THE APPLICATION OF THE LOCAL REMEDIES RULE UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: WITH A CASE STUDY OF COMMUNICATIONS FROM THE NIGER DELTA

By
Bernadine M. Agocha
Institute Of Comparative Law
McGill University, Montreal
November 2009

A THESIS SUBMITTED TO MCGILL UNIVERSITY IN PARTIAL FULFILLMENT OF THE REQUIREMENTS OF THE DEGREE OF MASTER OF LAWS (LLM)

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Acknowledgement

I would like to thank my thesis supervisor, Dr. Payam Akhavan. I would also like to express my respect and gratitude to my beloved sister, whose commitment to public service continues to inspire me. I dedicate this thesis in memory of the Ogoni 9 and all who have lost their lives in pursuit of justice in the Niger Delta. “Justice cannot be confined within limitations of space or time…justice breaks out beyond the bounds of particular cultural traditions and territorial boundaries.”¹

Abstract

The thesis argues that the local remedies rule as applied by the African Commission in the Niger Delta cases in a flexible manner which focused on the Respondent State’s obligation to provide effective legal redress rather than the mechanical act of exhaustion of domestic remedies by the petitioner, represents a correct application of the rule in human rights protection and that the African Commission’s pronouncements regarding the absence of effective domestic legal remedies in Nigeria facilitated improvements in Nigeria’s legal institutions. A flexible approach to the local remedies rule should therefore be applicable in all meritorious communications in the African human rights system.

Résumé

La thèse soutient que, dans les cas observes dans le Delta de Niger, la Commission Africaine a appliqué le règlement sur les recours locaux d’une manière flexible en mettant l’accent sur l’obligation de l’État répondant de prévoir un recours légal effectif plutôt que de s’appuyer machinalement sur le principe voulant que le requérant doit d’abord épuiser le recours domestiques. Cette approche représente une application juste du règlement dans le domaine de la protection des droits humains. De plus, la thèse soutient que les déclarations de la Commission Africaine concernant l’absence de recours légaux domestiques effectifs au Nigeria ont ouvert la porte aux améliorations dans les institutions légales de ce pays. Cette approche flexible au règlement sur les recours locaux devrait donc être applicable à toute pétition méritoire dans le système de droits humains en Afrique.
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CHAPTER ONE: INTRODUCTION

Within international human rights law there are procedural barriers that limit individual access to human rights tribunals. Foremost among these procedural barriers is the local remedies rule—a principle of customary international law which requires that a State be given opportunity to redress an alleged wrong within the framework of its own domestic legal system before its international responsibility can be called into question at the international level.¹ The misapplication of the local remedies rule in human rights cases can place the individual petitioner in a weaker evidentiary position despite formal procedural equality with the Respondent State.³ However, when applied by a human rights institution such as the African Commission on Human and Peoples’ Rights (African Commission) in a flexible manner without the “excessive formalism” of the traditional application of the rule, the local remedies rule can be transformed from a procedural barrier into a non-coercive adjudicative mechanism to facilitate normative reform within domestic legal institutions of States Parties to the African Charter on Human and Peoples’ Rights (African Charter).⁴

Using three communications arising from the Niger Delta crisis as case study, the thesis argues that in contrast with earlier admissibility rulings where the African Commission strictly applied the exhaustion requirement, in communications pertaining to the Niger Delta crisis, the African Commission applied the local remedies rule with greater flexibility by shifting the focus of the

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¹ See Interhandel Case (United States v. Switzerland), Preliminary Objections, [1959] I.C.J. Rep. 6 at 27 (in a dispute concerning a Swiss company seeking return of assets seized by the United States, the US raised as a preliminary defence the failure of the Swiss plaintiffs to exhaust local remedies. In ruling against Switzerland, the ICJ stated that the local remedies rule constitutes a principle of customary international law which operates as a prior condition to the exercise of international adjudication of claims).


admissibility inquiry from review of the petitioners’ mechanical exhaustion of domestic procedures to emphasizing the Respondent State’s obligation to ensure the existence within its domestic legal framework available remedies capable of providing effective judicial redress.⁵

The Niger Delta cases were authored in the 1990s during Nigeria’s military dictatorships and the complaints challenged Nigeria’s domestic legal order under military rule. The Niger Delta cases provided the African Commission opportunity to examine in broad detail ineffective adjudicative arrangements implemented by the governing regime. It will be demonstrated in this thesis that the scrutiny into Nigeria’s domestic legal framework, attendant with a flexible application of the local remedies rule, identified serious due process violations and the African Commission’s persistent denunciation of inadequate fair trial standards in Nigeria facilitated normative reforms within Nigeria’s legal institutions.

Given the regional importance of establishing domestic legal processes within African States capable of providing effective judicial redress for human rights violations, “the demonstrated capacity” of the African human rights system to facilitate normative improvements in Nigeria’s domestic legal institutions “ought to be more vigorously harnessed…in order to help address some of the structural problems that contribute to the generation of conflicts …” in Africa.⁶

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1.2 THESIS OVERVIEW

Chapter One

The thesis examines the African Commission’s role in facilitating reforms in Nigeria’s domestic legal system during the Niger Delta crisis. It is argued that close scrutiny of Nigerian domestic courts during the African Commission’s exhaustion inquiry identified aspects of the domestic legal order in contravention of African Charter due process guarantees. This prompted the African Commission to issue decisions and resolutions specifying needed improvements in the dispensation of justice in Nigeria. Although initially recalcitrant, the Nigerian government subsequently implemented the legal reforms recommended by the African Commission. The African Commission’s flexible application of the local remedies rule in the Niger Delta cases thus provides a good example of how the Commission can facilitate improvements in the legal system’s of other African States.

The Research methodology includes case law analysis and document review. Section 1.3 (a) provides a review of the literature on the African human rights system, with particular focus on the admissibility practice of the African Commission. Scholarship on the extension of the local remedies rule from the diplomatic context to human rights protection is also reviewed in this section.

Chapter Two

The African human rights system does not function in isolation but rather constitutes an integral part of the international human rights framework. 7

7 There are several instruments impacting human rights protection in Africa. However, in this thesis, “the African human rights system” refers specifically to the normative framework provided by the African Charter and its primary implementation body, the African Commission. Although oversight and implementation of the African Charter is currently vested in both the African
Two of the thesis briefly reviews the normative developments in the international protection of human rights in the aftermath of the Second World War (WW II) that led to the extension of legal personality to the individual in international law and aided in establishment of regional human rights arrangements such as the African Charter system with its broad *locus standi* rules which grant a degree of procedural capacity to individual human rights petitioners.

Section 2.6 of the thesis presents an overview of the African human rights system and reviews the African Commission’s mandate and enforcement authority under the African Charter.  

Chapter Three

It is noted in this chapter that fundamental human rights guarantees conferred on individuals by human rights instruments such as the African Charter are of little practical effect if the human rights of the individual are not fully protected by domestic legal systems. To minimize the occurrence of rights deprivations resulting from inadequate domestic legal systems, several scholars including A.A. Cancado Trindade suggest application of the local remedies rule in a flexible manner with “emphasis on the element of actual redress rather than the process of exhaustion.” The close scrutiny of the domestic legal framework arising from a flexible application of the local remedies rule identifies defects in the domestic remedies available to human rights victims, thereby enabling the international human rights institution to recommend corrective measures.
Within the African human rights system, ensuring the availability of effective domestic legal redress for rights violations has been identified as a critical component to maintaining regional stability and its absence constitutes “a root cause” of the “restiveness of the sub-State groups in post-colonial Africa.”

The domestic legal reforms facilitated by the African Commission’s pronouncements on Nigeria’s inadequate remedies in the Niger Delta cases demonstrate that the flexible application of the local remedies rule by the African Commission can assist States Parties to the African Charter in improving national legal systems.

Chapter Four

Before presenting the Niger Delta case study, Chapter Four of the thesis first reviews the evolution of the local remedies rule in the African human rights system. It is maintained that the African Commission in its initial admissibility practice applied the local remedies rule strictly with little scrutiny of the Respondent State’s domestic legal framework. The absence of detailed examination of national legal systems of States Parties by the African Commission diminished the capacity of the African human rights system to ensure State compliance with African Charter due process guarantees.

10 Okafor, “Peace Building”, supra note 6 at 439.

Sections 4.1 through 4.3 of the thesis will review those early communications where the African Commission insisted upon the petitioner’s mechanical compliance with domestic legal processes without addressing the effectiveness of such remedies or the Respondent State’s duty to ensure the availability within its legal system of adequate redress for the human rights claims asserted by the petitioner.

It is argued in section 4.7 of the thesis that a notable shift occurred in the Commission’s admissibility practice during the Niger Delta crisis. The African Commission’s flexible application of the local remedies rule in the Niger Delta cases stands in stark contrast to the more restrictive approach to the exhaustion requirement seen in decisions of the Commission in earlier regional communications. The Commission’s flexible application of the local remedies rule in the Nigerian context also achieved significant domestic impact and facilitated reform within Nigeria’s legal institutions. The Niger Delta case study will focus on three complaints filed with the African Commission alleging human rights violations by the Nigerian military government. The first Niger Delta case decided in 1998 was *International PEN and others (on behalf of Ken Saro-Wiwa Jr.) v. Nigeria (Wiwa)*. In 1999 the African Commission issued its decision in *Rights International v. Nigeria (Rights International)*. This was then followed by the Commission’s 2001 decision in *Social and Economic Rights Action Center v. Nigeria (SERAC)*.\(^{12}\)

Section 4.4 provides a brief overview of the underlying factors which prompted the Niger Delta communications before the African Commission. This will be followed by analysis of the correct manner in which the local remedies rule was applied by the African Commission in the three Niger Delta cases. Rather than a perfunctory test of admissibility, the African Commission in the Niger Delta cases closely examined the Respondent State’s existing legal order admissibility ruling and finally the Commission’s decision on the merits. Generally, the Commission’s “decision” is understood to reference the whole of the written text in which the Commission sets out its resolution of the matter).

and determined the domestic remedies available to rights petitioners incapable of providing adequate redress. The Commission therefore declined to apply the Charter’s exhaustion requirement and recommended that specific measures be adopted by the Nigerian military government to improve the availability of effective domestic redress.

Following review of the African Commission’s admissibility decisions in the Niger Delta cases, section 4.8 will analyze positive domestic outcomes facilitated by the African Commission’s pronouncements regarding the lack of effective judicial remedies in Nigeria.

Chapter Five

The thesis concludes by discussing the current status of the local remedies rule in the admissibility practice of the African Commission. Section 5.2 identifies recent efforts by the African Commission to further improve its admissibility rulings in relation to the human rights petitioner’s obligation to exhaust local remedies. Although the African Commission still requires the human rights complainant to exhaust judicial remedies available under a Respondent State’s municipal laws, the obligation is not indefatigable nor required when clearly futile.\(^\text{13}\)

1.3 RESEARCH METHODOLOGY

The thesis argument is primarily established through review of the relevant literature on the African human rights system and analysis of case law stemming from the admissibility practice of the African Commission.

\(^{13}\) See Article 19 v. Eritrea (2007) Afr. Comm. HPR 275/03 (providing a recent example of the Commission’s current stance on the local remedies rule, the Article 19 complaint alleges due process violations arising from in the Respondent State’s unlawful detention of journalists. The Commission found the communication admissible due to extensive due process violations in domestic judicial proceedings which rendered local remedies unavailable).
Scholarship on the extension of the local remedies rule to human rights protection is also referenced in the thesis.

a. Literature Review

Scholarship on the institutional development of the African human rights system is reviewed and used to demonstrate the historical gap in the regional protection of human rights the establishment of the African Charter has attempted to bridge. Publications by Umozurike, Lindholt, Ndahinda, and Viljoen trace the origins of the African Charter from post-WW II developments in the international protection of the individual through Africa’s decolonization which was spearheaded by the Organization of African Unity (OAU) under whose auspices the African Charter ascended.14 In general, much of the literature on the African human rights system applauds the tremendous effort required to create a regional human rights body authorized to monitor the domestic conduct of States in a region where the principle of non-interference still holds considerable sway in inter-State relations.15 However, while scholars acknowledge the necessity of a


regional human rights system to address persistent human rights challenges in African States, many reviewers express deep misgivings concerning the African Charter’s capacity to actually improve human rights conditions in Africa or influence State conduct in a substantive manner. As Ndahinda points out, “the major challenge to human rights promotion and protection in Africa relates not to the nature of rights but to a genuine commitment to their implementation.” Ndahinda elaborates further on the challenges to improving human rights conditions in Africa, noting that: “Africa seems to represent a paradoxical situation whereby the proliferation of formally adhered-to human rights norms is not matched with practice…” Scholarship by authors as diverse as Matua, Gittleman, Naldi, and Welch have also addressed defects in the level of protection the Charter provides due to factors such as the prevalence of “claw-back” clauses which appear to limit rights guarantees in the African Charter; limitations placed on the African Commission’s remedial authority because of its subordinate role to the African Union’s Assembly of Heads of State; and the near absence of direct State compliance with recommendations of the African Commission. While

(recalling the arduous history of the African Charter, the author notes that proposals to establish the African Charter were first forwarded in 1961 at the Conference on the Rule of Law in Lagos, Nigeria organized by the International Conference of Jurists to protect human rights in the newly independent States of Africa. The proposals then underwent years of review, seminars and resolutions which finally culminated in the 1979 OAU resolution tasking Justice E.K. Wiredu of Ghana to prepare a preliminary draft of the African Charter. The Wiredu Proposals formed the basis of the draft Charter prepared in Banjul in 1980 and adopted by the OAU in 1981); See also Umozurike, supra note 14 at 902-903 (describing regional adherence to the principle of non-interference in domestic affairs of States Parties to the OAU as hindering the protection of human rights in Africa, especially during the late 1960s through the 70s which marked the period after decolonization in most African States).

16 Viljoen & Louw, “Findings of the African Commission”, supra note 11 at 1-2 (noting that “innovations, advances and regional appropriateness of the substantive provisions in the African Charter have mostly evoked positive comment. More concern has been raised in respect of the implementation of findings made on the basis of these provisions”).

17 Ndahinda, supra note 14 at 714-715.

questions concerning derogation and the Charter’s supremacy to national laws have been largely put to rest in African Commission decisions such as the Media Rights case, the available data from studies prepared by Udombana, Viljoen and Louw, clearly indicate that non-compliance by States Parties with the recommendations of the African Commission continues to plague and devalue the African human rights system.

Given the broad range of authors critiquing perceived flaws in the African human rights system, it is not surprising that the literature is replete with proposals calling for revision of African Charter articles, while other studies promote alternatives to the Africa Charter’s current treaty enforcement regime.
But Odinkalu cautions that most conventional proposals for enhancing State compliance and implementation of African Commission decisions would require monetary investiture absent within the system or necessitate action by States Parties which would inevitably lead to prolonged delay—while the African Commission may modify its own rules of procedure, the African Charter can only be amended if approved by the majority of States Parties.\(^{23}\) Alternatively, some publications have provided insightful observations which suggest that radical institutional transformation is not necessarily required to improve the African human rights system’s capacity to protect individual rights. Okafor’s scholarship asserts that human rights institutions are “able to exert influence not as much because of how they are organized or what their enabling texts say…but much more because of how they read the text or engage with key state and sub-state actors… via processes of trans-judicial communication.”\(^ {24}\) Moreover, since it is primarily before domestic courts that human rights violations are adjudicated, D’Ascoli and Scherr recommend that international human rights institutions increase focus on facilitating improvements in the dispensation of justice within

Charter obligations by emphasizing individual duties while minimizing State obligations); See Udombana, “So Far”, supra note 21 at 36-37 (recommendation changes in the complaints procedure under the African Charter, to include inter alia, a specified time period within which States Parties must comply with recommendations by the Charter’s enforcement bodies); See Kenneth A. Acheampong, “Reforming the Substance of the African Charter on Human and Peoples’ Rights: Civil and Political Rights and Socio-Economic Rights” (2001) 2 Afr. Hum Rts L.J. 185 (discussing reform of provisions of the African Charter).


\(^{24}\) Okafor, “Peace Building”, supra note 6 at 422 (remarking on the issue of reforms to the African Charter system, Okafor states: “While textual or organizational reform of the system is not unimportant, to focus on it as the key to the [African] system’s effectiveness is, for the most part, misguided…”. In the author’s view, the Commission’s expansive interpretation of existing African Charter articles along with increased engagement with sub-state and non-state actors have proved much more effective in altering the behavior of States Parties); See Odinkalu, “ACHPR Case and Complaints Procedures”, supra note 23 at 234 (arguing that the African Charter and the Commission “have in-built mechanism for self-correction and adjustment.” Furthermore, “the Commission has, through its casework, jurisprudence, and practice, rendered much of this call for treaty revision irrelevant” at 235).
domestic legal systems. D’Ascoli and Scherr point out that an important mechanism with proven efficacy in furthering important human rights objectives such as the right to a fair trial and procedural due process is found within the existing admissibility requirements of international human rights institutions. In scholarship on the application of the local remedies rule in the context of human rights protection, D’Ascoli and Scherr write that: “in the field of human rights, the local remedies rule “seems to represent a further guarantee for individuals [and] can thus be seen in improving the judicial protection of human rights at the national level, in coordinating the international with the national level and the interests of the States with the interests of individuals.” Udombana provides additional support for the application of the local remedies rule in a manner which strengthens the domestic protection of human rights, noting that “[a] focused and creative interpretation and application of the local remedies rule by the African Commission could play a role in resolving the various antagonisms besetting the protection of human rights in Africa.”

The views expressed by Udombana, D’Ascoli and Scherr on the use of the local remedies rule to further human rights in domestic legal institutions, coincide with principles advanced by A.A. Cancado Trindade on the correct application of the local remedies rule in human rights protection. Trindade’s comprehensive scholarship describes the juridical effort within international human rights institutions to adapt the traditional local remedies rule to the prevailing needs of individual protection. Trindade’s analysis of the local remedies rule includes a review of the history of the rule from its traditional application in the context of diplomatic protection to its contemporary extension to the area of human rights protection. Trindade identifies the “contextual” distinctions between diplomatic

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26 Ibid. at 18; See Frans Viljoen, “African Charter Procedure and Admissibility”, supra note 11 at 81(noting that the exhaustion requirement is part of the admissibility rules of all international human rights systems).
27 D’Ascoli & Scherr, supra note 25 at 18.
29 Trindade, Exhaustion of Local Remedies, supra note 5at 36-37.
protection and human rights protection which necessitates a flexible application of the rule in the latter. A contrasting perspective on the application of the local remedies rule in human rights protection is offered by C.F. Amerasinghe in scholarship which advocates stricter conformity with the traditional application of the rule as it originated in diplomatic protection. However, in a review of Amerasinghe’s publication, Trindade rejects Amerasinghe’s critique of the flexible application of the local remedies rule in human rights protection. The Niger Delta case study in Sections 4.7 and 4.8 of the thesis validates Trindade’s contention that close scrutiny of the Respondent State’s domestic legal framework rather than petitioners’ mechanical exhaustion of local remedies, aides in furthering the protection of human rights by ensuring the availability of effective judicial remedies in the domestic legal order.

There is also ample support in the literature for the thesis argument that the African Commission’s close scrutiny of Nigeria’s inadequate domestic remedies facilitated reform of Nigeria’s legal institutions. Research by Viljoen indicates that the African human rights system has achieved the highest domestic impact in Nigeria. Viljoen links compliance with African Commission recommendations in Nigeria to the incorporation of the Charter into Nigeria’s domestic laws, however, he also finds that notable improvements in the written decisions of the Commission made the State’s implementation more

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32 See A. A. Cancado Trindade, “Thoughts on Recent Developments in the Case Law of the Inter-American Court of Human Rights: Selected Aspects” (1998) 92 Am. Soc’y Int’l L. Proc. 192, 201 [Trindade, “Thoughts on Recent Developments”] (Trindade writes that States are prepared to comply with decisions of human rights tribunals that “rest on a solid juridical basis,” and he points to “the prompt impact at the domestic law level” of human rights decisions which specify the State’s duty to provide effective domestic legal remedies).
feasible. Viljoen writes that when the African Commission’s jurisprudence improved and “took on a more legal appearance with reasoned arguments on the merits and more detailed remedies,” State implementation of the Commission’s recommendations increased, particularly in Nigeria.

However, Hathaway cautions that explaining State compliance with human rights regimes often proves “a difficult task.” Koh similarly writes that the compliance question presents a query that has “vexed” scholars in international relations and international law for years. Yet, despite its importance in the field of international law and inter-state relations, there is little consensus in the literature on appropriate resolution of the compliance question. In Koh’s view, “the various theoretical explanations offered for compliance are complimentary, not mutually exclusive.” As such, Koh recommends that where permissible and most likely to yield the greatest improvement in domestic human rights conditions, “those seeking to encourage countries to abide by international human rights law […] use all the tools at their disposal—not simply self-interest of states, not simply encouragement of liberal identity, not simply promotion of shared values, and not simply facilitation of legal process, but all of these at

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34 Viljoen, “African Charter in Domestic Courts”, supra note 33 at 7-8; See Viljoen & Louw, Findings of the African Commission”, supra note 11 at 12 (noting that initially the remedies ordered by the Commission were vague and often failed to specify relief. However, in the Niger Delta complaint against Nigeria, the Commission set forth “well-structured and detailed remedies, that are clear on implementation and the relief it will grant victims” at 12, n. 55).


36 See Oona Hathaway, “Do Human Rights Treaties Make a Difference” (2002) 111 Yale L.J. 1935, 1946 1962 (in scholarship which attempts to quantify State compliance with international human rights treaties, Hathaway credits the “explanatory” strength of the different theoretical approaches and their variants but questions their “predictive” ability. “Although each theory can account for some of the results, none either individually or collectively can explain totally…the patterns of human rights compliance…” at 1998-99).


once.” 39  Put differently, Koh affirms that, “[d]omestic internalization of human rights norms can occur through a variety of means, including incorporation into the legal system through judicial interpretation…”40

In linking Nigeria’s improved human rights conditions to the African human rights system, Section 4.9 of the thesis explores the interaction between sub-state actors, non-state actors and the African human rights system in achieving the normative reforms in Nigeria’s legal institutions. Okafor writes that, while important, the role of sub-state and non-state actors was not determinative in securing release of political detainees from the Niger Delta, or in the abrogation of draconian decrees ousting judicial review of Nigeria’s military tribunals. 41 The indispensable component of “the transnational legal process” that most influenced the Nigerian military government’s concessions during the Niger Delta crisis was the African human rights system through recommendations and resolutions of the African Commission. As explained by Okafor, the argument is not that the African system “caused” the normative changes in Nigeria’s legal institutions “in the same way that a twist to the hand causes pain,” rather, the salient point is that the African human rights system steadfastly promoted the idea of normative reform within Nigeria’s legal institutions and thereby “helped to foster a significant and valuable level of ‘correspondence’ between the behavior of the executive branch within Nigeria and the goals and norms of the African human rights system itself (including the decisions and resolutions that have emanated from that institution)...” 42  Onoria has also recognized the African

40 Ibid. at 1960-61 quoting Koh, “Transnational Legal Process” supra note 38 at 183-84(Koh’s “transnational legal process” model whereby a variety of actors engage in “…international fora to make, interpret, enforce and ultimately internalize rules of transnational law,” provides an important explanatory model for understanding State compliance with international human rights law); See Hathaway, supra note 36 at 1961-62 (discussing the “predictive” ability of theoretical models on state compliance with international law, Hathaway remarks that Koh’s formulation of the transnational legal process model “presents a coherent explanation for compliance with human rights regimes” ).
42 Okafor, “Peace Building”, supra note 6 at 423,425-427
Commission’s “impressive jurisprudence on the local remedies rule” in the Nigeria context and argues that the Commission’s successful efforts in facilitating domestic reforms in Nigeria’s legal institutions through improved scrutiny of the State’s domestic legal framework, should be extended to other State Parties where the scourge of State deprivation of a right of access to courts continues to flourish.43

b. Document Research

Other documents relied on to establish the thesis argument include the African Charter on Human and Peoples’ Rights; the Rules of Procedure of the African Commission; African Commission resolutions and activity reports relating to the human rights situation in Nigeria during the Niger Delta crisis.44

c. Case Study

A comparative analysis of earlier African Commission decisions with the admissibility rulings in the Niger Delta cases is employed to demonstrate the evolution of the local remedies rule in the African human rights system. With respect to the African Commission’s initial application of the local remedies rule, the thesis reviews several regional communications where the Commission’s

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earlier admissibility rulings unsatisfactorily addressed the exhaustion issue. This will be followed by analysis of the correct manner in which the rule was applied in the Niger Delta cases.

In regard to the domestic impact of the African human rights system on Nigeria’s legal institutions, this aspect of the thesis is demonstrated through examination of domestic legislative initiatives implementing legal reforms recommended by the African Commission. Section 4.8 also reviews specific cases adjudicated in Nigeria’s domestic courts where judicial rulings and legal outcomes reflect African Commission recommendations.
CHAPTER TWO: THE EXPANSION OF HUMAN RIGHTS PROTECTION UNDER CONTEMPORARY INTERNATIONAL LAW

2.1 The Absence of Individual Protection and Exclusion of Non-State Entities under Traditional International Law

The emergence of contemporary human rights regimes such as the African Charter which grant a degree of procedural capacity to individual complainants was made possible by social and political processes over the last fifty years that have transformed the framework through which the idea of the individual in international law is regarded. However, prior to WW II international law was firmly grounded in “the ideology of sovereign statehood” and denied legal capacity to non-State entities. During this era of international law, the individual was mostly without legal standing except to the degree in which the ill treatment of foreigners or non-residents impacted diplomatic relations between

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46 See Liam Burgess & Leah Friedman, “A Mistake Built on Mistakes: The Exclusion of Individuals under International Law” (2005) 11 Mq. L. J. 1 online: Macquarie Law Journal <http://www.austlili.edu.au/au/journals/MqLJ/2005/11.html> (describing the focus of international law prior to WW II as centered on the “ideology of State sovereignty” which was confirmed in legal terms by the 1648 Treaty of Westphalia. Thereafter, “The nation state became the exclusive subject of international relations and international law, entitling a State to exercise plenary authority in its own territory without molestation, at least from its temporal rivals. During the 19th Century the nation state continued to flourish and became entrenched at the centre of an international legal system founded on State consensus. At the same time States succeeded in maintaining a practically unchallenged monopoly of exclusive or concurrent jurisdiction over the individual”); See Trindade, Exhaustion of Local Remedies, supra note 5 at 19 (discussing the evolution of international law in respect to the protection of individuals, Trindade notes “it was only fairly recently that modern international law began promoting a generalization of the protection of the human person…It was not until after the Second World War that human rights protection in international law extended to the individual qua individual, covering also those categories of persons (like stateless persons who were left without protection under traditional international law”).
States. Under traditional international law, “...in the absence of an independent legal personality for the individual, if his rights were violated by a foreign State, it was the State of which the victim was a citizen which was authorized to bring a claim for violation of his rights...” at the international level. But even in the context of diplomatic protection where individuals supposedly obtained some protection from international law, the accrued rights were “derivative, not original.” “Individuals to the extent they obtained procedural capacity, obtained it from the State—and the State was entitled to suspend those entitlements at will” with little or no consequences. Furthermore, prior to the conclusion of WW II, strong international allegiance to the principle of sovereignty allowed States to “exercise exclusive internal jurisdiction and by necessary implication require[d] that States be free from external control.” Even in cases of egregious human rights abuses such as pogroms and mass expulsions, international concern for State sovereignty often foreclosed external interference for the purpose of protecting victims or preventing further human rights violations. Not surprisingly, stateless persons fared even worse under traditional international law during this period and enjoyed no international protection whatsoever for any mistreatment by the State within which they lived. However, the disregard of individual rights in international law and the international community’s unwillingness to censure State violators of human rights, ended following WW II.

48 Rehman, *supra* note 47 at 2.
49 Burgess & Friedman, *supra* note 46 at 3.
52 *Ibid.* at 3 (putting forth the argument that efforts by the international community to protect vulnerable populations and individuals during the “traditional era” of international law were not generalised and often limited to instances such as the 1926 Slavery Convention which codified a customary prohibition from the early 19th Century. Moreover, it is argued by the authors that, “such developments ran against the tide and did not signify a fundamental shift in treatment of legal personality under international law”).
2.2 Post WW II Extension of Legal Personality to the Individual in International Law

In international human rights law discourse, the conclusion of WW II is cited as the period whereby international legal personality was conferred on the individual petitioner, thereby marking the birth of the modern human rights movement. 54 “To say that an entity possess international legal personality is to say that it is capable of possessing international rights and duties and has the capacity to maintain its rights by bringing international claims.” 55

2.3 The International Human Rights Legal Framework

In the aftermath of WW II the international community implemented a wide array of international treaties, resolutions and declarations designed to protect the human rights of individuals. Steiner and Alston write that the contemporary international human rights framework, “…can be imagined as a four tiered normative edifice,” consisting of the United Nations Charter, the Universal Declaration of Human Rights (UDHR) with its two Covenants, and

54 See James, supra note 53 at 87-88; 93 (discussing the manner in which the Nuremburg trials extended the laws of humanity in international jurisprudence and aided in clarifying the international community’s duty to protect vulnerable persons and prosecute those accused of committing crimes against humanity).
55 See Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, [1949] I.C.J. Rep. 174 at 177-178 (ICJ advisory opinion extending “to entities other than States,” competence to bring an international claim and “resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims.” In reaching the conclusion that international legal personality is not exclusive to States, the ICJ further noted: “The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States” at 178-79).
multilateral human rights treaties at the international and regional level.  

Brysk defines the post-WW II concept of international human rights protection as encompassing: “…a set of universal claims to safeguard human dignity from illegitimate coercion typically enacted by State agents.”

These “universal claims” aimed at safeguarding the human individual were codified in widely endorsed international undertakings such as the Universal Declaration of Human Rights and its two Covenants; as well as “phenomenon-specific treaties” on genocide, torture, war crimes, and protection for vulnerable societal groups.

The undertakings enumerated in post-WW II human rights instruments made the protection of human rights a critical purpose of the international community by firmly establishing that relations between States and their citizenry are matters of international concern. To ensure adherence to the undertakings entered by States Parties to post-WW II human rights treaties, many authorize the creation of groups or bodies which monitor State compliance with treaty obligations and most provide a right of individual petition to persons claiming violations of treaty protected rights.

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56 Henry Steiner & Philip Alston, International Human Rights in Context: Law, Politics and Morals, 2nd ed. (New York: Oxford University Press, 2000) at 137-138; See Sabelo Gumedze, “Bringing Communications before the African Commission on Human and Peoples’ Rights” (2003) 3 Afr. Hum. Rts. L. J. 118, 122 (further noting that the international system for the protection of human rights is also supported by diverse international human rights organizations such as inter-governmental groups, State sponsored human rights agencies, and a host of non-governmental human rights organizations (NGOs) affiliated with private entities, civic groups and religious institutions. Within the African region, such miscellaneous human rights organizations have proven to be indispensable in providing humanitarian care and in the case of NGOs their importance in the jurisprudential development of the African Commission is immeasurable. A significant percentage of all communications received by the African Commission is authored by the NGO community).


