on the admissibility of a communication, the Commission always considers whether the four aspects of compatibility have been met. The same goes for the European Court. The study therefore concluded that all three regional organs are in sync on this matter.

The third admissibility requirement in article 56(3) raises the question of what disparaging or insulting language entails. This has been held to mean language that undermines the integrity and status of a State.⁴⁶ It also entails remarks meant to unlawfully and intentionally violate the dignity and reputation of the State concerned.⁴⁷ The American Convention has a provision that requires that a communication must not be out of order,⁴⁸ whereas the European Convention has a provision that requires a communication not to constitute an abuse of the right of application.⁴⁹ This has been held to mean that the communication must not be drafted in offensive language or in untrue statements that mislead the court.⁵⁰ The European Court is however more advanced than the African Commission in this regard as it allows complainants to remedy the offensive language so as to enable the communication to pass the admissibility test. The study thus recommends that the Commission should take cognisance of and adopt the European Court's application of the requirement to draft the communication in language that is not offensive or insulting. That is to say, the Commission, like the European Court, should allow complainants to remedy the offensive language contained in the communications so as to enable it to pass the admissibility test. The Commission must not just dismiss a communication based on this ground without giving the

⁴⁴ *Annette Pagnouille (on behalf of Abdoulaye Mazou) v Cameroon* (2000) AHRLR 55 (ACHPR 1995) para 16-18; Viljoen "Admissibility under the African Charter" 69.

⁴⁵ *Dabakorivhuwa Patriotic Front v the Republic of South Africa* (2000) AHRLR 115 (ACHPR 2013) para 72.

⁴⁶ *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (2009) AHRLR 97 (ACHPR 2009) para 91.

⁴⁷ Kofele-Kale 2007 *Annual Survey of International and Comparative Law* 131.

⁴⁸ Article 47 (c) of the American Convention.

⁴⁹ Article 35 (3) (a) of the European Convention.

⁵⁰ *Verbanov v Bulgaria* No 31365/96 5 October 2000.

complainant the opportunity to remedy the offensive language. The Commission will therefore have to match up to this standard so that this requirement cannot be used by Respondent States who want to easily escape the responsibility of human rights violations.

The fourth requirement for admissibility is to the effect that a communication must not be based on news disseminated through the mass media.⁵¹ The study revealed that this requirement deals with the increasing demands of global communication and technology awareness.⁵² It was also revealed that other United Nations treaties and other regional human rights systems have no similar requirement. Therefore, this requirement is only typical to the Banjul Charter. The Commission in providing clarity on this has held that article 56(4) does not prohibit reliance on media reports in part; in fact, it bars only the complete reliance on media reports as the only basis for the communication.⁵³ This raises the question of the limitations that can or should be attached to exclusive reliance as provided in article 56(4).

The Commission provides clarity in this regard by requiring the information from the media to be correct and truthful.⁵⁴ Furthermore, in clarifying the import of the word 'exclusively', the Commission held that it would be precarious if the Commission rejects a communication on the grounds that it has some aspects that rely on "news disseminated through the mass media".⁵⁵ The Commission further stated that the test for exclusive reliance should not be whether the information was acquired through the media, but whether the information is truthful.⁵⁶ Furthermore, the Commission held that a complainant must have at least tried to verify the truthfulness of these allegations. The Commission also accepts the reliance on media reports in part, especially in torture cases where media reports are instrumental in the corroboration of the widespread use of torture.⁵⁷

⁵¹ Article 56(4) of the Banjul Charter.

⁵² Viljoen "Admissibility under the African Charter" 110.

⁵³ Odinkalu 2001 *AHRLJ* 237-238.

⁵⁴ *Jawara v The Gambia* 2000 AHRLR 107 (ACHPR 2000) para 26.

⁵⁵ *Jawara v The Gambia* 2000 AHRLR 107 (ACHPR 2000) PARA 24.

⁵⁶ *Jawara v The Gambia* 2000 AHRLR 107 (ACHPR 2000) PARA 26.

⁵⁷ Viljoen and Odinkalu *The Prohibition of Torture and Ill-Treatment in the African Human Rights System* 87.

