

BEFORE THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

**BRIEF OF ABDUL BAASIT ABDUL ASIZ, RAYMOND
ATUGUBA, MAKAU W. MUTUA, H. KWASI PREMPEH, AND
OTTO SAKI AS AMICI CURIAE ON THE ADMISSIBILITY OF
COMMUNICATION 347/07, ASOCIACIÓN PRO DERECHOS
HUMANOS DE ESPAÑA (APDHE) / EQUATORIAL GUINEA**

March 13, 2009

James J. Silk
Elizabeth W. Brundige
Allard K. Lowenstein International Human Rights Clinic
Yale Law School
P.O. Box 208215
New Haven, Connecticut
United States of America

Counsel for Amici Curiae

On the brief: Emily Tendayi Achiume
Nwamaka Ejebe
Peter Liem

TABLE OF CONTENTS

| | |
|--|---------------|
| STATEMENT OF PURPOSE | 1 |
| STATEMENT OF INTEREST | 3 |
| INTRODUCTION..... | 5 |
| I. THE AFRICAN COMMISSION, CONSISTENT WITH OTHER REGIONAL AND INTERNATIONAL HUMAN RIGHTS BODIES, DOES NOT REQUIRE COMPLAINANTS TO EXHAUST DOMESTIC REMEDIES WHEN SUCH REMEDIES ARE UNDULY PROLONGED, UNAVAILABLE, INEFFECTIVE, OR INSUFFICIENT..... | 7 |
| A. International Human Rights Bodies, Including the African Commission, Have Interpreted the Requirement of Exhausting Local Remedies in Light of Their Duty to Protect Human Rights and Have Applied This Requirement in a Manner That Fulfills This Fundamental Duty..... | 7 |
| B. The African Commission, Consistent with International Law as Applied by Other International and Regional Human Rights Bodies, Allows Complainants to Proceed Without Exhausting Domestic Remedies When Such Remedies Are Unduly Prolonged, Unavailable, Ineffective, or Insufficient | 9 |
| 1) Unduly Prolonged Remedies..... | 11 |
| 2) Unavailable Remedies..... | 13 |
| 3) Ineffective Remedies..... | 16 |
| 4) Insufficient Remedies | 19 |
| C. Once a Complainant Alleges the Futility of Exhausting Domestic Remedies, the African Commission and Other Regional Human Rights Bodies Place the Burden of Proving the Existence of Available, Effective, and Sufficient Remedies on the Respondent State | 21 |
| II. WHEN A STATE PARTY TO THE AFRICAN CHARTER PARTICIPATES IN OR FAILS TO PREVENT SPOILIATION OF NATURAL RESOURCES AND CORRUPT EXTRACTION PRACTICES, IT VIOLATES THE RIGHTS OF ITS PEOPLE GUARANTEED BY THE AFRICAN CHARTER..... | 23 |
| CONCLUSION..... | 30 |

STATEMENT OF PURPOSE

The experts submitting this brief (amici) have prepared this submission in order to assist the African Commission on Human and Peoples' Rights (African Commission) in addressing the admissibility of *Communication 347/07, Asociación Pro Derechos Humanos de España (APDHE) / Equatorial Guinea (APDHE Communication)*. The purpose of this submission is to provide the Commission with a legal analysis of the requirement under international law that complainants to international human rights institutions exhaust domestic remedies and to urge the Commission to consider the merits of the *APDHE Communication* because of the gravity of the issues it addresses.

The exhaustion requirement is codified in Article 56(5) of the African Charter on Human and Peoples' Rights¹ and in other international and regional human rights instruments. Consistent with its own practice, as well as that of other international human rights bodies, the African Commission should ensure that its decision on the exhaustion of domestic remedies requirement respects its mandate to protect human rights. In this submission, the amici compare the exhaustion requirement as applied by the African Commission to the requirement as applied by other international and regional human rights bodies. This analysis demonstrates that human rights bodies require complainants to exhaust domestic remedies only when it does not undermine these bodies' duty to protect human rights. Based on the facts alleged in the *ADPHE Communication*,² the Commission should not require the complainant to exhaust

¹ African Charter on Human and Peoples' Rights, art. 56(5), June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 66-67 (1982) [hereinafter African Charter].

² See *Communication 347/07, Asociación Pro Derechos Humanos de España (APDHE) / Equatorial Guinea*, Submission on Admissibility of the Communication Under Article 56 of the African Charter on Human and Peoples' Rights, 19 March 2008 [hereinafter *APDHE Communication*, Admissibility Submission].

domestic remedies. The Commission should admit the *ADPHE Communication* and consider it on the merits.

Amici also offer this submission because the *APDHE Communication* raises issues of profound importance regarding the protection and fulfillment of peoples' right to "freely dispose of their wealth and natural resources," a right codified in Article 21 of the African Charter.³ By engaging in spoliation of natural resources and corrupt extraction practices, government authorities in Equatorial Guinea deny the peoples of this resource-rich country the benefits and revenue derived from their natural resources. As a result of this resource spoliation, the government also violates the African Charter rights to education, health, development, and lawfully acquired property. The issues at stake are thus of grave importance, and the African Commission should accept the *ADPHE Communication* and address these issues in the context of the violations alleged to have occurred in Equatorial Guinea.

³ African Charter, art. 21.

STATEMENT OF INTEREST

The *APDHE Communication* concerning the massive and pervasive resource spoliation in Equatorial Guinea raises important issues regarding the right of peoples to “freely dispose of their wealth and natural resources” and the duty of states to “enable their peoples to fully benefit from the advantages derived from their natural resources.”⁴ In determining the *ADPHE Communication*’s admissibility, the Commission has an important opportunity to reaffirm its commitment to the protection of human rights by deciding that the African Charter does not require complainants to exhaust domestic remedies when such remedies are unduly prolonged, unavailable, ineffective, or insufficient. These issues are an ongoing concern of amici, who are international human rights scholars and practitioners concerned with human rights, the rule of law, and development in Africa. Amici respectfully submit this brief of amici curiae (amicus brief) for the consideration of the Commission.

Abdul Baasit Abdul Asiz, Professor of Law at the Law Faculty and Business School of the University of Ghana, teaches legal theory, criminal law, and contract law. He is a co-founder and board member of the Legal Resources Centre (LRC) of Ghana, a human rights and development organization that seeks to use law as a tool for national development. For many years, he coordinated the organization’s human rights litigation.

Raymond Atuguba, Professor of Law at the Law Faculty and Business School of the University of Ghana, teaches conflict of laws, administrative law, and commercial law. He is a co-founder and board chair of the LRC.

⁴ African Charter, art. 21.

Makau W. Mutua is Dean, SUNY Distinguished Professor and the Floyd H. & Hilda L. Hurst Faculty Scholar at Buffalo Law School, The State University of New York, where he is the Director of the Human Rights Center and teaches international human rights, international business transactions, and international law. He serves as the Chairman of the Kenya Human Rights Commission and sits on the boards of several international organizations, including Global Rights, and academic journals, such as the Leiden Journal of International Law. In 2002-2003, Professor Mutua was appointed by the Government of Kenya as Chairman of the Task Force on the Establishment of a Truth, Justice, and Reconciliation Commission. He has conducted many human rights, diplomatic, and rule of law missions to countries in Africa, Latin America, and Europe.