58 Ibid.


60 See Rene Provost, International Human Rights and Humanitarian Law (Cambridge: Cambridge University Press, 2002) at 49-50 (providing a review of “the mechanisms created by human rights treaties whereby private persons are given the possibility of individually setting into motion procedures designed to protect their basic rights.” The author also notes that “[i]n nearly all cases where the individual is given full standing, the jurisdiction of the international body is subject to optional acceptance either directly or indirectly through ratification of the relevant human rights convention…”).
2.4 The “Universalism” of Fundamental Human Rights Guarantees

Although human rights documents such as the Universal Declaration and the UN Covenants constitute landmark undertakings for their inclusion of individual entitlements in binding international instruments, it is not entirely accurate to credit these instruments exclusively with conceiving the notion of the protection of the human individual. The philosophical underpinnings of many cultures antedate United Nations human rights instruments in espousing respect for the rights of the individual. 61 However, the fact remains that, with the advent of the United Nations Charter, the Universal Declaration and its two Covenants, the universal principles underlying the protection of human rights gained “proper formulation” in international documents. 62

2.5 The Function of Regional Systems in the International Human Rights Legal Framework

The regional human rights systems with treaty based mechanisms authorized by States Parties to adjudicate human rights complaints from their respective regions of the world are of great importance to the international human

61 Steiner & Alston, supra note 56 at 133; See generallyH. Patrick Glenn, Legal Traditions of the World, 2d ed. (New York: Oxford University Press, 2004) (supporting the view that principles governing respect and protection of the human individual are not limited to any one culture or region); See Weeramantry, supra note 1 at 6-8 (noting that the conception period for the underlying norms which seek to promote respect for the dignity of the human individual has its origins in the cultural, religious, and philosophical traditions of various peoples); But see Ndahinda, supra note 14 at 699, 702 (providing a strong critique of international human rights law which suggests that “many aspects of the discipline—either norms or their selective application—seem to reflect positivistic adherence to dominant Western historical and philosophical experiences and the geostrategic use of law by powerful States in their own interests”).

62 Weeramantry, supra note 1 at 195.
The post-WW II emergence of these regional arrangements has been described as one of the most important developments in international law.\footnote{See Steiner & Alston, \textit{supra} note 56 at 133 (Adopted in 1981, the African Charter on Human and Peoples’ Rights was preceded by the 1950 European Convention on Human Rights and the American Convention on Human Rights in 1969).} “…[I]n concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States but towards all individuals within their jurisdiction.”\footnote{See Andrew Moravcsik, “The Origins of Human Rights Regimes” in Laura Dickinson, ed., \textit{International Law and Society: Empirical Approaches to Human Rights Law} (Burlington: Ashgate, 2007) at 205 (expressing the view that the development and State support for regional treaty implementation regimes by States Parties constitutes an unparalleled development in the history of international law).} As observed by Moravcsik, the importance of regional human rights arrangements stems from their capacity to extend the domestic impact of international human rights guarantees through the treaty enabled Courts and Commissions.\footnote{Effect of Reservations on the Entry into Force of the American Convention on Human Rights (1982), Advisory Opinion OC-2/82, Inter-Am. Ct. H. R. (Ser. A) No. 2, at para. 29 [\textit{Effect of Reservations on Am. Convention}].} It is within this aspect of the international human rights legal framework that the African Charter and its implementing institution, the African Commission are categorized.

\subsection*{2.6 The Normative Development of the African Regional Human Rights System}

It has been established that broad acceptance of the universal precepts underlying the protection of human rights in the aftermath of World War II led to the creation of regional human rights treaties such as the African Charter, which currently stands as the most recently inaugurated regional system in the

\footnote{Moravcsik, \textit{supra} note 64 at 205-206 (remarking on the “radical” nature of regional human rights arrangements which permit treaty bodies attached to regional human rights regimes “to respond to individual claims by judging that the application of domestic rules or legislation violates international commitments, even where such legislation has been enacted through…procedures consistent with the domestic rule of law”).}
international human rights framework. 67 Indeed, the general influence of United Nations human rights instruments is reflected throughout the African Charter and in several respects the key rights provisions of the African Charter bear a strong resemblance to the Universal Declaration. 68 Created under the auspices of the Organization of African Unity, the African Charter is the first treaty enacted for the specific purpose of protecting human rights on the African continent. 69 Nonetheless, respect for individual rights and human dignity are not themes foreign to the African psyche and Ndahinda writes that, “intrinsic African notions and conceptions of human rights” are identifiable within the international human rights framework. 70 However, while Africa’s contributions to international human rights law are laudable, in comparison with Europe and the Americas, formal codification of human rights norms in the African region took place at a relatively late period with the adoption of the African Charter in 1981, and its subsequent entry into force in 1986. 71

67 See Viljoen, “Africa’s Contribution”, supra note 14 at 19 (linking the emergence of the African human rights system with the post-WW II “foundational period” of modern human rights law. “After gaining their independence, [African] states became members of the UN almost immediately. Despite, or maybe owing to, their colonial past, African states gradually extended their initial interest into vigorous participation in the international arena [and] in the process Africa contributed meaningfully to the renewal and redefinition of international human rights law…”).
68 Udombana, “Toward the African Court” supra note 15 at 46, 60 (noting that Articles 1-26 of the African Charter enumerate “…generous human rights guarantees” in the spirit of the UDHR, including the rights to life, integrity, human dignity, liberty, security, non-discrimination, freedom of conscience, religion, association, assembly, and movement, as well as the right to procedural due process and a fair trial”).
69 Ibid. at 59.
70 See Ndahinda, “African Political Institutions” supra note 14 at 700-703, 707-08 (discussing the contributions of African inter-governmental bodies in the development of important principles in international human rights law such as self-determination and “the right of peoples freely to dispose of their wealth and natural resources,” both of which were given greater effect by the actions of the OAU during Africa’s independence struggles. Although the concept of self-determination was “formulated at the turn of the 19th century in other regions of the world…the then evolving international entitlement of peoples—whether as a matter of right or principle—to self-determination acquired more significance in the context of the struggles for African independence”).
a. The Effect of Africa’s Contemporary History on the Regional Protection of Human Rights

As observed by Ndahinda, “[a] close examination of human rights on the African Continent suggests …that the concept and practice of human rights in Africa have been conditioned by the Continent’s past, its culture, traditions, values, its contemporary political and economic development as well as the political concerns of its leaders.”72 Thus in addition to the transformative changes in the protection of human rights ushered in by post-WW II legal instruments, human rights protection in Africa has also been highly influenced by decolonization and the region’s ongoing struggle for economic security.73 The influence of Africa’s contemporary history on the regional protection of human rights led Ndahinda to discern the existence of two distinct stages in the development of human rights in Africa.74 The “first season” is associated with the African independence movement.75 Ndahinda writes that African regional instruments of this “first season,” represented mainly by the OAU Charter, were characterized by “a strong anti-colonialist” sentiment which focused mainly on the decolonization process with little emphasis on individual rights.76 Moreover, after the formal acquisition of independence by most African States, efforts at satisfying the basic needs of a little fewer than one billion Africans seemed much more pressing than the pursuit of international human rights agenda often

72 Ndahinda, supra note 14 at 706.
73 Ibid. at 707.
74 Ibid. at 706; See V.O. Nmehielle, “The African Union and African Renaissance: A New Era for Human Rights Protection in Africa” (2003) 7 Singapore J. Int’l. & Comp. L. 412 (Nmehielle divides the development of human rights protection in Africa into “three eras”: (i) the response to colonial rule; (ii) the “middle ages of African human rights consciousness” where States paid little heed to individual protection; and (iii) the “African Renaissance” characterized by broader institutional response by the African Union to regional human rights challenges).
75 Ndahinda, supra note 14 at 706.
76 Ibid. at 706; See U.O. Umozurike, supra note 14 at 902 (remarking that the OAU, upon securing colonial independence in much of the continent, appeared to marginalize human rights violations perpetrated against individuals and groups by some African States).
perceived as a Western conceit, albeit erroneously. In post-independence Africa, serious human rights violations during the Biafran conflict, as well as in Uganda, Congo, the Central African Republic and Ethiopia occurred unimpeded or were met by ineffectual regional response by the OAU. Despite the OAU’s credible response to specific humanitarian challenges such as Africa’s ongoing refugee crisis, overall, the perception of organizational indifference to State violations of individual rights remained until the ascension of the African Charter. By the conclusion of the 1980’s, Africa had embarked on the “second season” of human rights protection.

b. The Ascension of the African Charter on Human and Peoples’ Rights

After years of prodding, the OAU finally adopted a regional mechanism for the specific purpose of protecting human rights on the continent. In the Wiwa decision, the African Commission described the significance of the African Charter in the regional protection of human rights, noting that: “…human rights are no longer solely a matter of domestic concern. The African Charter was drafted and acceded to voluntarily by States wishing to ensure the respect of

77 See Ndahinda, supra note 14 at 700, 708 (remarking that adherence to “relativistic notions of human rights” by some African governments often serves as subterfuge to avoid scrutiny of human rights violations and shield African leaders from fulfilling human rights treaty obligations).
78 See Naldi, supra note 19 at 3 (observing that the OAU tends to favour “quiet diplomacy” and that resort to informal procedures has been the preferred method for resolution of regional conflicts. While “such efforts still have a valuable role to play…in the context of human rights [in Africa] …among their drawbacks is that they are reactive and remedial rather than proactive and preventative. Considerable loss of life and property may have occurred before the OAU offered its services”).
79 See Viljoen, “Africa’s Contribution”, supra note 14 at 25-26, 38 (asserting that criticism of the OAU’s record in regional human rights protection often overlooks organizational efforts to address critical humanitarian issues such as the ongoing refugee crisis in Africa. “The UN Refugee Convention of 1951 (and the 1967 Protocol thereto) was supplemented by the OAU Refugee Convention of 1969, providing, amongst other things, for an extended definition of refugee”).
80 See Udombana, “Towards the African Court”, supra note 15 at 58 (recalling the arduous history of the African Charter the author notes, “It took twenty years after the adoption of the OAU Charter to establish an explicit human rights instrument for the region”).
human rights on this continent. Once ratified, States parties to the Charter are legally bound to its provisions.”

c. *The African Charter as a “Unique” Human Rights Instrument*

There are several human rights guarantees in articles of the African Charter which reflect the strong influence of United Nations human rights instruments, however, fundamental aspects of the African Charter are unique and constitute a departure from earlier human rights instruments. In Lindholt’s assessment, “the African Charter on the one hand exhibits adherence to the principle of universality, at least with respect to basic concepts, while at the same time expressing an even stronger commitment to the African context, culturally as well as politically.” As suggested by the Charter’s title, important group rights such as the right to self-determination are well represented in its provisions. However, while the “communal aspect” of the African Charter is often emphasized, the Charter’s guarantees also extend to individual civil and political rights.

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82 See Udomana, “Towards the African Court”, *supra* note 15 at 61 (expressing the view that the distinguishing characteristics of the African Charter “stem from the drafter’s intention that the Charter reflect and emphasize the influence of African traditions—to take as a pattern the African philosophy of law’ and to be designed to ‘meet the needs of Africa.’”); See also Rehman, *supra* note 47 at 237-238 (noting that “the African Charter is the only human rights treaty to accord explicit protection to civil and political rights, social economic rights and collective group rights or the so-called ‘third generation’ rights”).
83 Lindholt, *supra* note 14 at 135.
84 Umozurike, *supra* note 14 at 909; See Udombana, “Towards the African Court”, *supra* note 15 at 61 (discussing the significance of the word ‘peoples’ in the Africa Charter, the author notes that it is used in eight of the ten preambular paragraphs of the [African] Charter” and relates to ‘peoples’ with respect to self-determination); See Viljoen, “Africa’s Contribution”, *supra* note 14 at 20 (discussing the Charter’s frequent reference to “peoples,” the author explains that “[t]he African Charter treats the human being both as an individual and as a member of the collective—the people. Generally, every individual is a bearer of rights under the African Charter. The communal aspect is emphasised in the rights guaranteed to ‘peoples’ and in the recognition of the family as the natural unit and basis of society”)

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i. The “Open-Door” Approach to Locus Standi

The right of individual petition under the African Charter is among the broadest in the international human rights legal framework. As interpreted by the African Commission, the African Charter’s locus standi requirements permit individuals and organizations, in addition to States parties, to submit communications for consideration by the African Commission. In addition, the Commission has adopted an actio popularis approach where the author of a communication need not know or have any relationship with the victim. The African Commission explains the Charter’s “open door” policy in the consideration of communications filed in the Commission as critical to the regional protection of human rights, since this approach “enable[s] poor victims of human rights violations on the continent to receive assistance from NGOs and individuals far removed from their locality.”


The African human rights system under the African Charter has been credited for inclusiveness towards African peoples from all walks of life and the civil society organizations that advocate on their behalf have been generously

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86 See B. Obinna Okere, “The Protection of Human Rights in Africa and the African Charter on Human and Peoples’ Rights: A Comparative Analysis with the European and American Systems” (1984) 6 Hum. Rts. Q. 141, 150 (“Exercise of competence by the Commission is predicated upon satisfaction of the three traditional conditions of ratione loci, ratione materiae, and ratione personae. With respect to ratione loci, the human rights violations raised before the African Commission must have taken place within the territory of an African Charter member State. As to the Ratione materiae element of standing, this requires rights and duties to be such as are guaranteed under the African Charter on Human and Peoples’ Rights. Whereas the competence ratione personae envisage both states and individuals…”).
87 Article 19 v. Eritrea, supra note 13.
received by the African Commission. By adopting the *actio popularis* approach and widening the parameters of standing under the Charter, the African human rights system is seen as responsive “…to the practical difficulties that face individuals in Africa, and in particular where there are serious or massive violations that may preclude individual victims from pursuing national or international legal remedies.”

### d. The African Commission on Human and Peoples’ Rights

The African Charter provides for an eleven–member implementation body, the African Commission, which was established under Article 30 of the African Charter and inaugurated in 1987. In the African human rights system, the Commission has the mandate of promoting and protecting the human rights guarantees enumerated in the African Charter and undertaken by States Parties. Viljoen and Louw have studied the Commission’s legal status and determine that the Commission functions as “a quasi-judicial body” whose recommendations, while not legally binding on States Parties, nonetheless carries substantial “persuasive force.”

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88 See *Malawi African Association and Others v. Mauritania* (2000) Afr. Comm. HPR 196/97 at para. 78 [*Mauritania case*] (in a complaint detailing widespread racial discrimination and State orchestrated violence directed against sections of Mauritania’s society, the African Commission inter alia noted that the Charter requires only that communications before the Commission indicate their authors. However the author need not necessarily be the victim of the rights violation or even a family member of the victims. Moreover, in so far as the challenged human rights violation occurred within the African region, the location of the author does not constitute a bar to standing and has accepted communications from international and domestic human rights advocates).


90 See Articles 31-45 of the African Charter, *supra* note 4 (Articles 31-45 enumerate the functions and general composition of the African Commission. The Charter provides that the African Commission shall be composed of eleven members serving in their personal capacity for six years and must be selected from amongst “African personalities of the highest reputation… [with] particular consideration being given to persons having legal experience.”

91 Viljoen & Louw, “Findings of the African Commission”, *supra* note 11 at 3, n.9, 13-14 (In an assessment of the legal status of African Commission decisions, Viljoen and Louw distinguish between recommendations and findings of fact issued by the Commission as opposed to provisional measures directing specific legal action by States. The authors argue that the
its recommendations are non-binding. While the Commission self-identifies as a “quasi-judicial” organ, it has insisted that its findings are binding on States Parties. Indeed, not only does the Commission view its findings as binding and expects implementation of its recommendations, “[s]hould a State not comply, the Commission will find that the non-compliance in itself is a violation of Article 1 of the African Charter.”

i. The African Commission’s Mandate

As part of its mission to “promote and protect” human rights in Africa, the Commission is authorized under Article 45 to “interpret” the provisions of the African Charter. The Charter’s brevity in its conferral of authority to the African Commission has been the cause of much consternation. But despite the absence of a clear mandate specifying the exact parameters under which the Commission is authorized to act, the Commission has moved towards a very broad interpretation of its role and has succeeded in extending its protective mission far beyond that originally envisioned by States Parties. As observed by Viljoen and Louw, “[t]he African Commission in the absence of any direct mandate,

Commission’s recommendations and findings of fact are not legally binding in the sense that there are no legal consequences for State non-compliance. On the other hand, interim or provisional measures made by the Commission are binding on States Parties, since “from a national perspective, the finding of an international tribunal is binding if it can be executed in the national legal system and if that finding must be obeyed (given effect) in the national legal system” at 3,n. 9).

92 See ACHPR, Account of Internal Legislation of Nigeria, supra note 44 (In response to the Nigerian military government’s challenge of the Commission’s authority to recommend annulment of domestic legislation, the Commission noted, “Nigeria is bound by the African Charter…When the Commission concludes that a communication describes a real violation of the Charter’s provisions, its duty is to make that clear and indicate what action the government must take to remedy the situation”).

93 See Viljoen & Louw, “Findings of the African Commission”, supra note 11 at 8-9 (discussing the African Commission’s insistence in the Wiwa case that its findings are binding on States, the authors note the Commission’s conclusion that “by ignoring its previous decisions…Nigeria had violated Article 7 (1) (d)…” of the African Charter); See Wiwa, supra note 12 (in addition to finding Nigeria in violation of the African Charter in relation to events leading to the execution of Ken Saro-Wiwa, the Commission also concluded that in ignoring provisional measures indicated by the Commission which urged a stay of Wiwa’s execution, Nigeria also violated the African Charter).
developed a practice whereby it regularly issued remedies to State Parties upon finding them in violation of the African Charter... [and]...the issuing of remedies is now an established practice within the African system.  

The Commission’s expansive view of its Charter mandate has thus allowed it to issue decisions requesting monetary compensation for victims of human rights abuse, recommend the establishment of national investigative bodies and in the Niger Delta case, urge annulment of national legislation found to be incompatible with human rights guarantees provided by the African Charter. 

ii. The African Commission’s Enforcement Authority

The African Commission relies on Article 1 of the African Charter to give greater legal status to its recommendations. In addition, as Viljoen points out, “the African Commission has also justified its competence to issue remedies with reference to ‘the implied powers doctrine’...” In the Commission’s view, “by ratifying the Charter without reservation,” States Parties by implication submit

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94 Viljoen & Louw, “Findings of the African Commission”, supra note 11 at 11; See also Chaloka Beyani, “Recent Developments in the African Human Rights System 2004-2006” (2007) 7 H.R.L.R. 582, 591-593 (Noting that the African Commission has continued to reject challenges by States Parties to the Commission’s remedial authority. In addition, African Union efforts to curtail the Commission’s authority to issue pronouncements through resolutions have been met with resistance by Commissioners. The Commission’s interpretation of its competence to recommend ameliorative action under the Charter upon finding the Respondent State in violation of the African Charter directives, has also led to its issuance of “Country and thematic resolutions” which serve to “draw attention to human rights situations in particular States as well as signal particular human rights issues affecting the region.” The Commission’s country and thematic resolutions have been described as “mark[ing] a bold and courageous stand on the part of the Commission and a turning point in its institutional relationship with the African Union”).

95 Ibid.; See e.g. the Mauritania case, supra note 88 (in a complaint alleging widespread human rights violations, the African Commission’s decision included several recommendations to compensate rights victims and promote more equitable practices in State governance).

96 Viljoen & Louw, “Findings of the African Commission”, supra note 11 at 13; See Viljoen, “African Charter in Domestic Courts”, supra note 33 at 1 (noting that Article 1 of the African Charter provides the basic obligation to recognize and adopt legislation to give effect to human rights guarantees enumerated in the African Charter); See Article 1 of the African Charter, supra note 4 (Article 1 of the African Charter provides that States Parties “shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them”).

themselves to the Commission’s authority. 98 While the validity of the Commission’s rationale for assuming broader remedial authority than that explicitly vested by the Charter is subject to debate, until recently, the Commission functioned as the sole enforcement mechanism under the African Charter. The fulfillment of this role has required creativity and an innovative reading of African Charter provisions. Rather than “a power grab,” Odinkalu views the Commission’s expansive interpretation of its enforcement authority as a much-needed “self-correction” which has bridged gaps in the African Charter, thereby widening access to the African Charter’s protective procedures. 99

98 See ACHPR, Account of Internal Legislation of Nigeria, supra note 44 (asserting the “binding” character of recommendations of the African Commission in response to challenges raised by the Nigerian government).
CHAPTER THREE: THE LOCAL REMEDIES RULE IN HUMAN RIGHTS PROTECTION

3.1 Regional Challenges to Securing Fundamental Human Rights Guarantees in the African Human Rights System

As demonstrated in the preceding chapter, an extensive legal framework has been developed by the international community to hold States accountable for human rights violations and set guidelines for State behavior toward the individual. While the post-WW II conferral of legal personality on individuals constitutes a monumental achievement—legal recognition of the individual at the international level without more will not suffice. The human rights of individuals are not protected merely by “a systematic ordering…through treaties and customary law of fundamental postulates, ideologies and norms…” 100 It is essential to also give “substance and reality” to the protection of human rights. 101 The ratification of human rights instruments by African States and insertion of UDHR influenced rights in national constitutions are meaningless if generated norms are unenforceable by individual beneficiaries in domestic forums. 102 The human dignity of the individual must be fully recognized by his own domestic courts as well as the international legal system. 103

100 Steiner & Alston, supra note 56 at 134; See also James, supra note 53 at 29.
101 Weeramantry, supra note 1 at 196;
102 Weeramantry, ibid. at 713-714; See Provost, supra note 60 at 44 (describing the “substantive right to a remedy” as “a necessary element of the normative framework of human rights. Without such an element, the danger looms of that ‘vain thing’ of a right without a remedy threatening the reality of human rights…”); See Viljoen & Louw, “Findings of the African Commission”, supra note 11 at 18 (noting that “one of the topics of overriding concern of current international human rights law is the gap between the formal recognition and the realization of human rights, the disparity between the promise to give effect to treaty provisions and the effective implementation of these promises”); See Trindade, “Thoughts on Recent Developments”, supra note 32 (Trindade similarly notes that, “it is not reasonable to conceive rights without the procedural capacity to vindicate them” at 196, n. 14).
103 Weeramantry, supra note 1 at 161.
Currently, what has emerged in Africa appears to be a struggle between the African Charter supported human rights legal framework, on the one hand, while on the other lies domestic legal systems heavily influenced by autocratic State regimes seemingly “disconnected” from the human rights demands of their populace. Within national legal institutions of many States Parties to the African Charter, vindication of rights is often hampered by unavailability or the ineffectual nature of legal redress for human rights violations. Thus International law may recognize an individual’s rights and that person may still be subject to human rights abuse with little or no adjudicative recourse in domestic institutions.

3.2 The Absence of Effective Domestic Redress for the Vindication of Rights

Okafor identifies the predicament of domestic legal systems in African States as “one of the most important challenges to peace building on the African continent,” and notes that:

[This] …lack of effective arrangements and credible fora for the accommodation of the fears and interests of relevant sub-state groups vis-à-vis the states of which they are a part,” perpetuates “the deeply fragmented nature of societies that constitute these states…For if the deepest fears and concerns of relevant sub-state groups regarding the structural and distributive fairness of their relationships with each other, and with their englobing state, is left largely unresolved at the end of one conflict, these fears and concerns will be sure to spawn further rounds of violence.  

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104 Ndahinda, supra note 14 at 714-715.
105 Onoria, supra note 43 at 23; See Odinkalu, “ACHPR Case and Complaints Procedures”, supra note 23 at 228 (remarking that the successful protection of human rights in Africa is reliant on the African regional human rights system as well as a composite of national systems. “The best human rights standards in the world (including the African region) would hardly be worth the paper they are written on in the face of States Parties determined to consign them to irrelevance”).  
106 Okafor, “Peace Building”, supra note 6 at 439.
In several decisions and resolutions the African Commission has affirmed that the right to a fair trail in the domestic courts is essential for the protection of fundamental human rights. In Anuak Justice Council v. Ethiopia, the Commission stated: “Human rights law regards it as supremely important for a person whose rights have been violated to make use of domestic remedies to right the wrong…the full and effective implementation of international obligations in the field of human rights is designed to enhance the enjoyment of human rights and fundamental freedoms at the national level.” Moreover, the right to an effective remedy before national judicial organs ranks among the most vital guarantees enumerated in Article 7 of the African Charter. But the question

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107 See Baderin, supra note 99 at 125, 127-128. In furtherance of it efforts to strengthen domestic legal systems of African States, the Commission in 2003 adopted the Principles and Guidelines to a Fair Trial and Legal Assistance in Africa. Baderin describes the principles and guidelines as “very comprehensive, covering most of the recognized elements of the right to fair trial and due process under international human rights law. Moreover, “…in acknowledgement of the importance of the right to a fair trial and due process, the principles and guidelines have a comprehensive non-derogation clause which provides that ‘[n]o circumstances whatsoever…may be invoked to justify derogations from the right to trial’); See Resolution on the Right to Recourse and Fair Trial (1992) ACHPR/Res.4 (XI) 92 at para.1; See Resolution on the Right to a Fair Trial and Legal Aid in Africa (1996) ACHPR/Res.41 (XXVI) 99 at para. 1, online: Minnesota Human Rights Library <http://www1.umn.edu/humanrts/africa/resolutions/rec9.html>.

108 Anuak Justice Council v. Ethiopia (2006) Afr. Comm. HPR 299/05 [AJC v. Ethiopia] (in a complaint alleging extrajudicial killings, unlawful detention and destruction of private property by Ethiopian authorities, the Commission referred petitioners back to domestic courts for adjudication of the claims, noting inter alia the importance of domestic courts in the protection of human rights. “Access to an international organ should be available, but only as a last resort—after the domestic remedies have been exhausted and have failed”).

109 See Article 7 (1) of the African Charter, supra note 4 (providing in part that, “[e]very individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within reasonable time by an impartial court or tribunal.” Article 26 of the African Charter further imposes a duty on States Parties to the African Charter “to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the…Charter’); See Civil Liberties Organization v. Nigeria (1995) Afr. Comm. HPR 129/94 (in a communication challenging restrictions placed on Nigerian attorneys by the Nigerian military government pursuant to the Legal Practitioner’s Decree, the African Commission ruled the restrictions violative of the African Charter and expressed the importance of African Charter due process guarantees, noting: “Article 26 of the African Charter reiterates the right enshrined in Article 7 but is even more explicit about the States Parties obligations to ‘guarantee the independence of the courts and allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.’ While Article 7 focuses on the individual’s right to be heard, Article 26 speaks of the institutions which
remains how best to accomplish this critical objective of the African human rights system. Odinkalu provides that, “[i]n the African regional human rights system, the linkage between domestic and regional human rights mechanisms is processed through the rule on exhaustion of domestic remedies which is the cornerstone of the adjudicatory and protective mandate of the African Commission on Human and Peoples’ Rights under the African Charter.” D’Ascoli and Scherr also view the local remedies rule as improving the judicial protection of human rights at the national level by “coordinating the international with the national level and the interests of States with the interests of individuals.” This is particularly true when the exhaustion requirement is applied by the African Commission in a flexible manner.

3.3 Improving the Effectiveness of Domestic Legal Remedies through the Flexible Application of the Local Remedies Rule in Human Rights Protection

In a well-regarded opinion, acclaimed for clarifying the importance of the local remedies rule in the protection of human rights, Trindade in the Genie Lacayo Case describes the local remedies rule as embodying “a fundamental judicial guarantee far more important than one might prima facie assume…that the right to an effective remedy before competent national tribunals constitute[s] a basic pillar …of the rule of law …in a democratic society and its correct application has the effect of improving the administration of justice at the national level.” According to Trindade, the local remedies rule “contributes towards greater recognition of fundamental rights by emphasizing the need for

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are essential to give meaning and content to that right. This Article clearly envisions the protection of the courts which have traditionally been the bastion of protection of the individual’s rights against abuses of State power” at para. 15).