Thus, the study accepted that it is nearly impossible to rule out the importance and influence of the media in this day and age. Information is disseminated and acquired through the media especially in torture cases. On this note, though the European Convention does not expressly provide for a limit on the reliance on media, it is nonetheless submitted that the European Court may rule out a communication that relies on false media reports. Such reliance will constitute a ploy to mislead the court and consequently constitute an abuse of the right of application as stipulated in article 35(3) (a). The study thus noted that the Commission's decision to accept the reliance on truthful media reports is therefore acceptable since the media is an important tool in acquiring and sharing information.

In addition, the fifth requirement for admissibility is that the complainant must exhaust all local remedies before submitting a communication to the Commission.⁵⁸ The American and European Conventions also have a similar requirement.⁵⁹ This requirement reflects the sovereignty of a State Party in dealing with its domestic affairs.⁶⁰ Exhausting a local remedy places the onus to exhaust the local remedy on the victim as it would be illogical to require a complainant who is not the victim to exhaust local remedies.⁶¹ To add to the above, these local remedies can only be of a judicial nature to the exclusion of quasi-judicial remedies.⁶² They do not extend to extraordinary remedies such as instituting private prosecutions, requesting a review of a final judicial order or challenging the constitutional legality of an executive order. ⁶³ In addition, the wording 'if any' in article 56(5) has been noted to mean that remedies should be available, sufficient and adequate.⁶⁴ The complainant will therefore have to prove that he or she failed to exhaust all local remedies because they were not available or were either insufficient or inadequate.

Article 56(6) of the Banjul Charter which is the sixth requirement for admissibility of a communication before the Commission provides that a communication is

⁵⁸ Article 56(5) of the Banjul Charter.

⁵⁹ Article 35 of the European Convention; Article 46(1) (a) of the American Convention.

⁶⁰ Korang D 2015 *Journal of Law and Policy and Globalisation* 96-104.

⁶¹ *Ilesanmi v Nigeria* (2003) AHRLR 49 (ACHPR 2003) para 56.

⁶² *Ilesanmi v Nigeria* (2003) AHRLR 49 (ACHPR 2003) para 56.

⁶³ *Zimbabwe Human Rights NGC Forum v Zimbabwe* (2006) AHRLR 76 (ACHPR 2006) para. 67.

⁶⁴ *Jawara v The Gambia* 2000 AHRLR 107 (ACHPR 2000) para 28-35.

admissible if it is submitted to the Commission within a reasonable time after local remedies have been exhausted. This study had addressed the question of what a reasonable time entails was addressed. The Banjul Charter does not elucidate further on what encompasses a reasonable time. This means that the Commission is given the latitude to be flexible and make its own determination on what a reasonable time can entail.⁶⁵ This means that, unlike the American and European Conventions that prescribe six months as a reasonable time, the Commission chooses to determine a reasonable time on a case by case basis.⁶⁶

In coming to a decision on 'reasonable time', the Commission applies the good and compelling reasons principle.⁶⁷ This means that the Commission will likely declare a communication admissible even if it was submitted after six months provided that the complainant propounds a good and compelling reason that for the sake of justice and fairness warrants an opportunity for the complainant to be heard.⁶⁸

In addition, the last requirement for the admissibility of communications is embodied in article 56(7) which stipulates that communications before the Commission are admissible if they do not pertain to matters that have already been settled by the Commission or by the States involved. The study noted in this regard that even though the Banjul Charter provides for the submission of communications simultaneously to a United Nations treaty body such as the United Nations Human Rights Committee and the Commission, a complainant is still obliged to abide by the first finding or decision.⁶⁹ This approach is commendable as it eliminates the possibility of diverging conclusions in the same settled particular case before different bodies.

The European Convention, unlike the Banjul Charter and the American Convention, has a further unique requirement for the admissibility of communications in article 35(3) (b). This unique requirement is to the effect that the European Court will only

⁶⁵ *Scordino v Italy* (2003) 4 (ECHR 2003) para 136-148.

