COMMENT

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Setting the Law Straight:

Tanganyika Law Society & anor v. Tanzania

and Exhaustion of Domestic Remedies before the African Court

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Abstract

The rule of exhaustion of domestic remedies is an integral part of the right of individuals to bring international claim against a State. This rule is expressly required in the African Charter on Human and Peoples' Rights and the Protocol of the African Court on Human and Peoples' Rights. Nevertheless, as the various types of domestic remedies and the various circumstances in which they are pleaded by respondent States are still unfolding, the jurisprudence of the African Court is understandably at an infantile stage and continues to undergo development and refinement. This short comment examines the view of the African Court, following that of the African Commission on Human and Peoples' Rights, that non-judicial remedies are not valid remedies that need to be exhausted before claims are brought before the African Court by individuals. It is argued that this is an unduly wide and indiscriminate proposition that would have the effect of unjustifiably excluding administrative remedies that may have effectively remedied a breach if approached by individuals before coming to the African Court. It was consequently argued that there is need for reconsideration now before the view becomes too entrenched.

1. Introduction: Overview of the Rule of Exhaustion of Domestic Remedies

Every system of international adjudication in which an individual has capacity to bring claims against States necessarily interferes with the sovereignty of

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States in two significant ways. First, it denigrates the rule of international law by which only States have international law rights of action, *inter se,* in that an obligation of a State to answer to an international claim brought by an individual, whether its national or an alien, diminishes the sovereign character of a State, an aspect of which is the rule that a State is not compellable to submit to arbitral or judicial settlement. Second, it interferes with the reserved domain of municipal law by touching on that sensitive part of the bond of nationality between a State and its citizens or at the very least, the link of territorial jurisdiction between a State and an alien resident within its jurisdiction.

One of the essential elements of the bond of nationality is that, except the State otherwise limits its absolute power and jurisdiction over its nationals, no other State or international organisation can claim protection over such a national for events that occurred within the territory of the State.[1] indeed it is now a rule of practical relevance, following the notable case of *Jurisdiction of the Courts of Danzig,*[2] that a State could confer international law benefits on individuals by international agreement. These include both the conferment of rights and the capacity on the individual to enforce the rights, not just before the courts of an individual's State of nationality, but also before an international court or tribunal having jurisdiction. The existence of such a treaty invariably encroaches on the reserved domain of States and necessarily limits the otherwise absolute powers of States respecting events occurring within their territories.

In spite of the degree of limitation, however, a State still retains an aspect of its sovereignty which it could assert in appropriate circumstances. As rightly pointed out by Anzilotti in his Separate opinion in *Customs Regime between Germany and Austria:*[1 2 3]

> The legal conception of independence has nothing to do with a State's subordination to international law or with the numerous and constantly increasing States of de facto dependence which characterize the relation of one country to other countries. It also follows that the restrictions upon a

[1] In deference to this, in the *Reparation for Injuries Suffered in the Services of the United Nations,* ICJ Rep. 1949, 174, 185, while affirming the right of the United Nations to bring international claims to protect its nationals, the International Court of Justice (ICJ) carefully avoided denigrating the overall rights of the State of nationality of an official being protected by the United Nations.

[2] *Advisory Opinion,* Series B, No. 15 (1928) 17 - 18. This rule was seamlessly followed by the African Court in the recent case of *Frank Omary & Ors.* v. *Tanzania,* Application no 001/2012, wherein former employees of the dissolved East African Community (before it was later re-established in 1999) where allowed to litigate an agreement between Tanzania, Uganda and Kenya before the municipal courts of Tanzania.

[3] (1931) PCIJ series A/B No. 41, p. 58

> State's liberty, whether arising out of ordinary international law or contractual engagements, do not as such in the least affect its independence. As long as these restrictions do not place the State under the legal authority of another State, the former remains an independent State however extensive and burdensome those obligations may be.