H. Kwasi Prempeh, Professor of Law at Seton Hall Law School, teaches constitutional law, business associations law, international economic law, and jurisprudence. Prior to this position, he was the Director of Legal Policy and Governance at the Ghana Center for Democratic Development. During his time in Ghana, Professor Prempeh worked on a wide variety of policy and legal reform issues, including land sector reform, anticorruption policy, review of the country's constitution, and reform of business-related legislation and corporate governance in Ghana's public commercial sector.

Otto Saki is a lawyer with the Zimbabwe Lawyers for Human Rights, where he coordinates urgent appeals to the African and the United Nations human rights systems. He is responsible for the organization's international litigation and human rights defenders' programs.

INTRODUCTION

In its application of the exhaustion requirement, the African Commission has repeatedly stated the importance of examining the practical and *de facto* barriers that stand in the way of victims seeking redress from their local courts. It has insisted that it will require the exhaustion of domestic remedies only when this procedure would not undermine the protection of human rights. Similarly, the Inter-American Commission on Human Rights (Inter-American Commission), the Inter-American Court of Human Rights (Inter-American Court), and the European Court of Human Rights (European Court), recognizing their mandate to protect human rights, have applied the exhaustion requirement in light of this mandate.

The African Commission, the Inter-American Commission and Court, and the European Court have all developed standards that protect human rights while respecting respondent states' interest in redressing human rights violations primarily through domestic remedies. These regional systems do not require complainants to exhaust domestic remedies when these remedies are unduly prolonged or in circumstances where such remedies are unavailable, ineffective, or insufficient. In these regional bodies, a respondent state challenging the admissibility of a communication on the grounds that a complainant has not exhausted domestic remedies has the burden of proving that these domestic remedies are not unduly prolonged and that they are available, effective, and sufficient.

Based on the facts stated in the complainant's submission on the admissibility of the *APDHE Communication*,⁵ victims of human rights abuse in Equatorial Guinea lack access to remedies that are not unduly prolonged. In addition, Equatorial Guinea has

⁵ See *APDHE Communication*, Admissibility Submission, *supra* note 2.

failed to provide available, effective, and sufficient remedies for Equatoguinean victims seeking relief from the respondent state's various alleged violations of the Charter.

Because the government of Equatorial Guinea has failed to provide remedies that meet the Commission's requirements for exhaustion, amici respectfully submit that the African Commission should admit the *APDHE Communication* and examine it on its merits.

Furthermore, corruption and spoliation of natural resources present a serious challenge to the successful development of Equatorial Guinea and violate the rights of Equatoguineans guaranteed in the African Charter. The African Commission has previously recognized that a government that facilitates spoliation of the natural resources of its people violates the Charter. The African Charter protects peoples' right to dispose freely of the wealth and natural resources of their country and individuals' rights to health, education, development, and lawfully acquired property. When a government funnels public wealth into private hands, it deprives citizens of resources and basic services that it is obliged to provide and thus violates their collective and individual rights. The *APDHE Communication* alleges particularly egregious violations by the government of Equatorial Guinea, and the Commission should give effect to the rights guaranteed in the African Charter by accepting the Communication and addressing its claims on the merits.

I. THE AFRICAN COMMISSION, CONSISTENT WITH OTHER REGIONAL AND INTERNATIONAL HUMAN RIGHTS BODIES, DOES NOT REQUIRE COMPLAINANTS TO EXHAUST DOMESTIC REMEDIES WHEN SUCH REMEDIES ARE UNDULY PROLONGED, UNAVAILABLE, INEFFECTIVE, OR INSUFFICIENT

- A. International Human Rights Bodies, Including the African Commission, Have Interpreted the Requirement of Exhausting Local Remedies in Light of Their Duty to Protect Human Rights and Have Applied This Requirement in a Manner That Fulfills This Fundamental Duty

Article 56(5) of the African Charter provides that the African Commission shall receive communications submitted by parties “after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.” The Commission has interpreted this principle “in the light of its duty to protect human and people’s rights as stipulated in the Charter.”⁶ In practice, it has applied the principle only when to do so would not undermine the protection of human and peoples’ rights.

The exhaustion requirement is firmly established in international law and is codified in several important international covenants that establish courts or commissions with mandates to protect the rights guaranteed in those covenants.⁷ For instance, the European Court has recognized the importance of applying the exhaustion requirement, included in the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention),⁸ in a manner that fulfills the European

⁶ *Malawi African Association and Others v. Mauritania*, ¶ 85, Comm. Nos. 54/91, 61/91, 98/93, 164/97 to 196/97, and 210/98 (2000), African Commission on Human and Peoples’ Rights, available at <http://www1.umn.edu/humanrts/africa/comcases/54-91.html>.

⁷ See Nsongurua J. Udombana, *So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples’ Rights*, 97 AM. J. INT’L L. 1, 3-12 (2003).

⁸ The European Convention for the Protection of Human Rights and Fundamental Freedoms incorporates a requirement to exhaust local remedies. Article 35(1) states, “The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law” Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11, which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively [hereinafter European Convention].

Court's obligation to protect human rights. In *Akdivar and Others v. Turkey*, the European Court affirmed the importance of applying the rule of exhaustion of domestic remedies with due concern for the difficult circumstances from which human rights claims frequently arise and the often fragile situation of the victims.⁹ Like the African Commission, the European Court has insisted that the specific context of the violations alleged by a complainant must be examined, and it has refused to require complainants to exhaust domestic remedies when to do so would undermine its duty to protect human rights.

The Inter-American Court and Commission have adopted an approach to the application of the exhaustion requirement similar to the approaches of the African Commission and the European Court. Like the African Charter and the European Convention, the American Convention on Human Rights (American Convention) requires a complainant to exhaust domestic remedies before submitting a communication to the Inter-American Commission.¹⁰ In *Velásquez Rodríguez*, a landmark case concerning a detention and possible disappearance in Honduras, the Inter-American Court refused to apply the exhaustion rule formalistically.¹¹ Although it recognized the

⁹ *Akdivar and Others v. Turkey* (Merits and Just Satisfaction) [G.C.], App. no. 21893/93, ¶ 69, ECHR 1996-IV (Sept. 16, 1996), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695939&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (stating that “[the Court] must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants”); see also *id.* ¶ 73 (stating that the Court “must also bear in mind the insecurity and vulnerability of the applicants’ position” when considering how strictly to apply the rule of domestic remedies).

¹⁰ Organization of American States, American Convention on Human Rights, art. 46 (2), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. Article 46(2) states that the exhaustion of domestic remedies will not apply when: “a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them.”

¹¹ *Velásquez Rodríguez Case* (Preliminary Objections), Inter-Am. Ct. H.R. (ser. C) no. 1 (June 26, 1987), available at <http://www1.umn.edu/humanrts/iachr/C/1-ing.html>.

important role the exhaustion requirement played in strengthening domestic human rights processes,¹² the Court noted that “the international protection of human rights is founded on the need to protect the victim from the arbitrary exercise of governmental authority” and “[t]he rule of prior exhaustion must never lead to a halt or delay that would render international action in support of the defenseless victim ineffective.”¹³

The African Commission and other regional human rights bodies have thus expressed an unequivocal commitment to enforcing the exhaustion requirement in light of their fundamental duty to protect human rights. In applying the requirement in this case, the Commission should take into account the magnitude and the scale of the violations of the African Charter alleged in the present communication and the potential vulnerability of Equatorial Guinean citizens. It should not require the complainant to exhaust domestic remedies if doing so would undermine the protection of human and peoples’ rights.