⁶⁶ *Interights (on behalf of Pan-African Movement and Citizen's for Peace in Eritrea) v Ethiopia* (2003) AHRLR 45 (ACHPR 2003) para 56.

⁶⁷ *Article 19 v Zimbabwe* (2010) AHRLR 108 (ACHPR 2010) para 23-32.

⁶⁸ *Article 19 v Zimbabwe* (2010) AHRLR 108 (ACHPR 2010) para 23-32.

⁶⁹ Rule 93(2) of the African Commission's Rules of Procedure.

consider a communication for admissibility if the complainant has suffered a significant disadvantage. It is however contended that the Banjul Charter need not include such a provision in article 56. Thus, though the European Convention precedes the Banjul Charter there may be good reasons to depart from the European practices in the African setting. It should be noted that the European and American systems have dealt with thousands of communications as opposed to only over 200 communications dealt with by the African Commission. It is therefore wise for the European Court to limit the number of communications brought before it, the converse is true for Africa. Put differently, individuals should actually be encouraged to submit more communications before the African Commission.

BIBLIOGRAPHY

Literature

Amerasinghe *Local Remedies in International Law*

Amerasinghe CF *Local Remedies in International Law* 2nd ed (Cambridge University Press Cambridge 2005)

Ankhumah *The African Commission on Human and Peoples' Rights*

Ankhumah EA *The African Commission on Human and Peoples' Rights* (Martinus Nijhoff The Hague) 1996

Balanda *The African Charter on Human and Peoples' Rights*

Balanda ML 'The African Charter on Human and Peoples' Rights in Ginther K & Benedek W (eds) *New Perspectives and Conceptions in International law: An Afro-European dialogue* (Hart Publishing Oxford 1994) 139-158

Bello *The African Charter on Human and Peoples' Rights: A Legal Analysis*

Bello E *The African Charter on Human and Peoples' Rights: A Legal Analysis* (Nijhoff Leiden Boston 2007)

Benedek W 1993 *NQHR*

Benedek W "The African Charter and Commission on Human and Peoples' Rights: How to Make it More Effective" 1993 *NQHR* 25-40

Benedek W "Peoples rights and individuals duties as special features: of the African Charter on Human and Peoples Rights"

Benedek W "Peoples rights and individuals duties as special features of the African Charter on Human and Peoples Rights" in Kunig P, Benedek W & Mahalu CR (eds) *Regional protection of human rights by international law: The emerging African system* (Baden Baden 1985) 109-140

Cerna "The Inter-American Commission on Human Rights: Its Organisation and Examination of Petitions and Communications"

Cerna C "The Inter-American Commission on Human Rights: Its Organisation and Examination of Petitions and Communications" in Harris D and Livingstone S (eds) *The Inter-American System of Human Rights* (Martinus Oxford: 1998) 79–96

Clapham *Africa and the International System: The Politics of State Survival*

Clapham C *Africa and the International System: The Politics of State Survival* (Cambridge University Press United Kingdom 1996)

El-Sheikh 1989 *NQHR*

El-Sheikh B "The African Commission on Human and Peoples' Rights: Prospects and Problems" 1989 *NQHR* 272-297

Gittleman 1982 *Virginia Journal of International Law*

Gittleman R "The African Charter on Human and Peoples' Rights: A Legal Analysis" 1982 *Virginia Journal of International Law* 22 667-690

Gye-Wado 1991 *African Journal of International and Comparative Law*

Gye-Wado O "The Rule of Admissibility Under the African Charter on Human and Peoples' Rights" 1991 *African Journal of International and Comparative Law* 742–55

Gye-Wado 1990 *AJICL*

Gye-Wado O "A Comparative Analysis of the Institutional framework for the Enforcement of Human Rights in Africa and Western Europe" 1990 *AJICL* 187–200

Kofele-Kale 2007 *Annual Survey of International and Comparative L*

Kofele-Kale A "Asserting Permanent Sovereignty over Ancestral Lands" 2007

M'Baye "Introduction to the African Charter on Human and People's Rights"

M'Baye K "Introduction to the African Charter on Human and People's Rights"
in M'Baye K *The African Charter on Human and Peoples' Rights: A Legal Analysis* (Cambridge University Publishers Cambridge 1985) 23-49