In the event of international litigation against a State by individuals, therefore, there is always the domestic jurisdiction of a respondent State to be asserted in defence to the claim. As a consequence, whenever an additional international level of enforcement jurisdiction is created in favour of individuals, primus status is accorded to municipal institutions (as the institutions that have the most proximate link with the aggrieved individual and the cause of action) over any international enforcement mechanism there may be. This primus place is clothed in the doctrine of exhaustion of domestic remedies.

This rule of customary international law of antiquity origin was first developed in relation to the right of diplomatic protection. It requires that an individual whose rights have been violated by a State should first seek remedies under the laws of that State as a condition precedent to the individual's State of nationality bringing an international claim on the individual's behalf. It is thus well established in the case law of international courts and tribunals that the purpose of the rule is to allow the State to resolve the problem by its internal law before being confronted with an international proceeding, and that this is particularly true respecting the jurisdiction of international human rights courts, because the latter reinforces or complements domestic jurisdiction.[4] The reason for the rule within the context of diplomatic protection, according to Judge Winiarski of the ICJ, is to enable a State in which the rights of a foreign national are alleged to have been injured in breach of international law to provide a remedy by its own means within the framework of its own laws.[5]

The requirement for aliens, who have no bond of nationality with a defaulting State to exhaust the domestic remedies available in the State before the alien's State of nationality could exercise diplomatic protection on the

[4] *Velasquez v. Honduras,* Judgment of July 29 1988, Series C No 4, para 61; *Emanuel Mjawasi& 748 Ors* v. *The Attorney General of the Republic of Kenya,* Application 009/2011, para 34 (holding that "[t]he rule is to the effect that a state should be given an opportunity to address an alleged wrong within the framework of its own domestic legal system before its international responsibility can be called into question'); also see *William Campbell & Ors* v. *The Republic of Zimbabwe* Case No SACDT: 03/2009 of June 5, 2009, para 26; Candedo Trinidade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights,* Cambridge University Press, 1983, p. 1

[5] Dissenting Opinion of Judge Winiarski in *Interhandel case (Switzerland* v. *United States of America)* ICJ Rep 1959, 6, 83

alien's behalf, emphasizes the general inexcusable character of the rule of exhaustion of domestic remedies in respect of international claims by individuals against their State of nationality. The rule is however subject to several exceptions.

The emergence of, and indeed the proliferation of international courts in which individuals could sue their States of nationality and even third States has given more usage to the rule of exhaustion of domestic remedies as much as it has given rise to the temptation to diminish its application. This is even as it has become the consistent view of some international tribunals that they are not bound by the rule of exhaustion of domestic remedies even respecting a claim brought under the African Charter on Human and People's Rights (hereafter African Charter).[6] Such a view is not only an arrogation of a power essentially reserved in the territorial State, absent the recognised exceptions under international law, it also alienates the international human rights court and its eventual judgment from the institutions of the territorial State.[7] This is of particular importance as the implementation of the judgments of international human rights courts usually rests upon the legal structures of the respondent State.

The rule of exhaustion of domestic remedies is contained in article 56(5) of the African Charter and article 6(2) of the Protocol of African Court on Human and Peoples' Right (Hereafter, the African Court). It is thus one of the conditions to be fulfilled before an individual can bring an international right action under the Charter, and more so, before the African Court. Though the African Court faithfully adheres to the requirement and had declared several cases inadmissible on account of failure to exhaust domestic remedies, but as the recent case of *Tanganyika Law Society & anor v. Tanzania*[8] manifestly shows, the African Court, as does the African Commission, has been failing to give full effect to the rule in one important respect. This assertion is based on the recurrent view of the African Court that the domestic remedies needed to be exhausted are judicial remedies to the exclusion of remedies of political or administrative nature.