111 D’Ascoli and Scherr, supra note 25 at 18 593-594.
adequate redress in domestic legal systems.” 113 To fully realize the capacity of the local remedies rule to improve the domestic protection of human rights, Trindade advocates for a “flexible application” of the exhaustion requirement in human rights tribunals which requires “…emphasis on the element of actual redress rather than on the process of exhaustion…”114

a. The Origins of the Local Remedies Rule in Diplomatic Protection

The concept of a “flexible” application of the local remedies rule is used by Trindade to explain the correct manner in which the rule should be applied in human rights protection as opposed to rigid adherence to the traditional formulation of the rule as it originated in diplomatic protection of aliens abroad.115 In the context of diplomatic protection, the exhaustion requirement was viewed mainly as “a diplomatic exercise” aimed at furthering international comity and respect for State sovereignty by requiring that “…the factual and legal issues of a dispute should receive a full airing before the dispute is allowed to ripen into a confrontation between States.” 116 In the traditional context of

113 Trindade, Exhaustion of Local Remedies, supra note 5 at 48-49, 55-56.
114 Ibid.
115 Ibid. at 32-35; See Burgess & Friedman, supra note 46 at 3 (noting that the law of diplomatic protection of aliens refers to the right of a national to protection or a minimum standard of treatment while in the territory of another State. In this traditional context, the local remedies rule was invoked by the host State prior to the exercise of diplomatic protection by the State espousing the claim of its national abroad. Like other legal concepts originating in the “state-centric” period of international law, diplomatic protection of aliens was “a right owed to the individual’s State by the host State. It may be waived by the individual’s State and, where it is violated; only the individual’s State may decide whether to pursue compensation through diplomatic channels or in an international forum”).
116 See Trindade, Exhaustion of Local Remedies, supra note 5 at 7; See Herbert W. Briggs, “The Local Remedies Rule: a Drafting Suggestion” (1956) 50 Am. J. Int’l L. 921 at 924 (providing the traditional rationale for the rule of exhaustion of local remedies in diplomatic protection, “…first, the citizen going abroad is presumed to take into account the means furnished by local law for the redress of wrongs: secondly, the right of sovereignty and independence warrants the local state in demanding for its courts freedom from interference on the assumption that they are capable of doing justice; thirdly, the home government of the complaining citizen must give the offending government an opportunity of doing justice to the injured party in its own regular way, and thus avoid if possible, all occasion for international discussion; fourthly, if the injury is committed by an individual or minor official, the exhaustion of remedies is necessary to make certain that the wrongful act or denial of justice is the deliberate act of the state; and fifthly, if it is a deliberate act
diplomatic protection, the local remedies rule was “envisaged from an essentially formalistic point of view with a consequent emphasis on existing local remedies and the individual’s duty to exhaust them.” 117 Traditionally, “the function of the local remedies rule is to postpone the invocation of international responsibility pending a resort to local remedies through which that responsibility may be discharged.” 118 Indeed, in the traditional diplomatic context, “classical writers like Brochard and Eagleton maintained that the exhaustion of local remedies ought to be pursued up to the point of a denial of justice before an international claim can be presented…” 119

Trindade however, rejects such rigid application of the local remedies rule in the protection of human rights. In Trindade’s scholarship, it is maintained that “there are no compelling reasons why the rule of exhaustion of local remedies should, in the framework of human rights protection, necessarily have the same application it had in the system of diplomatic protection.” 120 This is particularly true in light of the “contextual differences” between human rights protection and diplomatic protection which necessitates a more flexible approach to the local remedies rule. 121

of the state, that the state is willing to leave the wrong unrighted. It is a logical principle that where there is a judicial remedy, it must be sought”).
117 See Trindade, *Exhaustion of Local Remedies*, supra note 5 at 6-7, 57.
118 Briggs, *supra* note 116 at 925.
120 Trindade, *ibid.* at 37.
121 *Ibid.* at 13, 39, 45 (opposing strict adherence to the parameters of the rule as established in the arena of diplomatic protection and arguing that “…a mechanical transplantation of the rule from the older into the newer protective system would be likely to lead to an unwarranted rigidity in its application, tending to be destructive of the very purposes of securing an effective protection of human rights”).
b. Awareness of Contextual Differences between Human Rights Protection and Diplomatic Protection in Application of the Local Remedies Rule

Trindade identifies the “contextual differences” found in the protection of human rights which necessitate a distinctive application of the local remedies rule as follows: “First, the premises underlying each area of international legal practice are distinguishable. Diplomatic protection is a system devoted to a State’s interest in protection of its citizens abroad as a means of “maintenance of a unified socio-economic order among States.” 122 On the other hand, “human rights protection is by its nature more comprehensive, extended to aliens and nationals (and stateless persons) alike.” 123 Contemporary international human rights law not only “emancipated the individual vis-à-vis [their] own State” but also provided “a generalization of protection to all individuals irrespective of the bond of nationality.” 124 As a consequence of these “contextual” distinctions, several issues pertaining to the application of the local remedies rule, including limitations or exceptions to the rule, “have received a treatment in human rights protection that is quite different from that in diplomatic protection, in the sense of proceeding in the former with greater flexibility to achieve the object and purpose of human rights treaties.” 125

122 Trindade, Exhaustion of Local Remedies, supra note 5 at 13.
123 Trindade, ibid. at 36.
124 Ibid. at 22-23.
125 Trindade, Book Review of Amerasinghe, supra note 31 at 628; See also, Trindade, Exhaustion of Local Remedies, supra note 5 at 55, 58, 110-11 (highlighting distinctions in application of the local remedies rule in the traditional context of diplomatic protection and human rights protection, including the fact that in human rights the rule assumes a procedural role rather than as a substantive legal principle as in the diplomatic context. Other distinctions are found in the area of available exceptions to the rule. In diplomatic protection the rule was deemed applicable absent a denial of justice whereas in the protection of human rights “it is not necessary that judicial irregularities should be superadded to a previous wrong.” Finally, with respect to the nature of local remedies which petitioner must exhaust, in the diplomatic context this includes all remedies within the framework of the State’s adjudicative system but in human rights, “the remedies to be exhausted include [only] those that are afforded under the municipal law of the accused State and are capable of redressing the alleged wrongs and preventing international intervention. The local procedures must be such as to protect interests that correspond as closely as may be and in practical terms with the interests involved in a subsequent international claim” at 110-111).
c. The Local Remedies Rule in the Human Rights Context as a “Distinct”
Principle of International Law

Within international human rights institutions, increased awareness of the “contextual differences” between human rights protection and diplomatic protection has resulted in significant modification of the local remedies rule to the degree that the rule as applied in the context of human rights protection arguably presents a distinct principle of international law.\(^{126}\) The juridical effort within international human rights institutions to adapt the local remedies rule to the context of human rights protection was manifested firstly, by recognition of the “special” needs of individual protection which entails the crafting of exceptions and other discretionary caveats when applying the rule in admissibility proceedings.\(^{127}\) This was followed by the emphasis within regional institutions such as the Inter-American human rights system on the Respondent State’s duty to provide “non-illusory” domestic judicial remedies.\(^{128}\)

\(^{126}\) See D’Ascoli & Scherr, supra note 25 at 18 (putting forth the argument that “even though initially influenced by the original rule in the field of diplomatic protection—at present the local remedies rule in human rights law is an autonomous and self-contained rule with different functions and aims”); See A.A. Cancado Trindade, “Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century” (2000) 8 Tul. J. Int’l & Comp. L. 5 at 13 [Trindade, “Current State and Perspectives”] (observing that at the regional level, human rights institutions such as the Inter-American Court view the rule in the context of human rights protection as distinct from its orthodox application. In human rights protection “the rule does not have an absolute character and is applied with flexibility”).

\(^{127}\) Trindade, “Current State and Perspectives”, supra note 126 at 13; See e.g. Akdivar v. Turkey (1996) 23 E. H. R.R. 365 (In the Akdivar case the European Court affirmed support for flexibility in the application of the rule of exhaustion of local remedies and acknowledged the “due allowance” that must be made for the fact that the rule is applied in the context of human rights proceedings).

\(^{128}\) Trindade, supra note 126 at 13 (discussing the current practice of the Inter-American human rights system whereby, “conditions of admissibility are applied paying particular attention to the needs of protection. For example, in the application of the local remedies rule the Inter-American Commission has adopted a variety of solutions. In the so-called general cases, it has dispensed with the exhaustion rule and has applied presumptions (e.g. nonexistence or ineffectiveness of local remedies) in favour of the alleged victims”).
d. The Elements Required for the “Correct” Application of the Local Remedies Rule in Human Rights Protection

As provided by Trindade, there exist three identifiable elements for a “correct” application of the local remedies rule in the context of human rights protection: (1) available domestic remedies must not be illusory; (2) in addition to the petitioner’s obligation to exhaust domestic remedies, the local remedies rule in human rights protection imposes a corresponding duty on the Respondent State to provide effective judicial remedies; and (3) the “special needs” of human rights protection must prevail in application of the rule.

i. Domestic Remedies must not be Illusory

It has been found to be implicit in the application of the local remedies rule in the context of human rights protection that the remedies to be exhausted must be practicable, accessible and available—in other words, the local remedies must be adequate for the object of the claim and must necessarily be effective in securing redress.\(^{129}\) Thus, in human rights protection, the expression “local remedies to exhaust” should not be regarded literally lest it convey the false impression that the process of exhaustion represents “the essence” of the local remedies rule in international human rights law.\(^{130}\) Rather, what constitutes the rule’s “fundamental element and ultimate purpose—the raison d’être of the local remedies rule in human rights protection—is the actual redress for the wrong suffered.”\(^{131}\) As such, a pre-condition for the application of the local remedies rule in human rights protection is that it must first be determined by a tribunal that domestic remedies are not “illusory” and that they actually exist.\(^{132}\)

\(^{129}\) Trindade, Exhaustion of Local Remedies, supra note 5 at 58.
\(^{130}\) Ibid. at 57.
\(^{131}\) Ibid. at 57.
ii. The Respondent State’s Duty to Provide Effective Domestic Remedies

While requiring individual complainants to exhaust available remedies found within the framework of the Respondent State’s legal system, the local remedies rule in the context of human rights protection also imposes a corresponding duty on the State to provide effective remedies within its domestic legal framework. This necessarily means that the Respondent State can not simply rest on the mere assertion that a human rights petitioner failed to comply with the local remedies rule without more. When the Respondent State puts forth the argument that the human rights complaint against it can not proceed at the international level because local remedies have not been exhausted, “the government then has the burden of demonstrating the existence of such remedies.”

As explained by Trindade:

The distinct interpretation and application of the local remedies rule in human rights protection, as compared with diplomatic protection may also be examined from the standpoint of the duty to provide local remedies: while the system of human rights protection embodies the State’s duty to provide effective local remedies, the

No. 9 at para. 24 [Judicial Guarantees of the American Convention] (discussing the obligations of States with respect ensuring the availability of domestic remedies in the context of human rights protection, the Inter-Am. Court noted that: “…States Parties have an obligation to provide effective judicial remedies to victims of human rights violations…remedies that must be substantiated in accordance with the rules of due process of law…In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case…when the judicial power lacks the necessary independence to render impartial decisions or the means to carry out its judgments…”).

133 D’Ascoli & Scherr, supra note 25 at 1, 8.
134 Udombana, “So Far”, supra note 21 at 6 (noting that as “self-evident” as the State’s duty to provide adequate redress may be, it is often conveniently overlooked by Respondent States seeking to quash a complaint by objecting to its admissibility on grounds that local remedies were not fully exhausted).
system of diplomatic protection, on the other hand does not...Furthermore, while diplomatic protection does not correspond to an international obligation to protect, human rights protection...contribute[s] towards greater recognition of fundamental rights by emphasizing the element of adequate redress; attention is thus shifted...into the obligation to provide local remedies—an obligation largely neglected in the past.  

Moreover, recognition of the State’s corresponding duty under the exhaustion requirement to provide effective legal remedies furthers the “competing interests” of both human rights petitioners and States Parties.  

According to D’Ascoli and Scherr, emphasis on the State’s duty to provide effective domestic remedies not only serves to enhance the protection of individuals seeking redress, it is also “in the interest of the Respondent State to have opportunity to adjudicate by its own tribunals upon the issues of law and fact which the claim involves in order to discharge its responsibility... to redress the wrong committed.” In this manner, the Respondent State will ensure that due respect is paid to its sovereign jurisdiction.

iii. Recognition of the “Special” Needs of Individual Protection in Application of the Local Remedies Rule

In Trindade’s view, the “special” needs of human rights protection requires “a realistic theory” of exhaustion of local remedies marked by absence of mechanical or rigid application “which adm[its] a certain margin of appreciation of the facts and flexibility in the application of the rule.” The “literal” application of the local remedies rule in admissibility proceedings has been aptly described as “an instrument of procedural massacre” resulting in “a systematic rejection” of substantive human rights applications and occupying an inordinate

135 Trindade, Exhaustion of Local Remedies, supra note 5 at 55.
136 D’Ascoli & Scherr, supra note 25 at 8.
137 Ibid. at 8 quoting Interhandel Case, supra note 2 at 45.
138 Ibid. at 8.
139 Trindade, Exhaustion of Local Remedies, supra note 5 at 49.
amount of judicial resources without always strengthening the protection of human rights.140 However, when the rule is applied correctly by international human rights institutions—in a flexible manner that directs attention towards the overriding needs of individual protection—it can be transformed from a procedural barrier mandating a human rights petitioner’s mechanical exhaustion of illusory local remedies into a mechanism whereby the human rights tribunal can direct its focus on the respondent State’s inherent obligation to provide effective legal redress within its domestic legal institutions.141

e. A “Traditionalist” View of the Application of the Local Remedies Rule in Human Rights Protection

A contrary perspective on the manner in which the local remedies rule should be applied in human rights protection has been expressed by Amerasinghe.142 In expressing “disagreement” with Trindade’s advocacy for a flexible application of the exhaustion requirement, Amerasinghe, as a threshold matter, takes issue with Trindade’s choice of terminology. Amerasinghe argues that: “flexibility and rigidity are relative terms—relative to the point of view being used. What is flexibility from the Respondent State’s angle is rigidity from the individual’s point of view and vice versa…”143 Thus in Amerasinghe’s scholarship it is suggested that Trindade’s characterization of the local remedies rule in human rights protection as necessitating a “flexible” application is flawed and that incorporation of such terminology should be avoided by human rights

140 Ibid. at 52 quoting N. Antonopoulos, La Jurisprudence des organs de la Convention European des droit de L’Homme, (Leidan: Sijthoff, 1967) at 68, 71.
141 Trindade, “Current State and Perspectives”, supra note 126 at 14; See Trindade, “Thoughts on Recent Developments”, supra note 32 at 196.
142 See Amerasinghe, supra note 30 at 73, 437 (arguing that “[o]n the theoretical level…there may be a good argument for giving more recognition to the interests of the individual…in the application of the local remedies rule to human rights protection, than is given to them in the case of diplomatic protection…Yet, this consideration should not per se result in arbitrary departures from the interpretation of the rule as applied in diplomatic protection…on the ground that human rights protection is different and special” at 73).
143 Amerasinghe, supra note 30 at 435, n. 2.
organs in resolution of the exhaustion requirement as it would “obviously” result in “a bias against States...”144 Amerasinghe further argues that:

[Since] the primary purpose of the rule is to give the host or Respondent State... an opportunity of rectifying a situation which is alleged to be in violation of the law... it would defeat that purpose, if the rule were implemented in such a manner or if such an approach were taken as to make it too easy for aliens or individuals to have direct access to international fora... by avoiding recourse to local, domestic or internal remedies without giving the host or Respondent State a fair chance of doing justice. What is required is that the rule be applied in such a way that justice is not travestied by too much regard for the interests of the Respondent States and too little consideration of the other interests involved...145

Hence, Amerasinghe proposes that the local remedies rule in the context of human rights protection should be applied in much the same manner as in the area of diplomatic protection of aliens.146 According to Amerasinghe, notwithstanding the “contextual differences” between the two areas of international legal practice, the extension of the rule to human rights has not substantially altered the rule and he argues that “although human rights may have had an influence on the basic theories underlying the rule itself and its nature,” it still remains the same rule.147

144 Ibid.
145 Ibid. at 436-37 (expressing concern that “too much regard” for human rights petitioners in respect to the application of waivers to the exhaustion requirement creates a bias against the Respondent State. Amerasinghe argues that “[i]t is chiefly in the area of limitations on the rule, particularly by reference to the principle of avoiding undue hardship to the individual... that the legitimate parameters of the rule need to be kept in mind”).
146 Ibid. at 73, 81-83 (arguing against the “growing tendency, among text writers and analysts, to invoke the contextual differences in the application of the rule of local remedies to the two institutions of diplomatic protection and human rights protection as reason for taking a more ‘flexible’ approach to the application of the rule to human rights protection...”).
147 See Amerasinghe, supra note 30 at 425, 435 (putting forth the argument that despite minor alterations in application of the rule by human rights tribunals, “in respect of the material content of the rule, its application in the field of human rights protection is identical with its application in the law of diplomatic protection... its raison d’être is still to be deemed unchanged and viable. The rule sprang up primarily as an instrument designed to ensure respect for sovereignty of host states in a particular area of international dispute settlement. Basically, this is the principal reason for its survival today and also for its projection into the international systems of human rights protection” at 425).
f. Trindade’s Response to Amerasinghe’s Proposal for Strict Adherence to the Traditional Application of the Local Remedies Rule in Human Rights Protection

Not surprisingly, Trindade categorically rejects Amerasinghe’s notion that contextual differences in the field of human rights protection and diplomatic protection requires no divergence in application of the local remedies rule.\footnote{Trindade, Book Review of Amerasinghe, supra note 31 at 626.} Trindade’s description of Amerasinghe’s argument as erroneous rests mainly on the fact that the contextual differences between human rights and diplomatic protection “are not slight but fundamental.”\footnote{Ibid. at 626; See P.R. Ghandi, Book Review of Local Remedies in International Law by C. F. Amerasinghe (1994) 43 (2) I.C.L.Q 470, 471 (rejecting Amerasinghe’s proposition that the local remedies rule in the human rights context should not depart significantly from its original application in diplomatic protection. Ghandi notes that any suggestion that the rule in human rights should “mirror” the diplomatic application of the exhaustion requirement ignores the considerable amount of practice which shows that the experience of human rights protection necessitates “...departures from the exact practice relating to the implementation of the rule in diplomatic protection...” at 471).} Trindade adds that:

…but to argue as [Amerasinghe] does, that the application of the rule in human rights protection should mirror its application in diplomatic protection as a rule of customary international law is to claim that generally recognized rules of international law apply in the same way regardless of context... [However]...the formulation of the local remedies rule in human rights instruments was never meant to entail such uniformity of application.\footnote{Trindade, Book Review of Amerasinghe, supra note 31 at 626.}

Trindade further notes that despite Amerasinghe’s contention, in the international protection of human rights the local remedies rule is not of unlimited scope and “[i]nternational practice affords no evidence for treating the local remedies rule as an absolute dogma or sacrosanct principle always to be applied.”\footnote{Trindade, Exhaustion of Local Remedies, supra note 5 at 110, 112.} In Trindade’s view, the divergence between the traditional application of the local remedies rule and its more flexible application in human rights protection is justified by the inescapable fact that: “when inserted in human rights treaties, generally recognized rules of international law follow an evolution of their own
…these rules necessarily suffer a certain degree of adjustment or adaptation, which is dictated by the special character of the object and purpose of those treaties and by the widely recognized specificity of human rights protection.”

Moreover, the flexible application of the local remedies rule in human rights protection does not imply that the local remedies rule be “reduced to nothing,” nor is it suggested that “domestic remedies may be side-stepped…” in pursuit of human rights objectives. Rather, it is maintained that application of the local remedies rule in the sphere of human rights protection requires “a realistic assessment of the general legal and political context in which the remedies operate and the personal circumstances of the applicant.” Trindade describes such proactive use of the local remedies rule in human rights protection as a “positive” application of the local remedies rule and he further advises:

Rather than to contest or support the application of the local remedies rule, a more constructive attitude would seem to be to search for a proper and adequate application of the rule within a particular context in pursuit of clear and well-defined purposes…In diplomatic protection, the local remedies rule was approached in an essentially ‘negative’ way, preventing the exercise of protection until remedies had been unsuccessfully exhausted. There is nothing to prevent the local remedies rule being approached in a ‘positive’ way in the context of human rights protection…The rationale of the local remedies rule ‘positively’ approached in the present context does not…prevent international protection, it rather insists on local protection as part of the international system of human rights.

153 Briggs, supra note 116 at 923.
154 Amerisinghe, supra note 30 at 435.
156 Trindade, Exhaustion of Local Remedies, supra note 5 at 48-49, 55-56; See D’Ascoli & Scheer, supra note 25 at 18 (“To guarantee that individuals have effective domestic remedies before their national authorities can be considered a positive function of the rule in the field of human rights…”).
3.4 The Need for a Consistent Application of the Local Remedies by the African Commission in the Flexible Manner Described by Trindade

Based on Trindade’s comprehensive analysis of the application of the local remedies rule in human rights protection, it is clear that a viable mechanism for assisting African States in establishment of domestic legal institutions capable of protecting the rights enshrined in the Charter, is provided by a flexible application of the local remedies rule in African Commission admissibility proceedings. The application of the local remedies rule in a flexible manner which focuses on the State’s duty to provide effective legal redress rather than the petitioner’s mechanical exhaustion of “illusory” domestic procedures, aids in identifying African Charter violative features of the domestic legal framework of States Parties and provides the Commission opportunity to recommend corrective measures. Because the local remedies rule is a widely accepted principle of customary international law, and incorporated in the articles of the enabling human rights treaty—the African Charter, it can be invoked by the African Commission to scrutinize the internal workings of the Respondent State’s domestic legal institutions without overtly offending regional conceptions of sovereignty. In expressing support for the close scrutiny of the Respondent State’s domestic legal system during admissibility proceedings before international human rights systems, Trindade observed that the notion that

157 Onoria, supra note 43 at 23.
158 See Rachel Murray, “Decisions by the African Commission on Individual Communications under the African Charter on Human and Peoples’ Rights” (1997) 46 I.C.L.Q. 412, 422 [Murray, “Decisions by the African Commission”] (Murray has observed that the principle of sovereignty is particularly important in the context of the African Charter. In the view of many African States, their hard won independence from colonial rule could not be readily relinquished to a regional supervisory body absent guarantees that sovereignty would be respected—hence the need for incorporation of the local remedies rule into the Charter); But see Trindade, Exhaustion of Local Remedies, supra note 5 at 39 (Trindade explains that concerns over State sovereignty in the flexible application of the local remedies rule are unfounded. “In the mechanism of diplomatic protection, exhaustion of local remedies preceded State intervention, hence the rigour with which the local redress rule has been applied in that framework. In the system of human rights protection this is certainly not the case as the machinery is entrusted to the international authority: State sovereignty is not so easily threatened, and the local remedies rule—primarily an attribute of State sovereignty—could theoretically be more flexibly interpreted and applied” at 39).
“…decisions of national tribunals and eventual defects of national legislation are [solely] domestic questions…leads to a compartmentalization between the international and the domestic legal orders in the domain of human rights protection…,” 159 and he further notes that in the domain of human rights protection there must be “a constant interaction between international law and domestic law, to the benefit of the protected human beings.” 160

As illustrated in the Niger Delta cases, facilitating domestic efforts to strengthen national legal institutions in a manner that “significantly expand[s] the ability of aggrieved sub-state groups to ventilate and seek redress in more peaceable ways,” is an attainable goal for the African human rights system which can be achieved in part through a flexible application of principles of international law such as the local remedies rule. 161 In the Niger Delta line of cases, the exhaustion requirement was effectively utilized by the African Commission to further African Charter due process guarantees and the domestic impact of the African Commission’s pronouncements regarding Nigeria’s inadequate legal arrangements for human rights violations occurring during the Niger Delta crisis, admirably reflected the African Commission’s role in “assist[ing] States Parties to implement their obligations under the African Charter.” 162 In fact, since the Charter came into force, the African human rights system’s most significant influence has come from concessions and institutional reforms implemented within Nigeria’s domestic legal system and the Commission’s jurisprudence regarding application of the exhaustion requirement in the Nigerian context has received wide praise by legal scholars. 163 However, prior to the Commission’s flexible application of the local remedies rule in human rights complaints challenging Nigeria’s domestic legal framework, the African Commission’s admissibility practice was less well received due in large part to the strict view of

159 Trindade, “Thoughts on Recent Developments”, supra note 32 at 201.
160 Ibid.
161 Okafor, “Peace Building”, supra note 6 at 440.
162 Wiwa, supra note 12 at para.114.
163 Viljoen & Louw, “Findings of the African Commission”, supra note 11 at 12, 17 (observing that in both substantive factual detail and legal analysis the Commission’s findings have improved dramatically over the years and that such improvements may account for increased compliance with recommendations of the Commission in countries such as Nigeria).
the exhaustion requirement taken by the Commission in earlier admissibility rulings.
CHAPTER FOUR: THE EXHAUSTION OF LOCAL REMEDIES UNDER THE AFRICAN CHARTER

4.1 The African Charter’s Exhaustion Requirement under Article 56 (5)

The requirement of exhaustion of local remedies can be found in the admissibility conditions enumerated in Article 56 (5) and (6) of the African Charter, which provides inter alia that individual communications alleging human rights violations shall be considered by the Commission if they “[a]re sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.” 164 The Charter further imposes an obligation to submit communications to the Commission “within a reasonable period from the time local remedies are exhausted…” 165

164 Article 56 (5) of the African Charter, supra note 4; See Rule 97 (c), African Commission Rules of Procedure, supra note 44 ( noting that the Commission shall consider a communication only when “[t]he Commission is certain that all the available local remedies have been utilized and exhausted, in accordance with the generally recognized principles of international law, or that the application of these remedies is unreasonably prolonged or that there are no effective remedies”); See also Okere, “The Protection of Human Rights in Africa”, supra note 85 at 151 (noting that with respect to communications from member States, the Charter imposes few procedural requirements primarily owing to the fact that the Charter “envisages amicable bilateral settlement,” of inter-State complaints through negotiation or other peaceful method of settlement. However in the case of individuals or groups other than States, communications alleging violation of human rights will be considered by the Commission upon satisfaction of the following conditions enumerated in Article 56 of the Charter: (1) Indicate their authors even if the latter requests anonymity; (2) Are compatible with the Charter of the Organization of African Unity or with the [African] Charter; (3) Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity; (4) Are not based exclusively on news disseminated through the mass media; (5) Are sent after exhausting local remedies if any, unless it is obvious that this procedure is unduly prolonged; (6) Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter; and (7) Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the [African] Charter).
165 Article 56 (6) of the African Charter, supra note 4; See also Onoria, supra note 43 at 4 (noting that the African Commission in several decisions has affirmed support for the application of the local remedies rule in the international protection of human rights. In World Organization against
4.2 The African Commission’s Application of the Charter’s Exhaustion Requirement in Early Admissibility Rulings

The Commission has noted that, in its admissibility practice, the exhaustion provision of Article 56 is necessarily the first to be considered before any substantive consideration of the communication, and as a consequence, “it has already been the subject of substantial interpretation in the jurisprudence of the African Commission…”\(^{166}\) However, despite having been the most contested condition for admissibility before the African Commission, detailed guidance as to its application under the Charter was lacking in both the enabling text and the Commission’s early admissibility decisions. This led the Commission to construct a variety of standards on the application of the local remedies rule under the African Charter, few of which proved successful in promoting human rights protection or achieving greater State compliance with African Charter due process guarantees.\(^{167}\) Although the African Commission issued numerous rulings granting waivers of the local remedies rule, many of those earlier decisions appear “fact specific” thus limiting their precedential value and creating further procedural uncertainty for human rights petitioners seeking to avail themselves of the Commission’s adjudicative authority. Viljoen also faults the African

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\(^{166}\) *Civil Liberties Organization v. Nigeria* (1999) Afr. Comm. HPR 151/96 at para. 11 (noting that the requirement of exhaustion of local remedies “is just one of seven conditions specified by Article 56, but it is the one which usually requires the most attention”).

\(^{167}\) See Viljoen & Louw, “Findings of the African Commission”, *supra* note 11 at 12 (commenting on the overall quality of the Commission’s early jurisprudence, the authors note that initially the Commissions decisions were very vague. Even when the Commission found the State party in violation of the Charter, the decision merely noted this fact without stipulating at all how the situation should be remedied. By failing to specify relief for the victims of human rights abuses, the Commission’s decisions were rarely implemented by States Parties).
Commission’s early admissibility practice, noting “the lack of substantiation in the reasoning of the African Commission” in its initial years of operation. 168

4.3 The Defects in the African Commission's Initial Admissibility Practice

An evaluation of the manner in which the local remedies rule was applied by the African Commission in its initial admissibility practice shows the Commission’s application of the exhaustion requirement unsatisfactory on several grounds.

a. The Absence of a Clear Test for “effectiveness” of Domestic Legal Remedies

The inconsistency found in the Commissions initial admissibility practice is exemplified by the Commission’s rulings on a critical issue pertaining to the correct application of the local remedies rule in human rights protection, namely, the determination of an “effective” domestic remedy. 169 Under the Commission’s Rules of Procedure, communications are admissible when “the Commission is certain...that there are no effective remedies.” 170 However, neither the Commission’s Rules of Procedure nor Article 56(5) of the African Charter defines a threshold of “effectiveness” that local remedies must meet before the obligation to exhaust them is required and several years after the Commission received its first individual complaint, the matter remained

169 Inconsistency should not be mistaken for flexibility. While Trindade’s analysis of a flexible application of the rule rejects mechanical or rigid application of the exhaustion requirement, a discernable pattern in application of the rule is also necessary to guide human rights petitioners in meeting the African Charter’s admissibility requirements.
170 Rule 97, African Commission Rules of Procedure, supra note 44.
Indeed at the onset, the Commission even declined to read a requirement of “effectiveness” into the State’s duty to provide domestic remedies under Article 56 (5) and at times appeared satisfied with the mere availability of domestic legal remedies without initiating further inquiry into their efficacy. As a consequence, individual human rights complaints were routinely denied admissibility by the African Commission on the basis of the complainant’s failure to exhaust domestic remedies, regardless of the capacity of the available remedies to provide the redress for which petitioner seeks international intervention. In this regard, Kofele-Kale writes that “a linear focus” on exhaustion before the domestic courts serves only to negate the right of individual petition authorized by the African Charter, and he adds further that:

…the right to individual petition, captured in Article 58 (7) of the African Charter, holds such a prominent place in international human rights law, any restrictive interpretation would not correspond to its aim and purpose. Therefore, insisting that individuals seeking to assert their rights…must first go through the national court system even when it has been demonstrated that that system lacks independence, amounts to a preference for a formalistic approach that is totally at odds with the protection of human rights enshrined in the African Charter…

The Commission thus erred in its initial admissibility practice in neglecting to acknowledge that the availability of formal remedies may be “illusory” where a right is not well provided for under the existing domestic legal framework.

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172 Ibid. at 259; Viljoen, “African Charter Procedure and Admissibility”, supra note 11 at 63.
173 Kofele-Kale, supra note 3 at 14-15 (in a complaint to the African Commission concerning land appropriation by the government of Cameroon the Respondent State argued for dismissal of the communication for failure to exhaust domestic remedies. However, Ndvia-Kofele-Kale, acting as counsel for the indigenous people of Fako division, argued against a “linear focus” on exhaustion before the domestic courts).
174 See Trindade, “Thoughts on Recent Developments”, supra note 32 at 196-97 (noting that the summary disposition of the exhaustion issue “on the basis of the test of the availability rather than of the adequacy and effectiveness of domestic remedies” provides inadequate human rights protection and precludes inquiry on the State’s duty to provide effective local remedies…”).
Odinkalu and Christensen have noted that on rare occasions during the Commission’s early admissibility practice when the Commission actually addressed the issue of effectiveness of domestic remedies, the Commission’s decisions on the threshold of effectiveness domestic remedies must meet were often “inexplicable”. In some cases the Commission declared the communication inadmissible under Article 56 (5) despite the fact that the remaining local remedy offered no redress for the harm alleged, while in other communications the Commission insisted that States make available to petitioners domestic remedies sufficient to provide adequate redress for the human rights violations raised in the complaint.

Even in cases where the African Commission excused the application of the exhaustion requirement due to the “pervasiveness” of the human rights violations, the Commission’s admissibility decision rarely included scrutiny of the Respondent State’s domestic legal framework to ensure the capacity of State legal institutions to guarantee the procedural due process mandated by the African Charter. Nor did the Commission in its early admissibility practice

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175 Odinkalu & Christensen, “ACHPR Non-State Procedures”, supra note 171 at 259; See Viljoen, “African Charter Procedure and Practice”, supra note 11 at 63 (noting that in the Commission’s early admissibility practice the reason for a finding was often unclear or the factual basis for the finding was not disclosed).