McGoldrick *The Human Rights Committee. Its Role in the Development of the International Covenant on Civil and Political Rights*

McGoldrick D *The Human Rights Committee. Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press United Kingdom 1994)

Murray *Human Rights in Africa: from the OAU to the African Union*

Murray R *Human Rights in Africa: from the OAU to the African Union* (Cambridge University Press United Kingdom 2004)

Murray *The African Commission on Human and Peoples' Rights and International Law*

Murray R *The African Commission on Human and Peoples' Rights and International Law* (Hart Publishing United Kingdom 2000)

Murray 1999 *NQHR*

Murray R "Serious or Massive Violations Under the African Charter on Human and Peoples' Rights: A Comparison with the Inter-American and European Mechanisms" 1999 *NQHR* 109-127

Naldi *Documents of the Organization of African Unity*

Naldi GJ *Documents of the Organization of African Unity* (Mansell London: 1992)

Naldi "Future Trends in Human Rights in Africa: The Increased Role of the OAU"

Naldi G J "Future Trends in Human Rights in Africa: The increased Role of the OAU" in Evans M and Murray R (eds) *African Charter on Human and Peoples' Rights- The System in Practice* (Cambridge University Press Cambridge 2002) 1-35

Naldi *The Organisation of African Unity*

Naldi GJ *The Organisation of African Unity* 2nd ed (Mansell London 1999)

Odinkalu 1998 *Transnational Law and Contemporary Problems*

Odinkalu CA "The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment" 1998 *Transnational Law and Contemporary Problems* 359-401

Odinkalu and Christensen 1998 *Human Rights Quarterly*

Odinkalu CA and Christensen C "The African Commission on Human and Peoples' Rights: The Development of Its Non-State Communications Procedures" 1998 *Human Rights Quarterly* 231- 258

Onoria 2003 *AHRLJ*

Onoria H "The African Commission on Human and Peoples' Rights and the exhaustion of local remedies under the Banjul Charter" 2003 *AHRLJ* 1-24

Rudman 2016 *PER*

Rudman A "The Commission as a Party before the Court – Reflections on the Complimentary Arrangement" 2016 *PER* 1-29

Schabas *The European Convention on Human and Peoples' Rights*

Schabas WA *The European Convention on Human and Peoples' Rights* (Oxford university Press United Kingdom 2015)

Scoble "Human Rights Non-Governmental Organisations in Black Africa: Their Problems and Prospects in the Wake of the Banjul Charter"

Scoble H "Human Rights Non-Governmental Organisations in Black Africa: Their Problems and Prospects in the Wake of the Banjul Charter" in Welch C and Meltzer R (eds) *Human Rights and Development in Africa* (State University of New York Press, New York 1984) 192-230

Shaw *International Law*

Shaw MN *International Law* 4th ed (Cambridge University Press Cambridge 1997)

Smith *Textbook on International Law*

Smith RKM *Textbook on International Law* 6th ed (Oxford University Press Oxford 2014)

Umozurike 1983 *AJIL*

Umozurike UO "The African Charter on Human and Peoples' Rights" 1983 *AJIL* 871-938

Umozurike *The African Charter on Human and Peoples Rights*

Umozurike UO *The African Charter on Human and Peoples Rights* (The Hague Kluwer 1997)

Twining and Miers *How to Do Things with Rules*

Twining W and Miers D *How to Do Things with Rules* 5th ed (Cambridge University Press Cambridge 2010)

Viljoen "Admissibility under the African Charter"

Viljoen F "Admissibility under the African Charter" in Evans M and Murray R (eds) *African Charter on Human and Peoples' Rights- The System in Practice* (Cambridge University Press Cambridge 2002) 61-99

Viljoen "Review of the African Commission on Human and Peoples' Rights: 21 October 1986 to January 1997"

Viljoen F "Review of the African Commission on Human and Peoples' Rights: 21 October 1986 to January 1997" in Heyns CH (ed) *Human Rights Law in Africa* 1996 (The Hague Kluwer 1997)