This comment challenges that position and argues that the view of the Court is not in keeping with the position of international law as established by

[6] See Amos O Enabulele (2012), 'Sailing Against the Tide: Exhaustion of Domestic Remedies and the ECOWAS Community Court of Justice', 56(2) *Journal of African Law,* 268

[7] Amos O Enabulele (2010), "Reflections on the ECOWAS Community Court Protocol and the Constitutions of Member States" 12 *International Community Law Journal,* 11

[8] Application 009/2011. This case was consolidated with *Mtikila* v. *Tanzania application,* No 011/2011

international courts and tribunals. In holding this view, however, the writers consider that it will be easier for an international court to find that there are indeed no remedies to be exhausted by an individual, when the remedies, being administrative or political, are predominantly discretionary. Nevertheless, the writers hold the firm view that it does not follow from that position that administrative or political remedies do not count as exhaustible domestic remedies in all circumstances.

2. Tanganyika Law Society & Anor v. Tanzania

In the case, the Tanganyika Law Society and Rev. Mtikila brought separate applications before the African Court on the claim that Tanzania had, through certain amendments to its Constitution, violated its citizens' right of association, the right to participate in public/governmental affairs, among others. The applications were later consolidated. The main grouse of the second applicant was the Eight Constitutional Act, by which the Constitution of Tanzania was amended to make it mandatory for an electoral candidate to be a member of, and be sponsored by a political party and thus prohibiting independent candidacy.

Following this amendment, the 2nd applicant filed a case in the High Court of Tanzania, challenging the amendment on the ground that it conflicted with the Constitution of Tanzania. The Court held in his favour and declared the amendment which sought to bar independent candidacy null and void. Meanwhile, the government continued to pursue its desire to exclude independent candidacy by seeking to nullify the right of independent candidates to contest elections by a new proposal for constitutional amendment - the eleventh amendment. By this amendment, which was eventually passed by the legislature and assented to by the President, the High Court judgment was made nugatory.

In consequence, the 2nd Applicant commenced another suit at the High Court on the ground that the amendment yet violated the Constitution. The High Court found in his favour, holding that the impugned amendment violated the democratic principles and the doctrine of basic structures enshrined in the Constitution. On appeal to the Court of Appeal by the respondent, the High Court judgment was reversed in favour of the amendment banning independent candidature.

In its judgment, the Court of Appeal held that the matter was a political matter that should be resolved by Parliament. As a result, Parliament began a consultative process aimed at obtaining the views of the citizens of Tanzania on the possible amendment to the Constitution. This process was still ongoing by the time the case before the African Court was decided. The prevailing constitutional order in Tanzania by the time this case was decided by the African Court barred independent candidature.

At the African Court, the applicants prayed the Court to declare that Tanzania was in violation of articles 2 and 13(1) of the African Charter and articles 3 and 25 of the Interantional Covenant on Civil and Political Rights. They urged the Court to direct the Respondent to put the necessary constitutional, legislative and other measures in place to give effects to the rights contained in the aforementioned provisions and to report to the Court within a 12 month period. The 2ndAppellant prayed the Court to specifcally find that his right had continuously been violated.

In response to the claim, the Respondent raised a preliminary objection challenging the admissibility of the claim on the ground that domestic remedies had not been exhausted. The respondent based its argument on the judgment of theTanzanian Court of Appeal, which directed that the matter be settled by Parliament, and argued that the processes initiated by Parliament towards this end were still ongoing.

On their part, the Respondents contended that constitutional amendment did not constitute a viable remedy within the contemplation of the rule of exhaustion and that what constitutes viable remedies to be exhausted are judicial remedies. In its ruling, the Court began by noting that the remedies envisaged by the combined reading of articles 6(2) of its Protocol and 55 of the Charter are primarily judicial remedies as they are the ones that meet the criteria of availability, effectiveness and sufficiency.[9] The Court further held that human rights jurisprudence equates the term "local [domestic] remedies" with judicial remedies.[10]

Accordingly, the Court held that the 2nd appellant exhasuted domestic remedies since the matter had been decided by the Court of Appeal, which is the final Court in Tanzania.[11]In the reasoning of the Court:

> The parliamentary process, which the respondent states should also be exhausted is a political process and is not an available, effective and sufficient remedy because it is not freely accessibile to each and every individual; it is discretionary and may be abandoned anytime. No matter how democratic the parliamentary process will be, it cannot be equated to an independent judicial process for the vindication of the rights under the charter. In conclusion, we find that the applicants have exhausted local remedies....[12]

Though the decision of the Court that there were no viable remedies left unexhausted is unassailable in the circumstances of the case, the reasoning upon

[9] *Id,* para 82.1
[10] *Id,* para 82.3
[11] *Id,* para 82.2
[12] *Id,* para 82.3

which that decision was based is untenable and remains to be demonstrated in international jurisprudence on the point in the light of the discussion below.

3. Domestic Remedies is not Limited to Judicial Remedies

It is indeed difficult to agree with the Court that viable domestic remedies are limited to judicial remedies. It is even more difficult to agree with the Court that this view, as the Court consistently claimed, represents the established international jurisprudence on the point. In any event, the reasoning of the Court went beyond the bounds of what was necessary to deal with the claim of in-exhaustion raised in the case, in that, it was completely possible for the Court to have reached the same conclusion given that the unexhausted domestic remedies in Tanzania were actually not viable. To all intent and purposes, the so called parliamentary consultation was never intended to yield any result in time for it to be useful to the 2nd respondent. After all, it was the same Parliament that reversed the decision of the High Court via constitutional amendment. It was thus credible for the African Court to have simply relied on the obvious fact that the parliament was already an interested party that could not have acted in good faith in the entire process without seeking to discredit all administrative or political remedies that a State party may genuinely put in place to deal with specific breaches.

In any event, the parliamentary procedure was not a preexisting remedy; it was rather a product of the order of the Court of Appeal. In a technical sense, the case before the African Court was in effect an appeal against the decision of the Tanzania Court of Appeal. This is even more convincing when seen in the light of the eventual decision of the African Court, which in overruling Court of Appeal, restored the view earlier taken by the High Courts.

It is pertinent to note at this point that the view of the African Court is not an isolated interpretation of the exhaustion provision of the Charter as it has been the recurrent view of the African Commission on Human and Peoples' Rights that only judicial remedies are viable for the purpose of the exhaustion rule. In *Constitutional Rights Project v. Nigeria*,[13] it was shown that a conviction rendered by a Special Armed Robbery Tribunal which the complaint before the Commission was against was subject to the power of the Governor of a State to confirm or reject. Moreover, the judgment of the Tribunal was not subject to judicial review. Based on this, Nigeria had argued that the complainant should not be held to have exhausted domestic remedies until the Governor exercised this power either way. The Commission held that the remedy, being discretionary and not of a judicial character, was not viable and effective. In

[13] Communication 60/91

Adocat Sans Frontieres (on behalf of Bwampanye) v. Burundi,[1] the Commission held that the failure to seek to be pardoned by the relevant authority did not violate the rule of exhaustion, as pardon, not being judicial remedy, was ineffective. The same view was held in *Amnesty International v. Sudan,* wherein the Commission demanded the exhaustion "...of all internal remedies, if any, if they are of judicial nature, are effective and are not subordinated to the discretionary power of public authorities".[15]

while it may be true that judicial remedies are the most viable remedies, it does not mean that non-judicial remedies should be completely foreclosed, nor does it mean that judicial remedies are effective in all circumstances. The goal of the exhaustion rule should always be towards allowing a State to resolve a matter by means of its own choosing, provided the choice of remedy relates to the breaches alleged and are available, accessible, effective and sufficient, not only in theory but also in practice.[16] It is thus incumbent upon a court assessing in-exhaustion of domestic remedies to consider the end the domestic remedies pleaded before it are ultimately intended to serve, irrespective of whether the remedies are of a judicial, political or administrative character. it may well happen, particularly in a majority of African States, where the judicial process is slow, costly and cumbersome, that an administrative or political solution adopted for the purpose of resolving issues of the nature submitted to an international court may be more viable than judicial remedies.