176 See e.g. Abubakar v. Ghana (1996) Afr. Comm. HPR 103/93. In Abubakar, the complaint alleged unlawful detention by State officials for politically subversive acts and after 7 years escaped imprisonment. The Commission ruled the communication admissible noting that the Charter requires exhaustion unless local remedies are unduly prolonged and considering “the nature” of the complaint, it would not be “logical” to ask the complainant to go back to Ghana to seek a remedy. In contrast, in the case of Jean Yakovi Degli v. Togo (1994) Afr. Comm. HPR 83/92, 88/93, 91/93 [Degli], the Commission denied admissibility and referred petitioners back to domestic courts for exhaustion purposes even though the complaint made clear the fact that no domestic claim would likely be permitted by the ruling government authorities and where serious human rights violations were alleged. In Degli, the complaint alleged that Togolese military officials engaged in acts of harassment against political opponents including the killing of several peaceful demonstrators causing other victims to flee from Togo thus precluding access to Togolese domestic courts. The facts allege that acts by Togolese officials resulted in the death of 20 persons and the flight of up to 40,000 individuals. Nonetheless, the Commission concluded that a fact finding mission sent to Togo “abducted that these acts were committed under a previous administration [and] the Commission is satisfied that the present administration has dealt with the issues satisfactorily” at para. 5.

sufficiently address the importance of the role played by an independent judiciary in ensuring the “effectiveness” of available domestic remedies, despite the prevalence with which the lack of judicial independence was raised by human rights complainants requesting waiver of the local remedies rule. ¹⁷⁸

Finally, in a decision issued in 2000, the Commission in *Jawara v. Gambia* enunciated a comprehensive test of effectiveness for available domestic remedies among which was included the proviso that a remedy “…is deemed effective if it offers a prospect of success… [and] the existence of a remedy must be sufficiently certain not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness.”¹⁷⁹ However, few of the criteria argument, noting that as “a practical matter” Zambia’s domestic remedies were unavailable and ineffective. However, the Commission’s recommendation to the Respondent State were vague and failed to specify how compliance with due process guarantees can be achieved; See Free Legal Assistance Group and Others v. Zaire (1995) Afr. Comm. HPR 100/93 [*FLAG v. Zaire*] (although the Commission waived the exhaustion requirement based on the pervasiveness of the human rights violations raised by petitioners, the decision in *FLAG v. Zaire* does not address defects in domestic law which are clearly insufficient to properly redress human rights complaints).


¹⁷⁹ See *Jawara v. Gambia* (2000) Afr. Comm. HPR 147/95, 149/96 [*Jawara*] (in a complaint by Gambia’s former president deposed by military coup in 1994, the petitioner alleged multiple violations of the African Charter, including extra-judicial executions, unlawful detention and fair trial violations. The Respondent State alleged that petitioner failed to exhaust domestic remedies and that the alleged violations were necessitated by State efforts to quell social unrest orchestrated by the political opposition. The Commission rejected the State Party’s objections to admissibility. In *Jawara*, the African Commission finally elaborated on the definition of an effective domestic remedy under the Charter and established “three major criteria in determining when a local remedy exists for purposes of exhaustion. “[N]amely, the remedy must be available, effective and sufficient.” According to the African Commission, “the first test that a local remedy must pass is that it must be available to be exhausted—meaning that the petitioner can pursue it without impediments or can make use of it in the circumstances of his case. In other words, “remedies, the availability of which is not evident, cannot be invoked by the State to the detriment of the complainant.” Secondly, “a remedy is considered effective when it actually exists within the domestic legal system and when it offers a reasonable prospect of success. If it appears for example—on the basis of established case law—that the exhaustion of a particular remedy is futile and not helpful, then such a remedy need not to be exhausted.” Therefore, the existence of a remedy must be sufficiently certain not only in theory but also in practice, failing which it will lack the requisite accessibility and effectiveness”).
for effectiveness finally set forth in Jawara v. Gambia were applied by the Commission on a consistent basis in early admissibility decisions.

b. Summary Dismissal of Individual Complaints

In the Commission’s initial admissibility practice there exist broad discrepancies in the application of the local remedies rule in human rights complaints on the basis of the degree of harm alleged and the number of persons impacted by the State’s misconduct. Viljoen notes that in the jurisprudence of the African Commission, “[a]s a practical matter, local remedies are prima facie not available or effective in instances of serious or massive violations.” Thus a review of several African Commission admissibility decisions shows that the Commission routinely waives application of the exhaustion requirement in cases which evidence “massive violations” of human rights. Conversely, in all other complaints made during the initial practice of the African Commission, the local remedies rule was applied strictly and the Commission often insisted on near “literal” exhaustion of available domestic remedies. This is especially true in complaints which the Commission views as alleging “a single incident of human rights violation over a short period of time.” Although the Commission acknowledged in Free Legal Assistance Group and Others v. Zaire that the requirement of local remedies is not meant to “apply literally,” in practice, the Commission’s early admissibility rulings often seemed to demand a “literal” exhaustion of domestic remedies by individual complainants no matter how

180 Viljoen, “African Charter Procedure and Admissibility”, supra note 11 at 119; See e.g. Organization Mondiale Contre La Torture v. Rwanda (1996) Afr. Comm. HPR 99/93 (complaint concerning the expulsion of refugees wherein the Commission waived the exhaustion requirement on grounds that local remedies need not be exhausted in cases of “serious and massive violations”).


182 See AJC v. Ethiopia, supra note 108 (In a later case, the Commission explained the reasoning behind its strict approach in application of the exhaustion requirement in “single incident” complaints versus the less rigorous exhaustion examination in cases of massive human rights violations. According to the African Commission, in cases involving wide spread violations, “the State will be presumed to have notice…”).
“impractical or undesirable,” thus contradicting the holding reached in cases such as *Free Legal Assistance Group.*  

The Commission has explained its disparate application of the local remedies rule on the basis of the pervasiveness of the harm alleged by noting that in complaints involving widespread violations, “the gravity of the human rights situation…and the great number of victims involved render the channels of remedy unavailable in practical terms…” Moreover, in communications alleging “grave and massive violations” of human rights, “the State will be presumed to have notice of the violations within its territory and the State is expected to act accordingly to deal with…human rights violations.” However, while the gravity of the human rights situation in complaints alleging massive violations of human rights merits dispensation of normal procedural rules, there are no just grounds under the African Charter to support summary dismissal of “single incident” individual complaints in the manner frequently adopted by the Commission in its early admissibility practice. On several occasions the Commission has rationalized its strict application of the exhaustion requirement in “single incident” complaints as preventing the African Commission from becoming a court of first instance. However, such concerns are surely

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183 *FLAG v. Zaire, supra* note 177 at para. 37.

184 *Mauritania Case, supra* note 88 at para. 85; See *AJC v. Ethiopia, supra* note 108 (offering the explanation that exhaustion is waived in cases of massive violations on the basis that the pervasiveness of the rights violations serves as adequate notice to the State).

185 *AJC v. Ethiopia, ibid.;* See Article 58 (1) of the African Charter, *supra* note 4 (Waiver of the local remedies rule in cases alleging wide spread violations is also justified by the Commission pursuant to Article 58 (1) of the African Charter which in recognition of the “special” character of “cases which reveal the existence of a series of serious or massive violations” of human rights, also mandates immediate action by the Commission. Specifically, Article 58 (1) provides that “When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples’ rights, the Commission shall draw the attention of the Assembly of Heads of State to these special cases”).

186 See e.g. *AJC v. Ethiopia, supra* note 108; See also Rule 104 of the African Commission Rules of Procedure, *supra* note 44 (pursuant to Rule 104, upon the Commission’s request, a petitioner may resubmit a complaint when local remedies have been properly exhausted or if complainant establishes that local remedies are unavailable, ineffective or unreasonably prolonged. Practically, however, given the obvious exigencies of human rights protection, including physical peril to petitioners as well as the limited resources available to petitioners and the financial constraints faced by NGOs operating within the African human rights system, the resubmitting of a communication often proves to be a difficult barrier. Thus despite its “procedural character” under the African Charter the Commission’s denial of admissibility on grounds of failure to
outweighed by the fact that human rights tribunals are “in the domain of protection which is fundamentally victim-oriented” and consequently the foremost objective should be concern for the protection of individual human beings. \(^\text{187}\) State violations of the African Charter impacting a small group of persons or even one single individual, are not inconsequential and are certainly no less injurious to the human dignity which the Africa Commission is empowered to promote. All human rights complaints merit serious review during admissibility proceedings and summary dismissal of individual complaints as a means to maintain the Commission’s exclusivity is ill-founded. \(^\text{188}\) Indeed, the dismissive attitude evident in the Commission’s early admissibility practice in respect to “single incident” human rights complaints had greater potential to diminish the status of the African human rights system by eroding public trust in the institutional capacity of the Commission to defend fully the individual rights guaranteed in the African Charter. \(^\text{189}\) 

exhaust local remedies is often fatal to the human rights claim and in practical terms carries the same weight as a decision on the merits; See Chidi Ansem Odinkalu, “Human Rights Mechanisms in Africa: Recent Developments in their Norms, Institutions and Jurisprudence” (2003) 3 Hum. Rts. L. R. 105, 116 [Odinkalu, “Human Rights Mechanisms”] (noting that the Commission’s decision declaring a complaint inadmissible for non-exhaustion tends to bring the communication to an end); See Viljoen, “African Charter Procedure and Admissibility”, supra note 11 at 114 (noting that upon dismissal of a complaint for non-exhaustion of local remedies, the Commission rarely requests clarification even where the factual basis are unclear).

\(^\text{187}\) Trindade, “Current State and Perspectives” supra note 126 at 14.

\(^\text{188}\) Although the goal of preventing the Commission from being transformed into a court of first impression is routinely raised in several African Commission admissibility decisions, the likelihood of its occurrence appears remote. Indeed, the Commission itself has acknowledged that “local remedies are normally quicker, cheaper and more effective than international ones” A/J C v. Ethiopia, supra note 108. Therefore, where available, most complainants are likely to resort first to domestic remedies prior to seeking international adjudication of human rights violations.

\(^\text{189}\) An example of early Commission decisions in individual complaints adversely affecting the Commission’s credibility can be found in Ayele v. Togo (1994) Afr. Comm. HPR 35/89 (in a communication alleging discrimination and denial of “nationality,” the Commission issued a decision consisting of two sentences denying admissibility pursuant to Article 56 on grounds that the complaint was “vague.” The Commission gave no further explanation for inadmissibility and the Commission could have requested clarification or supplementary facts); See Ousman Manjang v. Gambia, Afr. Comm. HPR 131/94 [Manjang] (in the Manjang case, the petitioner alleged unlawful detention by Gambian authorities. However, the Commission denied admissibility on grounds that the author failed to exhaust domestic remedies. The Commission neglected to indicate what remedies remained available for petitioner to exhaust and it remains unclear whether the Commission intended petitioner to pursue an appeal of his human rights claim against Gambia to the level of the (British) Privy Council since this was Gambia’s highest court of appellate review); See International PEN (in respect of Kemal al-Jazouli) v. Sudan (1995) Afr. Comm. HPR 92/93 (communication alleging unlawful detention by State authorities for a four month period in
This is not to suggest that individual complainants be absolved of the obligation to exhaust domestic remedies where such remedies are clearly available and the petitioner for subjective reasons chooses not to pursue them. However, the exhaustion requirement is not indefatigable and the human rights complainant should not be obligated to pursue ad nauseam futile domestic procedures. “… [T]hough the requirement of exhaustion of local remedies is a conventional provision, it should not constitute an unjustifiable impediment to access to international remedies.” As noted by Trindade, the application of the local remedies rule in human rights protection “was not conceived as a mechanically applied device, leading to systematic rejection of complaints” moreover, a mechanical application of the rule in human rights protective systems would “tend to be destructive of the very purposes of securing an effective protection of human rights.”

1992, the Commission denied admissibility for non-exhaustion of local remedies. The Commission stated that despite being held incommunicado for four months by the government of Sudan, the petitioner had “ample freedom” to pursue domestic remedies during the interim between his detention in 1992 and the lodging of the complaint with the Commission in March 1993. Ibid at para 3. The Commission thus insisted on petitioner’s mechanical exhaustion of domestic remedies, further noting that “the fact that the Government has in general terms denied the existence of incommunicado detentions in Sudan does not amount to saying that the case has been tried in Sudan” at para. 3. At no point does the Commission’s decision review defects in Sudan’s domestic legal framework which led to petitioner having been detained incommunicado or the unlikelihood that any redress could be achieved by petitioner in the domestic courts of Sudan); See Degli v. Togo, supra note 176 at para. 5 (relying on assertions made the Togolese government, the Commission denied admissibility. The Commission’s decision offers no explanation or finding as to how the atrocities alleged by petitioner were resolved including allegations that actions by the State caused numerous Togolese to flee their homes. The Commission simply dismissed the communication on the basis of the new Togolese government’s denial of responsibility).

190 Trindade, Exhaustion of Local Remedies, supra note 5 at 110-113 (noting that it is generally accepted that a human rights tribunal ought not to relieve complainants of the obligation to exhaust domestic remedies where the excuse proffered is deemed frivolous or objectively unreasonable. Although international human rights practice recognizes non-application of the rule “when courts have no jurisdiction to afford relief” or other comparable circumstances, waiver of the rule is applied sparingly and “certain arguments have been dismissed by international organs and tribunals as constituting mere excuses not relieving the claimant from the duty of exhausting local remedies.” For example, “the complainant’s personal opinion as to the assumed uselessness of a given domestic remedy is no ground for absolving him from the obligation to exhaust).

191 AJC v. Ethiopia, supra note 108; See also Trindade, Exhaustion of Local Remedies, supra note 5 at 4, 39 (recommending that where possible, “due allowance must be made for the fact that the rule is applied in the context of human rights proceedings”).

192 Trindade, Exhaustion of Local Remedies, supra note 5 at 4, 39.
c. The Commission’s Early Application of the Local Remedies Rule Favored the Respondent State

In RADDHO v. Zambia, the African Commission reiterated a traditional rationale for the local remedies rule, noting that, “[t]he rule requiring exhaustion of local remedies as a condition of the presentation of an international claim is founded upon, amongst other principles, the contention that the Respondent State must first have an opportunity to redress by its own means within the framework of its own domestic legal system, the harm alleged to have been done the individual.” The Commission’s dictum in RADDHO v. Zambia addresses one of the challenges inherent in the extension of the local remedies rule to the area of human rights protection—namely, achieving the correct balance between respect for the Respondent State’s sovereignty and effective international protection of individuals against human rights violations committed within the State’s territory. A review of the Commission’s early decisions on admissibility shows that the balance of interests was weighted heavily towards the Respondent State’s sovereign prerogative as opposed to individual protection. For example, in several early African Commission decisions, “the initial if not the whole, burden of proving exhaustion was placed on the human rights victim” in direct contravention of international practice whereby the “distributive” evidentiary model is deemed preferable in resolution of the exhaustion

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194 See generally Trindade, Exhaustion of Local Remedies, supra note 5.
195 While the Commission appeared to favor the Respondent State in several early admissibility decisions, it has insisted that available remedies not be of a discretionary nature. The decisions of the African Commission indicate that the domestic remedies referred to by Article 56(5) of the African Charter are legal remedies sought from courts of a judicial nature. Where the domestic remedies available to petitioners are non-judicial, administrative and/or of a discretionary nature, the African Commission has ruled the exhaustion requirement inapplicable. See e.g. Krishna Achutan on behalf of Aleke Banda v. Malawi (1995) Afr. Comm. HPR 64/92, 68/92, 78/92 [Achutan](The Commission indicated in its admissibility decision that “where the remedy is at the complete discretion of the executive, the existence of local remedies is futile and to exhaust them would be ineffective”); See Constitutional Rights Project v. Nigeria (1995) Afr. Comm. HPR 60/91(ruling that complainants are not required to exhaust “extraordinary or discretionary remedies of a non-judicial nature”).
requirement. Thus in its initial practice the Commission interpreted Article 56 (5) of the African Charter as mandating that human rights petitioners demonstrate serious efforts to exhaust domestic legal remedies and often rejected the petitioner’s allegations of futility on grounds that the author failed to substantiate her claims on the absence of effective domestic remedies.

In contrast to the Commission’s insistence that petitioner’s exhaustion claims be supported by objective factual evidence, comparable evidentiary standards were rarely imposed on States Parties seeking to prevent international adjudication by interposing an exhaustion objection. Several African Commission decisions reflect that the Commission often permitted the Respondent State to successfully raise objections to admissibility of the complaint in the absence of a clear showing that unexhausted local remedies are readily available and sufficient to provide the redress sought by petitioner. This defective evidentiary practice is illustrated by Degli v. Togo, where the Commission, despite the significant human rights violations alleged, nevertheless

197 See Trindade, Exhaustion of Local Remedies, supra note 5 at 135-138 (noting that the preferred practice in other international human rights tribunals calls for a “distributive” evidentiary burden whereby each party asserting a legal argument must set forth supporting facts sufficient to maintain the proposition asserted).

198 Viljoen, “African Charter Procedure and Admissibility”, supra note 11 at 114; See Odinkalu & Christensen, “Non-State Procedures”, supra note 171 at 265(discussing the Commission’s early admissibility practice the authors note that “[i]n some cases…the Commission appears more reluctant towards the author’s allegations. In such cases, without requesting additional information from the author, the Commission declares the communication inadmissible on the grounds that the author failed to provide information as to the exhaustion of local remedies” at 265); See e.g. Capitao v. Tanzania, (1995) Afr. Comm. HPR, Comm. 53/91 (communication alleging unlawful seizure of property by Respondent State. The Commission ruled the communication inadmissible for non-exhaustion of local remedies. Although the Commission recommended petitioner resubmit the communication upon proper exhaustion, the decision failed to adequately address petitioner’s assertion that as a “foreign” resident of Tanzania, no domestic remedies were available to him, especially in a dispute involving financial claims asserted against the government).

199 See Murray, “Decisions by the African Commission”, supra note 158 at 423 ( remarking that “the Commission has held cases inadmissible if it received no response from the author as to exhaustion and, more disturbing, on the basis of a statement by the government that remedies were not exhausted”).

200 See e.g. International PEN v. Sudan (1995) Afr. Comm. 92/93 (the Commission took a strict approach to the exhaustion requirement ruling that the victim was required to exhaust domestic remedies despite the Respondent State’s defective legal framework which resulted in the incommunicado detention of petitioner); See also Manjiang, supra note 189 (the complainant who alleged unlawful detention by the Respondent State was denied admissibility based on “lack of effort” to exhaust local remedies. The admissibility decision consisted of one sentence without further legal analysis).
denied admissibility based solely on assurances submitted by Togolese officials that petitioners’ human rights claims have been resolved. Thus in Degli, despite the absence of objective factual evidence in support of the Respondent State’s assertion that it has dealt with the “issues” raised in the complaint, the Commission expressed satisfaction with the State’s bald claim to have remedied the human rights situation in Togo.

The Commission’s former practice in cases such as Degli v. Togo, of adopting the Respondent State’s claims pertaining to unexhausted local remedies without requiring objective factual evidence in support of such claims, “…den[ies] an individual complainant who alleges State violations of [African] Charter guaranteed rights from having his complaint heard on the merits.” As Kofele-Kale has observed, a “procedural equality of arms (égalité des armes),” in the application of the exhaustion requirement is essential to the regional protection of human rights:

A one-dimensional approach to the exhaustion rule creates an imbalance between individual complaints and Respondent States in favor of the latter. It makes it possible for the Respondent State to avoid addressing the merits of a complaint alleging human rights violations through a well-timed objection to the non-exhaustion of domestic legal remedies.

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201 Degli, supra note 176 at para 3, 5 (The Commission’s decision gives no indication how Togolese officials “dealt with the issues” nor does the decision present any information from the victims of the human rights violations in support of the Respondent State’s assertion that the human rights violations were satisfactorily resolved).

202 Ibid. (notably, the decision in Degli is deficient in both the denial of admissibility as well as the Commission’s legal analysis on successor State responsibility. The decision in Degli is made even more egregious by the Commission’s acquiescence to the State’s erroneous claim that it can not be held accountable for the human rights violations raised by petitioners on grounds that responsibility for the social unrest lies with the preceding Togolese government under whose authority the rights violations occurred. In contravention of international law, the Commission conceded the Respondent States view that the presence of a new government in Togo vitiates human rights violations committed by its predecessor. Thus the Commission dismissed the complaint based on findings that a previous government regime committed the alleged violations and as such “the Commission is satisfied that the present administration has dealt with the issues satisfactorily” at para 5); See Achutan, supra note 195 ( In contrast to the admissibility ruling in Degli, the Commission in Achutan correctly ruled that “a new government inherits the previous government’s international obligations, including the responsibility for the previous government’s mismanagement. Although the present government of Malawi did not commit the human rights abuses complained of, it is responsible for the reparation of these abuses” at para 12).

203 Kofele-Kale, supra note 3 at 15.

204 Ibid. (urging the African Commission against adopting a “restrictive” interpretation of the Charter’s exhaustion requirement, Kofele-Kale notes inter alia that “…insisting that individuals
Similarly, Onoria in expressing disappoint in the quality of the Commission’s earlier decisions on the local remedies rule, forthrightly notes: “In Africa where there is a tendency to shelter acts of the government and its officials behind all manner of legal and political immunities, it may be imperative to place a stricter burden upon the State to prove not only the existence of local remedies but also of their accessibility and effectiveness.”

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\[d.\] The Absence of Substantive Legal Analysis in the Commission’s Admissibility Practice

Criticism pertaining to the lack of in depth legal analysis in the African Commission’s initial decisions on admissibility of communications under the African Charter has been expressed by many observers of the African human rights system. Viljoen and Louw, note that in several earlier communications, the African Commission’s application of the local remedies rule not only appears inconsistent but on the whole, the admissibility decisions were abbreviated, often employing equivocal language more suitable for “diplomatic communiqués” rather than substantive legal analysis pertaining to serious violations of human rights. 206 Some of the Commission’s earlier decisions on admissibility at times consisted of no more than two or three sentences noting the denial of admissibility for non-exhaustion of domestic remedies without legal analysis or reference to any international law principle upon which the decision rests. 207

As noted by

\[205\] Onoria, supra note 43 at 16.

\[206\] See Viljoen & Louw, “Findings of the African Commission”, supra note11 at 14 (remarking that “at least up to the publication of the Commission’s Eighth Annual Activity Report in 1995, the Commission’s decisions have in fact read very much like ‘diplomatic communiqués’ rather than reasoned judgments”).

Odinkalu and Christensen, the Commission’s vague pronouncements on the local remedies rule made it “difficult to assess the thoroughness of an examination carried out by the Commission in order to establish whether or not domestic remedies have been exhausted…”208 The end result of the African Commission’s parsimony in its early admissibility jurisprudence was the issuance of decisions possessing an overall pro forma appearance which international law scholars have correctly described as “formulaic.” 209

While it is assumed that unsatisfactory decisions and other jurisprudential difficulties are to be expected in the elementary stage of development of an international human rights institution such as the African Commission, the practical and analytical defects in the Commission’s early admissibility decisions prevented the African Commission from persuasively seizing the opening presented by the African Charter’s broad locus standi rules to further extend

employment practices, the Commission’s admissibility decision consists of less than two paragraphs finding the communication inadmissible for failure to exhaust local remedies); See Ceesay v. Gambia (1995) Afr. Comm. HPR 86/93 (in a communication alleging discriminatory employment practices by Respondent State the Commission ruled the case inadmissible for failure to exhaust domestic remedies. The Commission’s decision amounted to one sentence and relied only on representations made by the Respondent State); See Achutan, supra note 195 (communication authored on behalf of detainees alleging unlawful 12 year detention, the Commission found violations of the African Charter by the Respondent State. However, the Commission reached the merits with no admissibility analysis); See Kenya Human Rights Commission v. Kenya (1995) Afr. Comm. HPR 135/94 (communication authored on behalf of Kenyan unions alleging State violations of free speech and right to assembly, the Commission’s admissibility ruling consisted of two sentences with no analysis or inquiry regarding available domestic remedies); See Manjang, supra note 189 (in a communication alleging wrongful detention, the Commission, despite the hardship to petitioners clearly apparent in Gambia’s domestic legal framework, denied admissibility in a decision consisting of three sentences); See International PEN v. Burkina Faso (1994) Afr. Comm. HPR 22/88 (the Commission in a decision consisting of three sentences “declared that the file be closed” on grounds that the petitioner was no longer detained by the Respondent State. The decision gives no indication what redress or compensation petitioner may be entitled based on unlawful detention by the Respondent State); See Embga Mekongo Louis v. Cameroon (1995) Afr. Comm. HPR 59/91 (case alleging false imprisonment wherein petitioner sought substantial monetary award against the Respondent State. The Commission found the case admissible and affirmed that there existed a miscarriage of justice by the Respondent State for which it should compensate petitioner. However, rather than direct the State to provide compensation, the Commission referred the matter back to the domestic courts of Cameroon for determination of the quantum of damages due petitioner under the laws of Cameroon. The Commission’s decision ignores the fact that domestic courts may not be available to petitioner and the decision lacked any inquiry as to the capacity of the national courts to provide the redress sought by petitioner).

208 Odinkalu & Christensen, “Non-State Procedures”, supra note 171 at 265.

human rights protection in the African region.\textsuperscript{210} The absence of persuasive legal analysis thus negated any chance of member State compliance with Commission decisions and deprived individual petitioners of the guidance necessary to meet the African Charter’s admissibility requirements.\textsuperscript{211}

4.4 The African Commission’s Improved Admissibility Practice in the Niger Delta Cases

Much scholarship has been generated with respect to the rulings of the African Commission in the Niger Delta cases. Nwobike applauds the African Commission for issuing “a novel and commendable decision… illustrative of how the African Charter can be ‘generously interpreted’ to further the protection of human rights.”\textsuperscript{212} Similarly, Odinkalu describes the African Commission’s pronouncements on the Niger Delta as representing “a ground-breaking ruling on the standards applicable to the implementation of economic, social and cultural rights under the African Charter on Human and People’s Rights.”\textsuperscript{213} However,

\textsuperscript{210} See Matua, “African Human Rights”, supra note 19 at 346-347 (remarking that the African Commission initially appeared reluctant to assert its full implementation authority under the African Charter. The author adds that the Commission’s early decisions attracted little notice due to their poor quality and failure to “fire the imagination” at 348).

\textsuperscript{211} See Murray, “Decisions by the African Commission”, supra note 158 at 415; 422-423 (noting that even though the Charter’s exhaustion requirement is the most important admissibility condition for petitioners, the Commission’s earlier decisions were unaccompanied by legal analysis and often merely state that petitioner “failed to exhaust” domestic remedies without offering necessary guidance for future authors as to the criteria required to meet the African Charter’s exhaustion standards).

\textsuperscript{212} J.C. Nwobike, “The African Commission on Human and Peoples’ Rights and the Demystification of Second and Third Generation Rights under the African Charter” (2005) 1 Afr. J. Legal Stud. 2 at 129-146, (noting that “since its inception… no decision of the African Commission has generated the same level of interest as SERAC…The decision, which has been described as groundbreaking, cuts across a wide spectrum of rights guaranteed under the African Charter” at 130); See Shelton, supra note 155 at 222 (Shelton describes the SERAC decision as the Commission’s “most innovative decision.” The author further notes that it is not surprising that the African Commission has become “the first human rights body to decide a contentious case involving violation of nearly all categories of rights…” given that “[t]he African Charter was the first binding international human rights treaty to integrate civil, political, economic, social and cultural rights in a single instrument. It was also the first to include the right to ‘a general satisfactory environment’ among its guarantees).

\textsuperscript{213} Odinkalu, “Human Rights Mechanisms in Africa”, supra note 187 at 106,116,122 (describing the Commission’s affirmation that “economic, social, and cultural rights as capable of protection
in addition to the African Commission’s commendable jurisprudence on the
merits, the Niger Delta cases are equally notable for the Commission’s efforts to
facilitate improvements in Nigeria’s domestic legal institutions through its
admissibility rulings and supplementary resolutions condemning Nigeria’s lack of
effective domestic legal redress. 214

4.5 The Factors Which Led to the Human Rights Crisis in
the Niger Delta

The crisis in the Niger Delta 215 represents a complex human rights
situation stemming largely from three factors described as “Nigeria’s destructive
troika of militarism, ethnic factionalism and petro-business.” 216

a. Militarism and Neglect of the Rule of Law

The origins of the human rights crisis in the Niger Delta can be traced
back to Britain’s rapacious colonial trade practices in the “oil rivers” of West

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214 See Resolution on Nigeria, ACHPR Res.11 (XVI)94 (1994); Resolution on Nigeria,
ACHPR/Res.16 (XVII)95 (1995); Final Communiqué, 2nd Extraordinary Session of the ACHPR,
18th-19th December, 1995 Kampala, Uganda, online: <http://www.achpr.org/english/_doc_target/documentation.html>.
at 11, 13-15 (Geographically, the Niger Delta has been described as “a triangle” located in South-
Eastern Nigeria on the Atlantic coast between the Bight of Benin and the Bight of Biafra. With an
area of about 36,000 square kilometers the Niger Delta is one of the largest wetlands in the world.
It is composed of four main ecological zones, including coastal barrier islands, low-land rain
forests, fresh water swamp forests and encompasses the largest mangrove forest in Africa); See
International Institute for Democracy and Electoral Assistance, Democracy in Nigeria, Capacity-
Building Series 10 (Stockholm: IDEA Publication, 2001) at 239 [IDEA] (At present, within the
Nigerian Federation, the Niger Delta region consists of the six states of the South-Eastern zone of
the country, namely, Akwa-Ibom, Bayelsa, Cross River, Delta, Edo and Rivers. It is estimated that
around 6 to 10 million persons reside in the villages, towns and cities of the Niger Delta).
216 IDEA, supra note 215 at 10.
Africa and the ill-advised British amalgamation of this volatile region into modern day Nigeria.\textsuperscript{217} However, the Niger Delta crisis reached its modern apex during the country’s military dictatorships of the 1990s. In nearly 50 years of independent nationhood, the military has governed Nigeria for at least 30 of those years.\textsuperscript{218} The main features of military rule in Nigeria have been the absence of the rule of law and official impunity.\textsuperscript{219} With respect to Nigeria’s legal institutions,\textsuperscript{220} for much of its post-independence history, national laws have been


\textsuperscript{218} See generally IDEA, \textit{supra} note 215 at 46, 136 (providing an overview of Nigeria’s history of military coups beginning from the period following colonial independence from Britain in 1959, the first military coup occurred in 1966 and was followed by a counter-coup within the same year. Since then Nigeria, in addition to a devastating civil war in the late 1960s, has had nine military coups with seven military heads of State. Despite an intervening period of civilian governance between 1979 through 1983, the military soon returned to power when the democratically elected President Shehu Usman Shagari was deposed in a military coup on December 31, 1983 which was led by Major General Buhari. In August 1985, another military coup led by Major General Ibrahim Babangida seized power. General Babangida remained as president until 1993 and oversaw democratic elections. However, the 1993 elections were voided by the military and the presumed winner of the presidency, Chief M.K.O. Abiola was imprisoned. Following cancellation of the 1993 elections, General Abacha seized power and remained Head of State until his death in 1998 whereupon the transition to civilian governance began once more); See also U.S., Department of State, \textit{Nigeria Human Rights Practices, 1995} (Washington, D.C.: United States Government Printing Offices, 1996) [U.S. State Dept., \textit{Nigeria Human Rights Practices}], online: Department of State <http://www.dosfan.lib.uiuc.edu> (reporting on the repressive domestic conditions in Nigeria under military dictatorship).

\textsuperscript{219} See U.S. State Dept., \textit{Nigeria Human Rights Practices, supra} note 218 (The report describes the Abacha military dictatorship (1993-1998) as especially authoritarian and repressive. The Abacha regime set out to eliminate all political opposition and between 1993 through 1998, Nigeria’s most prominent political figures were incarcerated on manufactured charges of treason. In addition, “[u]nder Abacha, the main decision making organ was the exclusively military Provisional Ruling Council [PRC], which ruled by decree.” The Abacha military dictatorship also enforced its “arbitrary authority” through the Federal Security System comprised of—the army, the security services and police forces from federal, state and local governments. “All branches of the security forces committed numerous serious human rights abuses…The human rights record worsened in 1995…Security forces used excessive force …killing and wounding a number of persons, including innocent civilians. Police tortured and beat detainees, and prison conditions remained life threatening; many prisoners died in custody…To continue its hold on power, the regime enacted or extended a series of harsh decrees restricting press freedom and civil liberties…Security services continued routine harassment of human rights and pro-democracy groups, including labor leaders, journalists and student activists”).