Viljoen and Odinkalu *The Prohibition of Torture and Ill-treatment in the African Human Rights System*

Viljoen F and Odinkalu *The Prohibition of Torture and Ill-treatment in the African Human Rights System* 2nd ed (World Organisation against Torture Switzerland 2014)

Welch 1992 *HRQ*

Welch C "The African Commission on Human and Peoples' Rights: A Five Year Report and Assessment" 1992 *HRQ* 43–61

Zwart *The Admissibility of Human Rights Petitions*

Zwart T *The Admissibility of Human Rights Petitions* (The Hague Kluwer 1994)

Case Law

Alfred B. Cudjoe v Ghana (2000) AHRLR 127 (ACHPR 1999)

Alberto T. Capitaio v Tanzania (2017) AHRLR 1 (ACHPR 2017)

Alhassan Abubakar v Ghana (1996) AHRLR 3 (ACHPR 1996)

Akdivar v Turkey (1996) 4 (ECHR 1996)

Amekane v UK 16 YB 356 (1973)

Amarandei v Romania (2016) 1443/10 (ECHR 2016)

Ambatuelos Arbitration v Greece/ Great Britain (1956) 12 RIAA 83

Amnesty International v Sudan (2018) AHRLR 11 (ACHPR 2018)

Amnesty International v Tunisia Seventh Activity (1993) AHRLR 9 (ACHPR 1993)

Amnesty International v Zambia (2000) AHRLR 325 (ACHPR 1999)

Andre Houver v Morocco (1990) AHRLR 5 (ACHPR 1990)

Annette Pagnouille (on behalf of Mazou) v Cameroon (2000) AHRLR 55 (ACHPR 2000)

Anuak Justice Council v Ethiopia (1996) AHRLR 97 (ACHPR 1996)

Article 19 v Zimbabwe (2010) AHRLR 108 (ACHPR 2010)

Association Internationales des Juristes Democrates v Ethiopia (1989) AHRLR 5 (ACHPR 1989)

Ataykaya v Turkey (2014) 50275/08 (ECHR 2014)

Austrian Committee Against Torture v Burundi (2018) AHRLR 14 (ACHPR)

Austrian Committee Against Torture v Morocco (1989) AHRLR 4 (ACHPR 1989)

Bakweri Land Claims Committee v Cameroon (2004) AHRLR 60 (ACHPR 2004)

Bankovic & Others v Belgium (1999) 52207/99 (ECHR 1999)

Blondje v the Netherlands (2009) 7245/09 (ECHR 2009)

Bob Ngozi Njoku v Egypt (2000) AHRLR 83 (ACHPR 1997)

Centre of the Independence of Judges and Lawyers v Algeria (2000) AHRLR 15 (ACHPR1994)

Centre for the Independence of Judges and Lawyers v Yugoslavia (1988) AHRLR 17 (ACHPR 1988)

Centre Haitien des Libert ´es Publiques v Ethiopia (1988) AHRLR 12 (ACHPR 1988)

Chernitsyn v Russia (2006) 5694/02 (ECHR 2006)

Cinar v Turkey (2006) 28602/95 (ECHR 2006)

Co-ordinating Secretary of the Free Citizens Convention v Ghana (1988) AHRLR 9 (ACHPR 1988)

Commission Francaise Justice et Paix v Ethiopia (1989) AHRLR 6 (ACHPR 1989)

Commission Nationale des Droits de l'Homme et des Libertés v Chad (2000) AHRLR 66 (ACHPR 1995)

Committee for the Defence of Political Prisoners v Bahrain (1988) AHRLR 4 (ACHPR 1988)

Constitutional Rights Project v Nigeria (2000) AHRLR 180 (ACHPR 1995)

Dabalorivhuwa Patriotic Front v the Republic of South Africa (2000) AHRLR 115 (ACHPR 2013) para

Dalia v France (1998) 38 (ECHR 1998)

Darfur Relief and Documentation Centre v Sudan (2009) AHRLR 104 (ACHPR 2009)

De Wilde, Ooms & Versyp v Belgium (1974) 56 ILR 336

Diawara v Benin (2000) AHRLR 22 (ACHPR 1994)