B. The African Commission, Consistent with International Law as Applied by Other International and Regional Human Rights Bodies, Allows Complainants to Proceed Without Exhausting Domestic Remedies When Such Remedies Are Unduly Prolonged, Unavailable, Ineffective, or Insufficient

The African Charter on Human and Peoples’ Rights states explicitly that complainants need not exhaust domestic remedies if “it is obvious that this procedure is unduly prolonged.”¹⁴ In addition to enforcing this provision of the African Charter, the African Commission has clearly stated that it will apply the exhaustion requirement only

¹² *Id.* ¶ 92.

¹³ *Id.* ¶ 93; *see also Godínez Cruz Case* (Preliminary Objections), Inter-Am, Ct. H.R. (ser. C) no. 3, ¶ 95 (June 26, 1987), available at <http://www1.umn.edu/humanrts/iachr/C/3-ing.html>.

¹⁴ African Charter, art. 56 (5).

when a domestic remedy is “available, effective and sufficient.”¹⁵ These three requirements, in addition to the requirement that a remedy should not be unduly prolonged, overlap in practice. Their interconnectedness is evident in the Commission’s jurisprudence.¹⁶ These standards ensure that the exhaustion requirement is enforced only in contexts where to do so would not undermine the protection of human rights.

Other regional human rights bodies have similar standards for determining when to require that complainants exhaust domestic remedies. The European Court has stated that to uphold objections based on failure to exhaust domestic remedies, the remedies must be both formally available and “sufficiently certain, in theory as well as in practice, failing which they will lack the requisite accessibility and effectiveness.”¹⁷ The Inter-American Commission has explained that exhaustion of domestic remedies is required only where such remedies “exist[] formally” and are “adequate to protect the legal interest infringed and effective for producing the result for which they were designed.”¹⁸ In addition, “the right to adduce failure to exhaust domestic remedies as the basis for declaring a petition inadmissible must never lead to ‘a halt or delay that would render international action in support of the defenseless victim ineffective.’”¹⁹

¹⁵ *Dawda Jawara v. The Gambia*, ¶ 31, Comm. Nos. 147/95 and 147/96 (2000), African Commission on Human and Peoples’ Rights, available at <http://www1.umn.edu/humanrts/africa/comcases/147-95.html>.

¹⁶ See, e.g., *id.* ¶ 39 (deducing insufficiency from an analysis finding unavailability and ineffectiveness of domestic remedies).

¹⁷ *Pavletić v. Slovakia* (Merits and Just Satisfaction), App. no. 39359/98, ¶ 68, ECHR (June 22, 2004), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=699711&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>; see also *Tám v. Slovakia* (Merits and Just Satisfaction), App. no. 50213/99, ¶ 47, ECHR (June 22, 2004), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=699712&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>; *E.O. and V.P. v. Slovakia* (Merits and Just Satisfaction), App. nos. 56193/00 and 57581/00, ¶ 73, ECHR (June 27, 2004), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=699623&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

¹⁸ *Parque São Lucas v. Brasil*, Case 10.301, Inter-Am. C.H.R., Report No. 40/03, OEA/Ser./L/V/II.114, doc. 70 rev. 1 at 677, ¶ 31 (2003), available at <http://www1.umn.edu/humanrts/cases/40-03.html>.

¹⁹ *Id.* (quoting *Godínez Cruz Case* (Preliminary Objections), *supra* note 13, ¶ 95).

The African, inter-American, and European regional human rights systems thus share a commitment to enforcing the exhaustion requirement in a manner that does not undermine their fundamental commitment to protecting human rights. Accordingly, in the African and inter-American systems, a complainant is exempt from exhausting unduly prolonged remedies, and in all three systems, a complainant is required to exhaust domestic remedies only if such remedies are available, effective, and sufficient.

1) *Unduly Prolonged Remedies*

The African Charter states that the exhaustion requirement does not apply when domestic remedies are unduly prolonged.²⁰ In cases in which a complainant has already waited a long time for a remedy, the Commission has determined the period of time that would render a remedy unduly prolonged on a case-by-case basis. The Commission has also applied this exception to the exhaustion requirement in cases in which the specific facts of the case *would probably* unduly prolong domestic remedies, if pursued. For example, in *Amnesty International and Others v. Sudan*, the Commission found that domestic remedies “would probably be ‘unduly prolonged’”²¹ because of the extensive list of violations and the large, diverse group of people harmed by these violations.²²

²⁰ African Charter, art. 56(5). See also *John K. Modise v. Botswana*, ¶ 69, Comm. No. 97/93 (2000), African Commission on Human and Peoples’ Rights, available at <http://www1.umn.edu/humanrts/africa/comcases/97-93c.html>; *Amnesty International and Others v. Sudan*, ¶ 39, Comm. No. 48/90 (1999), available at http://www1.umn.edu/humanrts/africa/comcases/48-90_50-91_52-91_89-93.html; *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, ¶ 43, Comm. No. 102/93 (1998), African Commission on Human and Peoples’ Rights, available at <http://www1.umn.edu/humanrts/africa/comcases/102-93.html>; *Civil Liberties Organization v. Nigeria*, ¶ 9, Comm. No. 129/94 (1995), African Commission on Human and Peoples’ Rights, available at <http://www1.umn.edu/humanrts/africa/comcases/129-94.html>.

²¹ *Amnesty International and Others v. Sudan*, *supra* note 20, ¶ 39.

²² The African Commission also made a prospective determination of whether domestic remedies would probably be unduly prolonged in *Civil Liberties Organization v. Nigeria*, where it held that because the decree challenged by the complainant also stripped courts of jurisdiction to hear such a challenge, “it is reasonable to presume that domestic remedies [would] not only be prolonged but [would be] certain to yield no results.” *Civil Liberties Organization v. Nigeria*, *supra* note 20, ¶ 9.

Thus, even where formal remedies exist, the Commission, by making prospective determinations about whether they are *likely* to be unduly prolonged, has sought to achieve its human rights goals by ensuring that lengthy domestic processes do not prevent complainants from obtaining justice.

The American Convention also provides that exhaustion of domestic remedies is not required where “there has been unwarranted delay in rendering a final judgment under [any available domestic remedies].”²³ The Inter-American Commission has explained that “remedies that are unable to be resolved within a reasonable time cannot be considered either available or effective” and that the exhaustion requirement is inapplicable in those situations.²⁴ For example, in *Gonzalez v. Argentina*, the Inter-American Commission held that Argentina failed to provide sufficient information to justify the delay in the investigation into the deaths of the complainants’ daughters.²⁵

Like the African Charter and the American Convention, the First Optional Protocol to the International Covenant on Civil and Political Rights contains an exception to its exhaustion requirement for domestic remedies that are unduly prolonged. Article 2 requires individuals to “exhaust all available domestic remedies”²⁶ before submitting a communication to the UN Human Rights Committee, the body responsible under the protocol for hearing individual petitions, but Article 5(2)(b) provides an exception if “the application of the remedies is unreasonably prolonged.”²⁷

²³ American Convention of Human Rights, art. 46 (2).

²⁴ *María Emilia González, Paula Micaela González & María Veronica Villar v. Argentina*, Case 618-01, Inter-Am. C.H.R., Report No. 15/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1, ¶ 31 (2007), available at <http://www1.umn.edu/humanrts/cases/15-06.html>.

²⁵ *Id.* ¶¶ 1, 35-36.