\textsuperscript{220} IDEA at 46, 136, 363-364 (the authors provide a basic summary of the Nigerian legal system and note that, other than the military government’s imposition of ouster clause and other judicial bypass features, the basic framework of Nigeria’s legal system has not deviated from the inherited colonial tripartite system with its overlap of customary laws, Sharia and English Common Law. In general, the Nigerian domestic legal framework consists of a network of local and district courts as well as State-level and Federal courts. At the apex is the Nigerian Supreme Court, followed by the Federal Court of Appeal and the Federal High Courts. The intermediary courts are the High
manipulated and the judicial authority usurped by the military as a means to preserve the prerogatives of the junta. During the five year military dictatorship of General Sani Abacha in particular, the judicial power of review was usurped by ouster provisions inserted in military decrees and other legislative acts to prevent any legal challenge to the military government’s actions. The Abacha regime asserted that ouster of the normal civilian courts and imposition of military tribunals to adjudicate enumerated offense was necessitated by domestic

Courts of each State, followed by Magistrate Courts, the Sharia Court of Appeal and the customary courts. The statutory native or customary courts are courts of first impression for civil, criminal and customary matters. Appeals from the decisions of native courts are made to the magistrate courts and High Courts. The Nigerian Supreme Court adjudicates disputes between the legislative and executive branches of government. The Nigerian Supreme Court also has original and appellate jurisdiction with respect to civil and criminal cases.

221 See Nonso Okerefozeke, Law and Justice in Post-British Nigeria (London: Greenwood Press, 2002) at 168, 171 (noting that Nigeria is established as a Federation with powers shared between the national authorities, the states, local government areas and the Federal Capital Territory of Abuja. Constitutionally, the principle of separation of powers among executive, legislative and judicial branches is in place but in reality, save for a few short years of civilian rule, Nigeria has been governed by successive military dictatorships unwilling to broker dissent let alone share power. “Since the first military intervention in Nigeria in 1966, every military regime in the country has taken steps to circumscribe, and in many cases abolish the basic and fundamental rights of citizens…to challen[ge] the illegal military regimes” at 171).

222 See Bronwen Manby, The Price of Oil: Corporate Responsibility and Human Rights violations in Nigeria’s Oil Producing Communities (New York: Human Rights Watch, 1999) at 156-57, online: Human Rights Watch <http://www.hrw.org/reports/1999/nigeria/nigew9991-05.html> (Noting that among the most notorious of these tribunals are those created under the Civil Disturbances (Special Tribunal Decree No. 2 of 1987, which convicted Ken Saro-Wiwa and precludes judicial review of such convictions); See UN CCPR HRC 56 Sess., 1495th Mtg. UN Doc. CCPR/C/SR.1495 (1996) at 5 [UNHRC Summary Record] (noting that Nigeria’s domestic legal framework under General Abacha’s military dictatorship was comprised of the following decrees:

“The Constitution (Suspension and Modification) Decree No. 107 of 1993 relegated the1978 Constitution to a subordinate position; the Head of State could override the Constitution including the fundamental rights enshrined therein, merely by issuing a decree…Moreover, the State Security Detention of Persons Decree of 1984 provided for the indefinite detention incommunicado without charge or trial of persons deemed to threaten the security of State…The Detention of Persons Decree was inherited from the previous military regime, but instead of repealing it, it had been strengthened by the October 1994 Amendment removing the right of habeas corpus…In connection with the Civil Disturbances (Special Tribunal Act…the so-called ‘ouster-clauses’ were…used to preclude the possibility of judicial review and appeal…[P]ursuant to decisions of the Robbery and Firearms Special Provisions Tribunals, over 200 people had been executed since November 1993. Furthermore…, [t]he Treason and Other Offenses Special Military Tribunal Act of 1986 gave the military wide powers to bring persons to trial for rebellion—even a peaceful protest could be so designated. Those tribunals were not bound to follow civil procedures, there was no possibility of appeal, the trials took place in secret and the defendants had no access to counsel of their own choice. Arbitrary rule by decree [was] further consolidated by the enactment of the Federal Military Government Supremacy and Enforcement of Powers Act of 1994, stripping the courts of jurisdiction to challenge Government actions…” at 5-6.
security and administrative considerations. However, the Abacha regime’s justifications were unpersuasive. The arbitrariness of procedural and substantive provisions in legislation governing the military tribunals could not be concealed and the “serious defects” in Nigeria’s domestic legal order under the Abacha regime have been described as follows:

A normal situation of democracy clearly [does] not exist and serious human rights abuses occurred as would be the case in any society in which the rule of law did not prevail…The system in force was clearly incompatible with the rule of law. There was no concept of justice in both its procedural and substantive aspects, and the power wielded by the military was not subject to review. The special and military tribunals as well as the courts simply did not meet the requirements of the rule of law. There was no equality before the law. Persons were detained incommunicado without being charged. The notion of presumption of innocence was disregarded and the right of appeal denied. The reality of the situation on the ground, together with the arbitrary deprivation of life and the numerous allegations of torture, made mockery of the claim…that Nigerian tribunals acted in conformity with democratic norms.

223 See UNHRC Summary Record, *supra* note 222 at 5 (summarizing claim by representatives of the Nigerian military government that judicial ouster provisions were instituted to serve domestic administrative purposes such as ensuring that the speedy trial rights of detainees were adequately met. In the case of tribunals dealing with treasonable offenses, representatives of the regime claimed that such military tribunals “had been created in reaction to a coup attempt in the past and the present regime had extended their jurisdiction to cover civilians involved in treasonable felonies. The special disturbances tribunals, of which there had been three, including the tribunal for the Ogoni case, had been created for the purpose of responding to severe communal disturbances or inter-ethnic strife…” at 5).

224 See *Report of the Fact-Finding Mission of the Secretary General to Nigeria*, UNGAOR (1996) at para 2, 7, 16 [*UN Nigeria Report*] (discussing the human rights situation in Nigeria, the report states that “The constitution of special tribunals is established in Nigerian Law since colonial times. Special Tribunals have been constituted for specific offenses such as armed robbery, drug trafficking, and illegal bankruptcy. Indeed special Tribunals have been set up in the past, as early as in 1981 and 1986. In both those instances, the tribunals were established in conformity with the procedures envisaged in the Act; investigation committees were established prior to the decision to constitute a tribunal. Whereas special tribunals do form an integral part of the regular judicial system of Nigeria, the special tribunal that tried Ken Saro-Wiwa was established without a report by a duly constituted investigation committee… [Moreover]…the procedures actually followed in the course of the trials were not fair… [And]… the composition of the special tribunal is not in conformity with the standard of impartiality and independence set out in applicable human rights law…”).

225 See UNHRC Summary Record, *supra* note 222 at 7.
The neglect of the rule of law during the years of military dictatorship had numerous adverse effects not only on the Nigerian legal system but on daily life in communities such as those in the Niger Delta. As noted by Manby, in an investigative report on the Niger Delta crisis:

A major factor in the cycle of protest and repression in the oil areas is the lack of a properly functioning legal system which could promptly and fairly rule in cases...Even if such a system existed, there would remain problems related to the inequality of bargaining power between poverty-stricken Delta villages and multinational oil companies, corruption and the lack of genuinely representative political structures at local (or national level). Nevertheless, the gravity of the situation in the Delta is greatly exacerbated by the fact that the Nigerian court system is in crisis. The lack of a properly functioning court system also contributes to conflict between communities and companies because instead of proper investigation of criminal damage or other offenses... the police instead choose to detain and assault youths and other community members, often on arbitrary basis as collective punishment for the whole community. The quality of judicial appointments has steadily deteriorated over the years, and the level of executive interference in court decisions has increased...The ability of Nigerian citizens to challenge executive wrongdoing is further curtailed by restrictions placed on the courts. The regular court system in Nigeria has been seriously undermined both by ‘ouster clauses’ in military decrees, which exclude courts from considering executive action taken under such decrees, and by the creation of special tribunals, both to hear politically sensitive cases and to bypass...the court system in the trial of high profile [cases].

The lack of effective domestic redress and absence of impartial means of adjudication of legal claims thus resulted in “a loss of faith” by the Nigerian populace in the legal system which led to vigilantism and widespread lawlessness throughout the region. 

226 Manby, Price of Oil, supra note 222 at 156-57.
227 See Emmanuel Kabirat Jekada, Proliferation of Small Arms and Ethnic Conflicts in Nigeria: Implication for National Security (Doctoral Thesis, St. Clements University, 2005) at 9 (noting that perceived inequities in the Nigerian legal system also forces the local population in the Niger Delta to seek extra-judicial means of “justice” through reckless and frequently violent behavior such as industrial sabotage and vigilantism).


b. Nigeria’s Ethnic Factionalism and Socio-Economic Disparity

The second aspect of the “troika” that created the Niger Delta crisis is the ethnic factionalism entrenched in Nigeria since the divisive process of decolonization whereby ethnic communities perceived as “loyal” to British interests were rewarded with greater economic access and control over Nigeria’s domestic institutions of governance.\(^{228}\) The economic and political hegemony acquired by Nigeria’s dominant ethnic groups—the Hausa, Fulani, Yoruba, and Igbo—remains intact and has resulted in the relegation to the periphery of society, minority communities indigenous to the Niger Delta.\(^{229}\) Socially, politically and economically, the peoples of the Niger Delta have been marginalized by Nigeria’s dominant ethnicities. Hence the civil unrest led by Ogoni activists such as Ken Saro-Wiwa in the mid-1990s was in part an expression of protest against the status of “second class citizenship” accorded Niger Delta communities.\(^{230}\)

\(^{228}\) Packenham, \textit{supra} note 217 at 183-200, 458-69, 671-76,680.

\(^{229}\) See IDEA, \textit{supra} note 215 at 10 (noting that “… factionalism remains a profound threat to human rights in Nigeria and the violence that has come to be associated with it hangs like ‘a sword of Damocles’ over the nascent democratic order”).

\(^{230}\) See generally IDEA, \textit{supra} note 215 at 240. (noting that despite some elements of a common historical experience among its peoples, the Niger Delta region is not homogenous in ethnic composition. Its various peoples are culturally distinct and do not necessarily share “a single consciousness of the commonality of their experiences”); See Obaro Ikime, \textit{Niger Delta Rivalry} (London: Longman, 1969) (providing a general overview of the Niger Delta and remarking on the multi-ethnic composition of the region. The author notes that several dialects are spoken in the Niger Delta and the region’s inhabitants are quite possessive of their ancestral distinctions. Moreover, the autochthonous ethnic composition of the region is a contentious subject matter and some aspects of the regional unrest results from atavistic inter-ethnic antipathies. Overall, the population of the Niger Delta is roughly divided into seven principal ethnic groups: the Ijaw, Aboh, Efik, Ibibio, Itsekiri, Urhobo, and Isoko. These ethnic groupings are further divided into sub-groups or clans consisting of persons with consanguineal relationships. An example of such clan-based groups is the Opobo of Opoboland and the Ogoni of Ogoniland, both of whom are part of the larger Ijaw ethnic group. In Eastern Delta communities, the ethnic sub-group is sometimes referred to as a “house” which simply describes a lineage group developed into a commercial, social and military organization).
c. The Niger Delta’s Role as the Epicenter of Nigeria’s Petro-based Economy

The third factor contributing to the Niger Delta crisis is petro-business. As Nigeria’s oil belt, the Niger Delta holds the bulk of the resources that sustains the nation. Given Nigeria’s economic dependency on oil, any shortfall in oil revenues accruing to the Nigerian Government translates into serious fiscal turmoil. As a consequence, the principle concern for successive regimes in Nigeria has been the maintenance of oil production from the Niger Delta at all cost, including violent suppression of the Ogoni and other Niger Delta peoples that dared speak out against the social injustice, economic mismanagement, brazen corruption and wanton depletion of mineral resources. Indeed, the Petroleum industry funded years of military domination in Nigeria and oil related issues continue to propel the Niger Delta conflict while at the same time exacerbating environmental degradation of the region.

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232 See Chukwumerije Okereke, “Oil Politics and Environmental Conflict: The Case of the Niger Delta, Nigeria” in Blount Gokay, ed. The Politics of Oil: A Survey (London: Routledge, 2006) at 111-112 (Niger Delta crude oil known as “Bonny Light Sweet Crude” is highly rated owing to its low sulfur content. It is also one of the easiest crudes to extract and refine. “Nigeria is about the 10th largest producer of oil in the world, with a production rate of well over 2 million barrels per day (2m. b/d). The country has the largest oil reserves in the whole of Africa—an estimated 22,000m barrels—with more than 90% of this resource located in the Niger Delta region. For Nigeria, oil is the most important export and provides the fiscal basis of the Nigerian State—accounting for all but a fraction of revenues accruing to the nation and the bulk of foreign investment).

233 Ibid.

234 IDEA, supra note 215 at 250-51 (noting that “resource control” is at the heart of the Niger Delta crisis and its eventual resolution requires “[a] complete restructuring of Nigerian society, economy and polity to allow the Delta people to exercise some control of their resources” or at the very least reap some visible financial windfall as a result of the billions generated from their community).

235 Ibid. at 10, 241-243; See Gokay, supra note 232 at 88 (discussing the fact that Nigeria’s excessive dependence on petro-dollars gives Multi-National Corporations such as Royal Dutch Shell, undue influence over Nigerian officials and Nigeria’s security forces—to the extent that
4.6 The Three Niger Delta Communications Sent to the African Commission

During the numerous years of tyranny imposed by Nigeria’s military rulers, efforts by Nigerian citizens to obtain justice for human rights violations centered mainly on communications authored by local NGOs to the institutions of the African Charter. For the troubled Niger Delta region, the African Commission provided an important forum whereby communications alleging human rights violations by the Nigerian government could be heard on a regional level and further expose the eroding human rights situation. Based on the egregious level of human rights violations perpetrated in the Niger Delta by the Nigerian military government and the looming environmental catastrophe created by years of negligent oil industry practices, three communications were filed with the African Commission. The first, *International PEN and Others (on behalf of Ken Saro-Wiwa Jr.) v. Nigeria*, was followed by *Rights International (on behalf of Charles Wiwa) v. Nigeria*, and finally, the case of *Social and Economic Rights Action Center v. Nigeria*.239

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236 See Viljoen, “African Charter in Domestic Courts”, *supra* note 33 at 8 (observing that Nigeria is party to a number of significant human rights instruments. However, few have been ratified and consequently remain outside Nigeria’s domestic laws. The exception being the African Charter on Human and Peoples’ Rights which has been incorporated into Nigeria’s domestic law since 1990); *See Enforcement and Ratification of the African Charter on Human and Peoples’ Rights [Act Cap. 10] Laws of the Federation of Nigeria [Fed. Of Nigeria Ratification of the African Charter Act]*; *See also Ogugu v. State [1994] NWLR pt. 366* (in the Ogugu case the Nigerian Supreme Court affirmed that the provisions of the African Charter are binding on the Federal Government of Nigeria).

237 *See Wiwa, supra* note 12.


239 *SERAC, supra* note 12.
a. The Wiwa Case

In *Wiwa*, the African Commission joined several complaints submitted by human rights organizations and professional advocacy groups.\(^{240}\) The complaints all pertained to the Abacha regime’s detention of Ogoni civil rights leaders, including Ken Saro-Wiwa, a prominent Ogoni writer.\(^{241}\) In the early 1990s, the Ogoni community led by Ken Saro-Wiwa initiated the most significant effort in the history of the Niger Delta to mobilize communities endangered by oil excavation activities and hold multinational oil corporations accountable for environmental degradation in the region.\(^{242}\) The Ogoni campaign led to mass protests at oil industry installations which were often forcibly dispersed by government security forces known to the local population as “Shell Police.”\(^{243}\) As the Ogoni movement continued to gain popular support, the military junta arrested Saro-Wiwa and eight other Ogoni community activists for inciting violence and other “subversive acts.”\(^{244}\) On October 31, 1995, Ken Saro-Wiwa


\(^{241}\) Ibid. at para. 7 (In addition to Ken Saro-Wiwa, eight other Ogoni activists—Saturday Dobee, Felix Nuate, Nordu Eawo, Paul Levura, Daniel Gbokoo, Barinem Kiobel, John Kpunien and Baribor Bera—were also detained and subsequently sentenced to death by the military tribunal).

\(^{242}\) See Okafor, *Legitimizing NGO*, supra note 39 at 39-40, 67-68 (describing the Ogoni activist Ken Saro-Wiwa as the founder of the Movement for the Survival of the Ogoni People (MOSOP) which in addition to environmental concerns, also sought to “highlight minority grievances” against the Nigerian Government’s flawed revenue allocation scheme, which unfairly deprived Niger Delta communities of adequate compensation for oil exports from the region. MOSOP was founded in 1990 specifically for the expression of views of the people who live in the oil producing areas especially in respect to their civil rights and environmental protection of the Ogoni lands. Although the Ogoni struggle for equality within the Nigerian State dates as far back as the 1960s with the initial discovery of oil on Ogoni lands, MOSOP represents the first organized effort by Nige Delta inhabitants to address the economic exploitation and social inequities in the Delta region. At the time of Ken Saro-Wiwa’s arrest, MOSOP also presented the most visible political challenge to the military regime of General Sani Abacha. However, despite the killing of Ken Saro-Wiwa and other Ogoni community leaders by the Nigerian military government, MOSOP continues to advocate on behalf of Ogoni social and environmental rights).

\(^{243}\) Gokay, supra note 232 at 88.

\(^{244}\) *Wiwa*, supra note 12 at para. 2-3, 96, 110 (In the *Wiwa* decision the African Commission noted that uncontested facts indicate that “the actual reason for the trial and the ultimate death sentences was the peaceful expression of views by the accused persons. The victims were disseminating
and his co-defendants received death sentences from the Special Military Tribunal for Civil Disturbances. Following the death sentences, several NGOs filed communications with the African Commission requesting the Commission’s emergency intervention. However, on November 10, 1995, the Nigerian government hanged Ken Saro-Wiwa and eight other Ogoni leaders despite efforts to stay the execution by the African Commission.

b. The Rights International Case

The Abacha regime’s harassment of the Ogoni community continued following the death of Ken Saro-Wiwa. On January 3, 1996, Charles Bandiorn Wiwa, a Nigerian student and relative of Ken Saro-Wiwa was arrested by Nigerian authorities. The complaint alleges that during the five-day period in

245 Ibid. at para. 96-101 (prior to the commencement of the military trial of the Ogoni defendants in the Wiwa case, representatives of the Nigerian military government “pronounced MOSOP and the accused Ogoni defendants guilty of the crimes at various press conferences and before the United Nations.” In the conduct of the tribunal, the Ogoni defendants were denied their chosen counsel after lawyers representing them were forced to resign due to harassment and physical assault by members of the military. When the defendants declined lawyers appointed by the military tribunal, the proceedings were completed without the accused having legal representation of any kind. In addition, the Ogoni defendants were denied access to evidence on which the prosecution was based).

246 Ibid. at para. 11-12 (The complaints filed on behalf of Saro-Wiwa and his co-defendants centered on the Nigerian Government’s violation of its African Charter obligation to guarantee its citizens a fair trial. In June 1995, the Constitutional Rights Project submitted a supplementary communication alleging further irregularities in the conduct of the adjudicative process before the special military tribunal which included harassment of defense counsel; the violation of attorney client privilege and an overall atmosphere of intimidation resulting from the presence of military officers at all stages of the process. Later in December 1996 the Civil liberties Organization filed a communication alleging that the special tribunal presiding over the case is invalid because inter alia, “…its composition with military officers and members of the Provisional Ruling Council meant that it could not be impartial and that the lack of judicial review of the decisions of this tribunal amount to a violation of the right to appeal and fair trial”).

247 Ibid. at para. 8-10 (The Commission’s efforts to stay the execution of Ken Saro-Wiwa and his co-defendants included the OAU’s invocation of emergency provisional measures requesting that the executions be delayed until the African Commission had considered the pending communications. The Nigerian government however, rejected all international efforts to delay the executions).
which Charles Wiwa was detained at Gokana Military Detention Camp, he was subjected to torture and confined under inhumane conditions. On January 8, 1996 Charles Wiwa was transferred from Gokana to the State Intelligence Bureau in Port Harcourt where he continued to be held without access to legal counsel. In addition, Charles Wiwa was not informed of the nature of the charges which led to his continued incarceration until January 11, 1996 when he along with 21 other Ogonis were arraigned before a magistrate on charges of unlawful assembly. Although the magistrate granted a bail application, upon his release, Charles Wiwa was subjected to ongoing threats by State security officials, including an aborted abduction attempt. Fearing that his life was in endangered by the Nigerian military government, Charles Wiwa fled Nigeria in March, 1996.

The communication authored on behalf of Charles Wiwa by the NGO Rights International, asserts that the Nigerian military government violated the African Charter through its unlawful detention of Charles Wiwa and by compelling the victim’s flight from his community.

248 See Rights International, supra note 12 at para. 1-5 (The complaint further alleges that Charles Wiwa’s identification as a relative of Ken Saro-Wiwa increased the hardship of his confinement and resulted in acts of brutality inflicted by Nigerian military officials).
249 Ibid. at para. 11-13 (Notably, the “unlawful assembly” for which Charles Wiwa was detained took place during the period of his incarceration at Gokana Military Camp. If one is to follow the logic of Nigerian government officials seeking to prosecute him, Charles Wiwa must have been in two places at the same time).
250 Ibid. at para 14-16.
251 Ibid. at para 16-17; See also Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000) (After fleeing Nigeria, Charles Wiwa went to the Republic of Benin where he was declared a refugee by the United Nations High Commissioner for Refugees. On September 17, 1996, the United States government granted him refugee status. In that same year, other members of the Wiwa family along with the surviving relatives of the 8 Ogoni activists hanged with Ken Saro-Wiwa filed a civil action in United States Federal Court. The suit alleged oil industry complicity in the deaths of Ogoni activists and the detention of members of the Ogoni community in Nigerian prisons during military rule. Following several failed attempts to dismiss the lawsuit, Shell settled the Ogoni claims for $15.5 million on June 9, 2009).
252 See Rights International, supra note 12 at para. 18 (the complaint asserts that in respect to Charles Wiwa, the Nigerian government violated African Charter Article 5 (the right to the respect and dignity inherent in a human being); Article 6 (the right to liberty and security); Article 7 (1) (the right to a fair trial and legal counsel of choice); and Article 12 (1) and (2) (the right to freedom of movement and return to the country of origin).
c. The SERAC Case

The SERAC communication was filed on behalf of the Ogoni people by two Nigerian-based NGOs—the Social and Economic Rights Action Center and the Center for Economic and Social Rights.\textsuperscript{253} The complaint indicates that the Nigerian government through the State owned oil company, Nigerian National Petroleum (NNPC), created a consortium with Shell Petroleum Development Corporation. The consortium’s subsequent oil excavation activity in the Niger Delta caused extensive environmental degradation throughout the region as well as health defects among the Ogoni population due to high levels of toxic waste and industrial contaminates which the consortium through wilful neglect permitted to enter the region’s vital water sources, agricultural lands and atmosphere.\textsuperscript{254} The facts further indicate that under pretext of safeguarding oil installations from industrial sabotage, government security forces forcibly suppressed the Ogoni people’s right to peaceable assembly and the Nigerian government violated the right to life through its use of deadly military force to disrupt non-violent acts of civil disobedience by Ogoni activists.\textsuperscript{255}


The African Commission has expended considerable effort in addressing the exhaustion requirement of Article 56 (5) in the context of Nigeria’s inadequate domestic legal framework and important precedents concerning the application of the local remedies rule in the African human rights system have developed from

\textsuperscript{253} See Okafor, Legitimizing NGOs, supra note 41 at 33 (describing the authors of the SERAC communication as Lagos based NGOs concerned with the human rights problems in the Niger Delta attributable to “marginalization of socioeconomic rights” by Nigeria’s successive military rulers).

\textsuperscript{254} SERAC, supra note 12 at para.1-6.

\textsuperscript{255} Ibid. at para. 7-9.
the Commission’s jurisprudence.\textsuperscript{256} The Niger Delta cases especially, showcased “the progressive development” of the Commission’s admissibility decisions and serve to highlight “the importance of the right to an effective domestic remedy” in maintaining regional stability and national cohesion.\textsuperscript{257} Other jurisprudential developments in the Commission’s admissibility practice arising from the Niger Delta cases include: (a) the Niger Delta cases marked a departure from the Commission’s former reticence to strongly criticize the prevailing domestic order in an African State; (b) the Niger Delta cases provided additional clarification towards the Respondent State’s duty pursuant to the African Charter to provide effective legal remedies within national institutions; (c) in the Niger Delta cases the Commission altered its earlier admissibility practice of summary dismissal of complaints alleging “single incident” human rights violations; and (d) the Niger Delta cases expanded the circumstances under which the African Charter’s exhaustion requirement can be waived beyond the narrow ground provided under Article 56 (5).


\textsuperscript{257} See Kofele-Kale, supra note 3 at 15 (noting the “constant process of progressive development” of the African Commission’s jurisprudence and urging the Commission to strengthen regional human rights protection by expanding exceptions to the local remedies rule); See also Trindade, “Thoughts on Recent Developments”, supra note 102 at 197 (noting that correct application of the local remedies rule can have domestic impact in the protection of human rights).
a. The African Commission’s Unequivocal Condemnation of Nigeria’s Human Rights Violations

The Niger Delta cases are notable for the stark departure by the African Commission from the historic reticence of African inter-governmental institutions to pointedly criticize the prevailing political, social and economic order in an African State. Although well-known for its preference towards “amicable resolution” of human rights complaints, the Commission departed from the non-confrontational stance which previously marked its interactions with States Parties. In finding Nigeria’s domestic legal order incapable of providing effective legal remedies for the human rights violations raised by the Niger Delta petitioners, the Commission adopted blunt language challenging the impunity assumed by the Respondent State of Nigeria. According to the Commission, “by any measure of standards,” the conduct of the Nigerian government in the Niger Delta “falls short of the minimum standard of conduct expected of governments...” In addition, the Commission unequivocally declared that the undisputed facts underlying the Niger Delta petitioners’ claims reflects a deliberate and flagrant adoption of legislative measures by the Nigerian government to negate, rather than give effect, to the substantive rights enshrined in the African Charter.

Commenting on the Nigerian military government’s intransigence in rejecting international calls to stay the execution of Ken Saro-Wiwa, the

258 See generally SERAC, supra note 12. The African Commission in the SERAC decision excoriated the government of Nigeria for its complicity and silence in the face of “the destructive and selfish” conduct of the oil consortiums operating in the Niger Delta. The decision further stating in uncharacteristically blunt terms that, “the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors and the oil companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore is in violation of Article 21 of the African Charter” at para. 58.
259 See e.g. RADDHO v. Zambia, supra note 177 at para. 6-7 (despite allegations of mass expulsions by the Respondent State, the Commission’s decision continued to stress the Commission’s preference for “amicable resolution” of the human rights complaint).
260 SERAC, supra note 12 at para. 58.
261 Ibid. at para. 55, 57-58 (describing the “repressive tactics” of the Nigerian Government in Ogoni Land and the Government’s failure in its “duty to protect” its citizens).
Commission forthrightly described the killing of the Ogoni activists as “a blot on the legal system of Nigeria which will not be easy to erase...” 262 Most significantly, the Commission, in what appears to be a first instance, directly called upon the Nigerian judiciary to disregard national legislation which contravenes African Charter human rights guarantees. 263 Specifically, in Wiwa, the Commission after reiterating the importance of the rule of law in maintaining equity and a peaceable society, urged the Nigerian judiciary to take “courageous” action to ameliorate the insidious impact of military decrees on fundamental due process by examining violations of human rights notwithstanding ouster clauses, especially where the “decree is offensive and utterly hostile to rationality.” 264

By challenging the State’s impunity in the Niger Delta and urging the domestic judiciary to counteract the deleterious effects of military rule on fundamental rights, the African Commission enhanced its own reputation and altered earlier perceptions of “timidity” some scholars had observed in the Commission’s interactions with States Parties. 265 As noted by Okafor, in the Nigerian context, the African Commission “discharge[d] itself quite creditably,” and while assessments of the Commission as “timid” or “weak” may have been justified in the past, such appraisals no longer hold true. 266

262 Wiwa, supra note 12 at para. 115.
263 Ibid. at para 76.
264 Ibid. (in its decision the African Commission specifically addressed the Nigerian judiciary asking them to follow the example set by the Lagos Court of Appeal which relied on African Charter guarantees to reject the Nigerian military government’s usurpation of the judicial function and found that domestic courts should examine some decrees despite the ouster clause).
265 See generally Udombana, “Towards the African Court”, supra note 15 at 72 (describing the African Commission as “consistently demonstrating timidity in interpreting its powers,” and suffering from “normative deficiencies in the posture it appears to have discretionarily adopted in interpreting and undertaking its mandate.” In the author’s view, “…the substantive and procedural weaknesses surrounding the work of the African Commission are largely a result of the Commission’s unwillingness to interpret the Charter to its maximum effect”); See Welch, supra note 19 at 56-57 (Suggesting that the Commission is relegated to play only “a quiet role in African politics in the near future”); See Steiner & Alston, supra note 56 at 689 (providing an assessment of the African Charter as “[t]he newest, the least developed or effective, the most distinctive and the most controversial of the regional human rights regimes”).
266 See Okafor, “Peace Building”, supra note 6 at 421 (rejecting conventional assessments of the African human rights system as “weak”).
b. The Respondent State’s Duty under the African Charter to Provide Effective Domestic Remedies

In the Niger Delta cases, the African Commission waived application of the local remedies rule notwithstanding the complete absence of any factual assertion by the authors of efforts made to exhaust domestic legal remedies. Rather, than insist upon the petitioners “mechanical” pursuit of ineffective domestic remedies, the Commission instead focused the exhaustion inquiry on the Respondent State’s duty to provide effective legal redress within its institutions of governance. The Commission’s pronouncements regarding Nigeria’s

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267 Odinkalu, “Human Rights Mechanisms”, supra note 187 at 116; See Viljoen, “African Charter Procedure and Admissibility”, supra note 11 at 121 (noting that in Rights International, the Commission did not refer to any obligation on the complainant to pursue domestic remedies in Nigeria); See SERAC, supra note 12 at para. 31-41 (in the SERAC case the Commission noted that although “[t]he present communication does not contain any information on domestic court actions brought by the complainants to halt the violations alleged…the Commission is aware that at the time of submitting this communication, the then military government of Nigeria had enacted various decrees ousting the jurisdiction of the courts and thus depriving the people of Nigeria of the right to seek redress in the courts for acts of government that violate their fundamental rights. In such instances and as in the instant communication, the Commission is of the view that no domestic remedies are existent” at para. 40-41); See also Wiwa, supra note 12 at para. 73-77 (in Wiwa, the Commission made clear that the Nigerian government’s execution of Wiwa in no way renders moot the question of available domestic remedies in light of the prevailing legal situation in Nigeria whereby the right to judicial appellate review is denied all Nigerians under the special military tribunal decrees); See Rights International, supra note 12 at para. 23-24. With respect to the Rights International case, the complaint is silent on the issue of exhaustion but nevertheless, the Commission ruled the communication admissible based on the State’s unlawful conduct which caused him to flee the jurisdiction and thus deprived him of effective domestic remedies.