Demopoulos v Turkey (2010) 46113/99 (ECHR 2010)

Dioumessi v Guinea (2000) AHRLR 129 (ACHPR 1994)

Dudgeon v the United Kingdom (1981) 45 (ECHR 1981)

Duringer & Others v France (1999) 61164/00 (ECHR 1999)

Dr Abd Eldayem AE Sanussi v Ethiopia (1988) AHRLR 6 (ACHPR 1988)

Dr Kodji Kofi v Ghana (1988) AHRLR 15 (ACHPR 1988)

Dumbaya v the Gambia (1994) AHRLR 11 (ACHPR 1994)

Eberhard & M v Slovenia (2009) 8673/05 and 9733/05 (ECHR 2009)

Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt (2011) AHRLR 85 (ACHPR 2011)

Eritrea (2007) AHRLR 73 (ACHPR 2007)

Fidan v Turkey (2000) 24209/94 ECHR

Frederick Korvah v Liberia (2000) AHRLR 140 (ACHPR 1988)

Free Legal Assistance Group Lawyers' Committee for Human Rights Union Interafricaine des Droits de l'Homme Les T'emoins de Jehovah v Zaire (1996) AHRLR 9 (ACHPR 1996)

Gabriel Shumba v Zimbabwe 2017 (AHRLR) 142 (ACHPR 2017)

Gerardo Paez Garcia v Venezuela (2013) 13113 (ACHR 2013)

Georges Eugene v USA, Haiti (1990) AHRLR 6 (ACHPR 1990)

Getachew Abebe v Ethiopia (1988) AHRLR 2 (ACHPR 1988)

Government of Namibia v Sikunda 2002 NR 203 (SC)

Greek Federation of Bank Employee Unions v Greece (2011) 72808/10 (ECHR 2011)

Gürdeniz v Turkey (2014) 59715/10 (ECHR 2014)

Hadjali Mohamad v Algeria (2002) AHRLR 15 (ACHPR 1994)

Haregewoin Gebre-Sellassie & IHRDA v Ethiopia 2018 (AHRLR) 118 (ACHPR 2017)

Hertzberg v Finland (1982) 1713 (UNHRC 1982)

Hyde Park v Moldova 14 September (2010) 6991/08 (ECHR 2010)

Ibrahim Dioumessi, Sekou Kande, Ousmane Kaba v Guinea, 2000) AHRLR 129 (ACHPR 1994)

Iheanyichukwu A. Ihebereme v USA (1988) AHRLR 13 9ACHPR 1988)

Ilesanmi v Nigeria (2003) AHRLR 49 (ACHPR 2003)

Institute for Human Rights and Development in Africa (on behalf of Jean Simbarakiye) v Democratic Republic of Congo (2003) AHRLJ 43 (ACHPR 2003)

International Pen v Cameroon, Ethiopia, Kenya, Malawi (1989) AHRLR 8 (ACHPR 1988)

International Pen Constitutional Rights Project Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v Nigeria (1998) AHRLR 1 (ACHPR 1998)

International Lawyers Committee for Family Reunification v Ethiopia (1988) AHRLR 14 (ACHPR 1988)

Internationale Handelsgesellschaft v Einfuhr und Vorratstelle fur Getreide und Futtermittel (1970) ECR 1125

Interights (on behalf of Pan-African Movement and Citizens for Peace in Eritrea) v Ethiopia (2003) AHRLR 45 (ACHPR 2003)

Interights v Mauritania (2010) AHRLR 105 (ACHPR 2010)

Interights (on behalf of Sikunda) v Namibia (2002) AHRLR 21 (ACHPR 2002)

Jawara v The Gambia 2000 (AHRLR) 107 (ACHPR 2000)

Jimmy Rafael & Raman Antonio & Family v Venezuela (2011) 4/11 (ACHR 2011)

John D Ouko v Kenya (2000) AHRLR 27 (ACHPR 2000)

Jose Gregorio Mota v Venezuela (2012) 1336-07 (ACHR 2012)

Kafkaris v Cyprus (2011) 9644/09 (ECHER 2011)