²⁶ First Optional Protocol to the International Covenant on Civil and Political Rights, art. 2. G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976.

²⁷ *Id.*, art. 5(2)(b).

African human rights law is consistent with other regional and international human rights law in not requiring complainants to exhaust domestic remedies when the process of doing so has been or would be unduly prolonged. In the present case, the Commission should consider the extensive nature of the violations the complainant alleges and the various legal obstacles it is likely to face in pursuing domestic remedies. If domestic remedies available to victims of human rights abuse in Equatorial Guinea would likely be unduly prolonged, the Commission should not require the complainant to exhaust them.

2) *Unavailable Remedies*

The requirement to exhaust domestic remedies does not apply when such remedies are unavailable. If a complainant cannot “make use of [a remedy] in the circumstance of his case,” the African Commission has held that such a remedy is unavailable.²⁸ The Commission has emphasized that if the “availability of [the remedy] . . . is not evident [, the remedy] cannot be invoked by the State to the detriment of the complainant.”²⁹ The African Commission has also held that to qualify as available, a remedy must be “sufficiently certain” both in theory and in practice to ensure that the remedy will indeed be accessible to the complainant.³⁰

²⁸ *Jawara v. The Gambia*, *supra* note 15, ¶ 33 (referring to prior cases in which the Commission had declared communications admissible on the ground that “the competence of ordinary courts had been ousted either by decrees or the establishment of special tribunals,” which made it impossible for the complainants to pursue domestic remedies in their circumstances) (citing cases); *see also Rencontre Africaine pour la Defense des Droits de l’Homme v. Zambia*, ¶ 14, Comm. No. 71/92 (1996) African Commission on Human and Peoples’ Rights, *available at* <http://www1.umn.edu/humanrts/africa/comcases/71-92.html> [hereinafter *RADDHO v. Zambia*] (finding that where “[t]he mass nature of the arrests, the fact that victims were kept in detention prior to their expulsions, and the speed with which the expulsions were carried out gave the complainants no opportunity to establish the illegality of these actions in the courts,” the law providing for domestic appeal from deportation was “as a practical matter not available to complainants”).

²⁹ *Jawara v. The Gambia*, *supra* note 15, ¶ 34.

³⁰ *Id.* ¶ 35.

Where an “applicant cannot turn to the judiciary of his country because of a generalised fear for his life (or even the lives of his relatives), local remedies would be considered to be unavailable to him,”³¹ because he cannot practically gain access to these remedies. The Commission has also held that where a “great number” of applicants have suffered grave human rights violations, the exhaustion requirement does not apply, because the volume and magnitude of the violations “render[] the channels of remedy unavailable in practical terms.”³² In *Amnesty International and Others v. Sudan*, the Commission concluded that “[t]he seriousness of the human rights situation in Sudan and the great numbers of people involved render such remedies unavailable in fact.”³³ Under African Commission case law, an available domestic remedy must be, *inter alia*, evident, available as a practical matter, and accessible without impediment. This list is not exhaustive, and the practice of the Commission is to examine the specific context of the local remedies and the challenges that exhaustion poses for the complainants, in order to determine whether it should require them to exhaust domestic remedies.

The American Convention includes exceptions to the exhaustion requirement that are similar to the principle of unavailability that the African Commission has articulated. In an advisory opinion on the exceptions to the exhaustion requirement, the Inter-American Court stated:

Article 46(2)(a) applies to situations in which the domestic law of a State Party does not provide appropriate remedies to protect rights that have been violated. Article 46(2)(b) is applicable to situations in which the domestic law does provide for remedies, but such remedies are either

³¹ *Id.* In *Jawara v. The Gambia*, the respondent state had tried the complainant (a former head of state of the Gambia) in absentia. The respondent state had also detained members of the complainant’s parliament. An atmosphere of “generalised fear” created by the respondent state made the complainant’s return to the respondent state life-threatening. “Under such circumstances, domestic remedies cannot be said to have been available to the complainant.” *Id.* ¶ 37.

³² *Malawi African Association and Others v. Mauritania*, *supra* note 6, ¶ 85.

³³ *Amnesty International and Others v. Sudan*, *supra* note 20, ¶ 39.

denied the affected individual or he is otherwise prevented from exhausting them. These provisions thus apply to situations where domestic remedies cannot be exhausted because they are not available either as a matter of law or as a matter of fact.³⁴

Applying this rationale, the Inter-American Court stated, for example, that complainants who, due to fear of government reprisal, are unable to find a lawyer or who are indigent and must have legal representation or pay filing fees in order to exhaust domestic remedies, are not required to exhaust domestic remedies.³⁵

The European Court of Human Rights similarly requires that domestic remedies be available in practice. The European Court has consistently ruled that for a respondent state to invoke an objection based on failure to exhaust domestic remedies, the “existence of such remedies must be sufficiently certain not only in theory but also in practice.”³⁶ A remedy capable of addressing the subject matter of the violation a complainant alleges must be accessible in fact; otherwise, the European Court will not require the complainant to exhaust domestic remedies.

³⁴ Advisory Opinion OC-11/90, *Exceptions to the Exhaustion of Domestic Remedies (Articles 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights)*, Inter-Am. Ct. H. R. (ser. A No. 11, ¶ 17 (August 10, 1990)). In the *Fairen Garbi and Solis Corrales Case*, the Court explained that “it must be kept in mind that, as a norm of international law and the logical correlative of the obligation to exhaust internal remedies, the rule is not applicable when there are no remedies.” *Fairen Garbi and Solis Corrales Case*, Inter-Am. Ct. H.R. (ser. C) no. 6, ¶ 110 (March 15, 1989), available at <http://www1.umn.edu/humanrts/iachr/C/6-ing.html>.

³⁵ Advisory Opinion OC-11/90, *Exceptions to the Exhaustion of Domestic Remedies (Articles 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights)*, supra note 34, ¶¶ 19, 35.

³⁶ *Aquilina v. Malta* (Merits and Just Satisfaction), App. no. 25642/94, ¶ 39, ECHR (April 29, 1999), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=696116&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>; see also *Dalia v. France* (Merits), App. no. 26102/95, ¶ 38, ECHR (Feb. 19, 1998), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=696007&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>; *Vernillo v. France* (Merits), App. no. 11889/85, ¶ 27, ECHR (Feb. 20, 1991), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695549&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>; *Johnson and Others v. Ireland* (Merits and Just Satisfaction), App. no. 9697/82, ¶ 45, ECHR (Dec. 18, 1986), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695385&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

As the African Commission considers the admissibility of the present communication, it should scrutinize domestic remedies to determine whether they are, in fact, available. If they are not, the Commission should not require the complainant to exhaust domestic remedies. The lack of judicial independence in Equatorial Guinea, the political sensitivity of the complainant's allegations, and the pervasive nature of the African Charter violations that it alleges, all indicate strongly that domestic remedies are not available to the complainant.