268 Wiwa, supra note 12 at para. 83, 86 (describing the Nigerian government’s failure to provide effective legal remedies, the African Commission noted that: “Ken Saro-Wiwa and his co-defendants were arrested and kept in detention for a lengthy period under the State Security (Detention of Persons) Act of 1984 and State Security (Detention of Persons) Amended Decree No. 14 (1994)…This decree allows the government to arbitrarily hold people…for up to 3 months without having to explain themselves and without any opportunity for the complainant to challenge the arrest and detention before a court of law. The decree prima facie violates the right not to be arbitrarily arrested or detained protected in African Charter Article 6.” Ibid at para.83. As for the military trial and subsequent conviction of Ken Saro-Wiwa and his co-defendants, this was held under Nigerian Military Decree No. 2 of 1987 which established the “Special Military Tribunal for Civil Disturbances.” The Commission noted that “the special tribunals established under the Civil Disturbances Act violate African Charter Article 7.1(d), because their composition is at the discretion of the executive branch. Removing cases from the jurisdiction of the ordinary courts and placing them before an extension of the executive branch necessarily compromises their impartiality, which is required under the African Charter. This violation of the impartiality...occurs in principle, regardless of the qualifications of the individuals chosen for the particular tribunal.” Ibid. at para. 83-84. With respect to the right to appeal convictions by the tribunal, Sections 7 and 8 of the Civil Disturbances (Special Tribunals) Decree No. 2 of 1987
inadequate domestic legal framework, made clear that the mandate imposed on States Parties by the African Charter “to undertake measures to give effect” to the human rights guarantees enumerated in the Charter, places an “affirmative” obligation on States parties to provide effective domestic legal redress for human rights violations committed in their territory. As noted by the Commission, by ratifying the African Charter, States Parties are “legally bound” to its provisions, including those found in Articles 7 and Article 26 of the African Charter guaranteeing the right to an effective legal remedy before independent domestic legal institutions.

In focusing the exhaustion inquiry on Nigeria’s ineffective domestic legal framework and the government’s duty to provide effective legal redress within its institutions, the Commission’s decision to waive the exhaustion requirement in Wiwa, Rights International and SERAC exemplifies the “ultimate purpose” of the rule in human rights protection. Trindade writes that the “ultimate purpose” of the local remedies rule in human rights protection, is to serve as a legal principle which can be employed by the trier of fact to conduct an admissibility inquiry.
primarily focused on the capability of national legal institutions to provide the human rights petitioner actual redress for the wrong suffered rather than the petitioner’s mechanical adherence to the formal act of exhaustion. By deemphasizing mechanical adherence to the act of exhaustion of domestic remedies the African Commission made clear that a “literal interpretation” or rigid inquiry into the petitioner’s pursuit of illusory domestic legal remedies served no human rights interest and in no way furthered the purpose of the African Charter. Thus where human rights are concerned, the focus of the admissibility inquiry should not be on the mere process of exhaustion of local remedies without more, but rather on ensuring that there exists in the domestic legal framework institutions capable of providing effective and readily accessible means for addressing the wrongs for which the Respondent State is alleged to be responsible.

In the Nigerian context, the Commission departed from its initial practice “whereby the formal existence of domestic law remedies appeared sufficient to fulfill” the Respondent State’s duty and made clear that State imposed barriers preventing full access to national legal institutions—be they legislative, political

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272 Trindade, Exhaustion of Local Remedies, supra note 5 at 57.
273 Rights International, supra note 12 at para. 24 (Finding that there was “a constructive exhaustion of domestic remedies” based on the inadequate procedures available to petitioner); See also Wiwa note 12 at para. 75-77 (the Commission noted that review of petitioners’ exhaustion of local remedies was unnecessary not only because the subjects of the complaint are now deceased but also based on the reasoning used by the Commission in addressing judicial ouster provisions in Nigeria’s domestic laws and the conduct of military tribunals); See also SERAC, supra note 12 at para. 40-41 (notwithstanding the change of government the Commission found the exhaustion requirement inapplicable in the context of Nigeria based on the country’s unavailable domestic remedies).
274 Trindade, Exhaustion of Local Remedies, supra note 5 at 58; See also Trindade, “Thoughts on Recent Developments”, supra note 90 at 196 (discussing the fact that restricting the exhaustion inquiry to the determination of a formal existence of domestic remedies and petitioner’s compliance thereby without more is insufficient in the human rights context. The domestic legal process must also be capable of curing the wrongs complained of in order to constitute an “available domestic remedy”); See also Purohit and Moore v. Gambia (2004) Afr. Comm. HPR 241/2001 at para. 38 (the Commission further explained its adoption of an expansive interpretation of the African Charter’s exhaustion requirement in recognition of the fact that “a literal interpretation” of Article 56 (5) could result in dismissal of meritorious human rights claims).
or otherwise—could render legal remedies “unavailable” despite their “formal existence” within the legal framework of the Respondent State. 275

c. The Expansion of the Commission’s Admissibility Practice to Include a Broader Range of Human Rights Cases

In its initial practice, the Commission tended to deny admissibility in “single incident” cases with little or no inquiry on the capacity of available remedies to provide effective redress. 276 However, under the flexible standard of exhaustion applied by the Commission in the Niger Delta cases, the Commission refrained from the strict application of the local remedies rule in individual complaints alleging “a single incident” of unlawful State conduct. 277 The expansion of the Commission’s admissibility practice to include in depth legal analysis of the effectiveness of available domestic remedies irrespective of the number of persons impacted by the human rights violations is well illustrated by the Niger Delta case of Rights International. While the Rights International case constitutes a part of the human rights crisis in the Niger Delta, the complaint centered on the abuse of a single victim by State authorities over a short period of

275 See Wiwa, supra note 12 at para. 87-93 (In rejecting the argument put forth by Nigerian officials that “…tribunals are properly constituted in the Nigerian judicial system to deal with specific issues…,” the Commission noted that despite the formal appearance of domestic remedies within the Nigerian legal framework, these domestic remedies were nonetheless rendered ineffective and unavailable based on the judicial ouster provisions. The special tribunals established under the Civil Disturbances Act, Decree No. 2 of 1987 and related amendments [Amended Decree No. 14, 1994] thereto were neither “impartial nor independent” at 93. Moreover, critical components of a fair trial and due process were absent in the tribunals including withholding of evidence and denial of the right to appeal to a competent national judicial organ); See Trindade, “Thoughts on Recent Developments”, supra note 32 at 196 (exhaustion test in human rights protection should be on the adequacy and effectiveness of local remedies rather than on the basis of availability).
276 See Murray, “Decisions by the African Commission”, supra note 158 at 422 (Murray’s analysis of the early jurisprudence of the African Commission found that with the exception of cases alleging “massive” rights violations, the Commission, in all other instances often interpreted the exhaustion requirement very strictly which resulted in the summary dismissal of many individual complaints).
277 Ibid. (in contrast to the Commission’s strict approach to the local remedies rule in several cases, Murray notes the “more liberal stance” on the application of the exhaustion requirement adopted by the African Commission in complaints challenging Nigeria’s military decrees and judicial ouster provisions).
The factual issues raised by the authors dealt mainly with specific human rights violations by the State during a three month period which targeted a single individual—Charles Baridorn Wiwa—and caused him to flee the country for his personal safety. Nevertheless, the Commission after a thorough factual review, found the case admissible on grounds that the exhaustion requirement was “constructively” satisfied in light of State impediments which precluded Charles Wiwa from accessing the domestic courts.

By granting admissibility in the Niger Delta case of Rights International, the Commission made clear that State violations of the African Charter directed towards a single human rights victim merits serious legal review during admissibility proceedings and that such cases are a proper subject of international adjudication. Notably, the Commission’s efforts to broaden its admissibility practice by admitting “single incident” human rights violations was met with condemnation by representatives of the Nigerian government. In the view of Nigerian officials, the Commission lacked authority under the African Charter to admit individual complaints since the Commission’s adjudicative mandate, on its face, only authorized review of cases alleging “serious and massive” violations of rights. However, the Nigerian government’s challenge to the scope of the Commission’s adjudicative mandate under the Charter provided opportunity for the Commission to defend expansion of its admissibility practice to include a broader range of human rights complaints. The Commission responded to the State’s critique by noting that under the Charter, the African Commission possesses a dual mandate to “promote and protect” human rights which extends to

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278 See Rights International, supra note 12.
280 Ibid. at para. 24.
281 See Viljoen & Louw, “Findings of the African Commission”, supra note 11 at 4-5 (Discussing the arguments raised by the Nigerian government at the 2nd Extraordinary Session in Kampala challenging the Commission’s adjudicative authority. Representatives of the Nigerian government contend that Articles 55 through 58 of the Charter conferred on the Commission competence to adjudicate select cases alleging massive rights violations and that the Commission’s attempts to review a broader range of complaints exceeded its mandate under the Charter).
authority to “consider communications lodged by a wide range of interested parties” alleging violations of the African Charter. 283

Thus in addressing the Nigerian government’s failure to provide effective legal remedies in its domestic institutions, the Commission shed its earlier reluctance to interpret the African Charter’s exhaustion requirement as broadly as permissible in order to secure the maximum available human rights protection for petitioners. 284

d. The Expansion of Exceptions to the African Charter’s Exhaustion Requirement

In the traditional application of the local remedies rule, there exist very circumscribed exceptions to the requirement of exhaustion of domestic legal remedies. 285 For instance, in the context of diplomatic protection it was widely held by classical scholars such as Brochard and Eagleton that the only acceptable exception to a claimant’s obligation to exhaust local remedies is presented by circumstances which evidence a denial of justice or when “…the futility of further proceedings had been fully demonstrated…” 286 However, as noted by Trindade, international practice in the area of human rights protection in no way requires that “jurisdictional irregularities tantamount to denial of justice should be

284 See Beyani, supra note 94 at 608 (complimenting ongoing efforts by the African Commission to “show more resolve and boldness” in its decision making process); See Matua, “African Human Rights”, supra note 19 at 348 (addressing the evolution of the jurisprudence of the African Commission, the author notes: “It is fair to say that the African Commission’s communication procedure has come a long way since the early days [and] a predictable tradition of more fully considering petitions is…evolving”).
285 Trindade, Exhaustion of Local Remedies, supra note 5 at 110-112.
286 Ibid. at 111-112 quoting E.M. Brochard, “The Local Remedy Rule” (1934) 28 Am. J. Int’l L. 729; C. Eagleton, The International Responsibility of States in International Law (New York: New York University Press, 1928) at 113; See H.W. Briggs, The law of Nations (New York: Appleton Century Crofts, 1952) at 648 (Noting that this circumscribed view of exceptions to the traditional rule is best illustrated in the writings of classical scholars like Brochard and Eagleton both of whom “maintained that the exhaustion of local remedies ought to be pursued up to the point of a denial of justice before an international claim can be presented…”).
superadded to a previous wrong…” before the human rights petitioner is relieved of the obligation to exhaust local remedies. 287 Thus a widely recognized exception in human rights practice calls for relieving the petitioner of the requirement to exhaust domestic remedies due to slowness of domestic legal procedures. 288 In the African Charter, this exception for “unduly prolonged” domestic remedies is enumerated in Article 56 (5) of the Charter. 289

In the Niger Delta cases, the Commission, having examined Nigeria’s domestic legal framework, declined to insist on the Niger Delta petitioners’ fulfillment of the exhaustion requirement as necessitated by African Charter Article 56(5). 290 However, the Commission’s waiver of the exhaustion requirement in the Niger Delta cases is distinguishable from other instances wherein the Commission deemed Article 56 (5) inapplicable. While it is permissible under the African Charter to waive application of the exhaustion requirement where domestic remedies are “unduly prolonged,” such waiver is usually applicable upon a prima facie showing by petitioner that a waiver of the local remedies rule is necessitated by the objective facts. 291 The only other circumstance under the African Charter wherein the exhaustion requirement was previously waived by the African Commission in the absence of a showing of efforts to exhaust domestic remedies has been in communications demonstrating the presence of “serious and massive” human rights violations. 292 While such designation is wholly applicable to the facts raised in Wiwa and the SERAC case, the Commission did not rely on this ground to exclude application of the local

287 See Trindade, Exhaustion of Local Remedies, supra note 5 at 112,115 (in the context of human rights protection, denial of justice as an exception to the local remedies rule is not regarded literally or taken to its utmost extreme).
288 Ibid.
289 See Art. 56 (5), African Charter, supra note 4 (providing for waiver of the exhaustion requirement when domestic procedures are "unduly prolonged").
290 Wiwa, supra note 12 at para. 72-77; See SERAC case, supra note 12 at para. 40-41.
291 Viljoen, “African Charter Procedure and Admissibility”, supra note 11 at 112 (observing that other than complaints alleging massive human rights violations, the Commission’s practice generally requires the complainant to “at least lay a foundation for finding that local remedies have been exhausted”).
292 Ibid.
remedies rule. Rather, the African Commission relied on exceptions “inbuilt” in the local remedies rule to suspend application of the exhaustion requirement. In the Niger Delta cases, the African Commission extended the circumstances where the local remedies rule is deemed inoperable to include the judicially crafted waiver of the rule which holds that where “domestic tribunals refuse to administer justice, or they are not independent and impartial, or they render judgments which are manifestly unfair...” the requirement of exhaustion of domestic remedies is inapplicable. Such circumstances according to the Commission, present a “constructive exhaustion” of domestic remedies and there remains no reason to insist upon further delay in international adjudication of the merits of the human rights claims.

The admissibility rulings in the Niger Delta cases thus illustrate that the exceptions to the local remedies rule are not restricted to the narrow parameters enumerated in Article 56 (5) of the African Charter and that absence of explicit

293 See SERAC, supra note 12 at para. 59. (The authors of the SERAC communication alleged that “the military government of Nigeria massively and systematically violated” numerous economic, social and cultural rights of the Ogoni people. However there was no specific finding by the Commission that the human rights violations by the Nigerian Government in SERAC were “serious and massive” although they can be arguably described as such. Indeed the Commission has in prior resolutions described the human rights conditions in Nigeria as “gross” and involving “massive” violations of rights); See 1994 ACHPR Resolution on Nigeria, supra note 214 (condemning the military government’s “gross violations of human rights…”); See 1995 ACHPR Resolution on Nigeria, supra note 214 (condemning the “continued gross and massive violations of human rights in Nigeria…”).

294 See Viljoen, “African Charter Procedure and Admissibility”, supra note 11 at 121 (noting that in Wiwa, the Commission extended the exceptions to the African Charter’s exhaustion requirement); Wiwa, supra note 12 at para. 76-77; SERAC, supra note 12 at para 37, 41.

295 See Trindade, Exhaustion of Local Remedies, supra note 5 at 110 (The exhaustion ruling by the Commission in the Niger Delta cases is consistent with Trindade’s flexible approach to the local remedies rule. Trindade notes that “Exceptions governing the application of the local remedies rule are already built into the rule with the most obvious being provided by the rationale of the local remedies rule itself—which is to afford the state the opportunity to redress the alleged wrong through its own domestic legal system before its international responsibility can be invoked at the international level: It thus follows that where remedies are incapable of redressing the wrongful situation, the rule does not apply” at 110. In such cases, the rule is waived simply because “its rational ceases to exist,” thereby making further recourse to local remedies moot); See D’Ascoli & Scherr, supra note 25 at 13 (noting that the local remedies rule is subject to a number of exceptions and in the context of human rights protection, the local remedies rule should not apply “when domestic law does not guarantee due process of law [and] when the individual has been denied access to local remedies…” at 13).

296 See Rights International, supra note 12 at para 23-24 (Finding constructive exhaustion where petitioner was unable to pursue domestic redress due to legal barriers erected by the Respondent State).
exceptions to the local remedies rule in the enabling human rights treaty does not preclude exercise of the Commission’s discretion in waiving the rule as a means of protecting fundamental human rights. In *Wiwa, Rights International* and *SERAC* the African Commission reinforced Trindade’s view that for the purpose of human rights protection, the local remedies rule does not have an absolute character and its application is not mandatory when exigencies of human rights protection necessitate a waiver of the rule.297

In sum, the African Commission’s application of the local remedies rule in the Niger Delta cases furthered important principles on the correct application of the local remedies rule in human rights protection in the African region. However, the human rights benefits stemming from the African Commission’s pronouncements on Nigeria’s ineffective domestic remedies were not limited to improvements in the Commission’s admissibility practice. The Niger Delta cases also had significant impact at the domestic law level.

### 4.8 The Domestic Impact of the African Commission’s Pronouncements on Nigeria’s Lack of Effective Legal Remedies

In contrast to several other communications sent to the African Commission alleging a wide array of abusive State practices by the Nigerian Government, the Niger Delta cases were not easy to dismiss by Nigeria’s military establishment.298 Although the African Commission had issued other decisions condemning Nigeria’s domestic laws under successive military regimes, the Niger Delta cases were the most visible communications authored by Nigerians alleging

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297 Trindade, *Exhaustion of Local Remedies*, supra note 5 at 110-111 (remarking on the “increased judicial recognition of the fact that the local remedies rule is far from being a sacrosanct or rigid principle, but admits many exceptions”).

298 Okafor, “Peace Building”, supra note 6 at 427 (noting that the Commission’s very public condemnation of the Nigerian government in respect to the Ogoni matter “hurt the regime’s moral composure much more than those of other international entities whose actions could be dismissed in post-colonial Nigeria as improperly motivated”).

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human rights abuses by the Nigerian military government. This is not to suggest however, that the acquiescence of the military government to the legal reforms recommended by the African Commission during the Niger Delta crisis was readily achieved. Indeed, others have even questioned the efficacy of the Commission’s role during the Niger Delta crisis. With respect to the case of Ken Saro-Wiwa, scholars such as Wachira and Udombana have assessed the African Commission’s efforts as indicative of the Commission’s “weak enforcement authority,” based on the fact that the Nigerian government executed Ken Saro-Wiwa and his co-defendants in “total disregard of the provisional measures issued by the African Commission.” However, while factually correct, such a narrow assessment of the African Commission’s influence in the Niger Delta cases is incomplete. Nothing in the Commission’s efforts to secure the release of Ken Saro-Wiwa and other Ogoni detainees suggests apathy or implies “weakness” on the part of the African Commission. From the period of Saro-Wiwa’s initial arrest and detention in 1994, up until the moment

299 See Murray, “Decisions by the African Commission”, supra note 158 at 415 (According to Murray, the Commission’s publicizing of its deliberative efforts on the Niger Delta crisis was important as it garnered further adverse publicity for the Abacha regime’s human rights violations in the Niger Delta. “In addition, the Commission took a dynamic decision in December 1995 to hold a second extraordinary session in Kampala following the execution of Ken Saro-Wiwa and the eight other Ogoni activists by the military Nigerian government…This action by the Commission was also important because it meant that its deliberations, in respect of the situation in Nigeria, and the government’s response to these, were made public” at 415).

300 See e.g. George Mukandi Wachira, “Twenty Years of Elusive Enforcement of the Recommendations of the African Commission on Human and Peoples’ Rights” (2006) 6 Afr. Hum. Rts. L. J. 465(In scholarship describing inadequate State compliance with African Commission directives, the author expresses the view that the Commission had no domestic impact in Nigeria during the Niger Delta crisis); See Udombana, “Toward the African Court” supra note 15 at 68 (expressing the view that there exists “a general disregard for the Commission’s jurisdiction among African States” as illustrated by the Nigerian military government’s “flagrantly disregarding” the African Commission’s request for a stay of execution in the case of Ken Saro-Wiwa).

301 Wachira, supra note 300 at 474-75.

302 See Okafor, “Peace Building”, supra note 6. (remarking that “conventional assessments of the African system have always tended to imagine it as some kind of potential panacea, often chiding it for not having succeeded in eliminating Africa’s human rights problems. These assessments often give the impression that this is what the mandate of the system is…” While the achievement of a very high level of direct voluntary compliance with the systems decisions by state actors is a laudable ambition, it is not at all clear why that index should constitute the only or key measure of the system’s significance and value.” Under such a restrictive measurement of efficacy, “…only a partial picture of the range of effects that the system can exert within States is revealed”).

303 Ibid. at 423.
the Nigerian military government carried out his execution, the African Commission remained fully engaged in efforts to secure the release of all Ogoni detainees. Although the Commission was unable to secure the release of Ken Saro-Wiwa, other significant accomplishments were “facilitated” by the African Commission during the Niger Delta crisis.

**a. The Nigerian Military Government’s Adoption of the African Commission’s Domestic Legal Reform Proposals Regarding the Conduct of Military Tribunals**

After the Saro-Wiwa execution, the Commission continued its focus on Nigeria’s lack of effective legal remedies and persisted in condemning the military regime’s flawed domestic legal processes. Among the actions taken by the Commission in the aftermath of the Nigerian government’s execution of Ken Saro-Wiwa include the issuance of several resolutions condemning:

...the continued violations of human rights in Nigeria and particularly: the arbitrary arrests and detention of human rights and pro-democracy activities, critics and opponents of military rule; circumscribing the independence of the judiciary and setting up military tribunals lacking independence and due process to try persons suspected of being opposed to the military regimes; the abolition of habeas corpus with respect to political detainees; and promulgation of decrees and laws ousting the application of the

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305 See generally Okafor, “Peace Building”, supra note 6 at 427-429 (Although the Nigerian Government rejected the Commission’s request to halt the death sentence imposed on Ken Saro-Wiwa, the Commission’s efforts to protect human rights in Nigeria did not cease with the execution and the Commission’s inter-related activities in the aftermath of Saro-Wiwa’s death facilitated the Nigerian military government’s release of other Ogoni defendants incarcerated and awaiting trial under the same military tribunal that condemned Ken Saro-Wiwa. Moreover, the Nigerian military regime, in addition to releasing the remaining Ogoni detainees also acceded to the Commission’s recommendations regarding improvement of fair trial and due process standards in the conduct of military tribunals. On June 5, 1996, the Nigerian Government amended the Civil Disturbances (Special Tribunal Decree, 1987) by altering its composition to remove members of the governing military council and inserting a right of review of convictions by the tribunal).
In addition to resolutions condemning the human rights situation in Nigeria, the Commission, in a “dynamic” manner, held an extraordinary session in December, 1995 to further address the Niger Delta crisis. Following the December 1995 Extraordinary Session, the Nigerian government, despite vocal misgivings concerning the Commission’s remedial authority, began to comply with the specific domestic legal reforms proposed by the Commission. During this period, significant aspects of the domestic legal order found by the Commission to be in violation of international fair trial standards enumerated in Articles 7 and 26 of the African Charter were subsequently nullified by the Nigerian government.

b. The Repeal of Judicial Ouster Provisions in Domestic Legislation

In arriving at its conclusion that Nigeria’s domestic legal order lacked available and effective legal remedies for human rights violations in the Niger Delta, the African Commission identified as a determinative factor, the military government’s excessive use of judicial ouster provisions in domestic legislation. In the Niger Delta cases, the African Commission made clear the insidious nature of the judicial ouster provisions attached to the military decrees used to convict Ken Saro-Wiwa and several other Nigerians. In the reasoning of

306 1995 ACHPR Resolution on Nigeria, supra note 214.
307 Murray, “Decisions by the African Commission”, supra note 158 at 415; See also Final Communiqué, 2nd Extraordinary Session of the African Commission on Human and People’s Rights, 18th-19th December, 1995 Kampala, Uganda at para. 17 (6) [ACHPR Final Communiqué 2nd Extraordinary Session] (Following the hanging of Ken Saro-Wiwa the Commission held an Extraordinary Session to address “the compatibility of Nigerian legislation with the provisions of the African Charter,” and obtain a report on the status of the 19 remaining Ogoni defendants (Ogoni 19) awaiting trial before the same military tribunal under which Ken Saro-Wiwa was convicted and sentenced to death. The Commission’s Final Communiqué inter alia urged the Nigerian military regime’s compliance with fair trial and due process guarantees of the African Charter in the conduct of military tribunals).
308 See Okafor “Peace Building”, supra note 6 at 423-30 (describing specific domestic legal reforms in Nigeria facilitated by the African human rights system).
309 Wiwa, supra note 12 at para. 76, 86, 101-103; SERAC, supra note 12 at para. 41.
the African Commission, the Nigerian government’s use of judicial ouster clauses to bypass judicial review of the conduct of military tribunals, not only deprived Nigerians of the right to seek redress but also carried far reaching potential to destabilize the entire nation by restricting peaceable methods of dispute resolution in the law courts and thus encouraging further disintegration of the societal order as dissident groups seek other avenues to demonstrate displeasure with government actions. 310 Particularly egregious to members of the Commission was the aspect of the ouster clause which denied a right to judicial review to individuals sentenced to death by the Special Military Tribunal. 311 The Commission therefore urged that legislative and administrative changes be made to the conduct of Nigeria’s military tribunals to adequately guarantee the due process rights of the accused. 312

310 Manby, supra note 222 at 156-157; See Karl Maier, This House has Fallen (New York: Public Affairs, 2000) (describing the threat of national collapse resulting from acute human rights violations perpetrated by the Nigerian military government. The author notes that the human rights crisis in the Niger Delta called into question “the very unity of Nigeria” at xxix); See SERAC, supra note 12 at para. 41 (the Commission noted that in bypassing the jurisdiction of the courts, these judicial ouster provisions foreclosed normal channels of judicial remedies and thus deprived Nigerians of access to the domestic judicial organs for vindication of claims involving violations of human rights).

311 See Constitutional Rights Project (on behalf of Zamani Lekwot and six others) v. Nigeria (1995) Afr. Com. H.P.R. 87/93 [Zamani Lekwot case] (in a complaint concerning seven men sentenced to death under Nigeria’s Civil Disturbances (Special Tribunal) Act the Commission raised strong objections to the Special Tribunal Act owing to extraordinary discretionary powers conferred on the Armed Forces Ruling Council to confirm the penalties imposed by military tribunals without any review whatsoever by “any court of law” of “any aspect” at para. 8-10. In the Commission’s view, “to foreclose any avenue of appeal to competent national organs in criminal cases bearing such penalties clearly violates Article 7. 1 (a) of the African Charter, and increases the risk that even severe violations may go unaddressed” at para. 11); See Wiwa, supra note 12 at para.83 (describing the State Security (Detention of Persons) Decree which stipulates that the government may detain individuals without charge and that “the courts cannot question any such detention or in any other way intervene on behalf of detainees” as a serious violation of Nigeria’s obligations under the African Charter). See Art. 7, African Charter, supra note 4 (providing for the right to a fair trial and procedural due process); See Art. 26, African Charter, supra note 4 (imposing a duty on States Parties to the Charter to ensure the independence of the Courts).

312 The Commission has condemned Nigeria’s judicial ouster provisions in several cases, resolutions, reports and in a special session devoted to further edifying the military regime on the moral offensiveness and illegality of its ouster of the ordinary courts from the military tribunal process. See ACHPR Final Communiqué 2nd Extraordinary Session, supra note 307 (noting that the main issues discussed were the release of the remaining Ogoni detainees still held by the government and the “compatibility of Nigerian Legislation with the provisions of the African Charter…” at para 8, 16); See also, ACHPR Account of Internal Legislation of Nigeria, supra note 44 (special session of the Commission convened to urge Nigeria’s compliance with
On June 5, 1996 the Nigerian military government amended the Civil Disturbances (Special Tribunal) Act by removing the judicial ouster clause and recognizing the right of those condemned to death under its provisions to appeal their conviction to an independent body. Additional legislative repeals soon followed. On June 7, 1996 the Nigerian military government removed restrictions placed on the right to habeas corpus and restored judicial review of State imposed detentions. Not only were the two worst examples of Nigeria’s “Charter illegal” decrees repealed, “[t]he government also ordered a whole sale review of the cases of all those detained under the Act” which led to the release of several persons held unlawfully by the State. In Okafor’s assessment, the Nigerian military government, by amending the Civil Disturbances (Special Tribunal) Act and the State Security (Detention of Persons) Decree, “had reached a decision that reflected the African Commission’s recommendations almost to the letter,” and he further adds that “…it is not unreasonable therefore to deduce logically” that the African Commission’s pronouncements condemning Nigeria’s judicial ouster decrees were influential in achieving this outcome.

313 Okafor, “Peace Building”, supra note 6 at 429-430 (discussing the African human rights system’s influence in Nigeria, Okafor notes the June 5, 1996 amendments to the Special Tribunal Decree provided for the right to appeal military convictions to an appeals tribunal whose members were independent of the military government. In addition, on June 7, 1996 the Abacha regime also amended the State Security (Detention of Persons) Act of 1984 [Cap 414, Laws of the Federation of Nigeria (1990)] whose purpose was to detain persons for acts deemed “prejudicial” to State security.” The new law, the State Security (Detention of Persons) (Amendment) (No.2) (Repeal) Decree No. 18 of 1996, removed judicial ouster provisions and restored habeas corpus rights to those detained by the regime); See Viljoen, “African Charter in Domestic Courts”, supra note 33 at 8-10 (noting that the African human rights system played an important role in Nigeria’s domestic legal reforms).

314 Okafor, “Peace Building”, supra note 6 at 429-430.

315 See Okafor, “Peace Building”, supra note 6 at 429-430. While recognizing that “there were a number of other internal political and social forces” impacting the military governments legal reforms, Okafor notes that it is also clear that the repeated condemnation of the ouster provisions by the African Commission “played a very critical role” in Nigeria’s domestic reforms. “The Commission’s views were one of the factors that operated on the minds of the military as it made these changes. This much is deductible from the regime’s explicit and strong opposition to the decisions of the African Commission that had condemned the aspects of the legislation that [the regime] subsequently altered to correspond with the Commission’s views…the then ruling Nigerian military junta did almost exactly what the Commission preferred be done. There is not

The African Commission’s pronouncements on the human rights situation in Nigeria are also credited with aiding the domestic legal reform process by providing the Nigerian judiciary with substantive legal arguments upon which to challenge the military government’s usurpation of the judicial function. Following the Nigerian military’s suspension of the Nigerian Constitution and the ouster of judicial review of military tribunals, the African Charter along with African Commission decisions often provided the sole legal authority upon which Nigerian judges could rest their findings in domestic human rights cases. Viljoen notes that, despite efforts by the Nigerian military government to suspend application of the African Charter along with its suspension of the Nigerian Constitution, the domestic application of African Charter rights remained in operation, thus allowing Nigerian judges to “ameliorate the eroding impact of military rule on fundamental rights” by basing legal rulings on the African Charter and the decisions of the African Commission.