This is even so as there is settled international jurisprudence on the point that domestic remedies are not effective simply because they are of a judicial nature. In *Akdivar v. Turkey*,[17] for instance, the remedies that were found not to be viable were of judicial nature before administrative courts. in *Media Rights Agenda v. Nigeria*,[18] by reason of the failure of the then Military Government in Nigeria to obey a decision of a High Court which nullified a Decree, the Commission held that judicial remedies were ineffective as the failure to obey the court order was seen as "a dramatic illustration of the futility of seeking a remedy from Nigerian courts". In effect, judicial remedies would be held not to be valid remedies where it is shown that the government is in the habit of disobeying court judgments. [14] [15] [16] [17] [18]

[14] Communication 231/99

[15] Communications 48/90, 52/91 & 89/93

[16] *De Jong, Baljet& van den Brink* v. *Netherlands* (1984) 8 EHRR 20, 38; *Vernillo* v. *France,* 20 February 1991, Series A no. 198, pp. 11-12, 27; *Akdivar and Others* v. *TurkeyApplication no. 21893/93,* para 66; *Dalia* v. *France,* 19 February 1998, *Reports* 1998-I, 87-88, para 38)

[17] Ibid.

[18] Communication 102/93, para 50-51.

It thus defies judicial economy to dismiss a remedy, simply because it is not of a judicial nature, when in actual fact, the remedy is capable of resolving the complaint with minimal delay. It also unduly encroaches on the right of a State to determine the means by which conflicting claims and interests are resolved within its municipality. It is the writers' considered view that as "it is not entirely sufficient for a claimant to merely allege that the available remedies are futile without having made an attempt to exhaust them",[19] [20] so is it not sufficient for an international court to dismiss a domestic remedy on the basis of a preconceived distinction between judicial and non-judicial remedies.

The futility of such approach was shown in *Egyptian Initiative for Personal Rights andINTERIGHTS v Egypt,*[20] which came before the African Commission. Here, the Commission was willing to accept that police inquiry into sexual violence against the victims of the crime constituted domestic remedies to be exhausted, if the inquiry had not been stopped. The Commission noted that the decision not to prosecute, as well as the confirmation of that decision, following the Victims' appeal, is sufficient evidence that the conditions for the exhaustion of domestic remedies had been met, as the Victims were left with no other remedy because the inquiry procedures had been stopped.[21] Furthermore, the Commission declared:

> It is the African Commission's view that the Respondent State's submission on the temporary halt of inquiry procedures cannot justify the reason why Victims should be left without any recourse until a potential reopening of a matter, following new evidence. The African Commission notes that eighteen (18) months have passed since the alleged violations occurred and probabilities for the inquiry to be re-opened are slim since evidence has already been gathered and examined. The Respondent State, also did not supply the African Commission with any evidence that it has instituted actions to find the new evidence.[22]

What this confirms, is that investigation, a non-judicial remedy, being an obligation upon a State, constitutes legitimate expectation in the minds of individuals, and is therefore a domestic remedy to be exhausted. This view is reinforced by *Tanrikulu v. Turkey,* wherein the European Court of Human Rights (hereafter "ECtHR) held that the Turkish government was in breach of the right to life of the deceased for failure to effectively investigate the cause of

[19] Henry Onoria (2003), "The African Commission on Human and Peoples' Rights and the Exhaustion of Domestic Remedies Under the African Charter" *African Human Rights Law Journal* 13 (2003)

[20] Communication 323/06

[21] *Id,* para 65

[22] *Id,* para 66

death.[23] The existence of a duty to investigate on the part of a State invariably eventuates into a corresponding duty on an applicant to submit to investigative procedures in fulfilment of exhaustion requirement prior to seising an international court, except where evidence shows that the procedure was not accessible by the plaintiff or that it was unduly prolonged. The fact that it is not a judicial remedy does not discharge the complainant from exhausting that remedy as a first step towards obtaining redress in line with the laws of the respondent State. Nor does it give an international court the faculty to question the mode of redress available in the respondent State without proof by evidence that the mode of redress is actually not suitable to redressing the legal wrong. A State party to an international human rights instrument assumes an obligation of result which may be in form of prevention or satisfaction. it is absolutely the province of the State to determine what measures best give effect to its obligations. This view is in tandem with article 1 of the African Charter, by which:

> The Member States of the Organization of African Unity parties to the present Charter 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.