3) *Ineffective Remedies*

The African Commission has clearly stated that “[a]ccording to [its] established case law . . . [,] a remedy that has no prospect of success does not constitute an effective remedy”³⁷ and thus need not be exhausted for the purposes of admissibility. In *The Constitutional Rights Project v. Nigeria*, the only domestic remedy available to the complainant after he was convicted by a special tribunal was to appeal his conviction to the Armed Forces Ruling Council, a body that “[did] not operate impartially and [had] no obligation to decide according to legal principles.”³⁸ The Commission found that the African Charter did not require the complainant to exhaust such a “discretionary, extraordinary remedy of a nonjudicial nature.”³⁹

When applying the exhaustion requirement, the European Court similarly considers whether a given remedy offers any realistic chance of a determination favorable to the complainant. In *Akdivar and Others v. Turkey*, the European Court explained that

³⁷ *Jawara v. The Gambia*, *supra* note 15, ¶ 38. In *Jawara*, the African Commission held that where “[t]he prospect of seizing the national courts . . . in order to seek redress [was] nil,” this remedy could not be considered effective. *Id.*

³⁸ *Constitutional Rights Project v. Nigeria*, ¶ 10, Comm. No. 60/91 (1995), African Commission on Human and Peoples' Rights, available at <http://www1.umn.edu/humanrts/africa/comcases/60-91.html>.

³⁹ *Id.* ¶¶ 10-11.

it “is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time.”⁴⁰

The Court thus found that because Turkey was unable to show that the remedy it proffered had ever led to favorable decisions for complainants in situations similar to that of the complainant, the complainant had no obligation to exhaust domestic remedies.⁴¹

The existence of a procedure that is formally available to redress a human rights violation does not alone guarantee that the procedure will be effective. Where such a procedure does not provide an applicant with a realistic chance of receiving a favorable determination, it is not an effective remedy, and the European Court does not require the complainant to exhaust it.

The Inter-American Court defines an effective remedy as one “capable of producing the result for which it was designed”⁴² and does not require a complainant to exhaust domestic remedies that are ineffective. For example, domestic remedies are not effective in cases involving “a practice or policy ordered or tolerated by the government, the effect of which is to impede certain persons from invoking internal remedies that would normally be available to others.”⁴³ In *Velásquez Rodríguez*, the Court held that the legal remedies Honduras claimed were available to the victims, such as writs of habeas corpus or criminal complaints, were ineffective.⁴⁴ It found that “although there may have

⁴⁰ *Akdivar and Others v. Turkey*, *supra* note 9, ¶ 68; *Posti and Rahko v. Finland* (Merits and Just Satisfaction), App. no. 27824/95, ECHR (Sept. 24, 2002) ¶¶ 62, 65, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=698521&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (holding that no effective remedy was available where “the applicants would not have had such a reasonable prospect of success with an action for breach of contract as to require that remedy to be exhausted for Convention purposes”).

⁴¹ *Id.* ¶¶ 62-66.

⁴² *Velásquez Rodríguez Case* (Merits), Inter-Am. Ct. H.R. (ser. C) no. 4, ¶ 66 (July 29, 1988), available at <http://www1.umn.edu/humanrts/iachr/C/4-ing.html>.

⁴³ *Id.* ¶ 68.

⁴⁴ *Id.* ¶¶ 76-81.

been legal remedies in Honduras that theoretically allowed a person detained by the authorities to be found, those remedies were ineffective in cases of disappearances because the imprisonment was clandestine; formal requirements made them inapplicable; the authorities against whom they were brought simply ignored them[;] or because attorneys and judges were threatened and intimidated by those authorities.”⁴⁵ The Court thus found that, “aside from the question of whether between 1981 and 1984 there was a governmental policy of carrying out or tolerating the disappearance of certain persons, ... the writs of habeas corpus and criminal complaints that were filed were ineffective or were mere formalities.”⁴⁶

The Human Rights Committee does not require complainants to exhaust domestic remedies that are ineffective. In *Collins v. Jamaica*, it stressed that domestic judicial remedies “must not only be available in theory but also be effective, that is, have a reasonable prospect of success.”⁴⁷ The Human Rights Committee has stated that cases with “no prospect of success” include those in which, “under applicable domestic laws, the claim would inevitably be dismissed, or where established jurisprudence of the highest domestic tribunals precludes a positive result.”⁴⁸

International and regional human rights bodies, including the African Commission, do not require complainants to exhaust domestic remedies when these remedies have no reasonable prospect of success and thus are ineffective. The Commission should continue to examine the effectiveness of any purported domestic

⁴⁵ *Id.* ¶ 80.

⁴⁶ *Id.* ¶ 81.

⁴⁷ *Collins v. Jamaica*, Communication No. 356/1989, U.N. Doc. CCPR/C/47/D/356/1989, ¶ 7.1 (1993), available at <http://humanrights.law.monash.edu.au/undocs/html/356-1989.html>.

⁴⁸ *Barzhig v. France*, Comm. No. 327/1988, U.N. Doc. CCPR/C/41/D/327/1988, at 92 ¶ 5.1 (1991), available at <http://www1.umn.edu/humanrts/undocs/session41/327-1988.html>.

remedies as it considers the admissibility of the communication in the present case. The African Commission cannot require the complainant to exhaust domestic remedies if the circumstances in Equatorial Guinea provide it with no realistic chance of obtaining redress for the violations of rights that it alleges.

4) *Insufficient Remedies*

The African Commission has found that a remedy is “sufficient if it is capable of redressing the complaint.”⁴⁹ It has stated that where “a right is not well provided for in domestic law . . . there [can be] . . . [no] remedies at all.”⁵⁰ Under these circumstances, the Commission does not require the complainant to exhaust domestic remedies. The Commission has emphasized that, without an adequate right and remedy in the domestic forum, “potential conflict does not arise”⁵¹ when a complainant seeks redress at the international level.

The European Court has also determined that domestic remedies must be not only available and effective, but also sufficient. Even in a case in which a complainant has received a favourable decision and compensation—a formally successful remedy—the European Court may still find the remedy insufficient and decline a state’s exhaustion-based objection to a petition. In *Kučera v. Slovakia*, although Slovakia was able to show that the complainant had received a domestic determination in his favor and compensation, the Court dismissed Slovakia’s objection based on failure to exhaust

⁴⁹ *Jawara v. The Gambia*, *supra* note 15, ¶ 32. The mere existence of legislation that provides for a domestic appeal from the conduct alleged to be a violation does not satisfy the sufficiency requirement. The Commission has held in another case that when legislation provides appeal from a lower court decision, the appeal procedure itself must also “constitute[] an effective and adequate remedy in respect to the complaints,” in order to satisfy the sufficiency requirement. *RADDHO v. Zambia*, *supra* note 28, ¶ 13.

⁵⁰ *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, ¶ 37, Comm. No. 155/96 (2001), African Commission on Human and Peoples’ Rights (citing cases), available at <http://www1.umn.edu/humanrts/africa/comcases/155-96.html> [hereinafter *SERAC v. Nigeria*].

⁵¹ *Id.*

domestic remedies, because the particular remedies did not address the violations alleged in the complaint.⁵² Thus, the lack of a remedy that redresses the actual wrong relieves complainants of their requirement to exhaust domestic remedies.