Katangese Peoples' Congress v Zaire (2000) AHRLR 72 (ACHPR 1995)

Kazeem Aminu v Nigeria (2000) AHRLR 15 (ACHPR 2000)

Kenya Human Rights Organisation v Kenya (1996) AHRLR 9 (ACHPR 1996)

Law Offices of Ghazi Suleiman v Sudan (2002) AHRLR 25 (ACHPR 2002)

Legal Defence Centre v The Gambia (2000) AHRLR 18 (ACHPR 2000)

Ligue Camerounaise des Droits de l'Homme v Cameroon (2000) AHRLR 61 (ACHPR 1997)

Loizidou (Preliminary Objections) v Turkey (1995) 310 (EHRR 1995)

M. S. Ceesay v The Gambia (1995) 13 AHRLR (ACHPR 1995)

Malawi Africa Association v Mauritania (2018) AHRLR 136 (ACHPR 2018)

Maria Baes v Democratic Republic of the Congo (former Zaire) (2000) AHRLR 72 (ACHPR 1995)

Media Rights Agenda, Constitutional Rights Project, Media Rights Project and Constitutional Rights Project v Nigeria (2000) AHRLR 200 (ACHPR 1998) (ACHPR 1997)

Michael Majuru v Zimbabwe (2008) AHRLR 95 (ACHPR 2008)

Milošević v the Netherlands (2002) 631/01 (ECHR 2002)

Mohamed El-Nekheily v OAU (1988) AHRLR 10 (ACHPR 1988)

Monja Joana v Madagascar (2000) AHRLR 141 (ACHPR 1996)

Mouvement Burkinabe des droits de l'Homme et des Peuples v Burkina Faso (2001) AHRLR 32 (ACHPR 2001)

Mouvement des Réfugiés Mauritaniens au S'en'egal v Senegal (2000) AHRLR 287 (ACHPR 1997)

Mpaka-Nsusu Andre Alphonse v DRC (2001) AHRLR 17 (HRC 1986)

Muthuthirin Njoka v Kenya (2000) AHRLR 135 (ACHPR 2000)

Norris v Ireland (1988) 142 (ECHR 1988)

O'Halloran and Francis v the United Kingdom (2008) 46 (EHRR 2008)

OAQ Neftyanaya Kompaniya Yukos v Russia (2011) 14902/04 (ECHR 2011)

Obert Chinhamo v Zimbabwe (2007) AHRLR 80 (ACHPR 2007)

Open Door and Dublin Well Woman v Ireland (1992) 246 (ECHR 1992)

Organisation Mondiale contre la Torture (OMCT) v Zaire (1996) AHRLR 6 (ACHPR 1996)

Papamichalopoulos and Others v Greece (1993) 14556/89 (ECHR 1993)

Patyi and Others v Hungary (2008) 5529 (ECHR 2008)

Paul S. Haye v The Gambia (1994) AHRLR 12 (ACHPR 1994)

Peoples' Democratic Organisation for Independence and Socialism v The Gambia, (2000) AHRLR 104 (ACHPR 1996)

Prince J. N. Makoge v USA (1988) AHRLR 18 (ACHPR 1988)

Purohit and Moore v The Gambia (2003) AHRLR 49 (ACHPR 2003)

REDRESS v Sudan (2018) AHRLR 10 (ACHPR 2018)

Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia (2000) AHRLR 321 (ACHPR 1996)

Rights International v Nigeria (2000) AHRLR 132 (ACHPR 2000)

Rinck v France (2010) 18774/09 ECHR

Roberto Moreno Ramos v United States (2003) 4446/02 (ACHR 2003)

Sabri Güneş v Turkey (2012) 27396/06 (ECHR 2012)

Sakwe v Cameroon (2000) AHRLR 26 (ACHPR 2000)

S.A.S v France No 43835/11 1 July 2014

Scordino v Italy (2003) 4 (ECHR 2003)

Sejdovic v Italy (2006) GC 46

Seyoum Ayele v Togo (2000) AHRLR 315 (ACHPR 1994)

Shefer v Russia (2012) 45175/04 (ECHR 2012)