This provision has been variously espoused by the African commission without a single case in which it has been restricted to implementation only by way of judicial remedies. In *Association of Victims of Post Electoral Violence & Interights v. Cameroon*,[24] the African Commission declared that article 1 imposes an obligation of result and not just of diligence. This was to the effect that a State cannot be discharged of its obligation under the Charter by showing that it had exercised diligence in the protection of human rights if the diligence did not in fact prevent human rights abuses. Accordingly:

> ... the obligations which ensue from Article 1 impose on the State of Cameroon the need to implement all the measures required to produce the result of protecting the individuals living on its territory. The use of the legal, technical, human and material resources that the State of Cameroon claims to have did not produce the expected result, namely that of guaranteeing the protection of human rights.[25]

The Commission also stated that article 1 imposes on the State parties to the Charter, the need to put in place, within their territories, all measures conducive to producing the result of preventing all violations of the African Charter,

[23] Application No. 23763/94 of July 8, 1999
[24] Communication 272/03
[25] *Ibid,* para 115

irrespective of whether the violations are committed by a machinery of the State itself or by non-State actors.[26] In *Zimbabwe Human Rights NGO Forum v. Zimbabwe,* the Commission made it clear that the crust of the African Charter obligation is to ensure that any person whose right is violated would have an effective and enforceable remedy.[27] In the writers' view, enforceable remedies are not limited to judicial remedy. A political or administrative remedy properly determined is enforceable.

Also relevant here is the decision of the ICJ in *Avena and Other Mexican Nationals*.[28] In this case, Mexico brought an Application instituting proceedings against the United States of America for "violations of the Vienna Convention on Consular Relations" of 24 April 1963, allegedly committed by the United States.

Mexico claimed that the United States, in arresting, detaining, trying, convicting, and sentencing 54 Mexican nationals to death, violated its international legal obligations to Mexico. This claim was made in its own right and in the exercise of its right of consular protection over its nationals, as provided for under articles 5 and 36, respectively of the Vienna Convention on Consular Relations (VCCR). As a consequence, Mexico claimed, *inter alia, restitutio in integrum* and restoration of *status quo ante*, by re-establishing the situation that existed before the detention, trial, convictions and sentencing of Mexico's nationals in violation of the United States' international legal obligations.

In its decision, the ICJ held that the United States was in breach of its international obligation towards Mexico under the VCCR. This was for its failure to notify the appropriate Mexican consular post without delay of the detention of the 49 Mexican nationals and thereby depriving Mexico of the right, in a timely fashion, to render the assistance provided for by the VCCR to the individuals concerned.[29] Accordingly, the court directed that:

> ...should Mexican nationals nonetheless be sentenced to severe penalties, without their rights under ... the Convention having been respected, the [26] [27] [28] [29]

[26] Id, para 119

[27] CommunicationNo.245 (2002), para 171; Communication 251/02, *Lawyers of Human Rights* v. *Swaziland,* para 61 holding that by ratifying the charter without taking appropriate steps to bring its laws in line with the charter, the state failed to comply with its obligation under article 1; Communication 241/2001, *Purohit Moore* v. *The Gambia,* paragraph 43, holding that 'when a State ratifies the African Charter it is obligated to uphold the fundamental rights contained therein. otherwise if the reverse were true, the significance of ratifying a human rights treaty would be seriously defeated'.

[28] *(Mexico v.UnitedStates of America'),* ICJ Rep. 2004, 12, 36, para 40.

[29] *Id,* p. 71, para 153 (4) and (5).