The Inter-American Court has also emphasized the adequacy of a domestic remedy in applying the exhaustion requirement, defining “[a]dequate domestic remedies . . . [as] those which are suitable to address an infringement of legal right.”⁵³ The Court has refused to accept a non-exhaustion claim that a state has based on the availability of remedies that achieve some of complainants’ objectives but do not fully redress their claims.⁵⁴ For example, in *Fairen Garbi and Solis Corrales Case*, the state raised the exhaustion defense to the petitioner’s claims of disappearances. The Inter-American Court declined to require the petitioner to exhaust remedies, because the domestic court, while able to order an exhumation, lacked the authority to order the executive to actually provide a remedy for the alleged violation of rights. The court explained that “exhumation could have rendered important evidence [for the petitioner’s claim], but was not a remedy which, under . . . the [American] Convention, guarantees the human rights of a person presumably disappeared.”⁵⁵

The African Commission, like the European Court and the Inter-American Commission and Court, rejects states’ claims that complainants must exhaust domestic remedies when the remedies the states propose would inadequately redress the violations

⁵² *Kučera v. Slovakia* (Merits and Just Satisfaction), App. no. 48666/99, ¶ 79, ECHR (July 27, 2007), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=820805&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

⁵³ *Godínez Cruz Case* (Merits), Inter-Am. Ct. H.R. (ser. C) no. 5, ¶ 67 (January 20, 1989), available at <http://www1.umn.edu/humanrts/iachr/C/5-ing.html>; *Fairen Garbi and Solis Corrales Case*, *supra* note 34, ¶ 88.

⁵⁴ *Godínez Cruz Case* (Merits), *supra* note 53, ¶ 67; see also *Velásquez Rodríguez Case* (Merits), *supra* note 42, ¶ 64 (“If a remedy is not adequate in a specific case, it obviously need not be exhausted.”).

⁵⁵ *Fairen Garbi and Solis Corrales Case*, *supra* note 34, ¶ 89.

alleged. In all of these human rights systems, domestic remedies that do not provide relief for the alleged violations are considered insufficient, and complainants are not required to exhaust them. If the Commission finds that the justice system of Equatorial Guinea is not reasonably capable of providing an adequate remedy for the specific violations the complainant alleges in the *ADPHE Communication*, it should affirm this well-established principle and not require the complainant to exhaust domestic remedies.

C. Once a Complainant Alleges the Futility of Exhausting Domestic Remedies, the African Commission and Other Regional Human Rights Bodies Place the Burden of Proving the Existence of Available, Effective, and Sufficient Remedies on the Respondent State.

Under African Commission jurisprudence, if a respondent state wishes to challenge the admissibility of a communication on the ground that the complainants have not exhausted domestic remedies, “the government then has the burden of demonstrating the existence of such remedies.”⁵⁶ Although complainants have the initial burden of raising the issue of the futility of exhausting domestic remedies, once raised, the respondent state has the burden of proving the existence of domestic remedies that meet the Commission’s strict criteria.⁵⁷

Moreover, the African Commission has held that “in the absence of a substantive response from the Respondent State it must decide on the facts provided by the Complainants and treat them as given.”⁵⁸ The Commission’s conclusions regarding exhaustion of domestic remedies in *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* indicate that this rule applies when a

⁵⁶ *RADDHO v. Zambia*, *supra* note 28, ¶ 12.

⁵⁷ In *RADDHO v. Zambia*, the African Commission admitted the complainants’ communication over the respondent state’s objection that the complainant had failed to exhaust domestic remedies, because the respondent state failed to show that these remedies were available, effective, and adequate. *Id.* ¶¶ 12-17.

⁵⁸ See *SERAC v. Nigeria*, *supra* note 50, ¶ 40.

respondent state fails to respond to a complainant's submissions concerning the admissibility of a communication.⁵⁹ Thus, where a state fails to respond to a complainant's claim that exhaustion of domestic remedies is futile, the Commission should accept complainant's claim as true and, on the basis of that claim, decide whether to admit the communication.

In Europe, the burden of proof rests on a respondent state to convince the European Court that remedies are available to the applicant. In *Foti and Others*, the European Court held that "when a Contracting State seeks to shelter behind the duty to exhaust remedies, it is for the State to establish the existence of available remedies that have not been utilised by those concerned."⁶⁰

The Inter-American Court and Commission, too, have consistently held that States claiming non-exhaustion have the burden of proving which domestic remedies remain to be exhausted and of demonstrating the effectiveness of the remaining remedies.⁶¹ In discharging this burden, States claiming non-exhaustion must provide

⁵⁹ *Id.* The complainant did not make any submissions regarding exhaustion of domestic remedies or the futility of exhaustion. Nonetheless, in light of the government's failure to respond to the complaint, the Commission took notice of the fact that the government had enacted laws stripping its courts of jurisdiction, concluded that exhaustion was futile, and admitted the complaint. *Id.* ¶¶ 40-42.

⁶⁰ *Foti and Others v. Italy* (Merits), App. no. 7604/76, ¶ 48, ECHR (Dec. 10, 1982), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695366&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>. See also, e.g., *Deweert v. Belgium* (Merits and Just Satisfaction), App. no. 6903/75, ¶ 26, ECHR (Feb. 27, 1980) (holding that where "a Contracting State prays in aid the obligation to exhaust remedies, a rule essentially intended to 'protect its national legal order,' it is for the State to prove that there exist available remedies which have not been utilised by those concerned"), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695346&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>; *De Jong, Baljet and Van Den Brink v. The Netherlands* (Merits and Just Satisfaction), App. no. 8805/79, ¶ 39, ECHR (May 22, 1984) (explaining that it "falls to the respondent State to establish that these various conditions are satisfied"), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695343&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

⁶¹ *Velásquez Rodríguez Case* (Preliminary Objections), *supra* note 11, ¶ 88. See also *Neira Alegria et al. Case* (Preliminary Objections), Inter-Am. Ct. H.R. (ser. C) no. 13, ¶ 30 (Dec. 11, 1991), available at <http://www1.umn.edu/humanrts/iachr/C/13-ing.html>; *Castillo Páez Case* (Preliminary Objections), Inter-Am. Ct. H.R. (ser. C) no. 24, ¶ 40 (Jan. 30, 1996), available at <http://www1.umn.edu/humanrts/iachr/C/24->

concrete and specific evidence of available and effective remedies. Only then will the burden shift back to the petitioner to illustrate that these remedies have been exhausted or fall under one of the Convention's exhaustion exceptions.⁶² In *Parque São Lucas v. Brasil*, the Government of Brazil alleged failure to exhaust domestic remedies but did not indicate which remedies were left to be exhausted or provide evidence of the remedies' effectiveness.⁶³ The Inter-American Commission noted that although the Brazilian Government "had the opportunity to refute the petitioners' arguments in relation to the effectiveness of domestic remedies pursued, and of the judicial system itself," it did not.⁶⁴

If a respondent state challenges the admissibility of a communication on the ground that the complainant has failed to exhaust domestic remedies, the African Commission, the European Court, and the Inter-American Commission and Court place the burden firmly on the respondent state to prove that effective domestic remedies exist and are available.

II. WHEN A STATE PARTY TO THE AFRICAN CHARTER PARTICIPATES IN OR FAILS TO PREVENT SPOILIATION OF NATURAL RESOURCES AND CORRUPT EXTRACTION PRACTICES, IT VIOLATES THE RIGHTS OF ITS PEOPLE GUARANTEED BY THE AFRICAN CHARTER

A state party to the African Charter, such as Equatorial Guinea, that engages in spoliation of natural resources and corrupt extraction practices violates the rights of its

ing.html; *Juan Carlos Bayarri v. Argentina*, Case 11.280, Inter-Am. C.H.R., Report No. 2/01, OEA/Ser.L/V/II.111, doc. 20 rev. at 75, ¶ 30 (2000), available at <http://www1.umn.edu/humanrts/cases/2-01.html>; *Milagros Fornerón and Leonardo Anibal Javier Fornerón v. Argentina*, Case 1070-04, Inter-Am. C.H.R., Report No. 117/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1, ¶ 40 (2007), available at <http://www1.umn.edu/humanrts/cases/117-06.html>.