The Commission’s unyielding insistence that the Nigerian military government must honor its obligations under the African Charter to provide effective redress for human rights complainants aided in achieving domestic rulings such as Fawehinmi v. Abacha, wherein the Court of Appeal “affirmed the much room for reasonable doubt as to the fact that the Commission’s views influenced the decision to change the offensive features of the relevant law” at 430).

317 Ibid.
318 Ibid. at 8-10; See Civil Liberties Organization v. Nigeria (1995) Afr. Comm. HPR 129/94 at para. 13 [Civil Liberties Case] (complaint challenging the Nigerian military government’s suspension of the Nigerian Constitution and the African Charter which was incorporated into Nigerian domestic law pursuant to the African Charter Ratification and Enforcement Act, Chapter 10, Laws of the Federation 1990. In its decision, the African Commission rejected Nigeria’s attempt to nullify the Charter’s domestic effect and bluntly informed the regime that irrespective of any decree “the Charter remains in force in Nigeria…the Nigerian government has the same obligations under the Charter as if it had never revoked [and] [t]hese obligations include guaranteeing the right to be heard”).
status of the African Charter as superior to that of ordinary legislation. Its reasoning went on as follows…While the decrees of the Federal Military Government may over-ride other municipal laws they cannot oust the jurisdiction of the court whenever properly called upon to do so in relation to matters pertaining to human rights under the African Charter.”  

Similarly, in the domestic case of Constitutional Rights Project v. President Ibrahim Babangida, the High Court of Lagos rejected the government’s argument that domestic courts lacked jurisdiction to enforce interim measures urged by the African Commission. The Lagos Court enforced the African Commission’s stay of execution and ruled that the domestic court’s “jurisdiction was preserved by the African Charter, as provisions of the Charter override the ouster clauses” in domestic legislation.

In the view of scholars such as Okafor and Viljoen, the Nigerian judiciary is highly deserving of commendation for “courageously” defying government restrictions on independent judicial review, however, no matter how “progressive” a Nigerian judge may be, they need viable legal grounds upon which to base their decision and “need to be offered a cogent legal argument” upon which favorable rulings may issue. Despite the Nigerian judiciary’s “leading role” in

319 See Fawehinmi v. Abacha (1996) 9 NWLR (pt. 475) at 710 (case where Nigerian government officials argued that the jurisdiction of the domestic courts was ousted by military decrees. However, the Court of Appeal rejected the State’s contention and retained its jurisdiction pursuant to the due process guarantees mandated by the African Charter); See Viljoen, “African Charter in Domestic Courts”, supra note 33 at 11 (Viljoen notes that the Nigerian Court’s ruling in Fawehinmi v. Abacha established important regional precedent “that the African Charter has priority over any decree by government and cannot be excluded from application by decree”).

320 See Viljoen “African Charter in Domestic Courts”, supra note 33 at 8-9 (describing the case of Constitutional Rights Project v. Babangida Suit No. M/102/93-Lagos State High Court, as an influential decision which rejected the military government’s argument that domestic courts lacked jurisdiction to hear the application for a stay of execution of several defendants convicted by the Civil Disturbances Special Tribunal. The domestic court decision relied on the authority of the African Commission and the African Charter to reach this ruling).


322 See Okafor, “Peace Building”, supra note 6 at 425(noting that in many instances Nigerian Courts relied on Chapter 10 of the domestic laws—the legal instrument that incorporated the Charter into Nigerian law—to preserve the jurisdiction of domestic courts notwithstanding military ouster provisions. Similarly, domestic judges relied on interim measures indicated by the African Commission to grant injunctions precluding irreparable harm to several detainees. Had
domestic implementation of African Charter human rights guarantees, the
decisions of the African Commission “strengthened” the domestic legal
arguments made on behalf of rights victims and also provided local judges with
the legal authority upon which to issue judicial opinions favoring human rights
litigants despite the presence of the ouster clause in military decrees. 323

d. The Suspension of Sentences imposed by Military Tribunals in the Ogoni
19 Matter

An important example of the positive domestic impact the Commission’s
pronouncements on Nigeria’s lack of effective legal remedies had on domestic
jurisprudence occurred in the case of several Ogoni detainees imprisoned by the
Abacha regime during the Niger Delta crisis. 324 Here, the African Commission
played a “significant facilitative” role in preventing 19 Ogoni defendants from
having death sentences imposed by the same military tribunal system that
presided in Ken Saro-Wiwa’s trial and execution. 325 Despite the global outrage
directed at the Nigerian military government following the execution of Ken Saro-
Wiwa, the regime of General Abacha announced its intention to prosecute and

local NGOs not obtained favorable rulings by the Commission, the domestic courts could not have
granted relief “for Nigerian courts do not act suo motu…”); See Viljoen, “African Charter in
Domestic Courts”, supra note 33 at 9.
324 See Amnesty International, News Release, AFR 44/04/96 “Nigeria: Ogoni 19 Special Tribunal
Should be urgently Reformed or Disbanded” (14 February 1996), online: Amnesty International
<http://www.amnesty.org> (reporting that the Ogoni 19 Matter concerned 19 Ogoni community
activists charged with homicide by Nigeria’s Civil Disturbances Special Tribunal in connection
with the death of four individuals during the civic unrest and demonstrations which took place in
May 1994 in the Ogoni region of the Niger Delta. The Civil Disturbances Special Tribunal is the
same military tribunal that executed Ken Saro-Wiwa and eight other Ogoni civil rights activists on
November 10, 1995. Like the Wiwa hearing, the trial of the Ogoni 19 failed to meet the standard
of due process required under international law. The military trial was riddled with procedural
flaws including suppression of exculpatory evidence, denial of access to defense counsel and
duress-induced confessions. The Ogoni prisoners were also subjected to various other acts of
mistreatment including lack of proper nourishment and denial of medical care which resulted in
the death of one of the defendants, Clement Tusima in August 1995 from untreated diabetes).
325 Okafor, “Peace Building”, supra note 6 at 428.
carry out the executions of an additional 19 Ogoni detainees. Previous efforts by several international sources, including governments and human rights organizations, aimed at securing the release of the Ogoni 19 went unheeded until the Kampala Extraordinary Session where the African Commission publicly demanded their release. The Commission also challenged the impartiality of the military tribunal presiding in the prosecution of the Ogoni 19 and further requested that the OAU inform Nigerian authorities “…that no irreparable prejudice…” should befall the 19 Ogoni detainees pending an adjudicative process commensurate with international standards of fairness. After much debate and posturing by representatives of the Nigerian Government, the regime finally conceded several points raised by the Commission in Kampala. First, the Nigerian High Commissioner to Uganda, on behalf of the Nigerian Government emphasized “the will of the Nigerian Government to cooperate with the African Commission,” and the Nigerian delegation promised to submit a written response to all the concerns expressed by the African Commission concerning Nigeria’s military tribunals and the fate of the remaining Ogoni detainees. The Commission’s next course of action included an investigative mission to Nigeria to advance further its request for interim measures in the Ogoni 19 Matter and encourage the State’s compliance with the legal reform commitments entered in Kampala. The Nigerian military Government subsequently stayed the trial

326 Norm Dixon, “U.S., Britain, EU Refuse Sanctions” Green Left Weekly No. 214 (6 December, 1995), online: <http://www.greenleft.org.au/back/1995/214>. (Noting that the Abacha regime was “buoyed” by the modest sanctions imposed by Western governments following the Wiwa execution and in disregard of all international condemnation, the regime on November 26, 1995, announced its intention to lay additional capital punishment charges on the 19 Ogoni activists still held in custody. The trials of the Ogoni 19 were scheduled for military adjudication under a tribunal convened pursuant to the Special Tribunal Decree which the Commission on numerous occasions had found to be incompatible with the due process and fair trial guarantees of the African Charter).

327 See Okafor, “Peace Building”, supra note 6 at 427-428.

328 Ibid. at 427.


330 Okafor, “Peace Building”, supra note 6 at 427 (discussing the Commission’s request for a stay of proceedings in the Ogoni 19 Matter and the Commission’s on-site investigative mission following the 1995 Kampala Extraordinary Session); See ACHPR Final Communiqué 2nd Extraordinary Session, supra note 307 at para. 13-16 (OAU Ambassador Ahmad Haggag described the human rights situation in Nigeria and in particular, the detention of the 19 Ogoni activists as a “major preoccupation” of the African human rights system and members of the
of the Ogoni 19 and the men were later released, with all charges against them dismissed.331

According to Okafor, the release of the Ogoni 19 was critically aided by the efforts of the African Commission at the 1995 Kampala Extraordinary Session.332 The successful human rights outcome in this case owed a great deal to the Commission’s “very active interest in the end-results” of its demands for the release of the Ogoni detainees which placed considerable pressure on the Abacha regime and thus “played a significant role in producing the desired outcome…”333 Indeed, the various concessions made by the Nigerian Military Government to the African Commission in Kampala, marked the few public retreats by the regime from its intransigence in the area of human rights.

e. The Nigerian Government’s Formal Acknowledgement of the “Atrocities” Occurring in the Niger Delta Region

The African Commission’s efforts to facilitate legal reform in Nigeria did not cease following the end of military governance.334 The Commission’s decision in the SERAC case coincided with Nigeria’s transition to democratic governance under the civilian administration of President Obasanjo.335 While the African Commission pledged its support to assist the country in its democratic transition, Commission members also remained mindful of the ongoing human

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331 Okafor “Peace Building”, supra note 6 at 427-428.
332 Ibid. at 427-28.
333 Okafor, “Peace Building” supra note 6 at 427; See Shelton, supra note 134 at 223 (describing the Commission’s active role in seeking resolution of the Niger Delta crisis).
334 See IDEA, supra note 215 at 354. The sudden death of General Abacha on June 9, 1998 was followed by a “transitional” military government headed by General Abubakar. After presiding over democratic elections and adoption of a new federal constitution, General Abubakar transferred power to the winner of the presidential contest Olusegun Obasanjo in March 1999. After serving eight years Obasanjo was succeeded in 2007 by incumbent President Yar A’dua.
335 Shelton, supra note 155 at 226.
rights crisis in the Niger Delta. In 2001, the African Commission issued the *SEARC* decision which broadened the Nigerian governments duty to not only provide effective domestic legal remedies but reminded the new civilian administration of its economic and environmental obligations towards the Ogoni and other Niger Delta communities. Shelton commends the African Commission’s jurisprudence in the *SEARC* case and points out that timing the release of the *SEARC* decision to coincide with Nigeria’s democratic transition, “…enabled the African Commission to secure the cooperation of the new Nigerian government, which indicated its willingness to take measures to redress the violations that had occurred.”

Since Nigeria’s transition to civilian governance, measurable improvements in the dispensation of justice have occurred in the Niger Delta and some of these normative reforms are attributable to the African human rights system. As a threshold matter, the Nigerian government’s response to the SERAC case represents the first occasion where Nigerian authorities publicly admitted knowledge of the “atrocities” occurring in the Niger Delta due to oil excavation activity. In addition to outlining specific remedial measures aimed

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336 See ACHPR/Res.28(XXIV)98: Resolution on Nigeria’s Return to a Democratic System (1998) [1998 Resolution on Nigeria] ( in addition to offering the new government of President Obsanjo the African Commission’s full support “in its task of rebuilding in Nigeria a democratic society which respects human rights,” the Resolution also reminded the new civilian government of “their duty” to enact policies “to promote and protect human rights and freedoms…”)

337 *SERAC*, *supra* note 12.

338 Shelton *supra* note 155 at 226.

339 See SERAC, *supra* note 12 at para. 30; 42 ( the Obsanjo administration admitted the human rights violations committed in the Niger Delta by stating, “there is no denying the fact that a lot of atrocities were and are still being committed by the oil companies in Ogoni Land and indeed in the Niger Delta area.” In addition, in response to the SERAC communication, the Obasanjo administration further committed to “the establishment for the first time in the history of Nigeria: A Federal Ministry of Environment with adequate resources to address environmental related issues prevalent in Nigeria and as a matter of priority in the Niger Delta area; Enacting into law the establishment of the Niger Delta Development Commission (NDDC) with adequate funding to address the environmental and social problems of the Niger Delta and other oil producing areas of Nigeria [and]; Inaugurating the judicial Commission of Inquiry to investigate the issues of human rights violations…” *ibid.* at para. 30 ). See also Kaniye S.A. Ebeku, “Appraising Nigeria’s Niger Delta Commission” (2004) 25 Statute L. Rev. 85 at 85-86 (noting that the Nigerian Government in an effort to fulfill obligations undertaken in its note verbale in the SERAC communication initiated a Commission of inquiry to investigate human rights violations in the Niger Delta. The Obsanjo government also created the Niger Delta Development Commission to address issues of social and economic inequity in the region (NDDC Act). While neither pledge has resulted in a
at alleviating the human rights violations in the Niger Delta region, President Obsanjo committed himself to spearheading national efforts towards reconciliation between Nigeria’s disparate ethnic configurations. Although ethnic tensions persist in the Niger Delta and the region remains mired in deep poverty, the Obsanjo administration, to its credit, made significant effort towards restoring the rule of law by accelerating the repeal of many “draconian” laws enacted by the military and installed new legislative measures aimed at improving access to justice for the populace.  

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340 See Ndujihe Clifford, “Oputa Panel: Can it really Right Past Wrongs?” (2000) 12 Liberty 6 (The Oputa Commission named after its chair, Justice Chukwudifu Oputa was created by President Obasanjo in 1999 to investigate “gross violations of human rights in Nigeria” from 1966 through May 1999. The Commission is empowered by the Tribunal of Inquiry Act, Cap 447, 1990 Laws of the Federation of Nigeria to conduct public hearings of alleged “gross violations of human rights.” The most far reaching inquiry into human rights violations committed under the recent military regimes was conducted by Justice Oputa’s Commission. Unfortunately, the Oputa Panel’s reports have been shelved on the pretext that pending litigation by former military dictator Ibrahim Babangida precludes its release).

341 In an effort to further address the excesses of the military dictatorship towards the usurpation of the judicial function, several provisions of the Nigerian Constitution were also amended during the Obsanjo transition to greater reflect the principle of separation of powers which ensures that no branch of government—executive, legislative or judiciary—performs the duties of the other. For example, Section 6 of the 1999 Constitution vests the judicial power solely in the courts. Further, pursuant to the 1999 Constitution, the judiciary is a co-equal branch of government and is empowered inter alia to “serve as a means for the protection and enforcement of the fundamental rights of the citizens and communities…”; But see Okerefoezekwe, supra note 221 at 171 (describing the 1999 Nigerian Constitution as having accomplished nothing except insulate the military from accountability for their many illegalities and human rights violations. Specifically, Article 6 of the 1999 Nigerian Constitution attempts to preclude further accountability from the Nigerian military for past human rights violations and prevent Nigerians from “challenging the actions, programs, laws and other policies of the erstwhile military rulers,” from 1966 up until 1999); See Onoria, supra note 43 at 9 (remarking that the constitutional prohibitions on legal action against the military for past human rights violations suggests that despite a return to democratic governance “the nemesis of ouster clauses remain[] resilient”).
f. Increased Number of Civil Judgments in Favor of Plaintiff’s Pursuing Domestic Litigation against Multi-National Oil Corporations

Most normative improvements in Nigeria’s legal institutions can be found in the civil courts, especially at the appellate level. The renewed judicial independence evident in Nigeria has led to historic compensation awards in civil actions brought in Nigerian courts by Niger Delta litigants against multi-national corporations (MNCs) in the region. In research on oil related litigation in Nigeria, Frynas found that by the end of the decade, “there [was] a trend towards the adoption of substantive and procedural rules which render it easier for plaintiffs to successfully litigate against oil companies in Nigeria.” With respect to procedural reforms in domestic civil litigation, Frynas’ research indicates that the Nigerian judiciary for the most part, no longer appeared willing to entertain or tolerate the standard oil industry legal strategy of prolonging litigation through excessive motion practice and appeals to the detriment of less well funded plaintiffs. Further, domestic judges issued rulings that led to “the liberalization of locus standi and evidence rules and a broader interpretation of the quantum of compensation…all helped litigants win court cases against oil

342 Some of the legislative actions aimed at improving access to justice instituted by the civilian administration of Obasanjo and the Yar’Adua include a National Human Rights Commission Act (Cap.N46 Laws of the Federation of Nigeria 2004, Amended in 2007) and adoption of legislation to improve legal assistance for indigent litigants such as the Legal Aid Council Act.


344 Ibid. at 149

345 Ibid. at 148 (Frynas notes that previously when handling cases from the Niger Delta, many domestic judges shared the view expressed by the Warri High Court in Irou v. Shell-BP that “nothing should be done to disturb the operations of the oil industry which is the main source of the country’s revenue.” In contrast, the change in legal attitudes currently leans towards favorable plaintiff’s awards and increased willingness of the judiciary to exercise their discretion by denying oil industry delay tactics, as exemplified by the case of Nwadiaro v. Shell (1990) 5 NWLR (Pt. 150) 322 wherein Judge Onalaja rejected Shell’s “abuse of judicial procedure to feather [its] interests to the detriment of [Shell’s] adversary”). See also Shell Petroleum Development Company of Nigeria Ltd. v. Abel Isaiah and Others (1997) 6 NWLR (Pt. 508) 236 (case contesting allegations by Shell that oil spillage in Niger Delta communities resulted from industrial sabotage rather than negligence by Shell. In ruling in favor of compensation for victims of the oil spillage, the Court described Shell’s allegations of sabotage as “an afterthought” raised by Shell to avoid compensation claims); See Manby, supra note 201 at 157 (discussing efforts by the local courts and social activist groups to compel payment of compensation claims awarded Niger Delta communities as a result of oil spills caused by Shell).
companies.” In addition to increased compensation awards in litigation against oil industry defendants, Nigerian judges were also writing decisions which reflected increased criticism of the social costs associated with the negligent behavior of Nigeria’s oil industry.

4.9 The Factors which Link Nigeria’s Reforms to African Commission Pronouncements on Inadequate Domestic Legal Remedies

While Frynas does not directly attribute Nigeria’s improved legal atmosphere to the influence of the African human rights system, he does link the increase in favorable judicial rulings in civil claims filed by plaintiffs to evidence of a “change in social attitudes” resulting in the “legal transformation” of Nigerian courts. However, it is clear that normative reform and shifts in

346 Frynas, “Legal Change in Africa” supra note 343 at 149; See also Shell Petroleum Dev. Co. Ltd v. Farah (1995) 3 NWLR (Pt. 382) 148 (civil action pertaining to property damage resulting from a 1970 Shell oil spill at K-Dere. Farah is considered the foremost authority in domestic claims against the oil industry. In Farah, the Bori High Court set forth guidelines for awarding compensation for damage to property resulting from oil excavation. In addition to monetary compensation, the complaint sought an order compelling SPDC to engage in environmental clean-up of areas affected by the spill. At the time of the explosion in 1970, Shell accepted liability and provided sums in payment for destruction of crops and orchards. Plaintiffs allege that no compensation was ever paid for damage to farmland and environmental clean-up promised by defendant Shell did not occur. Following a three year trial, the trial court in 1995 ruled in favor of plaintiffs however the compensation was deemed erroneous by the Port Harcourt Court of Appeals on grounds that the “damages suffered went beyond a mere damage to crops and economic trees, for according to the experts…the respondents’ arable land was heavily polluted and rendered unproductive for many years.” The Appeals Court further ruled that when calculating damage to property resulting from oil spills courts must seek to place plaintiff “as far as money can do to the position he was before the damnum or would have been but for the damnum...” thus consideration must be made of “annoyance, inconvenience, discomfort, or even illness to the plaintiff occupier”).

347 Frynas, “Legal Change in Africa”, supra note 343 at 148; See John Vidal, “Chequered History: Shell in Nigeria” The Guardian (27 May 2009), online: Guardian Unlimited <http://www.guardian.co.uk> (Reporting on increased civil claims filed against Shell in Nigeria. While most involve minor damages others are more serious including a 2006 order by Nigeria’s parliament subsequently upheld by the domestic courts ordering Shell to pay $1.5bn to the Ijaw people of the Niger Delta for environmental damage. Shell has appealed the parliamentary order).

348 Frynas, “Legal Change in Africa”, supra note 343 at 147, 148 (Frynas states that “there appear to be multiple reasons why this legal change has occurred,” and he goes on to identify “three parallel developments which may explain more favourable judgements in favour of those affected by oil operations: a different approach to law by judicial officers, the increased professional ability..."
“social attitudes” within national institutions of governance do not occur spontaneously, especially in a country such as Nigeria governed for much of its independent existence by military dictatorships.

There are several competing theories that attempt to “identify the causal pathways by which compliance occurs.” Hathaway finds that, “the approach of ‘transnational legal processes’ advanced by Koh helps explain why human rights norms are obeyed even in the face of contrary self-interest on the part of participating States.” Koh writes that:

... [T]he process of norm internalization has three phases. It begins when one or more transnational actors provoke an interaction with one another, thereby requiring enunciation of the norm applicable to the interaction. The interaction generates a legal rule that can be used to guide future transnational interactions. Overtime, a series of such interactions causes the norms to become internalized, and eventually this iterative process leads to the reconstitution of the interests and identities of the participants.

of legal counsel working for those affected by oil operations, and the influence of changing social attitudes on judges. Of these three developments, changing social attitudes is probably the key one” at 148).


350 Hathaway, supra note 36 at 1962(expressing the view that Koh’s transnational legal process model provides a credible means of tracing the actors and process that may lead a state to comply with international human rights obligations. However, the author also expresses some reservation as to the predictive value of Koh’s model on the ground that “it is difficult to predict in advance which norms will become internalized through the three step process of interaction, interpretation and internalization...”); See Harold H. Koh, “A United States Human Rights Policy for the 21st Century” (2002) 46 St. Louis U.L.J. 293[Koh, “Human Rights Policy”].

351 Hathaway, supra note 36 at 1960-61quoting Koh, “Why Do Nations Obey”, supra note 37 at 2646; See also Thomas Risse & Kathryn Sikkink, “The Socialization of International Human Rights Norms into Domestic Practices” in Thomas Risse, Stephen C. Ropp, & Kathryn Sikkink, eds. The Power of Human Rights: International Norms and Domestic Change (Cambridge: Cambridge University Press, 1999) at 4 [Risse & Sikkink, “Socialization of Norms”] (Risse and Sikkink “explore the linkages between international human rights norms and changing human rights practices...[the authors] develop and present a theory of the stages and mechanisms through which international norms can lead to changes in behavior.” They note that “suppressive governments” sometimes adapt to normative pressures for purely instrumental reasons but on occasion, “they start institutionalizing human rights norms into domestic law and change their discursive practices” at 9).
Koh’s theoretical model predicts that interaction between various transnational actors—including nation-states, multinational enterprises, NGOs, professional and labour-based associations—in forums capable of generating norms, facilitate State internalization of human rights principles. The “interaction and norm-internalization” generated through the transnational legal process causes “States to become more law abiding by incorporating international law into their domestic legal and political structures. When such a State violates international law, that State creates frictions and contradictions that disrupt its ongoing participation in the transnational legal process.” Thus in Koh’s view, “transnational legal process provides the key…to understanding the critical issue of compliance with international law…”

Okafor concurs in part, but adds that a central component of the “transnational legal process” which aided in the domestic incorporation of human rights norms in Nigeria’s institutions of governance has been the African human rights system through the Articles of the Charter which were incorporated into Nigeria’s domestic laws and through decisions/resolutions promulgated by the African Commission. Although normative reforms in Nigeria’s legal institutions were greatly aided by local NGOs and conscientious state-actors within the domestic judiciary, the African human rights system exerted the most influence on Nigeria’s military leadership.

The link between improvements in Nigeria’s domestic legal framework and African Commission efforts to “facilitate” the restoration of the rule of law during the Niger Delta crisis is discernable from factors such as: (a) the African Commission’s role as a resource and platform for local NGOs to continue airing

353 Koh, ibid. at 206-207.
354 Koh, Transnational Legal Process”, supra note 37 at 183.
355 See Okafor, “Peace Building” supra note 6 at 426-427; See Viljoen, “African Charter in Domestic Courts” supra note 33 at 7-9 (reaching the conclusion that the African human rights system aided Nigeria’s domestic reforms).
356 Okafor, ibid.
the military government’s human rights violations; (b) the Commission’s “regional advantage” in promoting normative reform in Nigeria’s legal institutions; and (c) the Commission’s prolonged engagement in seeking resolution of the Niger Delta crisis both during military rule and following the transition to civilian governance.

a. *The African Commission’s Critical Role as a “Resource” for Local NGO Efforts to Reform Nigeria’s Legal Institutions*

Moravcsik writes that regional human rights institutions are particularly suited towards furthering human rights at the domestic level owing to their unique admissibility features which empower individuals “to challenge the domestic activities of their own governments.” Moravcsik describes the importance of these regional “arrangements” in the following manner:

Regional human rights regimes...differ from most other forms of institutionalized international cooperation in both their ends and their means. Unlike international institutions governing trade, monetary, environmental, or security policy, international human rights institutions are not designed primarily to regulate policy externalities arising from societal interactions across borders, but to hold governments accountable for purely internal activities. In contrast to most international regimes, moreover, human rights regimes are not generally enforced by inter-state action. Although most arrangements formally empower governments to challenge one another, such challenges almost never occur. The distinctiveness of such regimes lies instead in their empowerment of individual citizens to bring suit to challenge the domestic activities of their government.

357 Moravcsik, *supra* note 64 at 205.

358 *Ibid.* at 205-206; See Lindholt, *supra* note 14 at 122 (Lindholt similarly observes that regional human right institutions such as the African Commission “have the advantage of being closer to national law and citizens of their member states, which will also be significant in relation to their implementation mechanisms”).
By “empowering” local NGOs such as the Constitutional Rights Project, Rights International and the Social and Economic Rights Action Center in their challenge of Nigeria’s domestic legal order, the African human rights system facilitated domestic reform efforts by giving greater voice to these local groups to air long standing grievances on the deplorable human rights condition in the Niger Delta. Had the African Commission adopted a strict interpretation of the African Charter’s exhaustion requirement in the Nigerian context, and denied admissibility, local NGOs would have been deprived of a highly visible platform in which to contest domestic rights violations by the military government. Not only that, the Commission’s issuance of detailed legal findings specifying relief for the human rights complainants also provided Nigeria’s domestic human rights actors with “invaluable resources with which to circumvent some of the absolutist machinations and actions of the military dictatorships.”

As noted by Kall, several NGOs operating in Nigeria view the African Commission’s decisions in the Niger Delta cases as having made their advocacy on behalf of human rights victims “much stronger.” During the harshest periods of Nigeria’s military dictatorships, the incorporation of the African Charter into the Federal laws of Nigeria coupled with the serious engagement of the African Commission in condemning the regime’s authoritarian practices, enabled local NGOs to “persuade the courts to take cases that would not have been taken under national

359 Okafor, “Peace Building”, supra note 6 at 431; See Viljoen & Louw, “Findings of the African Commission”, supra note 11 at 12, n. 55 (describing the Commission’s jurisprudence in the Niger Delta case as providing a good example of a “well-structured and detailed” decision that made State implementation more feasible by specifying the relief it will grant victims); See Okafor, “Peace Building”, supra note 6 at 424, 431-432 (noting that: “The African system proved to be a key resource for the legal and political struggles waged by [local] activist[s]...within Nigeria...The African Commission issued a number of decisions that were well publicized in Nigeria and which offered much-needed normative justification and additional legitimization to these activist...as they risked their lives, families, livelihoods and financial investments in their battle against military dictatorship in Nigeria”).

360 See Malin Kall, Oil Exploitation in Nigeria: Procedures Addressing Human Rights Abuses (LLM Thesis, University of Lund, Faculty of Law, 2003) at 57-58 (noting the important role played by the African Commission in gaining international attention and putting pressure on the Nigerian government to reform oil industry practices and protect social rights in the Niger Delta. The author further states that in interviews with Nigerian NGOs, “[s]everal NGOs stated that they had used or were about to use the decisions from the African Commission as a starting point for advocacy and campaigns...” because “the decisions by the African Commission makes their advocacy much stronger” at 58).
legislation; to proffer creative legal arguments; to launch legal maneuvers that would not have been possible other wise and thereby persuade many courts to rule in their favor…” 361 As Okafor correctly remarks, in respect to Nigeria’s domestic legal reforms “the African system was as useful to popular forces as these popular forces were to the African system.” 362

b. The African Commission’s “Regional Advantage” in urging Normative Reform in Nigeria’s Legal Institutions

In a scholarship reviewing the international human rights framework, Lindholt adds to Moravcsik’s observations on the unique features of regional human rights institutions which help facilitate individual challenges to the domestic conduct of States. Lindholt provides that in the domestic protection of human rights, regional systems “are simply more practical with respect to communication and mutual understanding, and are easier implemented because given the diversity of the modern State system, it is natural that regional systems of enforcement should be more readily accepted” than directives emanating from other international sources. 363 According to Lindholt, the increased capacity of regional human rights institutions to promote fundamental human rights guarantees on a national level lies mainly in their demonstrated,

“…ability to define more closely and give legal meaning to the overall universal concepts by including an appropriate adaptation to cultural and other factors. In this respect, States may feel a higher degree of ownership and therefore exhibit greater willingness to follow decisions, etc. 364

361 Viljoen, “African Charter in Domestic Courts”, supra note 33 at 7-8; See Okafor, Peace Building”, supra note 6 at 424, 431-432.
362 Okafor, ibid. at 431; See SERAC case, supra note 12 at para. 49 (the Commission thanked the human rights NGOs operating in Nigeria for bringing the plight of the Ogoni to the Commission’s attention. The Commission further describes the efforts of Nigerian human rights NGOs as “a demonstration of the usefulness to the Commission and individuals of actio popularis which is wisely allowed under the African Charter”).
363 Lindholt, supra note 14 at 122.
364 Ibid. at 122.
Thus unlike the Nigerian military government’s blatant disregard of international chastisement from Western governments, the Abacha regime had been “clearly embarrassed” by the African Commission’s unstinting public rebuke of its defective domestic legal framework.\textsuperscript{365} Okafor explains that despite the regime’s blustering, the African Commission’s “repeated condemnation” significantly “hurt the regime’s moral composure” and made the Nigerian military government more amenable to grant concessions such as the release of the Ogoni 19, the nullification of several military decrees and alter the conduct of military tribunals to include a right of appeal, all of which “reflected the African Commission’s recommendations almost to the letter.”\textsuperscript{366}

Having explicitly opposed the resolutions and decisions that first recommended the repeal of these same legislative provisions, the Nigerian government was obviously aware of the Commission’s views on the matter, and took them seriously enough to respond so strongly in opposition thereto. In fact…the Commission had to fend off a very determined Nigerian military regime that had charged that the Commission had no power to interpret the Charter, or pronounce on the validity of Nigerian laws. The Commission’s view on this matter was thus one of the critical factors that operated on the mind of the regime as it considered what course of action to take.\textsuperscript{367}

Arguably, the world-wide condemnation of Nigeria’s human rights record may have had a cumulative effect in facilitating release of political detainees and in achieving domestic legal reforms. However, given the open disdain with which the Nigerian military government viewed any input from Western States on its human rights record, it is clear that such views carried little weight within

\textsuperscript{365} Okafor, Peace Building, supra note 6 at 427 (remarking that during the Niger Delta crisis, the strong public condemnation of Nigeria by the African Commission in addition to expressions of outrage released by several African States such as South Africa clearly embarrassed the Nigerian military government).