> United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention.[30] [31] [32] [33]

in line with the decision of the iCJ, the President of the United States, by a Memorandum, directed the courts of the States within the US, where the trials and convictions took place, to give effect to the iCJ judgment. in the consequential proceedings at the Supreme Court of the United States - *Jose Ernesto Medellin v. Texas*[31] - it was argued before the court that the President's determination was lawful and binding on the affected States' courts and that the ICJ decision was binding on organs of the US, including the courts of the land. In its decision, the Supreme Court was of the firm view that the expression of the obligation to comply in article 94(1) of the United Nations Charter (UNC) precluded the judicial branch from taking steps to comply and that the phrase, "undertake to comply" in article 94(1) of the UNC is simply a commitment by member States of the United Nations (UN) to take future actions through their political branches to comply with ICJ decisions. The Supreme Court therefore declared that the UNC did not vest decisions of the ICJ with immediate legal effect in domestic courts.

Sequel to the foregoing, Mexico returned to the ICJ in *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals*[32] wherein Mexico sought an interpretation of the judgment with a view to showing that the failure of the US Supreme Court to enforce the judgment of the ICJ in the main *Avena case*[33] was a violation of the obligation on the US to comply with the judgment of the Court under article 94(1) of the UNC. Mexico argued that the United States had an obligation of result under paragraph 153(9) of the main judgment and that the United States must provide review and reconsideration of the conviction and sentences of the Mexican Nationals.[34]

In its decision, the Court refused to prescribe to the United States a means of fulfilling the obligation imposed on it by the judgment of the Court, despite the trenchant argument of Mexico towards that end. According to the Court:

> The obligation laid down ... is indeed an obligation of result which clearly must be performed unconditionally; non-performance of it constitutes internationally wrongful conduct. However, the judgment leaves it to the United States to choose the means of implementation, not excluding the

[30] *Id,* p. 72, para 153(9)
[31] Supreme Court Reporter, Vol. 128, 2008, 1346
[32] *(Mexico* v. *United States of America),* ICJ Rep, 2009, p. 3
[33] *Supra,* note 28
[34] *Supra* note 32, p. 6, para 9

> introduction within a reasonable time of an appropriate legislation, if deemed necessary under domestic constitutional law... .[35]

The important question to be asked is whether the remedy adopted by the respondent State effectively deals with a grievance of the nature brought by the applicant. As the Inter-American Court of Human Rights rightly held in *Velasquez v Honduras,* domestic remedies should simply be weighed on the basis of their suitability to redressing a legal wrong of the nature before an international court. According to the Court:

> Adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable. For example, a civil proceeding specifically cited by the Government, such as a presumptive finding of death based on disappearance, the purpose of which is to allow heirs to dispose of the estate of the person presumed deceased or to allow the spouse to remarry, is not an adequate remedy for finding a person or for obtaining his liberty.[36]

The Court further stressed the importance of determining whether a remedy is capable of producing the result for which it was designed.[37] The test of the capability of an existing remedy to produce the expected result does not include an expectation that the complaint's case must be upheld. It is indeed the law that the fact that a remedy does not produce a result favourable to the complainant does not, in and of itself, demonstrate that domestic remedies are inexistent or ineffective.

Contrary to the claim of the African Court that it is well-established in international jurisprudence that only judicial remedies are viable remedies for the purpose of exhaustion, the International Court of Justice (ICJ) looks beyond judicial remedies in determining whether domestic remedies have been exhausted. For the avoidance of doubt, in *Ahmadou Sadio Diallo,* the ICJ declared:

> The DRC did, it is true, cite the possibility of requesting reconsideration by the competent administrative authority . the court nevertheless recalls that, while the local remedies that must be exhausted included all remedies of a legal nature, judicial redress as well as redress before administrative bodies,

[35] *Ibid,* p. 17, para 44
[36] *Supra* note 4, para 64.
[37] *Id,* para 66.