⁶² *Mariblanca Staff Wilson and Oscar E. Ceville v. Panama*, Case 12.303, Inter-Am. C.H.R., Report No. 89/03, OEA/Ser.L/V/II.118, doc. 70 rev. 2 at 531, ¶ 34 (2003), available at <http://www1.umn.edu/humanrts/cases/89-03.html>.

⁶³ *Parque São Lucas*, *supra* note 18, ¶ 26.

⁶⁴ *Id.* ¶ 32.

citizens guaranteed by the African Charter. The *APDHE Communication* alleges that the people of Equatorial Guinea continually endure the serious, deleterious effects of resource spoliation by their government. The severity and pervasiveness of this resource spoliation and the related issues raised in the *ADPHE Communication* make it critical that the African Commission admit the communication and determine whether the conduct alleged violates the African Charter.

Scholars have documented the cost and consequences of state corruption, the use of public power for personal gain.⁶⁵ The African Union estimates that corruption costs African states US \$148 billion a year, or 25 percent of the continent's GDP.⁶⁶ Although this figure alone represents an enormous loss to the continent, the costs of corruption cannot be measured solely by dollar amounts. Participants from 135 countries at the 1999 Anti-Corruption Conference in Durban observed that

corruption is an evil that threatens and challenges all people around the globe, but bears with special cruelty upon the world's most poor. It deepens poverty; it debases human rights; it degrades the environment; it derails development, including private sector development; it can drive conflict in and between nations; and it destroys confidence in democracy and the legitimacy of governments.⁶⁷

Economies dominated by extractive industries, especially those that depend on oil or

⁶⁵ Patrick X. Delaney, *Transnational Corruption: Regulation Across Borders*, 47 VA. J. INT'L L. 413, 418 (2007). See also Nikolay A. Ouzounov, *Facing the Challenge: Corruption, State Capture and the Role of Multinational Business*, 37 J. MARSHALL L. REV. 1181, 1181-82 (2004) ("Corruption awareness has exploded in recent years. Corruption as a phenomenon has emerged from the backstage of local socio-political concerns to the forefront of global economic, legal, and development debate. Local problems have become global, and it is no longer disputed that corruption in business transactions is a serious global problem.") (citations omitted). See generally JOHN MUKUM MBAKU, *CORRUPTION IN AFRICA: CAUSES, CONSEQUENCES, AND CLEANUPS* (Lexington Books 2007); *CORRUPTION AND DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY CASE-STUDIES* (Kempe Ronald Hope, Sr., & Bornwell C. Chikulo. eds., St. Martin's Press 2000); SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* (Cambridge University Press 1999).

⁶⁶ *The Cost of Corruption in Africa*, BBC NEWS ONLINE, Feb. 17, 2006, <http://news.bbc.co.uk/2/hi/africa/4723572.stm>.

⁶⁷ The 9th International Anti-Corruption Conference: The Durban Commitment to Effective Action Against Corruption, Oct. 15, 1999, available at <http://www.transparentmost.org.yu/english/DOCUMENTS/d011.html>.

mineral exports, are particularly vulnerable to corruption and spoliation and allow ample opportunity for those in positions of power to mismanage revenues and consolidate power through patronage.⁶⁸

Freedom from spoliation and state corruption is a well-established human right. Article 21 of the African Charter on Human and Peoples' Rights provides, "All peoples shall freely dispose of their wealth and natural resources." Similarly, both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights provide, "All peoples may, for their own ends, freely dispose of their natural wealth and resources . . . based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."⁶⁹

Furthermore, states have increasingly recognized that state corruption causes a range of significant problems, and they have adopted conventions specifically establishing mechanisms to combat those trends. For example, members of the African Union adopted the African Union Convention on Combating Corruption (AU Anti-

⁶⁸ See National Democratic Institute for International Affairs, *Transparency and Accountability in Africa's Extractive Industries: The Role of the Legislature* (Shari Bryan & Barrie Hofmann eds., 2007), available at http://www.accessdemocracy.org/library/2191_extractive_080807.pdf; see also The Anti-Corruption Resources Website, <http://www.u4.no/themes/natural-resources/main.cfm#intro>.

⁶⁹ International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, art. 1(2), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, art. 1(2), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). In broader terms, the Universal Declaration of Human Rights declares that "[e]veryone has the right to own property" and that "no one shall be arbitrarily deprived of his property." Universal Declaration of Human Rights, art. 17(1) (2), G.A. Res. 217A(III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948). See also G.A. Res. 1803 (XVII), U.N. Doc. A/5217 (Dec. 14, 1962) ("The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned."); Alice Farmer, Note, *Towards a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resource-Rich Countries*, 39 N.Y.U. J. INT'L L. & POL. 417, 419 (2006) ("Economic self-determination gives peoples the ability to take control over their mineral resources and use those resources for their own ends. It is a fundamental norm on which broader rights realization is based."); Jennifer M. Hartman, Note, *Government by Thieves: Revealing the Monsters Behind the Kleptocratic Masks*, 24 SYRACUSE J. INT'L L. & COM. 157, 164 (1997) (arguing that "[o]pposition to international corruption and spoliation is supported by long-standing principles espoused by international organizations such as the United Nations").

Corruption Convention) in 2003.⁷⁰ The AU Anti-Corruption Convention recognizes the deleterious effects that corruption has on the social and economic development of African nations, and parties to the convention pledge to strengthen “mechanisms required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors.”⁷¹ Similarly, the United Nations Convention Against Corruption expresses concern over the “seriousness of problems and threats posed by corruption to the stability and security of societies” and obligates states parties to combat and prevent corruption.⁷² At both the global and African level, states have committed themselves to combat corruption and its effects on society.

Protection from spoliation and corruption is also necessary in order to enable people to fully enjoy other human rights. The funneling of public wealth into private hands deprives citizens of resources and basic services that their governments have obligations to provide. The African Charter protects the rights to health, education, development, and lawfully acquired property.⁷³ When states allow the resources necessary to fulfill these rights to be diverted from public purposes, they violate their duty to protect these rights. Preventing spoliation and corruption is critical to ensuring that states meet their human rights obligations.

⁷⁰ African Union Convention on Preventing and Combating Corruption, adopted July 11, 2003, 43 I.L.M. 5 (entered into force Aug. 5, 2006).

⁷¹ *Id.*, pmbl. & art. 2 (1).

⁷² United Nations Convention Against Corruption, adopted Oct. 31, 2003, pmbl. & art. 1 (a), U.N. Doc. A/58/422 (entered into force Dec. 14, 2005), 43 I.L.M. 37 (2004), *available at* http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf. In 1996, the Organization of American States adopted the Inter-American Convention Against Corruption. Organization of American States Inter-American Convention Against Corruption, 35 I.L.M. 724 (entered into force Mar. 6, 1997), *available at* <http://www.oas.org/juridico/english/Treaties/b-58.html>. The European Union passed the Convention on the Fight Against Corruption in 1997. European Union Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of the Member States of the European Union, 1997 O.J. (C195) 1 (May 26, 1997), *available at* <http://europa.eu/scadplus/leg/en/lvb/l33027.htm>.

⁷³ African Charter, arts. 16, 17(1), 22, 14.