\textsuperscript{366} See Okafor, \textit{ibid.} at 427-430.

\textsuperscript{367} \textit{Ibid.} at 429-430.
Nigeria’s military establishment. Okafor’s research on the African human rights system explores the negligible impact the condemnation of Western governments had in modifying the conduct of the Nigerian military. The Abacha regime in particular, remained totally intractable and rejected all efforts by Western nations to induce the regime’s compliance with international human rights obligations. Following the execution of the Ogoni activist Ken Saro-Wiwa, the United States and European Union belatedly imposed sanctions on the Nigerian government, but most were of the “soft” variety having little impact on the daily operations of the governing regime and yielding no improvement in the human rights crisis in the Niger Delta.
Moreover, despite inaction by influential Western governments, there is no clear evidence to support the contention that a stronger response from the West could manifestly improve the human rights conditions in Nigeria during the Niger Delta crisis.\textsuperscript{372} Okafor notes that while “coercive action” by the international community can at times achieve results in the protection of human rights, “coercion in itself has not been particularly critical in the Nigerian case.”\textsuperscript{373} What appears to have achieved domestic impact in reducing human rights violations by the State is the “correspondence” between the African human rights system and local human rights activists developed through the African Commission’s public condemnation of the regime in well-regarded legal decisions and resolutions.\textsuperscript{374} Unlike pronouncements from other international sources, the African Commission’s findings of human rights violations in the Niger Delta could not be brushed off by the Nigerian government as “Western impositions” nor could the regime’s claims of “cultural relativity” hold since the demand for greater human rights protection emit directly from an African institution.\textsuperscript{375}

also excluded ‘non-lethal’ equipment, resulting in the export of rubber bullets and CS gas to the Nigerian police…”). See “EU Eases Sanctions on Nigeria” BBC News (30 October 1998), online: BBC News <http://news.bbc.co.uk/2/hi/africa/204720.stm>. (describing sanctions imposed on Nigeria in 1995 by the EU such as suspension of development co-operation, visa restrictions for high level government members of the regime and a sports boycott).

\textsuperscript{372} Okafor, “Peace Building”, supra note 6 at 440 (remarking on “the immune reaction of many African societies to international intervention…”).

\textsuperscript{373} Okafor, “Peace Building”, supra note 6 at 421 (Noting that during the Niger Delta crisis, “very little real coercive pressure was put on Nigeria’s various military regimes by external forces… [and] …modest transformations occurred within Nigeria without a significant amount of coercive pressure being mounted against the rulers of that country”).

\textsuperscript{374} Ibid. at 422, 428.

\textsuperscript{375} Okafor, Peace Building”, supra note 6 at 427-428 (noting that “High-level Nigerian government officials regularly denounced the activities of the human rights community, often accusing its members and the independent press of participating in foreign-inspired plots to destabilize the country”); See also U.S. Department, Nigeria Human Rights, supra note 197 (describing claims by Nigerian officials of “foreign interference” in Nigeria’s domestic affairs to justify the military government’s rejection of demands for an end to human rights violations in the Niger Delta.) See also Final Communiqué supra note 286 at para 14-15 (noting that the Nigerian High Commissioner to Uganda complained to the African Commission of “the slanderous campaigns against Nigeria on the issue of human rights…”).
c. *The African Commission’s “active-interest in the end result” of its Decisions in the Niger Delta Cases*

Another factor which lends support to the assertion that domestic legal reforms achieved in Nigeria are attributable in part to the Commission’s scrutiny of Nigeria’s domestic legal system, can be found in the highly visible role assumed by the Commission in challenging the domestic legal order in Nigeria. Despite efforts by the Nigerian military government to curtail the Commission’s criticism and related activities condemning Nigeria’s human rights record, the Commission pressed forward.376 Both Shelton and Okafor have observed that the African Commission’s “very active interest in the end-results of its decisions” regarding Nigeria’s human rights violations placed considerable pressure on the country’s military rulers and provided the long-term engagement often necessary to effectuate normative reform of domestic institutions.377 Through decisions, resolutions, requests for interim measures and in holding an extraordinary session “centered principally on the examination of the human rights situation in Nigeria,” the African Commission maintained regional focus on the regime’s human rights violations.378 No other inter-governmental organization sustained the condemnation of Nigeria’s ouster of the judicial function for the same duration as the African Commission. With respect to international institutions such as the United Nations, several UN bodies were actively engaged in urging

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376 See Viljoen & Louw, “Findings of the African Commission”, supra note 11 at 5 (Noting Nigeria’s restrictive interpretation of the breadth of the Commission’s remedial mandate under the African Charter and the Commission’s insistence that its mandate encompassed the role of facilitator “to assist States parties to implement their obligations under the Charter”).

377 See Shelton, *supra* note 155 at 220 (noting that the domestic impact achieved by the Commission in Nigeria was in part a result of follow-up efforts by the Commission.); Okafor, “Peace Building”, *supra* note 6 at 428 (remarking that efforts by the Commission to secure the release of political detainees proved successful in instances where “the Commission took a very active interest in the end-results of its decisions”).

reform of the domestic legal order in Nigeria and pursuing the release of political
detainees. However, while it is true that the United Nations and other
international human rights groups put forth valiant efforts to ameliorate the human
rights crisis in the Niger Delta, the fact remains that the efforts of the African
Commission in this regard pre-date most international opposition to the Nigerian
military government’s human rights violations.

Most importantly, the “critical posture” of the African Commission
towards the human rights violations committed by the Nigerian government
extended well beyond the cessation of military rule in Nigeria and resulted in
significant legal reform during the transition to civilian governance under
President Obasanjo. As such, the African Commission efforts to promote
greater respect for international human rights norms within Nigeria’s institutions
of governance were sustained well-past the short global attention span often

a stay of execution in the case of Ken-Saro-Wiwa).
380 The African Commission released its first resolution on the human rights crisis in Nigeria in
1994. Subsequent efforts by the UN urging judicial reforms and return to democratic governance
in Nigeria, mirror earlier pronouncements and resolutions issued by the African Commission; See
e.g. 1994 ACHPR Resolution on Nigeria, *supra* note 214 (condemning inter alia, “the gross
violations of human rights as evidenced in (1) the exclusion of the African Charter on Human and
Peoples’ Rights from the operation of decrees adopted by the military regime; (2) the detention of
pro-democracy activists and members of the press; (3) the exclusion of the jurisdiction of courts
over decrees; (4) discarding of court judgments; (5) the promulgation of laws without proper
procedure…; (6) the closure of newspaper houses.” The 1994 Resolution concluded by urging
democratic reform and reaffirming African Commission concern “about the gross violations of
human rights and…”); See 1995 ACHPR Resolution on Nigeria, *supra* note 214 (the African
Commission followed the 1994 resolution with a second resolution issued in March 1995 during
the imprisonment of Ken Saro-Wiwa. The March 1995 resolution again called for the Abacha
regime to “ensure respect for human rights and the rule of law, and in particular, to release all
political, reopen all closed media and respect freedom of the press, lift arbitrarily imposed travel
restrictions, allow unfettered exercise of jurisdiction by the courts and remove all military
tribunals from the judicial system”); As to the incompatibility of Nigerian legislative measures
with international human rights obligations, the 1995 Report of the Fact-Finding Mission of the
UN Secretary General, *supra* note 203, covered much of the same ground as several African
Commission communications on Nigeria’s ineffective domestic legal remedies in decisions dating
as far back as 1993. See, Wiwa, *supra* note 12 at para. 74-76 noting the four previous decisions
issued by the African Commission addressing the deleterious effect in Nigeria’s legal system of
judicial ouster clauses in various decrees and the lack of due process in Nigeria’s conduct of
military tribunals).
381 Okafor, “Peace Building”, *supra* note 6 at 428.
from military dictatorship to democratic governance, the African Commission in the SERAC decision maintained calls for domestic legal reform and economic equity for Niger Delta communities adversely impacted by oil excavation in the region. Thus in the Niger Delta cases, the African Commission achieved a significant level of domestic impact by making clear that “…it would follow up to ensure State compliance with its recommendations.”

In sum, while ancillary factors may have played a role in Nigeria’s legal reforms, it is clear that the presence of the African Charter in Nigeria’s domestic laws, combined with the African Commission’s progressive interpretation of the Charter’s provisions, proved very valuable to the reform process and greatly aided efforts by Nigerian civil society organizations in the protection of human rights. Admittedly, much remains to be accomplished before Nigeria’s domestic legal system can be hailed a success. Justice remains elusive for vast segments of Nigerian society and economic hardship remains a fact of life for most inhabitants of the Niger Delta region. However, notable improvements in the dispensation of justice within national legal institutions have occurred, and the restoration of the rule of law continues to gain pace. While dramatic and transformative change is preferable, realistically, what has occurred in Nigeria’s domestic legal institutions is the incremental movement towards greater legal protection of fundamental human rights. In denouncing Nigeria’s lack of effective legal

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383 See Onoria, *supra* note 43 at 9 (noting that the African Commission continued to press Nigeria’s new civilian government on “new manifestations of the ouster clause” inserted in the 1999 constitutional framework which sought to preclude legal action against former military abuses); See *SERAC, supra* note 12; See ACHPR/Res.28 (XXIV)98: Resolution on Nigeria’s Return to a Democratic System (1998) (expressing approval for Nigeria’s transition to democratic governance while also insisting that the new civilian administration maintain efforts to secure equitable resolution of the Niger Delta crisis).

384 Shelton, *supra* note 155 at 220.

385 Okafor, “Peace Building” *supra* note 6 at 431 (describing the various ways in which “the system did markedly facilitate, invigorate, and thus influence” Nigeria’s domestic legal reforms).

remedies and urging reform of the country’s domestic legal framework, the African Commission helped ease some of the hardship encountered by human rights victims seeking justice in Nigeria’s domestic courts. Despite legislative impediments imposed by the government, the Commission’s decisions and requests for interim measures were implemented by the local judiciary in such a manner as to give Nigerian citizens hope that the human rights situation in the nation is not irredeemable. As noted by Viljoen, the efforts by the Nigerian judiciary to incorporate African Charter guarantees and pronouncements of the Commission into domestic rulings led to the safeguarding of the lives of numerous Nigerians who would have otherwise been convicted and sentenced to death by military tribunals lacking international fair trial standards.387 As such, the domestic impact of the African human rights system in Nigeria “…must stand as one of the clearest examples of how the Charter and the Commission have materially affected the destiny of Africans…”388

387 Viljoen, “African Charter in Domestic Courts”, supra note 33 at 9; See Okafor, “Peace Building” supra note 6 at 431 (describing the efforts of the African Commission to reform the military tribunal system in Nigeria as having saved a number of lives).
388 Viljoen, ibid. at 9.
CHAPTER FIVE: THE FUTURE APPLICATION OF THE LOCAL REMEDIES RULE IN THE AFRICAN HUMAN RIGHTS SYSTEM

5.1 Recent Efforts by the Commission to further improve its Admissibility Practice by Clarifying Unresolved Evidentiary Issues in the Application of the Charter’s Exhaustion Requirement

Since the Niger Delta communications, the application of the local remedies rule in a flexible manner which focuses attention on the Respondent State’s duty to provide effective remedies rather than the petitioner’s mechanical exhaustion of domestic procedures, has continued to gain ground in the admissibility practice of the African Commission.\(^{389}\) Onoria has observed that the Commission’s findings on the lack of effective legal remedies in Nigeria, “in fact shows that… [t]here is …clearly a relationship between the findings on exhaustion of local remedies and the functional state of national judicial and legal procedures of the State Parties to the Charter. This arises from either a deliberate deprivation of the right of access to domestic ordinary courts or placing judicial power in the hands of special tribunals that tend to be political … or a situation of malfunctioning judicial systems.”\(^{390}\) It is thus encouraging that the legal precedents established in the Commission’s application of the local remedies rule in the Nigerian context have been maintained. Moreover, in cases such as Article 19 v. Eritrea, the Commission’s admissibility practice has further developed and

\(^{389}\) Viljoen, “African Charter Procedure and Admissibility”, \textit{supra} note 11 at 63 (discussing improvements in the Commission’s recent written decisions which have contributed to a clearer picture of the issues related to admissibility).

\(^{390}\) Onoria, \textit{supra} note 43 at 23.
unresolved issues such as the burden of proof have received additional treatment in the Commission’s jurisprudence. 391

The African Commission explained in Article 19 v. Eritrea, that in the exhaustion inquiry, the initial burden of proving the presence in its domestic legal framework of “available, effective and sufficient” legal remedies lies with the Respondent State if it alleges non-exhaustion as a means to preclude petitioner’s communication. 392 Only upon the Respondent State’s satisfying this initial evidentiary burden will petitioner then be required to show that available local remedies were exhausted or exceptions are applicable. The Commission’s strong support in the Article 19 case for the distributive evidentiary model in resolution of the exhaustion issue aligns the Commission’s jurisprudence with that of comparable human rights institutions. 393 Requiring the Respondent State to establish the “validity” of domestic remedies also ensures the Commission that local remedies exist, not only in theory but in practice—barring such evidentiary proof, the Respondent State could otherwise circumvent accountability for rights violations by obtaining dismissal of the complaint through a well-timed exhaustion objection unsupported by factual evidence of available local remedies. 394 However, as the Commission further notes in the Article 19 case, the shifting of the burden of proof towards the Respondent State does not entirely absolve petitioner from pursuing available local remedies. If the Respondent State meets its burden of proof, demonstrating sufficiently the existence of

391 See Article 19 v. Eritrea, supra note 13 (African Commission decision clarifying the issue of the burden of proof in establishing exhaustion of domestic remedies. In a communication alleging unlawful detention of journalists, the African Commission rejected the Respondent State’s assertion that petitioners were obliged to exhaust domestic remedies notwithstanding the “incapacities” of the Eritrean judicial institutions which resulted in a backlog of cases and a three year delay in the commencement of criminal trial proceedings against the detainees).

392 Ibid. (The Commission noted that “[w]hen ever a State alleges failure by the complainant to exhaust domestic remedies, it has the burden of showing that remedies that have not been exhausted are available, effective and sufficient to cure the violation alleged”).

393 See Trindade, Exhaustion of Local Remedies, supra note 5 at 135-138 (noting that the distributive evidentiary approach is widely used by most international human rights tribunals in resolution of the exhaustion issue).

394 Article 19 v. Eritrea, supra note 13; See Jawara v. Gambia, supra note 179 at para. 34-35 (in a complaint challenging the human rights situation in Gambia following a military coup, the African Commission stressed that “remedies, the availability of which is not evident, cannot be invoked by the State to the detriment of the complainant); See Kofele-Kale, supra note 3 (noting the importance of achieving balance in the application of the local remedies rule).
available and effective judicial remedies, “it is not enough for the complainant to cast aspersion on the ability of the domestic remedies of the State due to isolated incidences.”

5.2 Recent Efforts by the Commission to Improve its Admissibility Practice by Expanding the Circumstances Relieving the Petitioner of Exhaustion

In the Niger Delta cases, the African Commission through expansive interpretation of the African Charter extended the exceptions to the local remedies rule beyond the narrow parameters enumerated in African Charter Article 56 (5). However, important gaps still remain in the Commission’s admissibility practice in respect to the application of the exhaustion requirement and more needs to be done to ensure that meritorious human rights claims are heard. A progressive feature in the application of the local remedies rule within the Inter-American human rights system that merits incorporation in the African Commission’s admissibility practice is the expansion of available exceptions to include indigence as an exemption from the exhaustion requirement. The Inter-American Court has expanded the circumstances relieving the petitioner of the exhaustion requirement to include waiver of the local remedies rule in cases

395 Article 19 v. Eritrea, supra note 13; See AJC v. Ethiopia, supra note 108 (rejecting petitioners’ subjective claim of ineffective local remedies. The Commission found the communication inadmissible, noting that “apart from casting aspersions on the effectiveness of local remedies, the complainant has not provided concrete evidence or demonstrated sufficiently that these apprehensions are founded...

396 See Chidi Anselm Odinkalu, “Implementing Economic, Social, and Cultural Rights Under the African Charter on Human and Peoples’ Rights” (2001) 23 H.R.Q. 327, 360 [Odinkalu, “Implementing Rights”] (Odinkalu notes that although the African Commission has developed its admissibility practice to include several exceptions to the strict requirement of exhausting domestic remedies, the Commission has not fully developed guidelines governing the circumstances where poverty or inability to afford domestic legal procedures can exempt petitioners from the exhaustion requirement under Article 56 (5) of the African Charter. The issue of indigence as an exemption to the exhaustion requirement has added urgency given efforts by the Commission to promote and give realization to the economic, social and cultural rights enumerated in the African Charter).
involving petitioners’ indigence. 397 Specifically, the Inter-American Court has found that where indigence prevents the individual from pursuing domestic remedies necessary to protect a right guaranteed by the American Convention, the local remedies rule will not apply. 398 By acknowledging that economic obstacles often bar access to domestic remedies and tend to preclude adequate legal representation, the institutions of the Inter-American human rights system have adeptly incorporated the more common realities of life for the average human rights petitioner into the application of the local remedies rule.

In contrast, the African Commission has not fully embraced waiver of the local remedies rule based on a petitioner’s indigent status. 399 The Commission’s hesitancy may stem from the view that an exception to the exhaustion requirement

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397 See Trindade, “Current State and Perspectives”, supra note 126 at 13 (In addition to indigence, the Inter-American Court has also found an exception to the local remedies rule in the Inter-American system where there is unavailability of legal representation for victims of human rights violations resulting from a generalized fear of retribution in the legal community from state authorities.); See Amerasinghe, supra note 31 at 434 (Amerasinghe describes the Inter-American Courts rulings on indigence as an exception to the local remedies rule as a significant development in the application of the rule in international law and further notes: “In its traditional application in diplomatic relations, ‘impecuniosity or indigence of the alien was regarded as a factor which was not relevant to the issue of inaccessibility…However, the advisory opinion of the IACHR has now indicated that indigence is a factor which in principle is relevant to inaccessibility for the purposes of the rule of domestic remedies. This precedent is clearly one that could inform…the law of human rights protection as applied by other human rights bodies or organs…”

398 See Exceptions to the Exhaustion of Domestic Remedies (Art. 46 (1, 46(2) (a), 46 (2) (b) of the American Convention on Human Rights) (1990), Advisory Opinion OC-11/90, Inter-Am. Ct. H.R. (Ser. A) No. 11 at para. 30-31 [Exceptions to the Exhaustion of Local Remedies, Inter-Am. Advisory Opinion] Addressing the question of indigence in a human rights petitioner’s obligation to exhaust domestic remedies, the Inter-American Court of Human Rights concluded: “if legal services are required either as a matter of law or as a matter of fact in order for a right guaranteed by the [American] Convention to be recognized and a person is unable to obtain such services because of indigency, then that person would be exempted from the requirement to exhaust domestic remedies. The same would be true of cases requiring the payment of a filing fee…if it is impossible for an indigent to deposit such a fee, he cannot be required to exhaust domestic remedies unless the State provides some alternative mechanism”.

399 See Udombana, “So Far”, supra note 21 at 31 (recommending that the question of legal aid should be accorded greater attention in the work of the African Commission and that States and NGOs should take the initiative to promote the establishment of legal aid services); See Onoria, supra note 43 at 13 (noting that the Commission often points to the Charter’s actio popularis approach to standing as sufficient to enable the communications of indigent petitioners to be heard. However, this does not adequately address the financial constraints that often prevent individual petitioners from complying with the local remedies rule. Thus while the communication may reach the Commission under its broad standing rules, the communication remains subject to dismissal on exhaustion grounds unless the Commission finds a lack of available remedies resulting from the absence of legal aid for the indigent in domestic legal procedures).
on the basis of indigence will “open the floodgates of claims” to the African Commission thus transforming the Commission’s adjudicative process into a tribunal of first impression. However, the vast majority of African petitioners rely on *pro bono* NGO services for international human rights litigation and most regional NGOs are in no financial position to flood the African Commission with a surge of frivolous complaints.

**a. The Urgent Need for Recognizing Indigence as an Exception to the Local Remedies Rule in the African Human Rights System**

As noted by Viljoen there is an urgent need for resolution within the African human rights system on the question of whether indigence excuses the human rights complainant from exhaustion of local remedies. Onoria has also discussed the urgency for recognizing indigence as an exception to the exhaustion requirement in the African human rights system. Onoria writes that the African Commission exists in a region whose peoples on average constitute the world’s lowest per capita income earners and as a consequence, in Africa, more so than exists elsewhere, “…the financial aspects of domestic litigation remains a major constraint as regards the commencement of legal proceedings before domestic

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400 The “flood gates” rationale for placing restrictions on access to international protection of human rights has been proven specious and it is doubtful that an avalanche of human rights petitioners will converge on the African Commission. See e.g. *Abdusalami Abubakar v. Haf Abiola*, 408 F.3d 877 (7th Cir. 2005) (In reference to the Torture Victim Protection Act (TVPA) the court acknowledged the difficulties encountered by victims pursuing claims of human rights violations abroad and noted that it is manifestly clear from available data that victims of human rights abuse seek redress in international tribunals “as a last resort.” The economic circumstances of many human rights victims are circumscribed and “usually the alleged [perpetrator] has more substantial assets…Therefore as a general matter…in most instances the initiation of litigation under this legislation will be virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the [violation] occurred.)

401 See generally Okafor, “Legitimizing NGOs”, *supra* note 41 (providing an overview of NGOs operating in Nigeria and the economic constraints which present numerous challenges to their operations, including restricted community out reach due to lack of funds).


courts for the majority of litigants.” Onoria’s scholarship on the African human rights system indicates that the constraint posed by financial limitations on petitioners from the African region is made more acute in light of weak or non-existent legal aid programs in most African States. Hence, recognition of indigence as an exception to the exhaustion of local remedies does not only address a petitioner’s economic deprivation. The Inter-American Court’s assessment of this matter illuminates important human rights objectives furthered by an exhaustion exception for indigent petitioners. As provided by the Inter-American Court:

Merely because a person is indigent does not, standing alone, mean that he does not have to exhaust domestic remedies...whether or not an indigent has to exhaust remedies will depend on whether the law or the circumstances permit him to do so...If a person who is seeking the protection of the law in order to assert rights which the Convention guarantees finds that his economic status—in this case, his indigency—prevents him from so doing because he cannot afford either the necessary legal counsel or the costs of the proceedings, that person is being discriminated against by reason of

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404 Onoria, *ibid.* at 13; See Rachel Murray, “Recent Developments in the African Human Rights System 2007” (2008) 8 Hum. Rts. L.J.356, 364 (discussing the constraints faced by human rights defenders to fulfill their role in the African human rights system and provide domestic legal assistance to indigent litigants. Although the Commission has encouraged States to secure the safety needs legal aid providers and provide additional resources for these groups to continue their mission, the problem remains acute); See Resolution on the Situation of Human Rights Defenders in Africa, 28 November 2007, ACHPR/Res.119(XXXXXII) 07, online: <http://www.achpr.org/english/info/42-res-OS-eng.html>.

405 Onoria, *supra* note 43 at 13; See *Africa Legal Aid v. the Gambia* (2001) Afr. Comm. HPR 207/97 (despite acknowledging that “the lack of legal aid services in Africa precludes the majority of the African population from asserting their human rights,” the Commission in *Africa Legal Aid v. Gambia*, nonetheless refused to accept the argument that the victim’s lack of financial means should be a basis for exemption from the requirement to exhaust local remedies); See also Onoria, *ibid.* at 13 (Noting that the reasoning of the Commission on the question of indigence as an exception to the exhaustion requirement appears to rest on the view that because the majority of cases that have come before the Commission have been initiated by NGOs, the victims financial circumstances are not of concern in Commission proceedings. However, according to Onoria, the *Africa Legal Aid* decision presupposes that African-based NGOs are financially secure and more importantly, the decision does not fully address the question of whether a communication commenced directly by an indigent individual rather than through an NGO, is to be exempted from the requirement to exhaust local remedies. The insensitivity of the African Commission’s stance on the issue of indigence also ignores the fact that in The Gambia for instance, the State’s highest Court is the English Privy Council in the United Kingdom and none but the very affluent are financially disposed to pursue domestic litigation to this level).

his economic status and, hence is not receiving equal protection before the law.\textsuperscript{407}

Thus an exception for indigent petitioners in the application of the local remedies rule embraces the Respondent State’s duty to create structures necessary to guarantee equal protection for poor human rights complainants in domestic legal institutions. Such an exception would require African States to create or augment funding for domestic legal aid services and develop other solutions to broaden accessibility to courts such as means-testing the requirement of filing fees as well as other domestic litigation costs.

\textit{b. The African Commission's Decision in Purohit and Moore v. Gambia}

\textit{Addressing the Impact of Indigence on the Obligation to Exhaust Local Remedies}

In 2004, the Commission modified its position on the question of indigence as an exception to the exhaustion requirement, thus moving the Commission’s admissibility practice gradually towards the more inclusive stance practiced by its regional counterparts in respect to this issue. In \textit{Purohit and Moore v. Gambia}, petitioners’ challenged the Respondent State’s failure to provide legal assistance programs for indigent patients residing in State-operated health services facilities.\textsuperscript{408} The \textit{Purohit and Moore case} thus presented the Commission opportunity to apply the local remedies rule in a manner to remedy the pressing need for State funded legal assistance programs within domestic legal

\textsuperscript{407} \textit{Ibid.} at para. 20, 22.

\textsuperscript{408} \textit{Purohit and Moore v. Gambia} (2004) Afr. Comm. HPR 241/2001. (The \textit{Purohit and Moore} communication was submitted on behalf of patients in the psychiatric unit of the Royal Victoria Hospital in Gambia. The decision in \textit{Purohit} has also been hailed as “a landmark ruling,” on the rights of mental health patients in Africa. The challenged state action involved Gambia’s “Lunatics Detention Act” promulgated in 1917 which denied fundamental rights to patients institutionalized under its provisions. The challenged Act contained no right to release which meant that patients were subject to indefinite detention regardless of improved mental conditions. The Commission found the Act in violation of the African Charter as well as other international treaty obligations undertaken by Gambia—specifically, “the well established principle that all human beings are born free and equal in dignity and rights”).
institutions of States Parties to the African Charter.\textsuperscript{409} In addressing Gambia’s assertion of non-exhaustion, the Commission, correctly interpreted Article 56 (5) of the Charter “…in a manner that reflects the overriding needs of individual protection…”\textsuperscript{410} In \textit{Purohit and Moore}, “…the Commission reasonably took into consideration the nature of persons whose rights were involved and thus avoided a literal interpretation of the admissibility rules, which could otherwise have resulted in the inadmissibility of the communication.”\textsuperscript{411} The Commission acknowledged that adopting a literal interpretation of the exhaustion requirement of Article 56 (5) of the African Charter would result in the \textit{Purohit and Moore} communication being declared inadmissible because domestic legal remedies were not absent and there existed in the Gambia, general provisions in law that would permit anybody injured by another to access the legal procedures, provided the injured party had sufficient wealth to afford the services of private counsel.\textsuperscript{412} However, the mental health patients on whose behalf the communication was authored, could not access the domestic legal procedures of the Respondent State absent legal aid.\textsuperscript{413} Thus the African Commission found Gambia’s existent legal remedies unavailable for the mental health patients who are more likely to be indigent. In the reasoning of the African Commission, the remedies available to mental health patients in Gambia were illusory and unrealistic in the absence of legal aid services which Gambian authorities failed to provide.\textsuperscript{414}

The Commission’s admissibility decision in \textit{Purohit and Moore} therefore suggests that there exist within the African human rights system circumstances where indigence on the part of the individual petitioner will support waiver of the local remedies rule. It is hoped that the Commission will widen this proposition to include general economic hardship thereby obligating States Parties to the African Charter to implement African Commission resolutions calling for the

\textsuperscript{409} See Baderin, \textit{supra} note 99 at 137.
\textsuperscript{410} Trindade, “Current State and Perspectives”, \textit{supra} note 126 at 14.
\textsuperscript{411} Baderin, \textit{supra} note 99 at 138.
\textsuperscript{412} \textit{Purohit and Moore}, \textit{supra} note 408 at para. 35-38.
\textsuperscript{413} \textit{Ibid.} at para. 35-38.
\textsuperscript{414} \textit{Ibid.} at 38.
increased establishment of legal assistance programs in their domestic legal framework. 415

5.3 Conclusion

The African Commission has improved its admissibility practice through increased flexibility in application of the local remedies rule. The thesis has established through the Niger Delta case study that the local remedies rule is most effective in the protection of human rights when applied by the African Commission without the “excessive formalism” found in the traditional application of the rule in the context of diplomatic protection. 416 The Niger Delta cases are thus illustrative of the evolution of the local remedies rule from a procedural barrier within the African human rights system to a legal principle that has assisted the African Commission in identifying deficiencies in national legal institutions. 417 The domestic reforms facilitated by the African Commission’s heightened scrutiny of Nigeria’s domestic legal framework demonstrates the capacity of the African human rights system to improve the lives of Africa’s peoples—not by coercion or the rigid application of its enabling text—but much more because of how the articles of the African Charter are interpreted by the African Commission in resolution of human rights claims. 418 As observed by Okafor, the African Commission’s jurisprudence in the Nigerian context establishes that when the provisions of the enabling treaty of an international human rights institution are “creatively utilized,” even an institution that was once assessed as “weak” can help make a significant difference in the struggle to

415 See ACHPR/Res.41(XXVI)99: Resolution on the Right to Fair Trial and Legal Aid in Africa (1996), online: Minnesota Human Rights Library < http://www1.umn.edu/humanrts> (Recognising the importance of “…legal assistance and the need to strengthen the provisions of the Charter relating to this”)
417 See D’Ascoli & Scherr, supra note 25 at 18.
Indeed, the African Commission’s efforts to resolve the human rights crisis in the Niger Delta belie the Commission’s reputation as “timid” and “unwilling to interpret the Charter to its maximum effect.”

In an assessment of the institutional development of the African human rights system, Baderin observed:

The African regional human rights system, despite being the youngest and most resource constrained of the three regional human rights systems, appears to have come of age in endeavoring to meet the demands of the normative, jurisprudential and institutional developments of human rights...While the African system endeavors to match international human rights norms...it has also improved a great deal and has now set a pace for inter-regional jurisprudence, whilst remaining distinctively African.

The reasoning and deliberative process employed by the African Commission in the Niger Delta cases marked a transitory point for the Commission. Having found its voice, the African Commission through the use of international law principles such as the local remedies rule can now firmly respond to the realities and challenges of human rights protection in the African region.

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419 See Okafor, supra note 6 at 414, 434.
420 Udombana, “Towards the African Court” supra note 15 at 68.
421 Baderin, supra note 99 at 148.
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