> administrative remedies can only be taken into consideration for the purpose of the local remedies rule if they are aimed at vindicating a right and not at obtaining a favour, unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings. Thus, the possibility open to Mr. Diallo of submitting a request for consideration of the expulsion decision to the administrative authority having taken it - that is to the prime minister - in the hope that he would retract his decision as a matter of grace cannot be deemed a local remedy to be exhausted.[38]

As should be the case, the strength of the approach of the ICJ in this case is in the fact that, while leaving the possible remedies that could be relied upon seemingly open-ended, the Court carefully inserted the useful proviso that completely eradicates non-judicial remedies that are discretional.

In addition to the requirement that a non-judicial remedy must not be discretionary in nature, the remedy must by nature be aimed at resolving the breach suffered by the applicant. Following the established view of international human rights courts, it could be stated that an administrative remedy is not viable unless it is aimed at resolving the breach complained of. Indeed, a non-judicial remedy that merely turns individuals asserting their rights to beggars waiting on the magnanimity of a particular individual or authority, or a remedy which does not have clear and objective rules governing its outcome, needs not be exhausted. Where however a public officer's discretion is guided by clear rules and the remedy is assessable and fitting for dealing with a breach, it should be mandatory for an applicant to exhaust it.

4. Conclusion

The narrow but salient point this case comment set out to address was the blanket exclusion of non-judicial remedies from the class of domestic remedies mandatory to be fulfilled by an applicant before siesing the African Court. The writers have argued that though the Court was right to have held that there were no viable domestic remedies to be exhausted by the applicants in this case, the Court had no basis for declaring that only judicial remedies are required to be exhausted by applicants.

It is therefore the writers' considered view that it is essential for the Court to jettison the view that non-judicial remedies are not viable and thus need not to be exhausted to enable it assess domestic remedies within the context of each case and on the merit. This would be of benefit to the Court, the respondent State, and more so, the complainant who avoids being locked in a long and

[38] *(Republic of Guinea* v. *Democratic Republic of the Congo) (Preliminary Objection),* ICJ Rep 2007, 582, 601, para. 47

costly litigation for what he or she could possibly have got through a remedy, albeit non-judicial, put in place by the respondent State.

Indeed, the African Court immensely benefits from the jurisprudence of older international human rights courts that complement municipal law in human rights protection. The ECtHR, in particular, has been able to settle its jurisprudence on this point, maintaining the right balance to be struck between the need to provide effective remedies to individuals and the need to respect domestic competences. Like the African Court, the European Court is bound by the exhaustion rule, and it has espoused the rule in its jurisprudence. The policy consideration of the ECtHR in its approach towards exhaustion is the acknowledgement that the machinery of protection established by the European Convention on Human Rights and Fundamental Freedom is subsidiary to the national systems safeguarding human rights.[39] Accordingly, it primarily aims at affording the Contracting States the opportunity of preventing or putting right a violation alleged against them before the allegation is submitted to Court.[40] In this regard, the Court is not fixated on judicial remedies. Indeed as clearly stated by the Court in *Cardot v. France,*[4] what is required is for the complainant to have made the complaint - at least in substance - to the appropriate domestic body, and in compliance with the formal requirements and time-limits laid down in domestic law.

The Court has been unequivocal in stating that the application of this rule must make due allowance for the context and that in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case. This, according to the Court, means, amongst other things, 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.[42] The methods of the ECtHR towards the exhaustion rule are therefore recommended to the African Court. _____■

[39] See the *Handyside v. the United Kingdom,* Judgment of 7 December 1976, Series A no. 24, p. 22, para 48

[40] *Hentrich v. France,* Judgment of 22 September 1994, Series A no. 296-A, p. 18, para 33, and *Remli* v. *France* judgment of 23 April 1996, *Reports* 1996-II, p. 571, para 33

[41] Judgment of 19 March 1991, Series A no. 200, p. 18, para 34

[42] Van *Oosterwijck* v. *Belgium,* Judgment of 6 November 1980, Series A no. 40, pp. 17-18, para 69; Akdivar's case para 69