Despite the grave importance of eradicating corruption and spoliation, Equatorial Guinea has been unable or unwilling to take effective preventive action. Although corruption is a crime under the laws of almost every African state, and a number of national constitutions prohibit it, the practice persists.⁷⁴ When state officials are involved or complicit in spoliation and corrupt practices themselves, domestic solutions are untenable. When this combination of legal and political barriers reaches an acute level, as in Equatorial Guinea, it prevents citizens from bringing about the effective enforcement of their states' domestic anti-corruption laws. One scholar has observed that, for state spoliation and corruption,

international action is the only remedy because no court in a victim-state would want to risk adjudicating a claim of indigenous spoliation as long as the defendants are still in office wielding enormous power. Finding an impartial court and equally impartial judge who would agree to judge a sitting president or his closest associates would be difficult. . . . Thus, the only way to combat the problem of spoliation by chief executives and high-ranking officials is concerted international action.⁷⁵

The African Commission is uniquely positioned to address spoliation and corruption as human rights violations. Free from the political pressure and interests that inhibit domestic officials, the Commission can act where a state government has failed; it can determine when a state's conduct in these areas constitutes violations of the African

⁷⁴ Ndiva Kofele-Kale, *Change or the Illusion of Change: the War Against Official Corruption in Africa*, 38 GEO. WASH. INT'L L. REV. 697, 697 (2006). See, e.g., CONSTITUTION, pmbl. (1990) (Benin) ("We, the Beninese people, [r]eaffirm our fundamental opposition to any political regime founded on arbitrariness, dictatorship, injustice, corruption, misappropriation of public funds, regionalism, nepotism, confiscation of power, and personal power."); CONSTITUTION, Ch. II 15(5) (1999) (Nigeria) ("The State shall abolish all corrupt practices and abuse of power."); *id.*, Ch. V pt. 2 (E)(128)(2)(b) ("The powers conferred on the National Assembly . . . are exercisable only for the purpose of enabling it to . . . expose corruption, inefficiency or waste in the execution or administration of laws within its legislative competence and in the disbursement or administration of funds appropriated by it."); CONSTITUTION, Pt. 1, Art. 16 (1998) (Sudan) ("The State will seek by laws and directive policies to purge society from corruption, crime, delinquency and the consumption of alcohol by Muslims."); CONSTITUTION, XXVI (iii) (1995) (Uganda) ("All lawful measures shall be taken to expose, combat and eradicate corruption and abuse or misuse of power by those holding political and other public offices.").

⁷⁵ Ndiva Kofele-Kale, *Patrimonicide: the International Economic Crime of Indigenous Spoliation*, 28 VAND. J. TRANSNAT'L L. 45, 107-08 (1995).

Charter. Indeed, the African Commission has previously addressed spoliation and called on a state to act to punish it.

In 1996, the Social and Economic Rights Action Center, a Nigeria-based human rights organization, and the United States-based Center for Economic and Social Rights jointly submitted a communication to the African Commission regarding alleged human rights violations relating to the Nigerian government's development of oil resources in Ogoniland. The communication charged, among other things, that the government had violated its peoples' right to be free from spoliation under Article 21 of the African Charter.⁷⁶ In its decision, the Commission reasoned that "[t]he destructive and selfish role-played by oil development in Ogoniland, closely tied with repressive tactics of the Nigerian Government, and the lack of material benefits accruing to the local population, may well be said to constitute a violation of Article 21."⁷⁷ It concluded that the government had "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."⁷⁸ The Commission emphasized its duty to apply all of the Charter's rights:

Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.⁷⁹

The Commission recommended that the government investigate the human rights abuse

⁷⁶ *SERAC v. Nigeria*, *supra* note 50, ¶ 55.

⁷⁷ *Id.*

⁷⁸ *Id.* ¶ 58.

⁷⁹ *Id.* ¶ 68.

allegations, prosecute the responsible individuals, and compensate the victims.⁸⁰ The African Commission's commitment to make all rights in the African Charter, including the right to be free of spoliation, effective stands as a critical bulwark against corrupt state practices that deprive citizens of their well-being.

The facts alleged in the *ADPHE Communication*⁸¹ present a particularly stark example of the kind of corrupt state practices and resource spoliation that is prohibited by Article 21 of the African Charter. This alleged violation has, in turn, led to alleged violations of other Charter rights, including the rights to development, health, education, and lawfully acquired private property. The African Commission should accept this opportunity to address the issue of spoliation directly and make clear not only that the African Charter protects the right of the people to fully benefit from their natural resources but also that the Commission will apply and enforce this right. The Commission should admit the case so that it may examine the merits of the claims of the Equatoguinean people articulated in the *ADPHE Communication* and continue to address the grave problems arising from resource spoliation and corruption.

⁸⁰ *Id.* ¶¶ 58-69.

⁸¹ See Communication Submitted by the *Asociación Pro Derechos Humanos de España* Regarding the Republic of Equatorial Guinea, Under Article 55 of the African Charter on Human and Peoples' Rights, 17 October 2007.

CONCLUSION

The African Commission has consistently applied the exhaustion requirement in light of its strong commitment to protecting the human rights guaranteed by the African Charter. Consequently, the Commission examines the actual barriers that stand in the way of victims pursuing domestic relief for Charter violations. Where domestic remedies would be unduly prolonged or are not available, effective, or sufficient, the Commission has not required complainants to exhaust such remedies. A respondent state arguing non-exhaustion of domestic remedies has the burden of proving that it provides domestic remedies that meet the Commission's criteria. Other international human rights bodies, including the Inter-American Commission and Court, the European Court, and the United Nations Human Rights Committee, have similarly applied the exhaustion requirement in light of their duty to protect human rights. They have consistently declined to require exhaustion of domestic remedies when such remedies are unavailable, ineffective, insufficient, or unduly prolonged.

On the basis of the facts alleged in the *APDHE Communication*, Equatorial Guinea is unable or unwilling to provide a domestic remedy that is available, effective, sufficient, and not unduly prolonged. Consequently, the Commission should not require the exhaustion of domestic remedies in this case.

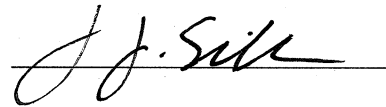
The African Charter provides that spoliation of natural resources is a violation of human and peoples' rights. The African Commission addressed the issues of corruption and spoliation in a previous case and found that the respondent government violated its peoples' right under Article 21 of the African Charter to freely dispose of their wealth

and natural resources. The grave nature of the facts alleged by the complainant requires the Commission to address these issues again.

Consistent with the international law of exhaustion and the well-established and uniform practice of the Commission and other international human rights bodies, and based on the facts alleged in the communication submitted by APDHE, amici respectfully urge the Commission to admit the *APDHE Communication* and examine it on the merits.

Dated: March 13, 2009

Respectfully Submitted,



James J. Silk
Elizabeth W. Brundige
Allard K. Lowenstein International
Human Rights Clinic
Yale Law School
P.O. Box 208215
New Haven, CT 06520-8215
United States of America
Phone: 01-203-432-7480
Fax: 01-203-432-8260

Counsel for Amici Curiae

On the Brief:

Emily Tendayi Achiume
Nwamaka Ejebe
Peter Liem
Allard K. Lowenstein International
Human Rights Clinic
Yale Law School
P.O. Box 208215
New Haven, CT 06520-8215
United States of America
Phone: 01-203-432-7480
Fax: 01-203-432-8260