Simon B. Ntaka v Lesotho (1988) AHRLR 18 (ACHPR 1988)

Sikunda v Government of Namibia (1) 2001 NR 67 (HC)

Sikunda v Government of Namibia (3) 2001 NR 481 (SC)

Sylka v Poland (2014) 19219/07 (ECHR 2014)

SHB V Canada (1985) A/42/40 (ACHR 1985)

SOS-Esclaves v Mauritania (1997) AHRLR 35 (ACHPR 1997)

Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v Botswana (2018) AHRLR 5 (ACHPR 2018)

Tanko Bariga v Nigeria (2000) AHRLR 178 (ACHPR 1994)

The Social & Economic Rights Action Centre for Economic & Social Rights v Nigeria Africa (2001) AHRLR 34 (ACHPR 2001)

Trofimchuk v Ukraine (2005) 4241/03 (ECHR 2005)

Union Nationale de Liberation de Cabinda v Angola (1988) AHRLR 10 (ACHPR 1988)

Union Interafricaine des Droits de l'Homme and Others v Angola (2000) AHRLR 18 (ACHPR 2000)

Vatan v Russia (2004) 47978/99 ECHR

Verbanov v Bulgaria (2000) 31365/96 ECHR (2000)

Wesley Parish v Indonesia (1990) AHRLR 8 (ACHPR 1990)

Williams v the United Kingdom (2009) 32567/06 (ECHR 2009)

World Organisation against Torture v Zaire (1996) AHRLR 1 (ACHPR 1996)

X v Germany (1961) 984/61 (ECHR 1961)

X v the Netherlands (1976) 7230/75 ECHR (1976)

X v The United Kingdom (1976) 6956/76 ECHR (1976)

Y v Latvia (2014) 61183/08 (ECHR 2014)

Yaşa v Turkey (1998) 28 (ECHR 1998)

Zegveld and Ephrem v Eritrea (2003) AHRLR 52 (ACHPR 2003)

Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe (2009) AHRLR 97 (ACHPR 2009)

Zimbabwe Human Rights NGO Forum v Zimbabwe (2006) AHRLR 76 (ACHPR 2006)

International instruments

African Charter on Human and Peoples Rights (1981)

Common Market for Eastern and Southern Africa Treaty (1993)

Convention against Torture (1984)

European Convention of Human Rights (1950)

Inter-American Convention on Human Rights (1969)

International Covenant on Civil and Political Rights (1966)

International Covenant on Economic, Social and Cultural Rights (1966)

International Law Commission Draft Articles on State Responsibility (2001)

Organisation of African Unity Charter (1963)

Optional Protocol to the International Covenant on Civil and Political Rights (1966)

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998)

Revised Treaty of the Economic Community of West African States (1996)

Rules of Procedure of the African Commission on Human and Peoples Rights (1988)

Rules of Procedure of the European Court on Human Rights (2018)

Treaty Establishing the African Economic Community (1991)

Vienna Declaration and Programme of Action (1993)

Vienna Convention on the Law of Treaties (1969)

Internet sources

African Commission 2003
http://www.achpr.org/files/pages/communications/procedure/achpr_communication_procedure_eng.pdf

African Commission 2003 *Information Sheet 3 Communication Procedure*
http://www.achpr.org/files/pages/communications/procedure/achpr_communication_procedure_eng.pdf accessed 23 July 2018

African Commission on Human and Peoples Rights 2018
<https://www.achpr.org/instruments/achpr>

African Commission on Human and Peoples Rights 2018 *Legal Instruments*
<https://www.achpr.org/instruments/achpr> accessed 23 July 2018

Council of Europe 2018 <https://www.echr.coe.int/pages.aspx?p=basictexts>

Council of Europe 2018 *European Court of Human Rights*
<https://www.echr.coe.int/pages.aspx?p=basictexts> accessed 23 July 2018

The newsletter of the African Union 2016 *African Commission*
<https://au/int/sites/default/files/documents/31520-doc->

The newsletter of the African Union 2016 *African Commission*
<https://au/int/sites/default/files/documents/31520-doc-> accessed 23 July
2018